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LÁSZLÓ KORINEK*

Global and Hungarian Tendencies in Law Enforcement

Abstract. The author explores current trends in law enforcement and criminal policy. The first part of the essay focuses on the methodological and theoretical difficulties with describing the state of global crime. Special attention is given to the peculiarities of post-9/11 developments in the field of crime prevention and anti-terrorist legal regimes, a situation in which the efforts to combat terrorism have crossed the traditional boundaries of criminal law enforcement and the policy and practice of pre-emptive strikes is difficult to fit even into the recognized conceptual framework of crime prevention. Following this, the author turns to the analysis of decentralizing and privatizing public security and law enforcement and the question of security partnerships.

Prior to the assessment of the concept and paradigm of human security–which is at the heart of the inquiry–Professor Korinek provides an overview of the social effects of crime and security protection, the social perception of crime and law enforcement and the interrelation of politics and criminal law. The author calls for a complex and global approach when approaching the question of liberty and security, since the traditional distinctions between the military and the police as well as domestic and external security are fading. By using a comparative methodology (incorporating a wide range of international examples along with references to Hungarian criminal policy developments and constitutional jurisprudence) the author claims that the new element in the human security approach is that it places the perspective of individuals and their communities before the security interests of the national or even the whole international community, and thus is able to resolve the dichotomy that is generally presumed to exist between human rights and security.

Keywords: criminology, statistics, law enforcement, data protection, terrorism, transition, community policing, crime prevention, privatisation, private security, criminal policy, human security

I believe–and through my work would like to serve–the idea that criminology should be a science that contributes positively to the everyday practice of fighting crime, even on the local level. This does not however relieve the scholar of the responsibility for facing up to those more general consequences that he has contributed to through his work or through his professional neglects.

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Today it is not necessary anymore to argue in great detail that the whole world's security has an increasingly direct impact on our own situation. This is the very practical consideration that induced me–beyond the natural evolution in scientific thinking which tends towards attempting to grasp global issues–to deal with the topic referred to in title of this article. Initially the title was to be "Where does the world progress?", but the verb "progress" has inevitable positive connotations, while in reality the dissipation of the concerns expressed in this article seems doubtful for now.

1. The state of crime

It should be noted in advance that statistical data concerning the "state of global crime" are even less informative than data collected from individual legal systems. Behind the general numbers there are different, sometimes even downright contradictory behaviours, which are condemnable in some contexts, laudable in other, or at least part of citizens' fundamental rights. As an example for the latter one could refer to the Second Amendment of the United States' constitution, which enshrines the right to bear arms as a fundamental right for citizens, while in other countries the private ownership of firearms is prohibited or very restricted.

So I note with an emphasis on all these advance warning that a survey commissioned by the United Nations for the organisation's 11th congress in Bangkok on crime prevention and administration of criminal justice reported that the number of recorded crimes (based on data from 57 countries) increased by 12% between 1995 and 2002. The vast majority of countries investigated were European and American. The report itself emphasises that criminal statistics in the individual countries are different,[1] comprehensive numbers for the period under investigation were only available from 12 countries, for the rest corrective statistical methods had to be applied. Survey on victimization provided data for the period from 1992–2002, and these indicate decreasing numbers in most categories, but a careful investigation (citizens' willingness to report crimes as well as problems of uncovering them lead to vast differences between popular perception of criminal activity and the number of criminal acts

[1] See Kertész, I.: A bűnügyi statisztika nemzetközi összehasonlításának lehetőségei [Options for a comparative crime statistics-analysis]. *Statisztikai Szemle*, 1996. 1. 16–34.

registered by the authorities) reveals that there is no irreconcilable contradiction between the statistical data concerning criminal acts that become known.[2]

There is therefore reason for concern–but certainly not panic–on account of the reported data. There is even less cause for demanding exceptional powers or extraordinary licences for combating crime. As the example of dropping US criminal rates shows, crime growth can be stopped with the strengthening of procedural safeguards, the stability of legal unity and the mobilisation of social resources based on democratic co-operation.

Nonetheless, something changed in the area of law enforcement. Barriers were broken, centuries-old constitutional walls were torn down. The reason is not quantitative but qualitative. The exact time of the beginning of the new era in our thinking about security is: 11th September 2001.

It is true that the date and the associated terror attack with its tragic outcome has only symbolic significance for many, as terrorism itself, as well as organised crime and especially drug crimes, which had triggered similar responses earlier, reach back a very long time. September 11th major effect in this regard was to convince a significant portion of Americans that they need to give up their aversion to the state, as only a strong public power, capable of defending the nation from domestic and external threats alike, can be an effective protection from new threats.

One could sense the new direction already in the US president's first speeches following the attack. In his statement to Congress on 20th September 2001 he declared:

> *We will direct every resource at our command–every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war–to the disruption and to the defeat of the global terror network.*

In the same speech George W. Bush also responds to the question what Americans need to do. He asks them to live their lives, hug their children, uphold the American values, to continue to support the victims of the tragedy and to co-operate with the FBI agents investigating the attack. He asks them for patience with the delays and inconveniences that may accompany tighter

[2] State of Crime Report: The State of Crime and Criminal Justice Worldwide–Report of the Secretary-General, A/Conf.203/3. UN, Bangkok, 2005. points 35–38. 12.

security and for continued participation and confidence in the American economy. Finally: pray.[3]

It hardly needs complex proof: this is the message of the caring and protecting state. It does not require any individual initiative for fighting terrorism, and it wants activity only insofar as law enforcement officials request.

2. Being protected, observed and exposed

Experience shows that people gladly make sacrifices for the efficiency of law enforcement. If necessary, they contribute financially to combating crime and they are even willing to change their lifestyle. Citizens generally accept surveillance cameras recording events in their private lives. Those who can afford it hire bodyguards or employ difficult technical solutions for the supervision of their residence from a distance. The anxiety resulting from the threat of crime therefore leads to the situation in which being protected simultaneously means being observed.

In a broader context the storage of personal information about us in various databases also ties into this phenomenon. This cannot all be unequivocally attributed to an overzealous state engaged in keeping an eye on its citizens at all times, since there are many known cases in which citizens–especially in an effort to help uncover cases that elicited widespread public outrage, such as particularly grave and violent crimes–provided information voluntarily. A case in point was an investigation in the German province of Lower-Saxony, where persons within the presumed perpetrator's age range provided DNA samples in massive numbers. These samples then ultimately led to the identification of the murderer of the child who had fallen victim to a violent sexual crime, and the perpetrator confessed another similar crime as well.[4]

It is also true at the same time that data is not always provided voluntarily. Article 3 (2) (b) of our Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest, specifically mentioned–among other things–the interests of crime prevention and criminal investigations as circumstances in which the law could even prescribe the processing of special personal data. It is also a fact that today there are global systems established for the purposes of collecting data without publicly available information on

[3] Bush, G. W.: Address to a Joint Session of Congress and the American People, 20. September 2001. http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html

[4] See Hochgartz, P.: Zur Perseveranz bei Sexualmorden–Zugleich ein Bericht über die spektakuläre Ermittlung eines Mehrfachtäters. *Kriminalistik*, 54 (2000) 322–327.

the criteria chosen for their selection; here it is not only the aspect of voluntariness that takes a backseat to crime prevention and law enforcement interests, but in fact even the service of the latter is increasingly dubious.

Rumours on plans for developing general–global–wiretapping and surveillance systems abounded already in the last decade of the previous century. According to the well-respected civil rights organisation Privacy International, the EU and the FBI planned to jointly establish such a system.[5] There is no reliable information on whether it was realised, but it is safe to assert that given the current regulatory framework it could hardly operate legally. In 1998 a document was drafted to provide information to the European Parliament on this issue, and it stated that such plans exist, but they have not yet been presented to the strategic decision-makers or the relevant control forums. At the same time the report notes as fact that such a system practically exists already (ECHELON), but under the control of the United States.[6] It is hard to even argue with the notion that information gleaned from such a system could be used, for instance, in the context of economic competition as well.[7]

In reality the issue reaches even further: the efforts to combat terrorism have crossed the traditional boundaries of criminal law enforcement[8] The policy and practice of pre-emptive strikes is difficult to fit even into the recognized conceptual framework of crime prevention.

Crossing the boundaries of traditional criminal law has an immediate effect on the foundations of constitutionality and the rule of law. The Constitutional Court emphasised the mutual conditionality of criminal law and fundamental law in several decisions. In this vein:

> *It follows from the constitutionality of the legal system that a fundamental requirement regarding the state's exercise of its penal powers is that it adheres to constitutional principles: the basis for exercising penal power can only and exclusively be constitutional criminal law. ... It is the position of the Constitutional Court that a constitutional state governed by the rule of*

[5] See: http://www.privacy.org/pi/activities/tapping/statewatch_tap_297.html

[6] See European Parliament: An Appraisal of the Technologies of Political Control. PE 166.499/Int.St./Exec.Sum./en, Luxembourg, 1998.

[7] See European Parliament: Report on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI)). Final, A5-0264/2001. Strasbourg, 11. July 2001.

[8] See Sofaer, A. D.: Playing Games with Terrorists. *New England Law Review*, 36 (2002) 903–909.

law can only react to legal violations with adherence to the rule of law. The legal order of a state governed by the rule of law cannot deny anyone rule of law safeguards. The reason is that everyone is entitled to these as a fundamental right. Based on the rule of law even just claims cannot be enforced if rule of law safeguards are disregarded. Though justice and moral cause can serve as motives for establishing culpability, the legal basis for punishability has to be constitutional. ... The Constitution's Article 8 (1) and (2) serve as the guiding rule concerning the constitutional requirements on criminal law. According to these paragraphs the Republic of Hungary recognizes a human's inviolable and inalienable rights, the respect for and protection of these rights is the state's primary obligation. An important demand imposed by the Constitution is that 'the rules concerning fundamental rights and obligations are specified by law, which may not constrain the essential content of the fundamental rights, however'.[9]

It can be stated as a fact that the constitutional safeguards serving to protect fundamental rights were developed precisely with a view to criminal law, starting simply from the generally accepted fact that this is the area where fundamental rights are or can be most severely restricted. Pointing beyond the concrete procedure and decision at hand, this is probably what motivated the Constitutional Court to state–in its decision 23/1990 (X. 31) on the unconstitutionality of the death penalty–that the right to life and dignity as an absolute right imposes a limitation on the state's penal powers.

In spite of the broad array of public power efforts at protecting the essential preconditions of human life (for example environmental protection), it is safe to assert that this absolute value is considerably less protected than the areas falling under the purview of criminal law. If somebody intentionally kills someone else, then he can expect a harsh punishment, but the public power may not take his life, no matter what behaviour he displays in the course of the proceedings against him. The very same person can be legally killed (though not with outright intent) in the case of firearm use by the police, if he refuses arrest.[10] The Israeli security forces' "focused prevention" policy persons–generally used following a rocket attack–in reality denotes the liquidation of persons suspected of engaging in terrorist activities.[11] Though one could debate

[9] 11/1992 (III. 5.) Decision of the Constitutional Court.

[10] 9/2004 (III. 30.) Decision of the Constitutional Court.

[11] See Kretzmer, D.: Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence? *The European Journal of International Law*, 16 (2005) 171–212.

the necessity or constitutionality of such a policy, it can hardly be doubted that the frequent killing of bystanders (often children) in the process is absolutely unjustified in terms of criminal policy.

Regrettably the other fundamental value, human dignity, is also increasingly subordinated to the goals of fighting terrorism. Article 54 of our Constitution logically links the protection of human life and dignity with the prohibition of torture, inhumane, cruel and degrading treatment or punishment. There are circumstances under which extinguishing human life is accepted by international human rights conventions, but torture never is.[12] Nevertheless–primarily with reference to the war on terrorism–today the real occurrence of interrogation practices that employ torture is increasingly openly acknowledged, even in the judicial practice of systems that call themselves constitutional.[13] Moreover, there are even attempts to institutionalise it in constitutional forms.[14] Domestically, too, some have called for placing the members of terrorist organisations and their supports beyond the scope of law in the framework of a new international consensus.[15]

It is undeniable that terrorism is really an immense threat to people's security. Consequently, the principle of necessity and proportionality used as a constitutional test could in some cases lead to a different conclusion from the ones we are accustomed to, in terms of the means used to combat this phenomenon. The question is, however–and this is where the issue ties into the subject of this study–is in how far these exceptional authorisations will (or can) remain in the realm of fighting terrorism? The link between money laundering and the financial support for political violence[16] as well as considerations of pre-emption suggest that the special–data processing and other–

[12] See the UN Secretary General's statement: Press Release, SG/SM/9373 OBV 428, 17th June 2004, New York.

[13] See Crelinsten, R. D.: The World of Torture–A Constructed Reality. *Theoretical Criminology*, 7 (2003) 293–318.

[14] See Filó, M.: Az inkvizítor védelmében – a kínzás jogállami apológiája? [Protecting the inquisitor–a rule of law justification for torture?] *Fundamentum*, 9 (2005) 89–97 as well as Dershowitz, A. M.: *Why Terrorism Works.* New Haven–London, 2002. 131–163.

[15] Kiss Á. P.: A hadviselés szabályai és a nemzetközi terrorizmus [The law of armed conflicts and international terorrism]. *Új Honvédségi Szemle*, 59 (2005) 115.

[16] See Gál I. L.: A pénzmosás és a terrorizmus finanszírozása [Money laundering and financing terrorism]. In: Korinek L.–Kőhalmi L.–Herke Cs. (ed.): *Emlékkönyv Irk Albert egyetemi tanár születésének 120. évfordulójára.* Studia Iuridica Auctoritate Universitates Pécs Publicata, Pécs, 2005. 37–41, as well as Sorel, J.-M.: Some Questions about the Definition of Terrorism and the Fight against its Financing. *European Journal of International Law*, 14 (2003) 365–378.

authorisations ought to be extended to apply to background financial/economic operations as well (see for instance Act LIX of 2002, enacted on the basis of the international convention adopted by the United Nations General Assembly in New York in its 54th session on 9th December 1999, on the scaling backing of financing terrorism). You could expand the circle even further: it is undeniable the terrorism and organised crime–primarily but not exclusively in the realm of financing–display numerous common features and points of intersection.[17] Thus it seems hardly justified to draw substantial distinctions regarding the tools that can be employed by the public power in approaching the two issues, and generally this distinction is indeed not made (see for instance the explanation issued in support of the amendment of Articles 1–4 of Act LXXV of 1999 on the Provision of Combating Organised Crime and Certain Phenomena connected thereto). But it does not end here either. Research on the subject has shown that there are numerous criminal acts that, though they are committed in support of political violence or in connection with it, cannot in legal terms be categorised as being connected to terrorism or organised crime.[18]

It needs to be emphasised that prevention is an especially key area in terms of the special tools used, and this is also an area in which in the majority of cases one cannot know in advance what will end up becoming really relevant in the course of the investigation or in terms of immediate pre-emption (impeding an act). Thus inevitably data will begin to pile up that is unnecessary in terms of realising the original goal but could be used to scale back other acts that pose a threat to society. This is especially so in the case of countries–such as Hungary, for instance–where the threat of terrorist acts is rather low, but the authorities responsible for security are constantly active.

According to the consistent application of the principle of purpose limitation all information gathered with special authorisations and with special methods should be (and theoretically has to be) excluded from a criminal procedure, if originally their potential disclosure would not have allowed for the use of special authorisations. By contrast the professionals responsible for security reasonably assert that it cannot be in the interest of the legislator to render data

[17] See Bibes, P.: Transnational Organized Crime and Terrorism–Colombia, a Case Study. *Journal of Contemporary Criminal Justice*, 17 (2001) 243–258.

[18] See Hamm, M. S.: Crimes Committed by Terrorist Groups: Theory, Research, and Prevention. Washington D. C., 2005. http://www.ncjrs.gov/pdffiles1/nij/grants/211203.pdf

obtained with the most efficient tools and with a serious investment of resources inaccessible to law enforcement.[19]

It should be noted that while data collection and prevention in general, as well as criminal investigations, have experienced profound transformations, the study and practice of penalties has displayed a kind of return to classical, conservative principles. The penalty has to be proportional to the gravity of the deed.[20] At the same time in many places, Hungary among them, we can observe tendencies that divert the practice of applying sanctions from strict proportionality to promising more severe punishments, either out of utilitarian or political power considerations.[21] Prison (deprivation of liberty) as a social/political/legal response to criminal behaviour has regained its role and importance which it had somewhat lost in the prior decades of correction-focused trends.[22]

Overall it can be stated that the individual's and civil society communities' exposure to the public power has grown to a very significant degree, all the while there have been no observable benefits of limiting fundamental rights in terms of improved public security (though there have been no signs of a marked deterioration either).

3. Decentralisation, socialisation and privatisation in the defence of public security

At the same time it is apparent that in certain respects the state's security monopoly–in contrast to the developments described above–is loosening, and in some specific areas it is completely relinquished. The explanation is that the central power's massively increased control possibilities do not simultaneously indicate an interest in fully exploiting all these resources. The individual's and the community's exposure consists in the authorities' capability to observe who telephone what, when, why and whom. In reality the authorities responsible for security need to take account only of conversations that are important to them–such as those related to international organised crime and terrorism–but the

[19] Hetesy Zs.: A büntetőeljárás szükségtelen eleme: a célhoz kötött bizonyíték elve [An unnecessary part of criminal procedure]. In: Korinek L. (ed.): *Tanulmányok Finszter Géza 60. születésnapjára.* PhD tanulmányok 4. [Essays on Geza Finszter's 60th birthday]. Pécs, 2005. 74.

[20] Szabó A.: *A büntetőjog reformja* [Reforming Criminal Law]. Budapest, 1992. 255.

[21] See Sichor, D.: Penal Policies at the Threshold of the Twenty-First Century. *Criminal Justice Review*, 25 (2000) 1–30.

[22] Estrada, F.: The Transformation of the Politics of Crime in High Crime Societies. *European Journal of Criminology*, 1 (2004) 419–443.

caller does not know the criteria for selection or registration, and still less its concrete results. At the same time the interest of central (federal) authorities and bodies of political power is that there be an acceptable level of public security and stability in society. Sooner or later the recognition that the local factors and problems influencing security can–in some cases decisively–be better handled where they arise is going to dawn on the state leadership. Shifting interests will also transform the approach to security issues. The attendance and popularity (and thus profitability) of places that are by their nature public but are privately owned (shopping centres, entertainment facilities, etc.) are obviously improved by police protection. Under such conditions enlisting the owners and operators–or the person and property protection enterprises they employ for safeguarding their assets–hardly requires complex justification.

Relinquishing the state's monopoly naturally only applies to the immediate security protection activities. Threat prevention and the administration of justice still belong to the state's realm of responsibilities. It no longer fulfils this task alone, however, but rather serves as a coordinating director in a stage play that features multiple roles. In the context of this new co-operation between the police, security companies, local governments and other bodies, civil organisations, as well as individual citizens a–and in some areas more than one–*security partnership* emerges. In the long term operation of this joint effort the state creates the legal framework with a view towards ensuring that no area with security relevance remains uncovered. The state plans and creates the conditions that stimulate the participants' activities. Thus it "governs remotely": it accepts that it cannot provide for everyone's security at the desired level. Nonetheless, there still remain areas of activity that cannot be privatised.

The process can therefore most aptly be described as follows: a state with limited capabilities confers part of the protection tasks on enterprises and citizens, who by assuming these tasks enter into a risk community, security partnership relationship with the state.

There can be few doubts as to the necessity of these security partnerships. The mode of realisation, however, requires immense circumspection and the very careful weighing of interests and constitutional values. This is necessary because within the framework of the new forms of close co-operation, the private security companies serving private interests–and of course the clients behind them–will inevitably gain some influence over the operations of the public power, while the state for its part will also undoubtedly extend its intervention and control possibilities to relations that constitutionally belong within the realm of the private sphere. If the framework of co-operation is not very clearly specified and realised with a close view to constitutional principles, then there is the danger of the emergence of a law enforcement

complex that is disquieting in terms of both, the state's legal functioning and the protection of fundamental rights. Hoogenboom refers as "grey policing" to the system in which the security organisations belonging to various different sectors are engaged in informal relationships in which the boundaries of responsibility become blurred.[23] Research has shown the validity of Hogenboom's conclusions and the dangers of inscrutable security co-operations.[24] Citizens' voluntary engagement is not unproblematic either. On the one hand they depend on power interests, and on the other hand there is the problem that the civil guard and similar units are also subject to the control of persons or groups with their own respective interests and values, which in no way guarantees an operation that is compatible with constitutional principles.[25]

All the above does not cast doubt on the raison d'être of security partnerships, since in spite of the differences the basic values (personal or property security) are common, and the protection from dangers is a necessary element of all human activity and behaviour. One of the advantages of harmonised public and private security co-operation is diversity, that is the ability to flexibly adapt to the given requirements. There are many different models of partnership and their study could significantly enrich our knowledge of threat and crime prevention, and even law enforcement.[26]

The Hungarian national strategy for crime prevention [Annex to resolution 115/2003 (X. 28.) of Parliament] has given a substantial impetus to local and regional planning and coordination. Both, the local government documents on the objectives, principles and methods for protecting public security, as well as the institutionalising security partnerships are important elements of this tendency.

[23] See Hoogenboom, B.: Grey Policing: A Theoretical Framework. *Policing and Society*, 2 (1991) 17–30.

[24] See Fairchild, P.: The Emerging Police Complex: Hoogenboom and Australian Inter Agency Cooperation. *The Australian and New Zealand Journal of Criminology*, 27 (1994) 2–59.

[25] See Funk, A.: Die Fragmentierung öffentlicher Sicherheit–Das Verhältnis von staatlicher und privater Sozialkontrolle in der politikwissenschaftlichen Diskussion. In: Sack, F.–Voß, M.–Frehsee, D.–Funk, A.–Reinke, H. (Hrsg.): *Privatisierung staatlicher Kontrolle: Befunde, Konzepte, Tendenzen.* Baden-Baden, 1995. 49–53, as well as Bólyai J.: *Társadalmi részvétel a rendfenntartásban–közösségi rendőrség* [Social involvment in law enforcement–community policing]. Kandidátusi értekezés, Budapest, 1994. 122–154.

[26] See Pitschas, R.–Stober, R.: *Kriminalprävention durch Sicherheitspartnerschaften.* Köln 2000, as well as Terpstra, J.: Models of Local Security Networks: On the Diversity of Local Security Networks in the Netherlands. *Crime Prevention and Community Safety*, 7 (2005) 37–46.

4. The social effects of crime and security protection

It is a commonplace that crime is a social mass phenomenon whose causes–according to a significant portion of the scientific community–are rooted in coexistence, more specifically the disorders of coexistence. Another obvious fact: crime does not merely threaten the legal order and the specific objects of the criminal acts, but in its own way it also shapes the people's and communities' behaviour and life. It is also evident that the access to tools of protection, having those at one's disposal is an important factor of subjective and objective security, ultimately of life quality overall.

The population of a society can be grouped in relation to two extreme poles. Around the one pole are those whose victimisation is rather unlikely, as their situations allows them to install supplementary security equipment and to buy security services.[27] Nonetheless it must be noted that security cannot be listed among the easily maximised goods, as every institution, system, or equipment also produces new security hazards, whilst it increases protection against other threats. Many criminal acts are known in which it was the security personnel who provided the robbers with the necessary tip-off, in fact sometimes the robbers hailed from their ranks. Indira Gandhi was murdered by her own bodyguards.

Still, the most exposed are those who are located near the second pole. Their lifestyle, their destitution significantly correlates with a high risk of victimisation. Supplementary security is unavailable or less available for them, and the criminals select potential victims whose vulnerability is greatest. By virtue of the "rights of the poor" this group must make do with the level of security that the state guarantees to all.

This phenomenon is pernicious, because for one it marks the failure of the 20th century's aspiration to achieve social (welfare) homogeneity, and also because it wreaks havoc on society's community consciousness, its sense of self-identity. A fragmented society cannot feel, live and act according to common criteria of order. Disintegration is a negative process for the progress of society as a whole, and its effect on public security further widens and deepens the gap between the different strata of the population.[28]

In reality this is about even more than that. Even with the best regulation and strictest control the abovementioned security partnerships cannot resolve

[27] Salgó L.: *Az új típusú biztonság* [New Security]. Budapest, 1994. 59.

[28] Ferge Zs.: Szegénység és bűnözés, azaz: van-e dezintegrációs és decivilizációs veszély? [Poverty and crime: is there a danger of disintegration and de-civilisation?] *Belügyi Szemle*, 37 (1999) 3–27.

the differences between the various actors participating in protecting public safety in some form. This is complemented by the privatisation of communal spaces, which can in part be understood absolutely literally, while in another sense it means that significant manifestations of social life (for instance shopping, spending one's leisure time) increasingly take place in private places. As a consequence the poor, as well as members of groups marginalised on the basis of social prejudices, are more exposed to harassment, occasionally even expulsion by security personnel. Nota bene, the public power itself uses solutions that restrict people's freedom of movement (bans, house arrests, etc).

Another consideration that ought not to be neglected is that today the number of private police exceeds the personnel of the official bodies entrusted with ensuring public security.

According to official statistics there were 43 000 private investigator positions in the US in 2004–employees and entrepreneurs[29]–while the number of security guards somewhat exceeded one million.[30] At this time there were 842 000 police positions,[31] including investigators.

In Hungary the numbers are vastly different. According to the Chamber of Bodyguards, Property Protection and Private Detectives there are 112 066 persons with a licence that authorises them to conduct private security activities, and even those qualified as actively engaged are 69 951 as of 1st September 2005,[32] which is more than double the number of active police personnel. The total number of the latter, according to the January 1st 2005 statistic of the National Police Department (ORFK) was 29 449.[33]

The situation wherein the burghers live securely in cities surrounded by walls, while those stuck outside endure in hazardous living conditions, is reminiscent of medieval conditions. Just as back then, today, too, many people aspire to become members of the exclusive club, which naturally implies the exclusion of many people.

Poverty and exclusion do not merely impede access to security services; prejudices, as well as efforts resulting from misinterpreted and impatient notions of political efficacy result in deprivation itself being considered some sort of

[29] See http://www.bls.gov/oco/ocos157.htm#emply
[30] See http://www.bls.gov/oco/ocos159.htm#emply
[31] See http://www.bls.gov/oco/ocos160.htm
[32] See http://www.szvmszk.hu/node/6
[33] See (http://www.orfk.hu/magyar_rendorseg/tortenet/jelen_szamokban.html

deviance, even straight-out criminal behaviour.[34] Just as it was expressed by the outspoken monographer of the domestic police between the two world wars:

> *...it is a psychologically known fact that the destitute, needy popular stratum, or just group, is extraordinarily dangerous to public security, wholly unreliable from a national standpoint, and thus not only useless for the national society, but rather a burden.*[35]

Today the public power's turning on the poor and disadvantaged groups manifests itself most strikingly in framework of the still fashionable "zero tolerance" principle, which intensifies the policy of exclusion[36] even if the state may achieve some measure of success in terms of liquidating or alleviating some (social) differences, or at least the most flagrant manifestations of marginalisation (for instance Roma settlements). It has an especially demoralising effect when the penal power is spectacularly lenient towards a suspect that hails from the "upper ten thousand" (the prime suspect of the criminal act that caused billions in damages was interrogated by the prosecutors in a markedly friendly atmosphere, and the popular folk singer sentenced to incarceration was often allowed to leave the prison for a few days, etc.)

It also has to be said that the helplessness resulting from destitution and social exclusion can really veer those towards the world of crime who see not other possibility for improving their lot. Though of course the vast majority of them remain exploited and disgraced pariahs in that environment, too.[37]

5. Petty crime and major crime

Opposition parties aspiring to a ruling role generally like to refer to the incumbent administration's suspected corruption or other shady deals, at the same time promising that if elected they will mercilessly expose all abuses regardless of who the perpetrators may be. As far as they are successful, however, the

[34] See Crowther, Ch.: Thinking about the "Underclass"–Towards a Political Economy of Policing. *Theoretical Criminology*, 4 (2000) 149–167 as well as Gönczöl K.: *Bűnös szegények* [Guilty poor]. Budapest, 1990. 1990.

[35] Nagy J.: *A község rendészete* [Community law enforcement]. Szombathely, 1938. 171.

[36] See Ferge Zs.: A szétszakadó társadalom [Disintegrating society]. *Belügyi Szemle*, 38 (2000) 14.

[37] See Forrai J.: Szegénység és bűnözés különös formája a budapesti utcákon: a férfi- és női prostitúció [A special form of poverty and crime on the streets of Budapest: male and female prostitution]. *Belügyi Szemle*, 37 (1999) 91–101.

results are usually pretty slim, mostly straight-out disillusioning (witness for instance the activities of the short-lived State Secretariat for Public Funds). In the criminal proceedings concerning the astonishingly high commission paid from public coffers the successive court verdicts were diametrically opposed, and in terms of the key charges the case ended in the acquittal of the accused. The investigation concerning the oil affairs–that is their taking on the characteristics of organised crime–began in 1996 but has failed to produce even a first instance ruling.

In the last decade of the previous century there was such an underworld war in Hungary, in the course of which the attacks–typically bombing–of the criminals against each other created an almost unbearable situation. The interior department and police leadership at the time employed methods reminiscent of efforts aimed at total control, such as comprehensive identity checks, and as a result they apprehended 1.574 persons, 153 of whom were caught as a result of arrest warrants. 252 persons, mainly of Ukrainian, Romanian and Asian nationality, were expelled from the country due to lacking residence permits, employment without permit and other miscellaneous violations. Charges were brought against 268 persons on the basis of strong suspicion of criminal acts. In a parliamentary session the minister of the interior reported all this as a success. He also added that even though these measures do not offer a solution to the problems, there are nonetheless encouraging signs in the investigations concerning the bombings as well. We must note at this point that a significant portion of the bombings and their perpetrators remains unexposed even today.

The differing efficiency of law enforcement in fighting petty crime and major crime is a result of several factors.

Above all there is a difference in visibility and the closely related willingness to report crimes. In the case of major crimes the perpetrators' education, technical skills and levels of information increase the chance of failing to uncover, and finding evidence is also difficult. In the case of minor crimes this is usually not the case.

The other connection is that the administration of criminal justice needs measurable results which–just as commercial companies–it can best achieve with "mass production". It is a different matter that the possibilities open to the administration of justice (for instance the difference between misdemeanour and criminal proceedings) allow for fewer simplifications, and as a result the handling of petty offences does not reduce the strain on judicial administration of justice proportionally to their minor importance. Thus it can happen that courts become "clogged up" with cases that pose minor threats to society while as a result the capacities originally set aside for trials on major crimes are increasingly difficult to mobilise. This goes some way towards explaining

how in criminal law–and as a part of this phenomenon also in the context of court trials–fundamental requirements are formulated that seek to counter the difficulties in finding sufficient evidence by either renouncing or at least relaxing rule of law values (introduction of witnesses that the defence may not encounter, admitting into evidence materials from clandestine information gathering without revealing the sources or the methods for obtaining them, etc).

Increasing efficiency by abandoning rule of law principles is dubious to say the least. In my opinion we rather ought to start from the notion that minor crimes–though they affect a much larger group of victims–are altogether not as dangerous to society as terrorism, extremely well-funded organised crime structures that threaten the creation of alternative social structures, or environmental pollution that threatens the health of millions.

In the case of petty crimes it is more effective therefore to expand alternative sanctions that also contain civil rights elements. Simultaneously the capacity for combating major crimes ought to be improved and increased both in qualitative and quantitative terms.

6. The social perception of crime and law enforcement

It is hardly debatable that in democratic societies public perceptions, the citizens' opinions, sentiments and especially their fear of crime cannot be disregarded when it comes to the public power's approach to crime, nor in criminological research.

Generally it can be asserted that two kinds of approaches exist in terms of social reaction to crime. The first suggests that the self-restraint of criminal law is appropriate, since the decriminalisation experiences tend to be rather good overall. If society does not wish to receive back savage evil-doers back from prison, then the humanisation of penal law is imperative.

The other approach, referring to law and order, proclaims exactly the opposite. According to this thinking permissive criminal policy is a fiasco. Criminals do not deserve society's good faith or patience. Prisons are either completely incapable or extremely inefficient at conveying proper values to people, but it does not follow that one should try to humanise prisons, but that criminals ought to be locked up for as long as possible, for life if need be.

People generally tend to hold the latter belief. They perceive severe punishments as the best method for preventing criminal acts. Nonetheless, it is an indisputable fact that the punitive approach is not exclusive in reality but–though sometimes in a somewhat contradictory manner–is mixed with more tolerant views. The majority of people calling for strict punishments simulta-

neously accept the need for both, punishments and correctional-type measures.[38] We can also observe a subtle shift in the assessment of the role of retributive types of punishment, while there is an increased acceptance of complex state/public power responses to crime.[39] Proper information on crime and the administration of justice plays a very important role in this process, in persuading people–for instance in the course of all proceedings that pertain to them in any form, or in the media–, furthermore in increasing social participation in prevention and the administration of criminal justice.[40]

A special problem for societies that experienced regime transition is that dictatorships generally–including the former socialist systems as well–managed to keep crime rates at a low level, at least according to official statistics. Undeniably the paternalistic state provided people with some sense of security.[41] In contrast, the countries in transition were hit by massive waves of crime that struck simultaneously with political democratisation. It was easy for the perception to emerge–as it indeed did–that it was really the constitutional fundamental rights safeguards–suddenly taken more seriously–which lead to the "police's hands being tied" and thus caused increasing crime.[42] Consequently, the solution can be nothing but the curtailment of individual liberties, renouncing some principles in exchange for increasing the efficiency of law enforcement.[43] It can really be observed that in the transitional states free-market based

[38] Boers, K.: Kriminalitätsfurcht. Pfaffenweiler, 1991. 324 and 325, as well as Kerner, H.-J.: Kriminalitätseinschätzung und Innere Sicherheit. Eine Untersuchung über die Beurteilung der Sicherheitslage und über das Sicherheitsgefühl in der Bundesrepublik Deutschland, mit vergleichenden Betrachtungen zur Situation im Ausland. Wiesbaden, 1980. 225 and Korinek L.: *Rejtett bűnözés* [Latent crime]. Budapest, 1988. 151.

[39] Korinek L.: *Félelem a bűnözéstől* [Fear of Crime]. Budapest, 1995. 116–117, and Hart Research Associates: Changing Public Attitudes toward the Criminal Justice System for the Open Society Institute. 2002. http://www.prisonsucks.com/scans/CJI-Poll.pdf

[40] Allen, R.: What Works in Changing Public Attitudes–Lessons from Rethinking Crime and Punishment. *Journal for Crime Conflict and the Media*, 1 (2004) 55–67.

[41] Irk F.: Rendszerváltás Közép-Európában: a bűnözés-megelőzés és a kriminálpolitika kérdőjelei [Political transition in Central-Europe: the questionmarks of crime prevention and criminal polciy]. In: Vigh J.–Katona G. (eds.): *Társadalmi változások, bűnözés és rendőrség* [Social changes, crime and police]. Budapest, 1993. 267–275.

[42] See, Mawby, R.: A változó rendőrség–bevezető elmélkedés Kelet-Európa nyugat felé fordulásának ürügyén [Police in transition–introductory thoughts on Eastern-Europe turning westwards]. In: Vigh–Katona: (eds.): *op. cit.* 248–253.

[43] See Boross P.: Megnyitó beszéd a Társadalmi változások, bűnözés és rendőrség című konferencián [Opening speech at the Social change, crime, police conference]. In: Vigh–Katona (eds.): *op. cit.* 10.

governance is mixed with such police-state methods, indeed with such conceptual approaches.[44]

7. Politics and Criminal Law

Significant changes in criminal policy usually result from long, arduous processes in public thinking. The birth of a new policy is generally preceded by the exhaustion of reserves offered by old solutions, by the recognition that the previously used methods mark a dead-end.

This is how it was already in the 17th century, when as a result of continuously harsher penalties almost all legal violations resulted in the gallows, and in England, for instance, over two hundred offences were punishable by death. In spite of the increasing severity of punishments crime kept rising. The irony of the situation was that one of the best opportunities for committing crime was offered by public executions, which drew pickpockets and other criminals whose acts were also subject to the death penalty.[45]

It was Cesare Beccaria who recognized the need for a new perspective by emphasising that it was not the severity of the punishment, nor its cruelty, but its inevitability that exerted the best deterrent effect.[46] He also formulated other important, still valid considerations concerning police work and crime prevention. Regarding the former, for example, his opinion was that it should only be allowed to operate based on clear laws, lest it paves the way for tyranny, which always "lurks on the fringes" of political liberty.[47] Beccaria's ideas on the connection between criminal law regulation and prevention are also instructive and relevant today:

> *Just as nature's permanent and extremely simple laws cannot prevent turmoil in the movement of heavenly bodies, human laws, too, between the infinite and contradictory powers of attraction of pleasure and pain, cannot prevent all disruptions and disorder. Still, this is the illusion harboured by narrow-minded people once they attain power. If we forbid people to engage in various indifferent activities, then this will not unequivocally mean that*

[44] Łoś, M.: Post-communist Fear of Crime and the Commercialization of Security. *Theoretical Criminology*, 6 (2002) 180.

[45] See, King, P.: *Crime, Justice and Discretion in England 1740–1820.* New York, 2000. 343.

[46] See Beccaria, C.: *Bűntett és büntetés* [Crime and punishment]. Budapest, 1967. 99.

[47] See: *ibid.* 120.

we pre-empt the crimes resulting from such activities, but rather that we create new crimes, that we arbitrarily specify the concepts of virtue and crime, which are proclaimed as eternal and immutable. Where would we end up if we banned everything that might induce us to commit crimes? One would even have to deprive humans of the use of their sensory organs! [48]

The world has not changed much since, and neither has the temptations to solve its problems through criminal law regulations. It is time to recognise that criminal law alone is not capable of solving the problems it addresses.

As pointed out before, it is beyond dispute that the prevention and the reconnaissance preceding criminal investigations, furthermore the war on terror, as well as its expansion to include other criminal categories, increasingly takes place beyond the framework imposed by criminal law, in fact partly beyond any legal frameworks whatsoever. This raises fundamental human rights concerns. At the same time one also has to see that politics seeks to "channel back" the really great results into the administration of criminal justice–albeit with mixed success. International criminal courts are established one after the other, and failed dictators are brought to justice. It appears therefore that it is "only" the fundamental rights safeguard aspects of applying criminal law that are relegated to the background, the expectations from deterrent effects are still prominent.

In developing the future role of criminal law we ought to keep in mind that it is aimed at individual, externally manifested acts and behaviour, and is thus incapable of liquidating or substantially influencing the causes of crime. The exception here is the regulation itself, as far as the cause and objective of criminalisation is not the protection of general social values, but the interest of helping the public power's operation, in some instance the interest of furthering the enforcement of other legal statutes (mala prohibita).

Article 218 of our criminal code, for instance, ordains a punishment for anyone who helps another person to cross the national border without permission or in an impermissible method. The state undoubtedly has a right to regulate the conditions and modes of border-crossing. Still, it needs to be kept in mind that in this case (I would like to emphasise that the current regulation does not require the motivation of financial benefits nor other circumstances necessary to fulfil the criteria of a criminal act, that is a purely benignly motivated co-operation in helping somebody get into the country this way could prove sufficient to bring somebody into prison) the subject of the criminal act is in essence the furthering of a generally recognised human value (free movement).

[48] See: *ibid.* 134–135.

Moreover, the border crossing to leave the country, which is also subject to the prohibition, is the immediate assertion of an internationally recognised fundamental right, in as far as the International Covenant on Civil and Political Rights–implemented by Act 8 of 1976–, in its Article 12 (2) explicitly states that anybody may freely leave any country, including his own. It is true, of course, that the exercise of this right can be subject to legal limitations, but the restrictions do not change the hierarchy of values. We generally classify as mala prohibita those kinds of behaviour in the case of which the applicability of penalties depends on whether they were undertaken with authorisation or without. Here again I emphasise that the system of authorisations may have–and indeed usually does have–a reasonable justification, but the fact is that the action without permission is subject to punishment even if it does not violate anyone's interests. In other words: the basis for official action is not the concrete social damage caused by the legal violation, or any threat thereof, but the public power's loss of prestige.

The politicians who wish to use the seemingly simple tool of criminal law regulation for dealing with social problems fail to take into account–though as pointed out above Beccaria already called attention to this fact–that bad regulation and unjust application of the law not only fail to achieve a deterrent effect, but can outright lead to the opposite result: they can increase the number or severity of criminal acts.[49]

While emphasising the dangers lurking over lawmaking we also need to state–precisely because of the clandestine operations that are based on a war-like conception and are devoid of fundamental rights safeguards in their efforts to combat crime–that criminal law regulations are also repositories of social and constitutional values that need to be enforced in the future as well.

Above all we need to emphasise the values and most important norms based on these values, which provide some kind of security both in an objective and a subjective sense as well. The key issue here is that criminal law clearly and predictably establishes the expectations whose violation will allow for the application of–also previously established–legal consequences (nullum crimen, nulla poena sine lege). Thereby the rules' moral reinforcement is also achieved.[50] The creation of long term regulations based on generally accepted values also

[49] See Kury, H.–Ferdinand, Th. N.–Obergfell-Fuchs, J: Does Severe Punishment Mean Less Criminality? *International Criminal Justice Review*, 13 (2003) 110–148 and Sherman, L. W.: Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction. *Journal of Research in Crime and Delinquency*, 30 (1993) 445–473.

[50] See Robinson, P.–Darley, J. M.–Carlsmith, K. M.: Ex Ante Function of the Criminal Law. *Law and Society Review*, 35 (2001) 165–187.

presumes that ideological perceptions concerning crime and punishment are relegated to the background, both in justice policy, as well as in research.[51]

Beccaria was right. Prospective punishments have no deterrent effect.[52] Of course it does not follow that all prisons should immediately be torn down. Deterrence is not the only function of punishments and criminal law. It can undoubtedly be necessary, for example, to temporarily–or according to the reigning official view today even permanently–seclude some perpetrators from society. Though the severity of the prospective punishment in itself does not deter from committing a crime, the enforcement, as well as the authorities' treatment of suspects in general does have an effect on the individual and his future action. The most important "message" that the administration of criminal justice and the public power in general can send the people is: fair treatment. It is not surprising that studies have verified: the authorities' fair behaviour and the accepted legitimacy of their intervention has a demonstrable impact on law-abiding behaviour.[53]

A special problem is that in tough political battles criminal law may become dysfunctional. When financial resources are scarce, legislators–in the thrall of impatient omnipotence–may wish to try to heal society's general ills with a criminal law that is not supposed serve this purpose. If a phenomenon that they believe deeply worries society (in reality their presumed voters) spreads, they immediately revert to using the tool of criminal law. A typical example is the law adopted by the Orbán government to impose more severe punishments on drug consumption. It appeared that they lashed out at drug consumers, while in reality they sought to demonstrate their deep commitment to their own voters. In light of such practices the criminal code begins to resemble a book of political messages rather than a codex created by moderate politicians.

[51] Braswell, M. C.–Whitehead, J. T.: Seeking the Truth: An Alternative to Conservative and Liberal Thinking in Criminology. *Criminal Justice Review*, 24 (1999) 50–63.

[52] See Gendreau, P.–Goggin, C.–Cullen, F. T.: *The Effects of Prison.* Sentences on Recidivism. Ottawa, 1999.; Kury, H.–Ferdinand, Th. N.–Obergfell-Fuchs, J.: Does Severe Punishment Mean Less Criminality? *International Criminal Justice Review*, 13 (2003) 110–148. and Paternoster, R.–Iovanni, L.: The Deterrent Effect of Perceived Severity: A Reexamination. *Social Forces*, 64 (1986) 751–777.

[53] Sherman, L. W.: Defiance, Deterrence, and Irrelevance: A Theory of the Criminal Sanction. *Journal of Research in Crime and Delinquency*, 30 (1993) 452.

8. What is to be done?

So far I have dealt with–not without critical remarks–criminal law and its social and legal environment: I described some tendencies that can be observed in security protection today. A representative of science cannot limit himself to explaining the world, as best as his powers and talent allow he must also contribute to changing and improving it.[54]

Of course we already achieved something if we show politics and legislature the dead-ends, the paths they ought to avoid at all costs. Such is for example the removal of law enforcement from the rule of law, or the plan to scale back crime by increasing the severity of punishments.

There is more we have to offer, though. There is a continuously evolving approach that provides a modern response to the majority of the problems raised in this article, at least on a theoretical level. Its further extrapolation and application could help to end, or at least reduce, in many areas the dilemmas and problems presented in this study. This approach is nothing else than *human security*. Let me note that the English term "human security" is usually translated as humane security,[55] but the notion of "human security" is better in terms of expressing the close connection to human rights.

The concept of human security and the associated criteria were developed by the United Nations Development Programme (UNDP). The programme, in its 1994 Human Development Report, designates the freedom from fear and deprivation as a basic component of human security (Human Development Report, 1994). As regards to our topic the issue here is that the success of countering crime depends on the success of preventing social problems, resolving social tensions, and head off disintegration–in essence on pre-empting the need for criminal law intervention in the first place.

To further develop the concept of human security and to create a plan for its realisation, at the UN's Millennium session in 2000 a decision was made to establish a Commission on Human Security. The best theoretical and professional experts were delegated to this commission, which was co-chaired by Sadako Ogata, former UN High Commissioner for refugees, and Amartya Sen, Nobel Prize winner in economics. Former Polish foreign minister Bronislaw Geremek also participated in the Commission's work.

[54] See Fichte, J. G.: Einige Vorlesungen über die Bestimmung des Gelehrten. In: Fichte, I. H. (Hrsg.): *Johann Gottlieb Fichtes Sämtliche Werke.* Berlin, 1845–1846. 1794.

[55] See for example Axworthy, L.: A NATO új biztonsági küldetése [NATO's new security mission]. *Nato Tükör*, (1999) 8.

The body finished its report by 2003 and noted that the international community needs a new security paradigm. The state will continue to remain an important factor in ensuring security, but often it can or does not want to live up to its security obligations, and sometimes it even becomes a source of threat to its citizens itself. Thus instead of the state's security one has to make human security the centrepiece of attention.[56]

The Commission defines the concept of human security as follows:

> *to protect the vital core of all human lives in ways that enhance human freedoms and human fulfilment.*[57]

The protection of fundamental rights and liberties is absolutely inseparable from the concept of human security. But it also extends to the defence against severe wide-ranging threats and hazardous situations.

The need for complex[58] and global approaches[59] in the thinking on security was already recognised earlier. It has also became apparent that previous distinctions (military/police, domestic/external, etc.) are fading, or at least losing their pertinence. The new element in the human security approach is that it places the perspective of individuals and their communities before the security interests of the national or even the whole international community.

The assessment of migration exemplifies the difference in the traditional state or national security and the novel human security conception. The latter sees human migration as something positive, for it increases countries' mutual dependence and reinforces the acceptance of differences. It enhances the exchange of knowledge, as well as the spread and conveyance of skills. It helps economic development and simultaneously the success of the people involved in migration. Admittedly, there are also dangers and adverse consequences, but the negative consequences of migration should also be primarily assessed with regards to their effect on the people who are immediately affected.

The concept of human security resolves the dichotomy that is generally presumed to exist between human rights and security. This approach holds that

[56] See Commission: Human Security Now. Commission on Human Security, UN, New York, 2. 2003.

[57] See Commission: Human Security Now. Commission on Human Security, UN, New York, 4. 2003.

[58] See for example Rubin, H.: *Security in Society: Protecting an Increasedly Connected World.* Washington D. C., 2003.

[59] See for instance Steinbruner, J. D.: Principles of Global Security. Washington D. C., 2000.

providing for the most extensive enjoyment of human rights possible is not obstacle, but rather an objective–and in a successful case an achievement–of security and defence policy.[60]

If I need to sum up the desired strategy as succinctly as possible, I turn to a phrase by Javier Solana: "[A] world more fair is a world more secure".[61]

[60] See Oberleitner, G.: Human Security and Human Rights, European Training Centre for Human Rights and Democracy. *Occasional Papers*, 2002. No. 8.

[61] See Solana, J.: *Beszéd az Európai Nemzeti Fórumon* [Speech on the European National Forum]. S0005/4, Dublin, 2004.

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Judicial Independence in Transition: Revisiting the Determinants of Judicial Activism in the Constitutional Courts of Post-Communist States

Abstract. This study investigates the relationship between dimensions of judicial independence and judicial review in constitutional courts Central and Eastern Europe and the Former Soviet Union. In part a modified replication of prior works examining the issue, the study uses newly collected data from a panel of ten countries. It examines the relationship of judicial review with: (1) judicial independence (using both measures employed by the prior works, corrected versions of those measures, and measures original to this study); (2) political and social contextual factors; and (3) the receptiveness of post-communist countries to the importation of transplanted legal institutions. Improvements on the conceptualisation of judicial independence, inclusion of the dimensions of receptiveness, and a more appropriate panel of countries enable this study to present a more complete and accurate portrait of constitutional judicature in transition contexts. The results show that while corrections to prior measures of judicial independence improve the results at the margin, the entirely new measures of the concept represent a greater step forward. Several dimensions of judicial independence are positively related to judicial review, as are the measures of countries' receptiveness to legal transplants. Other key factors positively related to judicial review in transition include legislative fragmentation at the time of each court decision, the scope of rights guarantees in a bill of rights, and popular trust in courts. Presidential power is negatively related to judicial review. The findings further indicate that aside from judicial independence, the prior works do present correct portrayals of most of the contextual influences they investigate.

Keywords: judicial independence; constitutional courts; post-communist states; transitional justice; comparative law

1. Introduction

The collapse of communist regimes in the Former Soviet Union (FSU) and Central and Eastern Europe (CEE) brought with it the dramatic transformation of entire systems of constitutional justice across Europe's eastern

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frontier.[1] Many states where the rule of law had existed in name only for nearly half a century were suddenly freed to design and attempt to build (or import) new institutional frameworks for the administration of law and justice.[2] Of the structural features designed and built in transitioning states, "by far the most important of the new institutions" were the new constitutional courts each country adopted.[3]

These new tribunals stand out for at least two reasons. First, while the process and products of transition differed in many ways across the region, the presence of a constitutional court was one of a few important commonalities. Although until 1989 only two countries throughout CEE possessed some (nominally) independent constitutional court, by the mid-1990s every state in the region had established one, most patterned after Germany's Federal Constitutional Court (FCC).[4] This yielded a natural experiment of sorts: the same basic court model, transplanted into different contexts, produced noticeably different outcomes on a wide range of important issues.[5]

[1] Schwartz, H.: *The struggle for constitutional justice in post-communist Europe*. Chicago, 2000.; Procházka, R.: *Mission accomplished: on founding constitutional adjudication in Central Europe*. Budapest, 2002.; Přibáň, J.: Constitutional justice and retroactivity of laws in postcommunist Central Europe. In: Přibáň, J.–Roberts, P.–Young, J. (eds.): *Systems of justice in transition: Central European experiences since 1989*. Aldershot, 2003. 29–49.

[2] Sadurski, W.: Postcommunist constitutional courts in search of political legitimacy. Florence, 2001. 8ff.

[3] Dupré, C.: *Importing the law in post-communist transitions: the Hungarian Constitutional Court and the right to human dignity*. Oxford, 2003. 26.

[4] Sadurski: *op. cit.* 1; *cf.* Tanchev, G.: Constitutional safeguards of legality and legitimacy. In: Kelly, M. (ed.): *Openness and transparency in governance: challenges and opportunities*. Maastricht, 2000; Howard, A. E. D.: Judicial independence in post-communist Central and Eastern Europe. In: Russell, P.–O'Brien, D. (eds.): *Judicial independence in the age of democracy: critical perspectives from around the world*. Charlottesville, VA 2001. 89–110; Dupré: *op. cit.*; Schiemann, J.: Explaining Hungary's powerful constitutional court: a bargaining approach. *European Journal of Sociology*, 42 (2001) 357–390. Indeed, establishing a constitutional court became the distinguishing "trade mark" and the "proof of the democratic character" of post-communist states eager to demonstrate that a genuine transformation to democracy was underway. Sólyom, L.: The role of constitutional courts in the transition to Democracy: with special reference to Hungary. *International Sociology*, 18 (2003) 133, 134. Procházka insightfully emphasises the importance these states–especially the Visegrad Four (Hungary, Czech Republic, Slovakia, and Poland)–attached to being perceived in Western Europe as genuinely committed to transformation from authoritarian socialism to democracy. Procházka: *op. cit.*

[5] This experiment has not gone unnoticed by students of courts as policy-shapers. Epstein, L.–Knight, J.–Shvetsova, O.: The role of constitutional courts in the establishment and maintenance of democratic systems of government. *Law and Society Review*, 35 (2001)

Second, these courts played a very active part in shaping not just the outcome, but the even the *process* of democratic transition,[6] and many became formidable policy players in a very brief span of time. The Hungarian Constitutional Court, for instance, struck down nearly one-third of all primary legislation (273 of 905 national laws) brought before it for constitutional review during its first six years alone.[7] The weight of the issues in which that Court played a pivotal role is striking: retroactive criminal legislation,[8] restitution for expropriation by the communist regime,[9] lustration laws,[10] the IMF-directed economic austerity programme,[11] abortion,[12] the death penalty,[13] same-sex partnerships,[14] and many others.[15] More recently, in July 2005, on the basis of a petition by thirteen citizens, the Slovakian Constitutional Court nullified the

117–164; Boulanger, C.: Beyond significant relationships, tolerance intervals and triadic dispute resolution: constructing a comparative theory of judicial review in post-communist societies. Paper presented at the Law and Society 2003 Annual Meeting, Pittsburgh, PA, 5–8 June 2003; Scheppele, K. L.: Constitutional negotiations: political contexts of judicial activism in post-Soviet Europe. *International Sociology*, 18 (2003), 219–238.

[6] Dupré: *op. cit.* 26.

[7] Scheppele: *op. cit.* 224. This is particularly significant given the scope and range of the Hungarian Constitutional Court's exercise of its review powers in its first decade of operation. Nearly all of Hungary's legislative framework was reviewed by the constitutional court, largely as a consequence of the ease of access for petitioning review by the court. Sólyom, L.–Brunner, G.: *Constitutional judiciary in a new democracy: the Hungarian Constitutional Court*. Ann Arbor, 2000. 81. Specifically, via the *actio popularis*, any individual could petition for constitutional review of any law, regardless of whether she was in any way affected by the law itself; some 3,170 cases of this type were initiated between 1990 and 1996, inclusive. *Ibid.*

[8] See Decisions 11/1992 and 53/1993; available (in English) in Sólyom–Brunner: *op. cit.* For a fuller discussion of the retroactive punishment issue, see Nalepa, M.: Why post-communists punish themselves: a model of transitional justice legislation. Paper presented to the Midwest Political Science Association annual meeting, Chicago, IL, 27 April 2002; Nalepa, M.: Punish all perpetrators or protect the innocent?: a signaling model of truth revelation procedures. Paper presented to the American Political Science Association annual meeting, Philadelphia, PA, 28 August 2003.

[9] Decisions 21/1990 and 16/1991. In: Sólyom–Brunner: *op. cit.*

[10] Decision 60/1994. In: *ibid.*

[11] Decision 43/1995. In: *ibid.*

[12] Decision 64/1991. In: *ibid.*

[13] Decision 23/1990. In: *ibid.*

[14] See Decision 14/1995. In: *ibid.*

[15] *Ibid.*

legislature's ratification the EU Constitution and (temporarily) barred the country's president from signing it.[16]

For students of judicial politics, the development of these new courts is significant not merely as an opportunity to apply existing models, but also because lessons from these unconventional contexts can improve and expand extant theories.[17] The experiences, contexts, and compact histories of the new tribunals may prove pivotal in identifying gaps in existing theory; in particular, their study may bring to light forces which are invisible in 'conventional' contexts, but which ought to be incorporated into any general theory of constitutional adjudication.

Explorations of the courts and the lessons they have to teach have been underway for well over a decade, but one of the discoveries thus far is puzzling. After surveying the judicial decisions of seven CEE constitutional courts, two prominent American political scientists–Eric Herron and Kirk Randazzo–concluded that the degree of institutional judicial independence enjoyed by the courts did *not* affect the likelihood that those courts would annul a statute or other government act. This conclusion, along with several others reached by Herron and Randazzo and other scholars, runs counter to conventional wisdom, raising questions both about these new courts themselves and, more broadly, about broader theories of judicial independence. In short, if Herron and Randazzo are correct, then either (A) the new courts are *sui generis*, and have less in common with their Western templates, or (B) a basic tenet of political science–i.e., that institutional design affects behaviour–may not be true of constitutional courts.

Both the implications of Herron and Randazzo's findings and problems with their and others' studies make it necessary to revisit this question empirically. This Article does just that, seeking to uncover a more complete picture of CEE courts themselves and of judicial independence more generally. Building on the prior studies' research design, the Article principally explores whether the degree of institutionally inscribed formal independence of the courts themselves affects the incidence of judicial review in CEE and the FSU. This study

[16] Jurinová, M.: President ready to sign EU Constitution. *The Slovak Spectator*, 25 July 2005. <http://www.slovakspectator.sk/clanok.asp?cl=20421>. Forbes.com (2005): Slovak Constitutional Court blocks ratification of EU constitution. *Forbes.com*, 14 July 2005. <http://www.forbes.com/finance/feeds/afx/2005/07/14/afx2139424.html>

[17] As Scheppele observes, the new courts "are good to study not because they are different in kind from what becomes normal politics, but precisely because they reveal in sharper relief the problems buried in what passes for normal in 'consolidated' democracies." Scheppele: *op. cit.* 220.

also examines other factors that may influence the level of judicial review–some studied in previous work, and some original to this study. The study's findings regarding the determinants of judicial review by constitutional courts in CEE and the FSU will contribute not only to an understanding of these courts, but they can also help to both test and reshape general theories of both constitutional adjudication and the transplantation of legal institutions.

To this end, the Article proceeds as follows: Part 2 reviews existing literature addressing constitutional judicial politics in transition, describing and critique two particular investigations–Herron and Randazzo's, and another by John Ishiyama and Shannon Ishiyama Smithey–that studied the relationship between judicial independence and judicial review in CEE and the FSU.[18] Part 3 describes the data and methodology employed in this study, and Part 4 analyses the results. Part 5 offers conclusions regarding methodological improvements and substantive findings.

At the outset, it is important to note several obstacles that hinder all studies of the new courts. At a theoretical level, despite myriad volumes on judicial politics produced over the last two decades, a general theory of judicial independence–even a common definition–is still lacking.[19] A novel, though elementary, model is developed and used here, but it goes only a short way towards constructing a sound, comprehensive definition of judicial independence. Second, the methodologies developed for studying constitutional politics in stable democracies with long traditions of constitutional review may be inadequate to investigate states where the courts are brand new, that have no recent tradition or legacy to build upon, and where the rules of the game are constantly in flux.[20] This problem–troublesome enough when studying conventional, consolidated democracies[21]–is heightened in transition contexts where the existence, content, and effectiveness of formal and informal rules of law are never known with certainty.

Finally, the transition context presents problems concerning the actual data needed for study. There is no standardised, transparent, and widely used

[18] Smithey, S. I.–Ishyiama, J.: Judicial activism in post-communist politics. *Law and Society Review* 36 (2002) 719–741; Herron, E.–Randazzo, K.: The relationship between independence and judicial review in post-communist courts. *Journal of Politics* 65 (2003) 422–438.

[19] Russell, P.: Toward a general theory of judicial independence. In: Russell–O'Brien: *op. cit.* 1–24; Herron–Randazzo: *op. cit.*

[20] Boulanger: *op. cit.*

[21] Stone Sweet, A.: A comment on Vanberg: rules, dispute resolution, and strategic behaviour. *Journal of Theoretical Politics,* 10 (1998) 3, 327–338; Vanberg, G.: Reply to Stone Sweet. *Journal of Theoretical Politics,* 10 (1998) 3, 339–346; Boulanger: *op. cit.*

database on court activity available, as there is for the world's most-studied court.[22] Moreover, lack of basic familiarity with the new courts makes it hard for scholars to know what data to collect. Add to these problems the tremendous language barriers,[23] numerous inconsistencies between the courts in what documents and statistics are publicly available, and the fact that most in-depth research continues to come from single-country studies where the authors frequently are sitting or former jurists on the court they describe, and the challenges facing researchers of the new courts become quite daunting.

2. Existing Literature on the new courts

2.1. Methodologies and Findings of Prior Research

The new constitutional courts of CEE and the FSU remain the most "under-theorized" of any of the aspects of transition.[24] Although they have received attention from around the world and from a variety of disciplines,[25] much of this attention has been descriptive and exploratory in nature.[26] Moreover, those studying the courts often bring with them established theories and models of judicial independence developed in other contexts,[27] and thus comparatively little new theoretical ground has been broken.[28]

[22] Prof. Harold Spaeth's databases for the United States Supreme Court is "certainly the most important and influential"–as well as the most comprehensive and transparent–dataset available for the study of that Court. Epstein, L.–Knight, J.–Martin, A.: The political (science) context of judging. *Louis University Law Journal*, 47 (2003) 783, 807.

[23] Schwartz, whose book on the new constitutional courts in CEE is perhaps the most frequently cited major work on the topic, acknowledges: "I do not, however, know the languages of the many countries covered in this book. I certainly am not very familiar with either their legal systems or national cultures, and I have translations of only some of the decisions and actions I discuss" (2000, xix).

[24] Sadurski: *op. cit.*

[25] Dupré: *op. cit.* 3–4.

[26] Schwartz: *op. cit.;* Přibáň–Roberts–Young (eds.): *op. cit.;* Krygier, M.–Czarnota, A. (eds.): *The rule of law after communism: problems and prospects in East-Central Europe.* Aldershot, 1999. 55–76. Constitutional courts in the process of articulating constitutional rights in post-communist states of Central and Eastern Europe, Part I: social and economic rights. European University Institute Law Working Paper No. 2002/14. Florence, 2002; Harutyunyan, G.–Mavčič, A.: *The constitutional review and its development in the modern world: a comparative analysis.* Ljubljana, 1999.

[27] Howard: *op. cit.* Burbank, S.–Friedman, B. (eds.): *Judicial independence at the crossroads: an interdisciplinary approach.* Thousand Oaks, California, 2002.

This is surprising not only because of the ubiquity, activist tendencies, and importance of these courts to the transformation to democracy, but also because constitutional judicature in transition lies at the nexus of two rich fields of the political science and transition literatures. First, the theoretical and empirical literature on constitutional judicial politics has produced several methodologies and models for investigating established constitutional courts.[29] Intertwined with these advances have been efforts, incomplete as yet, to uncover the nature, causes, and effects of judicial independence.[30] Several applications of these theories and methods to transition contexts are discussed in the following section.

Second, the literature on the "transplantation"[31] or "importation"[32] of legal systems, and the explicit extensions of this line of investigation to post-communist contexts,[33] offers several critical insights pertinent to constitutional

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[28] There are exceptions, of course. See Procházka: *op. cit.;* Scheppele, K. L.: Declarations of independence: judicial reactions to political pressure. In: Burbank–Friedman (eds.): *op. cit.* 227–280.

[29] Shapiro, M.: *Courts: a comparative and political analysis.* Chicago, 1981; Stone Sweet, A.: *Governing with judges: constitutional politics in Europe.* Oxford, 2000; Vanberg, G.: *The politics of constitutional review in Germany.* Cambridge, 2005; Garrett, G.–Kelemen, R. D.–Schulz, H.: The European Court of Justice, national governments, and legal integration in the European Union. *International Organization.* 52 (1998) 149–176; Epstein, L.–Knight, J.: *The choices justices make.* Congressional Quarterly, Washington, 1998; Epstein–Knight–Martin: *op. cit.* As Boulanger recounts, three major threads of have taken shape in the literature on courts and their role in governance: formalist (i.e. rational choice) models, "behavioural/empiricist accounts" employing several tools of statistical analysis, and the more abstract "triadic dispute resolution" models such as that elaborated by Stone Sweet. Boulanger: *op. cit.* 7ff. As scholars have begun to turn their attention toward CEE and FSU constitutional courts, they have made more use of the first two of these approaches, while the third has been partly subsumed in historical-contextual accounts, such as those of Procházka and Boulanger.

[30] Russell–O'Brien: *op. cit.* Ackner, L.: The erosion of judicial independence. London, 1997; Burbank–Friedman: *op. cit.* Lane, L.: Judicial independence and the increasing executive role in judicial administration. In: Shetreet, S.–Deschenes, J. (eds.): *Judicial Independence: The Contemporary Debate.* Dordrecht, 1985; Ramseyer, J. M.–Rasmusen, E.: *Measuring judicial independence: the political economy of judging in Japan.* Chicago, 2003.

[31] Watson, A.: *Legal transplants,* 2nd ed. Athens, Georgia (USA), 1993; Watson, A.: From legal transplants to legal formants. *American Journal of International and Comparative Law,* 43 (1995) 469.

[32] Ajani, G.: By chance and prestige: legal transplants in Russia and Eastern Europe. *The American Journal of Comparative Law,* 43 (1995) 93–117.

[33] Dupré: *op. cit.* Pistor, K.: The demand for constitutional law. *Constitutional Political Economy,* 13 (2002) 73–87; Hendley, K.: Rewriting the rules of the game in Russia: the neglected issue of the demand for law. *East European Constitutional Review,* 8 (1999).

jurisprudence in transition countries. Most importantly, such explorations have identified several strategic and contextual factors–including a transitioning state's familiarity with and adaptation of the legal system transferred[34]–that can influence the successful transfer of legal norms and institutions from one state to another. When such factors are absent, the systems will not function as effectively as in their original context, a phenomenon that commentators call the "transplant effect."[35]

Despite this intersection of disciplines and the possibilities it may hold for developing new theories of constitutional judicature, scholars have instead relied on two familiar methodologies: static rational choice models and statistical analysis of judicial decisions. Each offers distinct costs and benefits. Rational choice models are among most prevalent and provocative tools for modelling courts and other institutions in non-transition contexts.[36] Because of the transition literature's youth, however, only a few attempts to apply rational choice models to new constitutional courts have appeared. The best example is the work of Epstein, Knight, and Shvetsova,[37] in which the authors employ rational choice theory to predict the interaction of constitutional courts with legislative and executive branches.

Although rational choice does offer a window into the 'black box' of judicial decision making, allowing outsiders to understand political influences on the courts as strategic actors, models like Epstein, Knight, and Shvetsova's face serious limits. First, to the extent they can accurately reflect the strategic rubric of political decisions faced by courts in a given country, they are likely too closely tied to that country's context to be of broader value. Second, as Alec Stone Sweet has observed,[38] rational choice models are as yet unable to

[34] Pistor, K.–Raiser, M.–Gelfer, S.: Law and finance in transition economies. Center for International Development Working Paper No. 49. Cambridge, MA 2000; Berkowitz, D.–Pistor, K.–Richard, J. F.: The transplant effect. *American Journal of Comparative Law*, 51 (2003) 163–204.

[35] Berkowitz, D.–Pistor, K.–Richard, J. F.: Economic development, legality and the transplant effect. *European Economic Review*, 47 (2003) 165–195.

[36] Ferejohn, J. A.–Weingast, B. R.: A positive theory of statutory interpretation. *International Review of Law and Economics*, 12 (1992) 263–279; Knight, J.: Law and rational choice. Paper (draft) presented at Politics and Rationality Lectures, Collective Choice Center, University of Maryland, 23 Feb 2001. <http://www.bsos.umd.edu/umccc/knight.pdf>; Vanberg, G.: Legislative-judicial relations: a game-theoretic approach to constitutional review. *American Journal of Political Science*, 45 (2001) 346–361.

[37] Epstein–Knight–Shvetsova: *op. cit.*

[38] Stone Sweet: Comment... *op. cit.*

explain situations where the 'rules of the game' themselves are in flux, especially when such changes are the result of interaction among the players.[39]

Third, the stylized portraits of political interactions that rational choice models present often include unrealistic, misleadingly oversimplified assumptions that affect their conclusions significantly. For example, Epstein, Knight, and Shvetsova ground their model in the assumption that courts do not have the final say in determining the outcome of a given constitutional controversy, and accordingly they hypothesise–and confirm empirically–that constitutional courts can only survive, let alone increase their position in the political order, if they issue decisions which *all* of the other branches find it too costly to contest. Because many of the new courts' most important cases concern conflicts between other branches of government, however, the authors' underlying assumption leads them astray. Their model excludes the possibility of a court deciding in favour of one branch of government, over and against another, and if necessary relying on the branch it supported to protect it from attacks. Yet the courts of Hungary[40] and Poland[41] did precisely this.[42]

The main alternative to formal rational choice models is statistical analysis, which Boulanger labels the "behavioural-empiricist" approach.[43] Transition scholars have employed statistical modelling to study both the creation of constitutional courts in CEE and the FSU[44] and the actual behaviour of the courts in deciding cases.[45] Of the latter type, two studies deserve mention: using a same measure of judicial independence developed by Smithey and Ishiyama, both Smithey and Ishiyama themselves and Herron and Randazzo

[39] The third analytical framework in the broader literature on courts–the 'triadic dispute resolution' model–sets out to solve precisely this problem. Shapiro: *op. cit.* Stone Sweet: *op. cit.*

[40] Scheppele: *op. cit.* Schwartz: *The struggle for constitutional justice... op. cit.;* Halmai, G.: The Hungarian approach to constitutional review: the end of activism?: the first decade of the Hungarian Constitutional Court. In: Sadurski, W. (ed.): *Constitutional justice, east and west: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective.* The Hague, 2002. 189–212.

[41] Brzezinski, M.: *The struggle for constitutionalism in Poland.* London, 2000.

[42] Additionally, the Epstein, Knight, and Shvetsova model ignores the role of parties/coalitions within legislatures or cabinets, which ought not and need not be excluded from rational-choice-type models, as evidenced by Steunenberg, B.: Courts, cabinet and coalition parties: the politics of euthanasia in a parliamentary setting. *British Journal of Political Science,* 27 (1997) 551–571.

[43] Boulanger: *op. cit.* 7.

[44] Smithey, S. I.–Ishiyama, J.: Judicious choices: designing courts in post-communist politics. *Communist and Post-Communist Studies,* 33 (2000) 163–182.

[45] Smithey–Ishiyama: Judicial activism... *op. cit.* Herron–Randazzo: *op. cit.*

examined what relationship, if any, existed between the level of judicial independence and the incidence of judicial review. Except for differences in time span examined,[46] the studies are markedly similar. Both aimed to capture the influence of various country-level attributes on the level of judicial review, and both examined a cross-sectional pool of constitutional court decisions from similar panels of countries through logit or probit analysis.[47]

Both the Smithey-Ishiayama and Herron–Randazzo studies yielded similar but surprising results. First, though both studies hypothesised a positive relationship between judicial independence and judicial review, the Herron–Randazzo study found no significant relationship, and Smithey and Ishiyama identified a significant *negative* relationship.[48] Each study, however, highlighted several contextual factors–political, social, and even economic–that were strongly associated with judicial review. Smithey and Ishiyama found significant positive relationships between judicial review and the degree of legislative fragmentation, the number of elected layers of government, and popular trust in the courts. Herron and Randazzo identified significant *negative* relationships between judicial review and change in the country's GDP growth as well as the level of presidential power.[49] At the level of individual decisions, Herron and Randazzo also found that cases where the president or an ordinary individual citizen was the appellant were more likely to result in judicial review, as were cases concerning economic issues. Consequently, each pair of authors concluded that these aspects of context, rather than judicial independence embedded in institutional design, must be the dominating factor in explaining the experience of constitutional courts in CEE and the FSU.

[46] Smithey and Ishiyama studied only the first three years of each court's operation, while Herron and Randazzo examined all available years.

[47] Each includes the Czech Republic, Estonia, Georgia, Lithuania, Moldova, and Russia; to this common set of six, Smithey and Ishiyama add Latvia and Slovakia, and Herron and Randazzo add Slovenia. Smithey and Ishiyama employ logistic (logit) regression, while Herron and Randazzo employ probit; as the underlying dependent variable is nominal, however, logit appears a more appropriate specification, and is thus used here. See Pampel, F. C.: *Logistic regression: a primer.* Thousand Oaks, CA. 2000.

[48] In addition, Smithey and Ishiyama observed, but did not test statistically, that judicial activism (defined as the frequency of judicial review) rose with judicial independence (measured by their judicial independence index scale) up to around 0.55 on the judicial–approximately the mean and median of the countries in their sample as well as the sample utilised in their earlier work which first employed the index–and then judicial activism begins decreasing, thus presumably yielding a unimodal peak. This possibility is tested and verified in the replication study herein.

[49] Herron–Randazzo: *op. cit.*

2.2. Grounds for Scepticism

As noted, the main conclusion of the Herron–Randazzo and Smith–Ishiyama studies is surprising. Both political theory and elementary intuition suggest that judicial independence, if defined meaningfully, should bear some positive relationship to courts' exercise of their independence through judicial review.[50] Accordingly, if these two studies are correct, then either conventional theory does not apply to these new courts, or that theory itself is incomplete or misguided.

A closer look at the design and execution of both the Smithey–Ishiyama and Herron–Randazzo research, however, reveals that one should not take their conclusions at face value. Both studies exhibit two critical problems: the data and cases selected, and the conceptualisation of the independent variables. After reviewing these key deficiencies, the need to revisit the ground these authors covered will be clear.

2.2.1. Data and Case Selection

Three troubling attributes of the Herron–Randazzo and the Smithey–Ishiyama studies concerning data and case selection should immediately stand out to those familiar with the work of these courts. First, both studies exclude several of the most visible and most intensely investigated courts in the region. Each pair of authors excludes Hungary–which was at the time "perhaps the most activist constitutional court not only in the CEE but also in the world"[51]–as well as Poland, a court which began as one of the weakest in the region, but began a steady rise to power years before its authority was formally expanded in the 1997 Constitution.[52]

[50] *Ibid.* 425.

[51] Sadurski: Postcommunist... *op. cit.* 3; Osiatynski, W.: Rights in new constitutions of East Central Europe. *Columbia Human Rights Law Review*, 26 (1994) 111, 151ff.; Brunner, G.: Development of a constitutional judiciary in Eastern Europe. *Review of Central and East European Law*, 18 (1992) 535, 539–540. See also Scheppele: *op. cit.* Schwartz: *op. cit.;* Sólyom: *op. cit.;* Procházka: *op. cit.;* Halmai: *op. cit.*

[52] Brzezinski: *op. cit.* Schwartz: *op. cit.* The authors of both studies indicated (in response to queries) data availability as the grounds for excluding Hungary, Poland, and other countries, both pairs of researchers indicated that data availability was a concern. However, it would appear that such data limitations result from those authors' decision to use decisions published on court websites as the source of their data, which is commented on below. Cases from Hungarian Court, however, were available in non-electronic form in Hungarian from the first case forward (in the *Hungarian Official Gazette*), began to be

Second, both studies exclude or mischaracterize one of the most important areas of the courts' activity: abstract review. The new constitutional courts in post-communist states, and especially those of CEE, were modelled not on Anglo-American templates, but rather imported their structure mostly from Western European constitutional courts, specifically Germany's FCC.[53] The abstract review competence–which enables courts to adjudicate the constitutionality (or legality, for sub-statutory acts) outside of the context of a concrete dispute[54]–is absolutely central to courts' activity and power,[55] especially in transition countries.[56] But the Herron–Randazzo study excludes cases involving the exercise of abstract review from their sample altogether,[57] and the Smithey–Ishiyama study implicitly conflates *a priori* review, which is abstract by nature, with *a posteriori* abstract review.[58] This confusion–which was explicit in their earlier work[59]–makes it difficult to decipher how Smithey and Ishiyama conceptualise judicial review.

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published in German from 1995 forward, Dupré: *op. cit.* 7, and are now available in print in a number of languages including English.

[53] Tanchev: *op. cit.;* Sólyom–Brunner: *op. cit.;* Procházka: *op. cit.* The model adopted in CEE represents the third generation of Kelsenian constitutional courts, after the pattern designed by Hans Kelsen for Austria in 1920 and later imported into post-war Germany and Italy. Sólyom: *op. cit.* The new courts, importantly, are linked to the Kelsenian model both in that they imported much of their structure (and in some cases, substantive jurisprudence–see Dupré: *op. cit.*) from Germany, and *also* through more direct ties to the original Kelsenian design. See Schwartz: *op. cit.* 270–271. n. 9.

[54] There remains, surprisingly, non-trivial disagreement over the border between concrete and abstract review. E.g., Procházka: *op. cit.* 79–80. Procházka distinguishes his own view from that of Stone Sweet in regard to review by constitutional courts of lower court decisions, which Procházka believes can be seen as abstract but which Stone Sweet classifies as concrete only.

[55] Stone Sweet: Governing... *op. cit.* 45ff.

[56] Procházka: *op. cit.;* Sólyom: *op. cit.*

[57] Herron–Randazzo: *op. cit.* 429. Herron and Randazzo give some reasons for their exclusion of cases of what they term "abstract review", but their description applies only to instances where legislators petition for review. The courts of CEE and the FSU do not limit this power to legislators, however, and thus their arguments, as stated, are unpersuasive.

[58] Smithey–Ishiyama: Judicial activism: *op. cit.* The difference between the two categories is actually quite important. For purpose of disambiguation, *a priori* review–or preventive norm control–enables the court to review statutes prior to either passage by the legislature, promulgation by the executive, or application. *A posteriori* review–or repressive norm control–can include both abstract and concrete review of statutes after they have been passed, promulgated, and brought to application. Schwartz: *op. cit.;* Sólyom–Brunner: *op. cit.;* Procházka: *op. cit.*

[59] Smithey–Ishiyama: Judicious choices... *op. cit.* 167–168.

One final data concern relates to the actual source of the prior studies' data. Both works used cases available from the websites of the respective courts, using a combination of original language publications and English translations.[60] Courts' selectivity in publishing decisions on their websites means that both studies relied on non-representative samples.[61] Although most of the new constitutional courts are required by law to publish their decisions in an official state publication, publishing any, let alone all, of those decisions on websites is neither required nor frequently practiced.[62]

Some degree of selectivity is unavoidable, of course, as many courts publish only their more important decisions even in print. The difficulty, however, lies in the *differences* between the courts' procedures and standards for choosing cases for *electronic* publication. Whereas some courts offer electronic versions of every published decision (e.g., Slovakia), others offer only a selection of the most important cases (e.g., Hungary and the Czech Republic). Each country may employ different standards to choose which cases merit publication. Accordingly, the samples used by the Herron–Randazzo and Smithey–Ishiyama studies for country A may be more representative, while the sample taken from country B will reflect only the more important cases. Because of this selectivity differential, the prior studies may have distorted the actual practice of individual countries.

2.2.2. Operationalising the Independent Variable

Beyond data and case-selection concerns, both studies also suffer from a deficient conceptualisation of the key independent variable, judicial independence. As noted above, both Herron and Randazzo and Smithey and Ishiyama employ the "Smithey and Ishiyama Index" of judicial independence ("SII") the latter pair developed in an earlier work.[63] The SII is a scalar measure, ranging from 0 to 1, with higher scores reflecting greater independence. It reflects the average of

[60] Herron and Randazzo explicitly state this, Herron–Randazzo: *op. cit.* 428, and–both pairs of authors confirmed this in response to queries by the author.

[61] Herron and Randazzo do note that their study is limited only to published decisions, and thus generalizable only to the universe of published decisions, *ibid.*; however, it is their conflation of publishing of decisions with publishing *electronically*, and in some cases *in an accessible language* which creates the difficulty.

[62] In Hungary, for instance, a total of 11 092 proceedings were initiated between 1990 and 1996. Sólyom–Brunner: *op. cit.* 72. But the Court's website currently lists only 3 837 decisions or case descriptions in Hungarian, and fewer than 50 in English.

[63] Smithey–Ishiyama: Judicious choices... *op. cit.* 167–169.

six individual scores–each also ranging from 0 to 1–representing six purported aspects of judicial independence.[64]

There are several problems with the SII's design and application in these prior studies, however. First, there is reason to doubt that it can measure a court's judicial independence meaningfully. Its six components supposedly represent various (vaguely-defined) dimensions of judicial independence, but the metrics employed appear arbitrarily chosen.[65] For instance, though Smithey and Ishiyama describe the SII as a measure of "judicial power,"[66] only two of its six components relate to the competences of the courts, while the rest deal with elements of the judges' protection from manipulation by other branches. Although both dimensions–powers and insularity–are conceptually important to judicial independence, the SII makes unstated and unjustified assumptions about the weight and interaction of these two dimensions. Accordingly, the SII does not reflect a well-grounded conception of the factors that comprise judicial independence, nor of the interactive relationships between those component factors.

Moreover, both studies rely on apparently erroneous SII values for the countries they study.[67] Coding errors are apparent in measuring countries' *a priori* review powers, judges' relative term length, and number of parties involved in appointment of judges. Thus, even if the SII were a valid measure by construction, there are reasons to question results achieved using it.

This is not to say that the prior studies' findings are necessarily incorrect–only that their conclusion must be tested more rigorously through modified replication. Replication also presents the opportunity to incorporate additional independent variables–both to test alternative causal stories and to control for important factors not accounted for in the original studies. The remainder of this Article undertakes that task.

[64] See Table 2 (and notes accompanying it) for original and corrected scores (corrections coded by the author) on each dimension of the index. See Smithey–Ishiyama: Judicious choices... *op. cit.* 167–169, for a detailed discussion of the construction and coding of the index.

[65] Moreover, even if the balance of areas represented by the six components was appropriate, the particular measures used to reflect each of the six components are markedly deficient proxies for the dimensions they are used to represent.

[66] Smithey–Ishiyama: Judicial activism... *op. cit.* 731.

[67] A full account of the errors described summarily here is provided in the notes to Table 2.

3. Data and Methodology

3.1. Hypotheses

3.1.1. Hypotheses for Variables Studied in Prior Works

The study undertaken here examines the effect on judicial review of judicial independence, legislative fragmentation,[68] and several new variables not studied the in previous works (introduced to measure the 'receptiveness' of the transition countries to the new legal institutions[69]). Regarding judicial independence, both the Smithey–Ishiyama and Herron–Randazzo studies–drawing on substantial support from the literature–anticipated that judicial independence and/or power is positively related to the degree of judicial review, which both defined as the frequency of judicial review. This expectation is premised on the view that courts enjoying "greater guarantees of independence" are "freer to exercise their own will" without fear of censure or retribution by the other branches.[70] The primary hypothesis for judicial independence is therefore:

$H_{1\text{-}A}$: Judicial *independence* is positively related to the frequency of judicial review (exercised by the constitutional court).

Because the prior authors use the exact same measure (the SII) to capture both judicial independence and judicial power, and because the present work aims to disambiguate these concepts, a second formulation of the first hypothesis is:

$H_{1\text{-}B}$: Judicial *power* is positively related to the frequency of judicial review (exercised by the constitutional court).

Also, because the present investigation also seeks to improve on several aspects of the execution of the prior works, this hypothesised relationship between judicial independence and judicial review should become gradually more apparent with each marginal methodological improvement.

Regarding legislative fragmentation, the prior studies harboured diverging expectations. Herron and Randazzo, building on an argument advanced by Stone Sweet,[71] argue that a more divided legislature is likely to pass laws that are "generally less contentious than those produced by one dominant party."[72]

[68] As both the expectations and findings of Smithey and Ishiyama and Herron and Randazzo diverged on this issue, a clear hypothesis is necessary.

[69] The other variables included by Smithey and Ishiyama and Herron and Randazzo are likewise tested here for purposes of replication, but separate hypotheses are not offered for these. Expectations for each variable are presented in the following section.

[70] Herron–Randazzo: *op. cit.* 425.

[71] Stone Sweet: Governing... *op. cit.* 54ff.

[72] Herron–Randazzo: *op. cit.* 427.

Legislation thus produced should be less prone to challenge, as presumably more parties were involved in its design and thus have less reason to petition for its nullification.

Although this argument is plausible, the literature more strongly supports the Smithey–Ishiyama study's hypothesis that legislative fragmentation is positively associated with judicial review, which that study confirmed empirically. Less unified legislatures or governing coalitions invite challenges by the judiciary, which (the judiciary expects) the legislature or coalition will be unable to override.[73] With this in mind, the primary hypothesis for legislative fragmentation follows Smithey and Ishiyama's expectations and results:

$H_{2\text{-}A}$: Legislative fragmentation is positively related to the frequency of judicial review.

The Herron–Randazzo view–that diverse participation may yield less contentious legislative output–should not be discarded entirely, however. Specifically, their expectation may be true of fragmentation *within* governing coalitions. Although overall fragmentation would not seem to guarantee that a party's preferences are incorporated into the legislative programme, membership in the coalition might offer some assurance of this. Additionally, whereas overall fragmentation would serve to weaken the legislature's ability to override a court which struck down the legislature's bills (in that overriding a court may require, as it does in many transition countries, a super-majority vote), fragmentation within the coalition seems less likely to generate this weakness: despite its internal divisions, the members of a coalition would presumably be willing to defend the coalition's policies against interference by the courts. Thus, a secondary hypothesis for legislative fragmentation is:

$H_{2\text{-}B}$: Legislative fragmentation within the governing coalition is negatively related to the frequency of judicial review.

For the remainder of the variables included for purposes of replication, separate hypotheses are not necessary, as the original authors' hypotheses and findings serve as the propositions to be verified or rejected.[74]

[73] Vanberg: Legislative-judicial... *op. cit.;* Tate, C. N.–Vallinder, T. (eds.): *The global expansion of judicial power.* New York, 1995. 31ff.; Holland, K.: *Judicial activism in comparative perspective.* New York, 1991. 9ff. A possible exception pertinent to some transitioning states is noted by Procházka: *op. cit.* 117, who suggests that legislatures divided to the point of fragility might receive extra deference from a constitutional court concerned more with stability of the new state than with conformity of certain legal provisions with the constitution.

[74] King, G.: Replication, replication. *PS: Political Science and Politics,* 28 (1995) 443–499; Herrndon, P.: Replication, verification, secondary analysis, and data collection in political science. *PS: Political Science and Politics,* 28 (1995) 443–499.

3.1.2. Hypotheses for Variables Not Studied in Prior Works

A few other hypotheses are needed, however, for several new independent variables that were not examined by the Smithey–Ishiyama or Herron–Randazzo works. These variables reflect aspects of the "demand for constitutional law,"[75] namely: familiarity with the imported legal traditions, adaptation of imported institutions, and political participation in the design of new institutions. These variables aim to capture the 'receptiveness' of each country to the 'transplantation'[76] or 'importation'[77] of legal institutions, including constitutional adjudicatory systems.

According to Pistor, Raiser, and Gelfer,[78] transplants of law to 'receptive' countries are more successful than those to 'unreceptive' countries. In countries which are receptive to the institutions they import, the import/transplant will be successful, whereas in unreceptive countries the institutions grafted in are more likely to operate dysfunctionally, exhibiting what scholars have termed a legal "transplant effect."[79] Countries "without previous exposure to the modern formal legal order before the collapse of the socialist system" are termed "new transplants," which are expected to function similarly to unreceptive transplants.[80]

This may not be true, however, of *constitutional* systems transplanted into new contexts. A country with no exposure to a system of constitutional judicature might have a 'clean slate,' as compared to those which are distinguishably "unreceptive" for substantive reasons, and therefore the transplant may be more successful.[81] Testing this requires a definition of 'dysfunctionality,' but what this means in the case of constitutional review is not clear from the transplant literature. One possibility is that 'dysfunctional' courts do not develop in the

[75] Pistor: *op. cit.*

[76] Watson: Legal transplants... *op. cit.*

[77] Ajani: *op. cit.* Dupré: *op. cit.* Pistor: *op. cit.*

[78] Pistor–Raiser–Gelfer: *op. cit.* 15ff.

[79] Berkowitz–Pistor–Richard: Economic development... *op. cit.;* Berkowitz–Pistor–Richard: Transplant effect... *op. cit.;* Pistor: *op. cit.;* Dupré: *op. cit.;* Ajani: *op. cit.* Pistor, Raiser and Gelfer (and works which build on this framework) identify countries classed *either* as exhibiting adaptation *or* familiarity as receptive; intuition suggests altering this definition to limit it to those countries exhibiting *both.*

[80] Pistor–Raiser–Gelfer: *op. cit.*

[81] For example, in the case of Poland, the Constitutional Tribunal began operations several years prior to the formal transition to democracy, but this brief heritage proved all but fatal to the Tribunal as a potent political actor in its early years after transition. See Schwartz: *op. cit.* 264 n. 10.

spiral-shaped pattern characteristic of the judicialization-politicization cycle.[82] As this pattern is associated with continually (if subtly) increasing judicial power and purview, this study expects that judicial review will be positively associated with the aspects of the demand for law indicated above. Thus, the final hypotheses are as follows:

- H_3: The more a country adapts the legal institutions it imports, the higher the level of judicial review its constitutional court exercises.
- H_4: The greater a country's familiarity institutions it imports, the higher the level of judicial review.
- H_5: Judicial review is higher in countries 'receptive' to legal transplants than those that are 'unreceptive'.
- H_6: Judicial review is higher in countries which are 'new transplants' than those which are 'unreceptive'.
- H_7: The greater the diversity of political participation in the decisions to design and/or import legal institutions at the beginning of transition, the higher the level of judicial review.

This last hypothesis connects also to the principal-agent theories of courts. The more 'principals' engaged in designing a new constitutional court should mean (1) more legitimacy and support for the court,[83] and (2) less unity among the principals, meaning (a) the court can become powerful by adjudicating disputes between principals, and/or (b) the principals may find it more costly to constrain the court.

3.2. Variables and Data

To test these hypotheses, the study examines decisions of constitutional courts of ten countries of CEE and the FSU: the Czech Republic, Estonia, Georgia, Hungary, Lithuania, Moldova, Poland, Russia, Slovakia, and Slovenia.[84] All available cases (n=915) from these ten countries where judicial review was requested by the petition or referral to the court are included, from the earliest (available) year of each court's operation through the end of 2003. Table 1 presents a comparison, by country, of the samples examined by Smithey and Ishiyama, Herron and Randazzo, and the modified replication study.

The sample includes decisions involving both abstract review (both *a priori* and *a posteriori*) of legal norms and concrete review. The source of the data is

[82] Stone Sweet: Governing... *op. cit.*

[83] Pistor: *op. cit.* 84.

[84] This includes all but one of the countries (Latvia, excluded to avoid overrepresenting the Baltic region) examined by both Herron and Randazzo and Smithey and Ishiyama.

the CODICES Database published by the Venice Commission of the Council of Europe, which provides full-text decisions and case descriptions from constitutional courts around the world. The CODICES Database does not entirely remove the problem of selection bias, but it significantly reduces the problem of *differential* selection bias, as cases are selected according to a single set of standards by a central agent.

3.2.1. Dependent Variable: Judicial Review

To replicate the prior works' methods, both bivariate correlation analyses and logistic regression analysis (logit) are used here. For the logit analysis, which forms the main part of the study, the dependent variable is the likelihood of a constitutional court exercising its powers of judicial review. Following Herron–Randazzo and Smithey–Ishiyama, cases were coded 1 if the courts declared unconstitutional or otherwise annulled a statute, explicit government action, substatutory legislation or regulation, a treaty, or other similar legal norms, and 0 if the courts did not.

For the correlation analysis, following Smithey–Ishiyama, static, country-level attributes are compared with an aggregate measure of judicial review's frequency: the number of cases where courts did exercise review across all years divided by cases where it was petitioned (or otherwise empowered) to do so. Three measures of this were used: (1) the scores originally calculated by Smithey and Ishiyama covering the first three years of each court's operation, (2) the same scores supplemented by third-party data on Hungary and Poland,[85] and (3) scores calculated from the replication dataset. In a second set of correlations presented side-by-side with counterparts of the first set, each of these three measures of the dependent variable is adjusted to reflect disparate levels of accessibility of the courts in each country.

3.2.2. Independent Variables

3.2.2.1 Judicial Independence: Power, Access, and Insularity

The prior works operationalise judicial power in the form of the SII described above, a synthetic measure designed to encompass "both the extent to which the constitutional courts possess judicial review powers and the extent to which the constitution extends independence of action to the constitutional court or supreme court from other institutional actors."[86] The present study begins

[85] Data from Scheppele: *op. cit.* and Brzezinski: *op. cit.*

[86] Smithey–Ishiyama: Judicious choices... *op. cit.* 167.

with this measure judicial independence, testing both the prior authors' values and corrected values (to fix arithmetical and coding errors in prior studies). Table 2A presents the Smithey and Ishiyama Index (SII) of judicial independence as originally calculated. Table 2B presents the SII when corrected for coding and calculation errors.

Additionally, Smithey and Ishiyama observe casually, without testing systematically or attempting to explain, that the level of judicial review generally rises with judicial independence up to 0.55, a point immediately between the mean (0.54) and median (0.56) and mode (0.56) of the original distribution of judicial independence scores,[87] but that judicial review declines thereafter. This possibility of a central peak is tested by comparing the absolute value of the distance of a country's SII score from this central 'peak' point (0.55) with its level of judicial review. If 0.55 is indeed at the apex of a curve, then the distance between a country's score and the peak will be negatively correlated to judicial review.

The limits of the SII itself can only be pushed so far, however, before a wholly new measure is needed. At the very least, judicial independence and judicial power–nebulous concepts which the literature has failed to define[88]–cannot be treated as coterminous. An improved measure of judicial independence must conceptually identify, separate, and thoughtfully recombine various dimensions of judicial independence, and should be designed from theoretical premises rather than an unbalanced, unrepresentative amalgamation of attributes of transition courts.[89]

The present study achieves this by identifying three separate conceptual components of judicial independence: Access, Power, and Insularity. 'Access' refers to the range of actors authorised to invoke the court's jurisdiction and request judicial review. It is comprised of the average access score of four types of constitutional review cases, each weighted equally: *a priori* review, *a posteriori* abstract review, *a posteriori* concrete review, and unconstitutional omissions. The access score for each of these case types is determined by the number of categories of petitioner authorised to initiate a case of that type.

[87] *Ibid.*

[88] Burbank–Friedman: *op. cit.;* Shetreet–Deschenes: *op. cit.*

[89] An alternative and/or supplement to designing such an index deductively is factor analysis, a data reduction method aimed to identify underlying forces in a range of independent variables. However, when employed in the present case, no single component derived accounted for even a majority of variance, and the main components identified were not associated with groupings of independent variables which were intuitively meaningful.

'Power' refers to the range of the court's substantive competences, reflecting the scope and depth of its judicial review authority. This measure is built in the same way as Access, constituted of four average power scores (reflecting the proportional number of powers within each of the four case types which the court possesses) which are also in turn averaged together.

Finally, the measure 'Insularity' reflects the degree to which constitutional courts are shielded from political attacks or censure for decisions unfavourable to other political actors. It results from the average of five component scores (each ranging from 0 to 1) reflecting different aspects of judges' protection from political retribution: judges' immunity from prosecution,[90] the number of effective appointing actors (deflated by a factor of 4 to yield an index with limits at 0 and 1),[91] the term length of the judges relative to a legislative session (likewise deflated by 4),[92] the original SII component for removal,[93] and the original SII component for who controls court procedure.[94]

Table 3a details the composition of the individual elements used to construct new indices of judicial independence; Table 3b lists the computations used to generate these indices.

These basic elements are tested both by themselves and in certain specific combinations to test interactive relationships. Thus, the measure Power * Insularity captures the interactive relationship expected between competences and protection from censure, testing the inference that competences on paper only empower the court to the degree that judges are shielded from retribution. Power * Access aims to adjust the measure of the court's competences on paper to reflect the ease with which those competences are invoked (since even the court with the greatest competences on paper can achieve nothing if no case can be brought because of justiciability requirements such as litigants' standing). Also, a "Composite" measure of courts' power and accessibility is computed by averaging the products of *a priori* power and access, *a posteriori* abstract power and access, *a posteriori* concrete power and access, and omission power and access. This Composite measure was also incorporated in an interactive measure: Composite * Insularity.

[90] Values: 0: Judges have no special immunity; 0.5: Judges can be removed only with legislature's consent; 1.0: Judges can be removed only with the Court's own consent.

[91] = $1 / \sum (a_i^2)$, where a_i is the proportion of control over Court appointments allotted to each actor *i*; same basic modification of Laakso–Taagepera (based on Herfindahl) formula for effective number of political parties.

[92] = T / L, where T is the term length of a single judge in years and L is the length of a legislative session.

[93] Values: Constitutional bar on removing judges = 1; Else 0.

[94] Values: Court sets own procedures = 1; Else = 0.

All the foregoing measures of dimensions of judicial independence have values ranging from 0 to 1 (1 reflecting greater independence). Each reflects one of the many possible elements of judicial independence. All of these elements, taken separately and when combined interactively, should relate positively to judicial review.

3.2.2.2. Additional Replication Variables

For all independent variables included for replication purposes, variable specifications computation (when necessary) followed the formulae used by the original authors. Thus, following Herron-Randazzo, legislative fragmentation–both at time of decision and in the first democratic election–was computed using the widely-used[95] Laakso–Taagepera measure of effective political parties.[96] Both of these variables should relate positively to judicial review. The number of parties within the governing coalition, however, should relate negatively to judicial review for reasons given above.

The measure of and data for presidential power incorporates twenty-seven distinct competences potentially possess by presidents, adjusted for cases where powers are shared or if the president is indirectly elected. This is expected to relate negatively to judicial review, in line with both the hypothesis and findings of Herron and Randazzo.

Both the Herron-Randazzo and Smithey-Ishiyama studies include a measure of rights guarantees in each country, both of which are tested here. Herron and Randazzo use each country's "Civil Liberties" score from annual Freedom House surveys. As lower scores on this scale (which ranges from 1 to

[95] The measure, incidentally just the inverse of the Herfindahl ownership dispersion index from the economics literature, is given by: EPP = $1 / \sum (p_i^2)$, where p_i is the proportion of seats allocated to each party *i*. The index was first presented by Laakso, M.–Taagepera, R. (1979): 'Effective' number of parties: a measure with applications to West Europe. *Comparative Political Studies*, 12, 3–27. It was later elaborated upon by Taagepera, R.–Shugart, M. (1989): *Seats and votes: the effects and determinants of electoral systems*. New Haven: Yale University Press. Despite numerous calls for modification some by its own creators, it remains the standard measure. Dumont, P.–Caulier, J.: The 'effective number of relevant parties': how voting power improves Laakso–Taagepera's index. Centre de Recherche en Economie (CEREC), Facultés universitaires Saint-Louis, CEREC Discussion Paper Series, Cahier #2003/7. Available online: <http://centres.fusl.ac.be/CEREC/document/cahiers/cerec2003_7.pdf>. Taagepera, R.: Supplementing the effective number of parties. *Electoral Studies*, 18 (1999) 497–504.

[96] Data for political parties' proportions of seats came from the University of Essex Project on Political Transformation and the Electoral Process in Post-Communist Europe. All computations of effective political parties are original to the present author.

7) are associated with greater civil rights protection, a negative relationship is expected here, which Herron and Randazzo expected but were unable to find. Smithey and Ishiyama generate their own index reflecting the scope of rights guaranteed in each country's bill of rights, which they expected but did not find to be positively related to judicial review.

Smithey and Ishiyama's measure of popular trust in the courts is also included here. Higher values of public confidence in courts should correspond to higher incidence of judicial review, an expectation which Smithey and Ishiyama confirmed. Additionally, the degree of federalism in each country–manifested in the number of elected subnational tiers of government–was also included in the Smithey and Ishiyama models and thus in the replication. The hypothesis, which Smithey and Ishiyama's data supported, is that greater divisions of power between the centre and regions should result in higher judicial review frequency.[97]

The final replication variable is the identity of the petitioner requesting the court to exercise judicial review. Following Herron and Randazzo, dummy variables for individual citizen petitioners and the president as petitioner are included. In addition, this study includes dummies for legislators as well as administrative or cabinet officials (e.g. ministers, ombudsman, etc.) as petitioners.[98] Each of these dummy variables should relate positively to judicial review, following Herron and Randazzo's hypotheses and findings.[99]

3.2.2.3. New Independent Variables

Aside from legislative fragmentation in the first democratic election, variable specifications and data for measures of countries' receptiveness to legal transplantation are taken from Pistor, Raiser, and Gelfer[100] and Berkowitz, Pistor, and Richard.[101] Both sets of authors present the same coding scheme, used with modifications here, which identifies countries as possessing 'Familiarity', 'Adaptation', both, or neither. Those "without previous exposure to the modern formal legal order before the collapse of the socialist system" are coded as "new transplants."[102] In the present study, the presence of Familiarity, Adaptation, or

[97] Smithey and Ishiyama cite the World Bank's annual *World Development Report* as their source, though there are discrepancies between the edition they cite and the numbers they report. In these cases, the original World Bank numbers are preferred.

[98] Herron and Randazzo identify cases where the legislature is the respondent, not the petitioner.

[99] Herron and Randazzo: *op. cit.*, 431.

[100] Pistor–Raiser–Gelfer: *op. cit.*

[101] Berkowitz–Pistor–Richard: Economic development... *op. cit.*

[102] Pistor–Raiser–Gelfer: *op. cit.*15.

both, as well as being coded as "new transplants," should relate positively to judicial review.

3.2.2.4. Control Variables

Both as a possible explanatory independent variable and as a necessary macro-level control, Herron and Randazzo incorporate the annual change in GDP growth in their model. They suggest several reasons why such economic conditions may lead to either higher or lower levels of judicial review,[103] none of which are compelling, but their findings are uniformly negative and statistically significant. The present study thus incorporates change in GDP growth as well (base year = 1990), expecting negative results in line with Herron and Randazzo's finding.

Additionally, in the correlation analysis only, each set of correlations were run a second time to control for ease of access to the constitutional court; to do so, the judicial review aggregate statistic was multiplied by the country's Access score. This is done to account for the possibility that easier access to the courts yields not only an increase in case volume but also a decrease in the proportion of cases with strong legal merits.[104] For example, for courts such as

[103] *Ibid.* 426.

[104] The aim of adjusting the dependent variable–the frequency of judicial review–for access to the courts is to control for the possibility that easier access permits not only more persons to petition the court, and thus presumably more cases, but also a higher proportion of cases with weak legal merits. The rationale for this expectation is complex, and can only be sketched briefly here: Assuming all parties are rational actors, if access to a court is suddenly opened to more parties and/or in more types of cases, the costs of petitioning the courts has effectively fallen (from infinity to a non-infinite level for those previously unable to petition the court at all; for some others, their ability to petition the court may have been indirect [as is common in CEE]–in that they could only request the ombudsman or an MP to petition the court on their behalf). Lower costs of petition, *ceteris paribus*, mean a fall in the cost-benefit ratio of petitioning the court–in short, a fall in the relative price of petitioning. That a fall in 'price' of petitioning should be met by an increase in the number of petitions, ceteris paribus, is not surprising. The important inference, though, is that presumably the group of 'sub-marginal petitioners'–for whom it was not on balance worthwhile to petition the courts (due to the cost-benefit ratio) before access was made easier, but for whom ex post petitioning is worthwhile–would come to make petitions with a lower average likelihood of success (since cases more likely to succeed would already have a lower cost-benefit ratio). In short, it is most likely, on average, sub-marginal cases (in terms of legal merits and/or likelihood of success in securing judicial review) which are added to the courts' docket when access is made easier.

Hungary's where access is wide open to all,[105] it makes sense that a smaller proportion of the 11,092 cases submitted in the court's first six years covering nearly every statute the legislature had passed were actually of sufficient legal merit to warrant judicial review.[106] Correcting for access controls for this possibility to some extent.

4. Results & Analysis

The results of bivariate correlations and selected regression analyses conducted (forty-eight regression models in total) are presented in Tables 4–16, reflecting of each layer of corrections and expansions upon the original Smithey–Ishiyama and Herron–Randazzo models.[107] The following sections discuss the key findings from these analyses.

4.1. Effects of Alternative Measures of Judicial Independence

Table 4 presents bivariate correlations of various independent variables with three aggregate measures of judicial review. Tables 5, 6, and 7 report results of logit regressions testing the SII (original, arithmetically fixed, and data-corrected) against both pairs of authors' original models.

The results concerning the influence of judicial independence on judicial review are indeed mixed, but a number of important are noteworthy. First, though the original SII is clearly a poor predictor of judicial review, substantive corrections in coding improve it noticeably. Correlations yield weak negative

[105] Under the *actio popularis*, any individual can petition for abstract review of any statute without having been affected by the statute herself; See Hungarian Constitution and *Act on the Constitutional Court*, Act XXXII of 1989.

[106] Sólyom–Brunner: *op. cit.* 72.

[107] All 48 logit regressions run employ a weighting procedure, developed by Herron and Randazzo and also used by Smithey and Ishiyama, to ensure that countries which issue comparatively fewer decisions are not treated as less important by the regression analysis. A similar, slightly modified method of weighting cases was employed here. The full technical details of Herron and Randazzo's weighting procedure are not detailed in their article, and were also not available on request; however, the procedure detailed above achieves the same purpose very similarly. In this study, the weight factor w given to each case decided by the court of country x is given by:

$$w_x = \frac{\text{(Total number of } \textit{cases} \text{ in the dataset)}}{\text{(Total number of } \textit{cases} \text{ from country } x) * \text{(Number of } \textit{countries} \text{ in dataset)}}$$

results, and no significant results were obtained by regression,[108] even when technical and arithmetical errors are corrected. However, the data-corrected version of the SII reflects a small but important improvement in the SII's predictive power: in correlation analysis it is positively correlated with judicial review (e.g. $r = 0.297$), a relation which is stronger when judicial review is adjusted for accessibility of the courts ($r = 0.389$ using original authors' data plus Hungary and Poland; $r = .263$ using the new replication dataset). It also yields a positive, statistically significant relationship in one of four regressions where it is tested, and in all others yields no significant relationship.

Second, Smithey and Ishiyama's casual observation that judicial review increases up to around the midpoint of the judicial independence scale before declining is confirmed. Tables 8 and 9 present results from models testing the 'peak' observation, but otherwise still following the authors' original template.

Using Smithey and Ishiyama's own judicial review statistics, the correlation between judicial review and absolute value of the distance from 0.55 on the judicial independence SII is –0.668 and –0.907 for the original and data-corrected indices, respectively. This negative relationship is also found in regressions based on Smithey and Ishiyama's (2002) models (where the relationship is statistically significant in every test), though not in those based on Herron and Randazzo's models.

Although Smithey and Ishiyama do not offer an explanation for this, at least one possibility deserves mention.[109] As both Vanberg[110] and Stone Sweet[111] suggest, more powerful courts can influence policymaking without striking down statutes, or indeed without hearing a case, if the legislature (or other branch or body) *anticipates* that passing a bill which the court might unconstitutional will result in it being struck down by the court. In short, "the spectre of constitutional censure hovers over the legislative process."[112] This is true only to the extent that others anticipate court intervention *and* only to the extent that the court possesses the authority to do so. Thus, the degree of the court's formal authority determines, as it were, the length of the shadow that the court casts over the legislature process. If this is true, it may in part explain the

[108] In all statistical procedures the α value is .10, as used by Herron–Randazzo: *op. cit.*

[109] A second explanation may also account for this, which parallels the argument for adjusting the dependent variable for ease of access to the courts: the more powerful a court, the greater the demand for its services by individual appellants, and thus the greater its caseload and potentially the greater the proportion of cases with weak legal merit.

[110] Vanberg: Legislative-judicial... *op. cit.*; Vanberg: Politics... *op. cit.*

[111] Stone Sweet: Governing... *op. cit.*

[112] *Ibid.* 196.

finding of the 'peak' in judicial review: the more power courts have, the less they need to exercise it, as statutes and other legal norms which they are likely to strike down are never passed in the first place.

Tables 10, 11, 12, and 13, report findings regarding new measures of judicial independence, tested in the framework of the prior authors' original models. Variables measuring countries' receptiveness to legal transplants are included in Tables 14 and 15. Finally, Table 16 presents three composite models which incorporate components from both the Smithey and Ishiyama or Herron and Randazzo template.

The new measures of the dimensions of judicial independence developed above do reflect some improvement over the SII, but the results are not consistent. On the one hand, the separate and combined measures of Power and Access (and the Composite power and access term) yield several positive, statistically significant relationships. On the other hand, both Insularity and its interactive term with Power (Power * Insularity) generate some positive and some negative statistically significant results. Moreover, no statistically significant relationships at all were evident in regressions based on Herron and Randazzo's models.

Taken together, these findings thus warrant caution making generalizations about the relationships between judicial independence and judicial review. The central hypothesis, that judicial independence is positively associated with judicial review in CEE and the FSU, is confirmed in part and rejected in part. However, the alternative formulation of this hypothesis, that judicial *power* is positively related to judicial review (as the prior authors used the same SII to reflect both independence and power on different occasions), is confirmed. At the very least, the findings show that excluding independence from the judicial politics puzzle in transition countries is premature. Better conceptualisations and operationalisations are certainly needed, but writing judicial independence out of the equation in CEE and FSU would be mistaken.

4.2. Effects of Other Replication Variables

Although the prior authors differed in their expectations of the effect of legislative fragmentation, the replication findings here resolve that question. In all but two models in which it is included (35 of 37 regressions), legislative fragmentation (at the time of the decision) is positively related to judicial review, statistically significant at or below the .01 level. The primary hypothesis concerning legislative fragmentation is thus confirmed, affirming the hypotheses findings of Smithey and Ishiyama but rejecting the hypotheses of Herron and Randazzo.

As noted earlier, however, Herron and Randazzo's expectation may make sense if applied to fragmentation inside governing coalitions. This is supported by the evidence: party fragmentation is negatively associated with judicial review to a statistically significant degree in every model where it appears. This therefore confirms the secondary hypothesis regarding legislative fragmentation inside coalitions (which neither previous work had tested).

Findings for presidential power clearly affirm the findings of Herron and Randazzo. In the overwhelming majority of models where it is included, presidential power is negatively associated with judicial review to a highly statistically significant degree. This makes intuitive sense for reasons described above: a powerful executive is in a better position to constrain the courts (by action or by explicit or implicit threat).

Findings for the degree of federalism, however, appear counterintuitive at first glance: in almost every regression, the number of elected sub-tiers of government is *negatively* correlated to judicial review, to a statistically significant degree–directly contrary to Smithey and Ishiyama's findings. While the negative and significant relationship is surprising, part of the problem may lie in the original authors confusing *direct* with *indirect* effects of federalism. While it is reasonable to expect a higher number of central, regional, and local layers of authority to generate jurisdictional conflicts yielding increased judicial *involvement*, it need not result in increased frequency of courts invalidating laws or official acts.

Smithey and Ishiyama's finding concerning popular trust in the courts is also confirmed: in most models where it appears it is positively associated with judicial review, to a statistically significant degree. Those authors' own index of written rights guarantees is also, in most models, positively and significantly related to judicial review.[113] The measure used for rights guarantees by Herron and Randazzo, on the other hand, generated conflicting results: as higher degrees of civil liberties are reflected by lower scores on the index used, a negative relationship was expected, yet both positive and negative relationships appeared at statistically significant levels in different models. Herron and Randazzo themselves were likewise unable to find a clear-cut relationship.

[113] Their data is taken from a variety of popular opinion surveys by the University of Strathclyde; however, direct access to this data was unavailable for replication, thus Smithey and Ishiyama's reported figures had to be relied upon. Yet again, these figures exclude Hungary, Poland, and Slovenia, as well as Georgia, warranting considerable caution (as the sample size is more than halved when these countries are excluded, and the representativeness of the panel is greatly reduced).

The final attribute replicated here is the identity of the petitioner requesting that the court engage in judicial review in each case. Herron and Randazzo included the categories of individual citizens and the president, and the replication study coded these in addition to legislative petitioners (Herron and Randazzo also coded cases where the legislature was the respondent) and where the petition was made by a cabinet member or administrative officer, such as an ombudsman. Cases where the president or a cabinet or administrative official made the appeal were positively and significantly associated with judicial review in almost every model where they appeared. Additionally, where the categories of individual petitioner and legislative petitioner were related significantly to judicial review, the relationship was positive, confirming Herron and Randazzo's hypotheses and affirming their findings.

4.3. Effects of New Variables

Replication also provided the opportunity to test additional causal factors influencing judicial review, namely those concerning the receptiveness of countries to legal transplantation. The present study set out five hypotheses, generally grounded in the existing literature on the 'demand for law', and the empirical data confirms all five.

First, it was hypothesised that in countries which showed a tendency for adapting the entire legal system (i.e. not just the constitutional court) which they had imported, the constitutional court the country imported would also function more 'normally' (i.e. resemble the model in the 'exporting' state more directly), meaning a higher level of judicial review than those which did not show a pattern of adaptation. Empirical findings clearly support this hypothesis: in all six regressions in which it is included, Adaptation[114] shows a positive relationship to judicial review (statistically significant to at least the 0.01 level). It was also hypothesised that a country's familiarity with the general legal system it imported during the transition period would be positive related to judicial review. The results here are less resounding, but they still confirm the expectation: statistically significant results appear in two of six regressions, and in both of these cases the relationship is positive.

In light of these first two, the results of testing the third hypothesis are therefore unsurprising. It was expected that receptiveness–meaning the presence of *both* adaptation and familiarity–would be positively related to judicial review. In both models where 'receptiveness' measured in this way is included, a highly statistically significant, positive relationship is evident.

[114] Data from Pistor–Raiser–Gelfer: *op. cit.*

The fourth hypothesis departed somewhat from the literature. It stated the expectation that countries which had no exposure at all to the "modern formal legal order"[115] would also experience a higher level of judicial review. In each of eight models where it is included, the dummy variable for 'new transplants' is positive, and in seven of these the results are statistically significant, indicating that new transplants exhibit a higher level of judicial review than the reference category, 'unreceptive' transplants. Thus, the fourth hypothesis is also confirmed.

Finally, it was hypothesised that the greater the diversity of participation in the constitutional design and negotiation process, the greater the legitimacy of the court, and thus the greater the support for an active, powerful tribunal. Thus, more varied participation at the constitutional design stage (measured by legislatively fragmentation at the first democratic election[116]) should be associated with higher levels of judicial review. This hypothesis is confirmed by the fact that the only model which includes this measure of participation yields a positive, statistically significant relationship between participation (i.e. legislative fragmentation at first election) and judicial review. Notably, in the models testing these new independent variables of receptiveness, the most important attributes of political context detailed above (viz. presidential power, legislative fragmentation at most recent election) return the expected results (negative and positive, respectively).

4.4. Effects of Control Variables

While change in GDP growth was included in Herron and Randazzo's model as a control variable, they make a number of arguments concerning its potential substantive import. For instance, following Tate and Vallinder,[117] that in periods of poor or declining economic performance, "if citizens and corporations are dissatisfied with the ability of the political branches of government to efficiently regulate the economy, then they may turn to legal remedies in order to advance their own self-interests."[118] This argument is not totally implausible, but appears to explain increases or decreases in the public's resorting to the courts, rather than judicial review.

[115] *Ibid.* 15.

[116] Complete and accurate data on the composition of various transition countries' Round Table negotiations was not available, thus a proxy measure was necessary; note, however, that Smithey and Ishiyama use this same indicator to measure the same concept. Smithey–Ishiyama: Judicious choices... *op. cit.*

[117] Tate–Vallinder: *op. cit.*

[118] Herron–Randazzo: *op. cit.* 426.

While access to the courts was included as a component of the new measures of judicial independence, it was also incorporated as a type of dependent-variable control in a second set of bivariate correlations. The purpose was to account for the possibility that courts where the right to petition was widely diffused would as a result receive far more cases, a larger proportion of which would have lower legal merit and thus not warrant the exercise of judicial review.[119] Adjusting the dependent variable (overall average of judicial review incidence) for access to the courts yielded much stronger correlations (e.g. r = 0.389 vs. 0.147; r = 0.263 vs. 0.007) with the data-corrected SII than non-adjusted measures. More strikingly, several dimensions of the new measures of judicial independence (Power; Composite power and access; Composite power and access * Insularity) switch from strong negative correlations (r = –0.547, –0.547, and –0.521, respectively) to strong positive correlations with judicial review (using original Smithey and Ishiyama data plus Hungary and Poland, r = 0.744, 0.815, and 0.800, respectively; using replication dataset, r = 0.851, 0.972, and 0.943, respectively).[120] Again, more rigorous and sophisticated methods of adjusting the dependent variable properly are still needed, but the elementary method employed here has yielded remarkable results.[121]

5. Conclusion

5. 1. Methodology

As the foregoing study is designed partly to improve upon methodology and operationalisation of key variables, one of its most important findings is that the changes incorporated above to improve the execution, data-accuracy, and conceptualisation of judicial independence *do* make a difference. Technical and substantive corrections to the original SII both (1) yield small but still noteworthy improvements in the predictive power of judicial independence and also (2) bring the findings more in line with Smithey and Ishiyama's, Herron and Randazzo's, and this study's hypotheses.

[119] See the Note to Table 4, *supra*.

[120] While it may appear that the including measures of access in both of the variables correlated is unsound, the computation of the measure of access incorporated into the Composite measure renders it quite different (in algebraic form and in outcome) from the single scalar measure used to adjust judicial review figures.

[121] For instance, various non-logit regression models were tested where the dependent variable (viz. decision outcome) was adjusted by access, but the resulting synthetic dependent variable was too highly leptokurtic to remain within regression assumptions.

Moreover, the new, theoretically-grounded measures capturing several dimensions of judicial independence also mark a methodological advance. A number of statistically significant results, which are supported by the literature, indicate that the measures are at least a step in the right direction. Specifically, the new measures are designed to assess separately the different dimensions of judicial independence (before combining them via interactive terms), but which the prior measure does not.

5.2. Substantive Findings

Beyond these improvements in the study of judicial independence, the foregoing investigation yields a number of intriguing findings. The first hypothesis, that judicial independence positively correlates with judicial review, was partially confirmed and partially rejected. The Insularity dimension of judicial independence appears negatively related to judicial review, while the Power and Access of the court are both positively related. The second form of this hypo ethesis, that judicial power correlates with judicial review, is thus confirmed. Additionally, a central 'peak' does exist in the level of judicial review *vis-à-vis* the judicial independence distribution, for which there are several possible explanations.

Additionally, the study answers conclusively at least one question left in doubt by the prior research and sheds at least some light on others. Overall legislative fragmentation at the time a decision is issued by a court is positively related to judicial review in the transition states studied. Fragmentation within the governing coalition, however, is negatively related to judicial review. These findings support the replication study's hypotheses, and make sense out of the disparate expectations and findings of Herron and Randazzo and Smithey and Ishiyama.

The study further confirms several secondary findings of the prior works: presidential power is negatively related to judicial review, while popular trust in the courts, extent of rights guarantees in the bill of rights, and popular trust in the courts are all positively associated with the frequency of judicial review. Likewise, cases where the president or an administration or cabinet official is the petitioner are more likely to result in the striking down of the law named in the petition.

Finally, the empirical data reveals relationships not studied in prior works. First, factors which affect the success of legal transplantations broadly speaking appear to influence the functionality of the newly imported constitutional courts. Second, the relative ease of access to courts has a significant, although complicated, effect on the frequency of judicial review.

All of these findings, taken together, present a clearer and more complete picture of the contextual influences on judicial review than the prior works. Both the holistic portrait of the determinants of judicial review in transition and the new operationalisations of judicial independence offered here are merely first steps. While many scholars lament the dearth of theoretically sound, widely applicable conceptions and measures of judicial independence,[122] for all its faults, Smithey and Ishiyama's work represents one of the few which actually sets out to fill the gap.

More importantly, the integration of better conceptualisations of independence with measures of receptiveness represents an important step towards understanding how the process and conditions of transplanting constitutional adjudication institutions affects their development and behaviour. It is here in part where future research of constitutional jurisprudence in transition contexts must now focus. If it is true that the study of post-communist transition is rapidly becoming a matter of history,[123] it is all the more important that the lessons taught by the experiences of constitutional judiciaries in CEE and the FSU be gleaned before the opportunity has vanished.

* * *

[122] Russell: *op. cit.;* Herron–Randazzo: *op. cit.;* Ramseyer–Rasmussen: *op. cit.*
[123] Dupré: *op. cit.* 3ff.

TABLES

Table 1.
Sample Comparisons–Prior Research vs. Replication Study

	Herron and Randazzo (2003)		**Smithey and Ishiyama (2002)**		**Replication Study**	
Country	*N*	*Years*	*N*	*Years*	*N*	*Years*
Czech Republic	11	1992–1996	10	1993–1995	61	1993–2003
Estonia	42	1993–2000	19	1993–1995	58	1994–2003
Georgia	11	1996–1997	11	1997–1999	17	1996–2003
Hungary	0	n/a	0	n/a	118	1991–2003
Latvia	0	n/a	13	1993–1995		n/a
Lithuania	103	1993–2000	41	1993–1995	136	1993–2003
Moldova	228	1995–2000	74	1995–1997	33	1998–2003
Poland	0	n/a	0	n/a	250	1991–2003
Russia	86	1995–1998	59	1995–1997	60	1995–2003
Slovakia	0	n/a	96	1993–1995	47	1994–2003
Slovenia	93	1993–1995	0	n/a	135	1992–2003
TOTAL	**574**		**323**		**915**	

Table 2a.
Smithey and Ishiyama Index (SII) of Judicial Independence (2000): Original Index

Country	(A) Can judicial decision be overturned?	(B) Presence of a priori review?	(C) Judges term relative legislative session	(D) No. of actors involved in selecting judges	(E) Who establishes court procedures	(F) Conditions for judicial removal	Judicial power score: A+B+C+ D+E+F/6
Czech Republic	1.00	0.00	0.33	0.50	1.00	0.50	0.56
Estonia	1.00	0.00	0.33	0.50	0.00	0.50	0.39
Georgia	1.00	0.00	0.33	1.00	0.00	0.00	0.56 (0.39) †
Hungary	1.00	0.00	1.00	0.50	0.00	1.00	0.58
Lithuania	1.00	0.00	0.67	1.00	1.00	0.50	0.70
Moldova	1.00	0.00	0.33	1.00	1.00	1.00	0.72
Poland (1989–1997/9)	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Poland (1997/9)	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Russia	1.00	0.00	1.00	0.50	0.00	0.00	0.42
Slovakia	1.00	0.00	0.33	0.50	0.00	0.00	0.31
Slovenia	1.00	0.00	0.33	0.50	1.00	0.50	0.56

Table 2b.
Smithey and Ishiyama Index (sii) of Judicial Independence (2000): Data-corrected Index

Country	(A) Can judicial decision be over-turned?[1]	(B) Presence of a priori review?[2]	(C) Judges term relative legislative session[3]	(D) No. of actors involved in selecting judges[4]	(E) Who establishes court procedures	(F) Conditions for judicial removal	Judicial power score: (A+B+C+D+E+F)/6	**Net Difference**
Czech Republic	1.00	0.00	**0.67**	0.50	1.00	0.50	0.61	**0.05**
Estonia	1.00	**1.00**	0.33	**1.00**	0.00	0.50	0.64	**0.25**
Georgia	1.00	0.00	**0.67**	1.00	0.00	0.00	0.45	**–0.11 (0.06)**[5]
Hungary	1.00	**1.00**	1.00	**0.25**	0.00	1.00	0.71	**0.13**
Lithuania	1.00	0.00	0.67	1.00	1.00	0.50	0.70	0.00
Moldova	1.00	0.00	0.33	1.00	1.00	1.00	0.72	0.00
Poland (1989–97/9)	0.00	0.00	**0.67**	**0.25**	0.00	0.00	0.15	**0.15**
Poland (1997/9)	**1.00**	0.00	**0.67**	**0.25**	0.00	0.00	0.32	**0.32**
Russia	1.00	**1.00**	1.00	0.50	0.00	0.00	0.50	**0.08**
Slovakia	1.00	0.00	**0.67**	0.50	0.00	0.00	0.36	**0.05**
Slovenia	1.00	**0.50**	**0.67**	0.50	1.00	0.50	0.70	**0.14**

[1] Poland's Constitutional Tribunal gained the ability to issue binding decisions which the Sejm cannot override in the 1997 Constitution (which took effect in October 1997), and the provisions concerning binding decisions (not open to overruling by the Sejm) took effect in October 1999. Smithey and Ishiyama (2000) acknowledge this but ignore the change in computing Poland's index score.

[2] From the text of their respective constitutions and laws empowering their constitutional courts, it is clear that the Supreme Court (Constitutional Chamber) in Estonia and the Constitutional Court of Hungary can each consider constitutional challenges prior to the final promulgation (and thus application) of legislative acts. Also, though Smithey and Ishiyama specifically consider the possibility that a court could have a priori jurisdiction in a narrow area of cases, such as the review of not-yet-ratified treaties, they do not count Russia nor Slovenia in this group, in contrast to the text of those courts' respective empowering statutes.

Country:	(A) Can judicial decision be over-turned?[1]	(B) Presence of a priori review?[2]	(C) Judges term relative legislative session[3]	(D) No. of actors involved in selecting judges[4]	(E) Who establishes court procedures	(F) Conditions for judicial removal	Judicial power score: (A+B+C+D+E+F)/6	**Net Difference**
Poland (1989–97/9)	0.00	0.00	**0.67**	**0.25**	0.00	0.00	0.15	**0.15**
Poland (1997/9)	**1.00**	0.00	**0.67**	**0.25**	0.00	0.00	0.32	**0.32**
Russia	1.00	**1.00**	1.00	0.50	0.00	0.00	0.50	**0.08**
Slovakia	1.00	0.00	**0.67**	0.50	0.00	0.00	0.36	**0.05**
Slovenia	1.00	**0.50**	**0.67**	0.50	1.00	0.50	0.70	**0.14**

N.B.: Scores in bold underline indicate a change from the original Smithey and Ishiyama (2000) score.

[3] Smithey and Ishiyama (2000, 168) define the values of this variable as follows: the variable "was coded as 0 when the term of the constitutional court judge was less than or equal to one term of the actor with the longest constitutional term; 0.33 when it was less than or equal to two parliamentary sessions; 0.67 when the judges term was more than two parliamentary sessions (but had constitutionally specified limit in the number of terms) and 1 when the term was life or until voluntary retirement". However, the maximum term length of parliamentarians in all of these countries is four years, and the term lengths of judges are as follows: Czech Republic, 10 years; Georgia, 10 years; Poland, 9 years; Slovakia, 12 years; and Slovenia, 9 years.

[4] In Estonia, the chairman of the Supreme Court is proposed by president, and adopted by national assembly; others are proposed by the chairman, and adopted by national assembly; the five members of constitutional panel elected by General Assembly of the Supreme Court. In Hungary, the court is chosen by a special committee of the (unicameral) parliament comprised of one member from each political party represented in parliament. In Poland, the panel of judges is chosen by the Sejm, but the President can appoint any of these to be the President and Vice-President, without the approval of the Sejm. Thus, for Estonia, a score of "1" seems more appropriate, and ".25" for Hungary and Poland.

[5] In their original table, Smithey and Ishiyama report this total as .56, when data in their table yield a value of .39.

Table 3a.
New Measures of Judicial Independence: Elements of New Indices

Power	Average of binary scores for each of the following powers (1: court has this power; 0: court lacks this power):
A priori	Review of: Constitution itself; International Agreements; Statutes; Regulations; Acts of the President; Acts of local/regional units; Other General Acts
A posteriori abstract	Review of: Constitution; International Agreements; Statutes; Parliamentary Resolutions; Regulations; Acts of the President of the State; Local Government Statutes; General Acts–Exercise of Public Powers; Other General Acts; National Norms versus Treaties; Regional Agreements
A posteriori concrete	Review of constitutional complaints
Unconstitutional Omission	Declare instance of unconstitutionality by omission (i.e. legislature has failed to act where it is obligated to do so)
Access	Average of binary scores for each of the following actors who have this right of access (1: this actor can invoke court for this power; 0: this actor cannot invoke court for this power):
A priori	Initiation by: President; Parliamentary leadership/cabinet; Individual members of parliament; Second legislative chamber's leadership; Individual members of second legislative chamber; Court itself; Other/lower courts; Administrative or legal official; Any citizen.
A posteriori abstract	Initiation by: President; Parliamentary leadership/cabinet; Individual members of parliament; Second legislative chamber's leadership; Individual members of second legislative chamber; Court itself; Other/lower courts; Administrative or legal official; Any citizen.

A posteriori concrete	Initiation by: Court itself; Lower court; Administrative/legal official; Local/regional government; Individuals with specific vested interest; Any individual citizen regardless of interest
Unconstitutional Omission	Initiation by: Court itself; Any individual citizen regardless of interest
Immunity	Values: 0: Judges have no special immunity; 0.5: Judges can be removed only with legislature's consent; 1.0: Judges can be removed only with the Court's own consent.
Number of Effective Appointers	$= 1 / \sum (a_i^2)$ Where a_i is the proportion of control over Court appointments allotted to each actor i; same basic modification of Laakso-Taagepera (based on Herfindahl) formula for effective number of political parties. N.B. where two parties share authority for the same appointment, the proportion they share is split between them (e.g. if Legislature and President each must confirm every appointee, they are each coded 0.50).
Relative Term Length	$= T / L$ Where T is the term length of a single judge in years and L is the length of a legislative session
Control of Court's Procedures	Smithey and Ishiyama Index, component E; Values: Court sets own procedures = 1; Else = 0
Removal Score	Smithey and Ishiyama Index, component F; Values: Constitutional bar on removing judges = 1; Else 0

Table 3b.
New Measures of Judicial Independence: Computation of New Indices

New Indices of Dimensions of Judicial Independence	
Power	= [(*a priori* power) + (*a posteriori abstract* power) + *a posteriori* concrete power) + (omission power)] / 4
Access	= [(*a priori* access) + (*a posteriori abstract access)* + (*a posteriori* concrete access) + (omission access)] / 4
Insularity	= [(Immunity score) + (number of *effective* appointers)/4 + (relative term length)/4 + (removal score) + (control of procedure)] / 5
Composite measure of power and access	= [(*a priori* power)*(a priori access) + (*a posteriori abstract* power)* (a posteriori abstract access) + (*a posteriori* concrete power)*(a posteriori concrete access) + (omission power)*(omission access)] / 4
Power * Access	= [(a priori power) + (a posteriori abstract power) + (a posteriori concrete power) + (omission power)] / 4* [(a priori access) + (a posteriori abstract access) + (a posteriori concrete access) + (omission access)] / 4
Power * Insularity	= [(a priori power) + (a posteriori abstract power) + (a posteriori concrete power) + (omission power)] / 4* [(Immunity score) + (number of effective appointers)/4 + (relative term length)/4 + (removal score) + (control of procedure)] / 5
Composite measure of power and access * Insularity	= { [(*a priori* power)*(a priori access) + (*a posteriori abstract* power)* (a posteriori abstract access) + (*a posteriori* concrete power)*(a posteriori concrete access) + (omission power)*(omission access)] / 4 } * {[(Immunity score) + (number of *effective* appointers)/4 + (relative term length)/4 + (removal score) + (control of procedure)] / 5}

Table 4.
Correlation Results (Modified Replication of Smithey and Ishiyama [2002])

Independent Variable		Data for Dependent Variable					
		Smithey & Ishiyama (2002)		Smithey & Ishiyama (2002) plus Hungary and Poland		Replication	
Variable	Statistic	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access
Judicial Independence							
Smithey and Ishiyama Index							
Original Index (fixed)	Pearson's *r*	*–0.117*	*–0.276*	*–0.021*	*0.225*	*–0.024*	*0.181*
	Sig. (2-tailed)	0.802	0.549	0.957	0.561	0.947	0.618
	N	7	7	9	9	10	10
	r^2	0.014	0.076	0.000	0.050	0.001	0.033
Data-corrected Index	Pearson's *r*	*0.297*	*–0.074*	*0.147*	***0.389***	*0.007*	*0.263*
	Sig. (2-tailed)	0.518	0.875	0.706	0.301	0.985	0.462
	N	7	7	9	9	10	10
	r^2	0.088	0.005	0.022	0.151	0.000	0.069
Original Index (fixed): Absolute Value of Distance from 0.55	Pearson's *r*	***–0.421***	***–0.668***	*–0.147*	***–0.595*** *	*–0.262*	***–0.418***
	Sig. (2-tailed)	0.347	0.101	0.706	0.091	0.465	0.229
	N	7	7	9	9	10	10
	r^2	0.178	***0.446***	0.022	***0.354***	0.068	0.175
Data-corrected Index (fixed) Absolute Value of Distance from 0.55	Pearson's *r*	***–0.655***	***–0.907*** ***	***–0.441***	***–0.378***	***–0.457***	*–0.126*
	Sig. (2-tailed)	0.110	0.005	0.235	0.317	0.184	0.729
	N	7	7	9	9	10	10
	r^2	***0.429***	***0.822***	0.194	0.143	0.209	0.016
New Measures:							
Power measure	Pearson's *r*	***–0.338***	***0.272***	***–0.547***	***0.744*** **	***–0.157***	***0.851*** ***
	Sig. (2-tailed)	0.458	0.556	0.127	0.022	0.665	0.002
	N	7	7	9	9	10	10
	r^2	0.114	0.074	0.300	***0.553***	0.025	***0.724***

Independent Variable		Data for Dependent Variable					
		Smithey & Ishiyama (2002)		Smithey & Ishiyama (2002) plus Hungary and Poland		Replication	
Variable	Statistic	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access
Insularity /Measure	Pearson's *r*	*–0.257*	***–0.437***	*–0.147*	*–0.107*	*–0.256*	*–0.063*
	Sig. (2-tailed)	0.578	0.326	0.705	0.785	0.475	0.863
	N	7	7	9	9	10	10
	r^2	0.066	0.191	0.022	0.011	0.066	0.004
Power * Insularity	Pearson's *r*	*–0.289*	*–0.064*	***–0.483***	***0.643*** *	*–0.229*	***0.730*** **
	Sig. (2-tailed)	0.530	0.892	0.188	0.062	0.524	0.017
	N	7	7	9	9	10	10
	r^2	0.083	0.004	0.233	***0.413***	0.053	***0.533***
Composite power and access measure	Pearson's *r*	***–0.587***	*0.183*	***–0.547***	***0.815*** ***	*0.065*	***0.972*** ****
	Sig. (2-tailed)	0.166	0.695	0.128	0.007	0.859	0.000
	N	7	7	9	9	10	10
	r^2	***0.344***	0.033	0.299	***0.664***	0.004	***0.945***
Composite power and access measure * Insularity	Pearson's *r*	***–0.522***	*0.009*	***–0.521***	***0.800*** ***	*0.024*	***0.943*** ****
	Sig. (2-tailed)	0.229	0.985	0.150	0.010	0.948	0.000
	N	7	7	9	9	10	10
	r^2	0.273	0.000	0.272	***0.639***	0.001	***0.889***
Legislative Fragmentation							
At first election	Pearson's *r*	***0.350***	***0.673*** *	***0.357***	*–0.126*	*0.045*	*–0.263*
	Sig. (2-tailed)	0.442	0.097	0.346	0.746	0.901	0.462
	N	7	7	9	9	10	10
	r^2	0.122	***0.453***	0.127	0.016	0.002	0.069
Overall average	Pearson's *r*	*0.068*	***0.559***	*0.155*	*0.101*	***0.363***	*–0.016*
	Sig. (2-tailed)	0.884	0.192	0.691	0.797	0.303	0.965
	N	7	7	9	9	10	10
	r^2	0.005	***0.313***	0.024	0.010	0.132	0.000

Independent Variable		Data for Dependent Variable					
		Smithey & Ishiyama (2002)		Smithey & Ishiyama (2002) plus Hungary and Poland		Replication	
Variable	Statistic	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access
Popular Trust in Courts	Pearson's *r*	***0.620***	*0.084*	***0.620***	*0.084*	***0.364***	*–0.243*
	Sig. (2-tailed)	0.189	0.874	0.189	0.874	0.478	0.643
	N	7	7	9	9	10	10
	r^2	***0.384***	0.007	***0.384***	0.007	0.132	0.059
Rights Index	Pearson's *r*	***–0.577***	*0.178*	***–0.577***	*0.178*	***0.329***	***0.792***
	Sig. (2-tailed)	0.175	0.702	0.175	0.702	0.471	0.034
	N	7	7	9	9	10	10
	r^2	***0.333***	0.032	***0.333***	0.032	0.108	***0.627***
Federalism	Pearson's *r*	*0.033*	***0.517***	*–0.170*	*0.228*	*–0.145*	*0.191*
	Sig. (2-tailed)	0.944	0.235	0.661	0.554	0.690	0.597
	N	7	7	9	9	10	10
	r^2	0.001	0.267	0.029	0.052	0.021	0.036

α = .10; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

Table 5.

Logit Results: Factors Affecting Judicial Review (Modified Replication of Smithey & Ishiyama 2002) – Original & Corrected Indices

Independent Variable	Model 1						Model 2			
	Original Index		Original Index (Calculations Fixed)		Corrected Index (Coding Fixed)		Original Index		Corrected Index (Coding Fixed)	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Judicial Independence										
Original S-I Index	0.430 (1.135)	0.143					5.100 (3.398)	2.252		
Index, Georgia Fixed			0.301 (0.856)	0.124						
Corrected S-I Index					0.598 (1.152)	0.269			8.660 * (4.640)	3.482
Legislative Fragmentation	0.463 **** (0.139)	11.072	0.445 **** (0.113)	15.436	0.438 **** (0.102)	18.255				
Popular Trust in Courts							0.099 ** (0.045)	4.803	0.091 *** (0.033)	7.636
Rights Index	5.568 * (3.256)	2.924	5.332 * (3.132)	2.899	6.184 * (3.647)	2.875	30.214 ** (13.23)	5.215	42.516 ** (17.30)	6.036
Number of Sub-tiers	–0.955 **** (0.281)	11.490	–0.924 **** (0.260)	12.621	–0.918 **** (0.257)	12.684	–0.205 (0.201)	1.041	–0.437 * (0.240)	3.302
Constant	–0.721 (1.004)	0.516	–0.591 (0.729)	0.657	–0.834 (0.966)	0.745	–7.694 * (4.444)	2.997	–10.702 ** (5.191)	4.251

N	414	414	414	397	397
-2LL	503.314	503.334	503.188	478.000	476.610
Model Chi Square	24.695	24.675	24.821	14.968	16.357
Prob < Chi Square	0.000	0.000	0.000	0.005	0.003
Pseudo R Square	0.080	0.080	0.081	0.052	0.057
Null Model	50.00%	50.00%	50.00%	50.00%	50.00%
Predicted Model	69.50%	69.50%	69.50%	68.70%	68.70%
Reduction of Error	39.00%	39.00%	39.00%	37.40%	37.40%

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

N.B.: Smaller sample sizes (414 and 397, respectively) result from unavailability of data for Smithey and Ishiyama's synthetic rights index for Hungary, Poland, or Slovenia, and in the case of Model 2, popular trust score for Georgia.

Table 6.
Logit Results: Factors Affecting Judicial Review
(Modified Replication of Herron and Randazzo 2003) – Original & Corrected Indices

Independent Variable	Original Index		Original Index (Calculations Fixed)		Corrected Index (Coding Fixed)	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Judicial Independence						
Original S-I Index	–0.146 0.374	0.151				
Index, Georgia Fixed			–0.123 (0.365)	0.113		
Corrected S-I Index					–0.552 (0.465)	1.404
Economic Conditions						
Change in GDP Growth (base year = 1990)	–0.147*** (0.054)	7.308	–0.147*** (0.054)	7.309	–0.152*** (0.055)	7.785
Contextual Influences						
Presidential Power	–0.084**** (0.023)	13.586	–0.084**** (0.023)	13.275	–0.092**** (0.024)	14.949
Legislative Fragmentation	0.193**** (0.052)	13.532	0.195**** (0.051)	14.307	0.186**** (0.051)	13.477
Civil Liberties	0.133 (0.108)	1.503	0.128 0.106)	1.470	0.140 (0.103)	1.857
Constant	0.390 (0.337)	1.000	0.380 (0.338)	1.000	0.714 (0.434)	1.000
N	915		915		915	
–2LL	1162.729		1162.768		1161.465	
Model Chi Square	36.200		36.161		37.464	
Prob < Chi square	0.000		0.000		0.000	
Pseudo R square	0.053		0.053		0.055	
Null Model	50.00%		50.00%		50.00%	
Predicted Model	64.50%		63.90%		63.90%	
Reduction of Error	29.00%		27.80%		27.80%	

α = .10; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 7.
Logit Results: Factors Affecting Judicial Review, continued
(Modified Replication of Herron and Randazzo 2003) – Original & Corrected Indices

Independent Variable	Original Index		Original Index (Calculations Fixed)		Corrected Index (Coding Fixed)	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Judicial Independence						
Original S-I Index	0.012 (0.431	0.001				
Index, Georgia Fixed			–0.168 (0.427)	0.155		
Corrected S-I Index					–0.671 (0.551)	1.482
Economic Conditions						
Change in GDP Growth (base year = 1990)	–0.123** (0.061)	4.020	–0.123** (0.061)	4.042	–0.126** (0.061)	4.219
Contextual Influences						
Presidential Power	–0.077*** (0.026)	9.175	–0.081*** (0.026)	9.656	–0.088**** (0.027)	11.003
Legislative Fragmentation	0.262**** (0.063)	17.375	0.257**** (0.061)	17.517	0.249**** (0.061)	16.681
Civil Liberties	0.099 (0.124)	0.644	0.113 (0.121)	0.871	0.118 (0.119)	0.991
Petitioner						
Individual	–0.188 (0.187)	1.013	–0.195 (0.187)	1.080	–0.209 (0.187)	1.247
President	1.247*** (0.437)	8.162	1.236*** (0.436)	8.035	1.218*** (0.436)	7.819
Administration or Legal Official (e.g. Ombudsman)	0.616** (0.310)	3.958	0.586* (0.309)	3.600	0.541* (0.307)	3.110
Members of Legislature	0.226 (0.237)	0.911	0.243 (0.239)	1.035	0.255 (0.238)	1.156
Constant	–0.133 (0.397)	1.113	–0.034 (0.400)	0.007	0.370 (0.520)	0.506
N	764		764		764	
–2LL	962.366		963.708		962.366	
Model Chi Square	53.944		54.099		55.441	
Prob < Chi Square	0.000		0.000		0.000	
Pseudo R Square	0.093		0.093		0.095	
Null Model	50.00%		50.00%		50.00%	
Predicted Model	64.90%		64.40%		63.90%	
Reduction of Error	29.80%		28.80%		27.80%	

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down).

N.B. Smaller sample size results from missing data on petitioners in some cases in the dataset. Weights have been adjusted.

Table 8.
Logit Results: Effect of Distance from 'Peak' of Judicial Power on Judicial Review (Following Smithey and Ishiyama's [2002] Models)

Independent Variable	Model 1				Model 2			
	Distance from Peak		Distance from Peak, Controlling for Access		Distance from Peak		Distance from Peak, Controlling for Access	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Distance from 'peak' of Judicial Independence	–3.402 * (1.945)	3.059	–3.632 * (1.971)	3.395	–3.524 * (1.869)	3.555	–3.740 ** (1.887)	3.927
Accessibility of Courts			–2.116 (2.321)	0.831			–2.362 (2.209)	1.143
Number of Sub-tiers	–0.968 **** (0.259)	14.010	–0.955 **** (0.259)	13.589	–0.281 (0.206)	1.855	–0.282 (0.206)	1.875
Rights Index	5.896 * (3.070)	3.689	4.935 (3.260)	2.291	12.478 **** (3.732)	11.177	10.902 *** (4.017)	7.366
Popular Trust in Courts					0.034 **** (0.010)	11.582	0.032 *** (0.010)	9.704
Legislative Fragmentation	0.425 **** (0.099)	18.363	0.411 **** (0.100)	16.803				
Constant	0.155 (0.444)	0.121	0.572 (0.639)	0.801	–0.629 (0.604)	1.084	–0.095 (0.787)	0.014
N	414		414		397		397	
–2LL	500.192		499.366		476.488		475.350	
Model Chi Square	27.817		28.644		26.479		17.617	
Prob < chi square	0.000		0.000		0.002		0.003	
Pseudo R square	0.080		0.080		0.057		0.061	
Null Model	50.00%		50.00%		50.00%		50.00%	
Predicted Model	69.50%		69.50%		68.70%		68.70%	
Reduction of Error	39.00%		39.00%		37.40%		37.40%	

α= .10; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

N.B.: Smaller sample sizes(414 and 397, respectively) result from unavailability of data for Smithey and Ishiyama's Hungary, Poland, or Slovenia, and in the case of Model 2, popular trust score for Georgia.

Table 9.
Logit Results: Effect of Distance from 'Peak' of Judicial Power on Judicial Review (Following Herron and Randazzo's [2003] Models)

	Without Controlling for Petitioner		Controlling for Petitioner	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*
Distance from 'peak' of Judicial Independence	0.352	0.427	–0.217	0.122
	(0.539)		(0.621)	
Contextual Influences				
Legislative Fragmentation	0.202 ****	16.064	0.260 ****	18.176
	(0.050)		(0.061)	
Presidential Power	0.144	1.750	0.085	0.473
	(0.109)		(0.124)	
Civil Liberties	–0.090 ****	12.496	–0.073 ***	6.639
	(0.025)		(0.028)	
Economic Conditions				
Change in GDP Growth (base year = 1990)	–0.148 ***	7.422	–0.123 **	3.979
	(0.054)		(0.061)	
Petitioner				
Individual			–0.195	1.082
			(0.188)	
President			1.254 ***	8.255
			(0.436)	
Administration or Legal Official			0.639 **	4.245
			(0.310)	
Members of Legislature			0.225	0.913
			(0.235)	
Constant	0.251	0.776	–0.090	0.071
	(0.285)		(0.340)	
N	915		764	
-2LL	1162.453		963.742	
Model Chi Square	36.477		54.065	
Prob < Chi square	0.000		0.000	
Pseudo R square	0.054		0.093	
Null Model	50.00%		50.00%	
Predicted Model	64.50%		65.00%	
Reduction of Error	29.00%		30.00%	

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down).

N.B. Smaller sample size results from missing data on petitioners in some cases in the dataset. Weights have been adjusted.

Table 10.

Logit Results: Effect of New Measures of Judicial Independence on Judicial Review Following Smithey and Ishiyama's (2002) 'Model 1'

Independent Variable	1		2		3		4		5	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Legislative Fragmentation	0.368 ***	6.739	0.371 ***	7.219	0.388 ***	10.103	0.444 ****	19.551	0.477 ****	19.117
	(0.142)		(0.138)		(0.122)		(0.100)		(0.109)	
Rights Index	−4.886	0.468	−8.913	1.103	−10.231	1.234	−6.788	0.736	0.920	0.041
	(7.139)		(8.487)		(9.209)		(7.911)		(4.557)	
Federalism	−0.801 ***	8.621	−1.166 ****	14.458	−0.591 *	3.724	−0.652 **	4.894	−0.777 ***	7.985
	(0.273)		(0.307)		(0.306)		(0.295)		(0.275)	
Judicial Independence										
Access Measure	8.999	2.211								
	(6.053)									
Power * Access			57.588 *	2.804						
			(34.391)							
Power * Insularity	1.443	0.198	−11.622	1.278						
	(3.243)		(10.281)							
Composite power and access measure					19.534 *	3.040	15.001	2.594		
					(11.203)		(9.314)			
Composite power and access measure * Insularity									10.998	1.513
									(8.942)	
Insularity			1.855	0.787	−0.825	0.604				
			(2.091)		(1.062)					
Constant	−1.328 *	3.050	−0.538	0.334	−0.047	0.003	−0.687 *	3.140	−0.786	2.677
	(0.761)		(0.932)		(0.905)		(0.387)		(0.480)	

N	414	414	414	414	414
-2LL	500.989	500.175	500.165	501.527	501.934
Model Chi Square	27.020	27.835	27.844	26.482	26.076
Prob < Chi Square	0.000	0.000	0.000	0.000	0.000
Pseudo R Square	0.088	0.090	0.090	0.086	0.085
Null Model	50.00%	50.00%	50.00%	50.00%	50.00%
Predicted Model	67.30%	69.50%	69.50%	67.30%	69.50%
Reduction of Error	34.60%	39.00%	39.00%	34.60%	39.00%

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 11.

Logit Results: Effect of New Measures of Judicial Independence on Judicial Review Following Smithey and Ishiyama's (2002) 'Model 2'

Independent Variable	1		2		3		4		5	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Rights Index	−20.765	1.008	−20.765	1.008	−17.336	0.180	−1.684	0.048	7.460 *	3.373
	(20.685)		(20.685)		(40.915)		(7.667)		(4.062)	
Federalism	−0.399	2.048	−0.399	2.048	−0.130	0.039	0.106	0.175	0.179	0.419
	(0.279)		(0.279)		(0.658)		(0.254)		(0.277)	
Popular Trust in Courts	−0.038	0.389	−0.038	0.389	−0.011	0.007	0.040 ****	13.697	0.057 ****	12.073
	(0.061)		(0.061)		(0.132)		(0.011)		(0.017)	
Judicial Independence										
Power * Insularity	−10.636	0.878	−10.636	0.878						
	(11.349)		(11.349)							
Access Measure	21.320 *	2.840	21.320 *	2.840						
	(12.652)		(12.652)							
Composite power and access measure					24.116	2.000	18.756 *	3.492		
					(17.052)		(10.037)			
Insularity					−3.860	0.152				
					(9.910)					
Composite power and access measure * Insularity									25.717 *	3.605
									(13.544)	
Constant	1.129	0.149	1.129	0.149	3.525	0.066	−1.825 ***	7.030	−3.079 **	6.628
	(2.929)		(2.929)		(13.754)		(0.688)		(1.196)	

N	414	414	414	414	414
-2LL	500.989	500.175	500.165	501.527	501.934
Model Chi Square	27.020	27.835	27.844	26.482	26.076
Prob < Chi Square	0.000	0.000	0.000	0.000	0.000
Pseudo R Square	0.088	0.090	0.090	0.086	0.085
Null Model	50.00%	50.00%	50.00%	50.00%	50.00%
Predicted Model	67.30%	69.50%	69.50%	67.30%	69.50%
Reduction of Error	34.60%	39.00%	39.00%	34.60%	39.00%

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 12.

Logit Results: Effect of New Measures of Judicial Independence on Judicial Review Following Modified Herron and Randazzo (2003) Model (Without Controls for Petitioner Identity)

Independent Variable	1		2		3		4		5	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Presidential Power	–0.083 **** (0.022)	14.124	–0.082 **** (0.022)	13.375	–0.083 **** (0.022)	13.624	–0.082 **** (0.022)	13.830	–0.082 **** (0.022)	13.714
Civil Liberties	0.146 (0.108)	1.842	0.179 (0.111)	2.595	0.123 (0.103)	1.426	0.117 (0.100)	1.367	0.116 (0.100)	1.356
Change in GDP Growth (1990 = base year)	–0.143 *** (0.055)	6.896	–0.134 ** (0.055)	5.860	–0.146 *** (0.054)	7.222	–0.146 *** (0.054)	7.197	–0.146 *** (0.054)	7.214
Legislative Fragmentation	0.174 *** (0.058)	8.897	0.182 *** (0.057)	10.207	0.192 **** (0.057)	11.344	0.199 **** (0.050)	15.715	0.199 **** (0.051)	15.403
Judicial Independence										
Power * Insularity	–1.736 (2.186)	0.631	–5.397 (3.988)	1.832						
Power * Access			2.582 (2.028)	1.622						
Access Measure	0.407 (0.668)	0.371								
Composite power and access measure					0.032 (0.643)	0.002	0.036 (0.642)	0.003		
Composite power and access measur* Insularity									–0.042 (1.150)	0.001
Insularity			0.918 (0.943)	0.947	–0.131 (0.531	0.061				
Constant	0.441 (0.341)	1.677	0.142 (0.534)	0.071	0.401 (0.499)	0.647	0.303 (0.304)	0.999	0.317 (0.313)	1.027

N	915	915	915	915	915
–2LL	1162.238	1160.982	1162.817	1162.880	1162.881
Model Chi Square	36.691	37.948	36.112	36.050	36.049
Prob < Chi Square	0.000	0.000	0.000	0.000	0.000
Pseudo R Square	0.054	0.056	0.053	0.053	0.053
Null Model	50.00%	50.00%	50.00%	50.00%	50.00%
Predicted Model	63.90%	65.10%	63.90%	64.50%	64.50%
Reduction of Error	27.80%	30.20%	27.80%	29.00%	29.00%

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 13.

Logit Results: Effect of New Measures of Judicial Independence on Judicial Review Following Modified Herron and Randazzo (2003) Model (With Controls for Petitioner Identity)

Independent Variable	1		2		3		4		5	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Presidential Power	−0.083 *** (0.026)	10.560	−0.085 *** (0.026)	10.771	−0.082 *** (0.025)	10.349	−0.078 *** (0.025)	9.780	−0.079 *** (0.025)	9.835
Civil Liberties	0.191 (0.127)	2.270	0.233 * (0.131)	3.170	0.117 (0.119)	0.961	0.100 (0.117)	0.723	0.098 (0.117)	0.707
Change in GDP Growth (1990 = base year)	−0.112 * (0.061)	3.348	−0.105 * (0.062)	2.898	−0.122 ** (0.061)	3.951	−0.123 ** (0.061)	4.022	−0.123 ** (0.061)	4.028
Legislative Fragmentation	0.191 *** (0.066)	8.309	0.216 *** (0.066)	10.805	0.235 **** (0.066)	12.620	0.261 **** (0.061)	18.200	0.259 **** (0.062)	17.506
Petitioner										
Individual	−0.196 (0.194)	1.024	−0.114 (0.199)	0.328	−0.214 (0.196)	1.194	−0.185 (0.194)	0.913	−0.177 (0.192)	0.842
President	0.594 * (0.303)	3.828	0.705 ** (0.315)	5.010	0.568 * (0.305)	3.461	0.613 ** (0.302)	4.114	0.607 ** (0.303)	4.028
Administration or Legal Official	0.357 (0.246)	2.106	0.323 (0.247)	1.713	0.289 (0.245)	1.389	0.227 (0.235)	0.927	0.227 (0.235)	0.928
Members of Legislature	1.258 *** (0.439)	8.206	1.325 *** (0.443)	8.947	1.223 *** (0.438)	7.797	1.249 *** (0.437)	8.158	1.255 *** (0.437)	8.246
Judicial Independence										
Power * Insularity	−5.442 ** (2.586)	4.428	−10.591 ** (4.644)	5.201						
Power * Access			4.903 ** (2.322)	4.458						

Access Measure	1.399 * (0.809)	2.989								
Composite power and access measure					−0.012 (0.749)	0.000	−0.043 (0.748)	0.003		
Composite power and access measure * Insularity									−0.318 (1.329)	0.057
Insularity			1.519 (1.140)	1.775	−0.614 (0.651)	0.890				
Constant	0.196 (0.393)	0.249	−0.259 (0.641)	0.163	0.321 (0.587)	0.299	−0.118 (0.361)	0.106	−0.083 (0.371)	0.051
N	764		764		764		764		764	
−2LL	959.401		957.678		962.969		963.860		963.806	
Model Chi Square	58.406		60.129		54.837		53.947		54.000	
Prob < Chi Square	0.000		0.000		0.000		0.000		0.000	
Pseudo R Square	0.100		0.103		0.094		0.093		0.093	
Null Model	50.00%		50.00%		50.00%		50.00%		50.00%	
Predicted Model	64.90%		65.10%		64.90%		65.10%		65.10%	
Reduction of Error	29.80%		30.20%		29.80%		30.20%		30.20%	

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 14.

Influence of Legal "Transplant Effect" on Judicial Review (Panel A)

Independent Variable	1		2		3		4		5	
	B (S.E.)	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*	*B (S.E.)*	*Wald*
Judicial Independence										
Corrected Index	−0.828	0.871	−0.503	0.977	−0.876	0.989	−1.030	1.333		
	(0.887)		(0.509)		(0.880)		(0.892)			
Presidential Power	−0.044	2.230	−0.047 *	2.722	−0.032	1.253	0.000	0.000	−0.032	1.267
	(0.029)		(0.028)		(0.029)		(0.036)		(0.028)	
Legislative Fragmentation	0.181 ***	9.605	0.193 ****	13.027	0.151 ***	7.410	0.206 ***	8.842	0.179 ****	13.249
	(0.059)		(0.053)		(0.056)		(0.069)		(0.049)	
Civil Liberties	−0.110	0.289	−0.116	0.320	−0.037	0.033	−0.044	0.048	−0.092	0.229
	(0.205)		(0.205)		(0.201)		(0.200)		(0.192)	
Change in GDP Growth (1990 = base year)	−0.140 **	6.110	−0.141 **	6.187						
	(0.057)		(0.057)							
Federalism							−0.306	2.119		
							(0.210)			
Adaptation	0.587 ***	6.897			0.644 ***	8.470	0.861 ***	10.297	0.674 ***	9.450
	(0.224)				(0.221)		(0.268)		(0.219)	
Familiarity	0.813	2.580			0.909 *	3.265	0.691	1.714	0.529	2.614
	(0.506)				(0.503)		(0.528)		(0.327)	
Receptive Transplant			0.609 ***	7.738						
			(0.218)							
New Transplant	1.273 **	5.833	0.563	2.488	1.252 **	5.688	1.047 *	3.755	1.130 **	4.920
	(0.527)		(0.357)		(0.525)		(0.540)		(0.509)	
Constant	−0.053	0. 010	−0.509	1.284	−0.364	0.483	−0.231	0.189	−0.590	1.559
	(0.546)		(0.449)		(0.524)		(0.531)		(0.473)	

N	915	915	915	915	915
-2LL	1153.029	1153.229	1159.167	1157.037	1160.155
Model Chi Square	45.900	45.701	39.762	41.892	38.774
Prob < Chi Square	0.000	0.000	0.000	0.000	0.000
Pseudo R Square	0.067	0.067	0.058	0.061	0.057
Null Model	50.00%	50.00%	50.00%	50.00%	50.00%
Predicted Model	65.93%	64.43%	64.73%	65.39%	61.89%
Reduction of Error	31.86%	28.85%	29.45%	30.78%	23.78%

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 15.
Influence of Legal "Transplant Effect" on Judicial Review (Panel B)

Independent Variable	6		7		8	
	B(S.E.)	*Wald*	*B(S.E.)*	*Wald*	*B(S.E.)*	*Wald*
Judicial Independence						
Power measure	21.457 *** (8.181)	6.879	19.035 ** (8.276)	5.291		
Insularity measure	7.220 *** (2.505)	8.311	9.419 **** (2.739)	11.829		
Power * Insularity	–36.925 *** (13.170)	7.861	–40.481 *** (13.364)	9.176		
Access measure	–1.430 (1.516)	0.889	0.966 (1.926)	0.252		
Presidential Power	–0.066 * (0.034)	3.731	–0.082 ** (0.036)	5.181		
Legislative Fragmentation						
At time of decision	0.163 *** (0.059)	7.553	0.225 *** (0.070)	10.342		
At time of first election					0.126 ** (0.051)	6.120
Civil Liberties	–0.074 (0.203)	0.135	0.035 (0.215)	0.026		
Federalism					–0.242 (0.154)	2.471
Adaptation			1.333 **** (0.315)	17.852	0.902 **** (0.214)	17.770
Familiarity			0.283 (0.558	0.257	0.625 * (0.327)	3.647
Receptive Transplant	1.216 **** (0.311)	15.245				
New Transplant	0.868 ** (0.352)	6.074	1.468 ** (0.640)	5.255	1.090 *** (0.336)	10.548
Constant	–3.738 *** (1.391)	7.226	–5.633 **** (1.612)		–0.770 * (0.435)	3.128

N	915	915	915
–2LL	1149.981	1145.895	1177.614
Model Chi Square	48.949	53.034	25.948
Prob < chi square	0.000	0.000	0.000
Pseudo R square	0.071	0.077	0.038
Null Model	50.00%	50.00%	50.00%
Predicted Model	64.72%	63.46%	61.80%
Reduction of Error	29.44%	26.92%	23.60%

Table 16.
Selected Composite Models of Factors Affecting Judicial Review

Independent Variable	1		2		3	
	B(S.E.)	*Wald*	*B(S.E.)*	*Wald*	*B(S.E.)*	*Wald*
Change in GDP Growth (1990 = base year)	–0.118 ** (0.056)	4.403	–0.098 * (0.055)	3.222	–0.105 (0.057)	3.319
Presidential Power	–0.257 **** (0.057)	20.430	–0.273 **** (0.055)	24.448	–0.353 **** (0.105)	11.374
Civil Lliberties	0.436 *** (0.169)	6.652	0.368 ** (0.160)	5.318	0.641 *** (0.242)	7.037
Legislative Fragmentation						
At time of decision	0.173 (0.114)	2.309			0.198 * (0.118)	2.786
Inside Coalition	–0.693 **** (0.193)	12.827	–0.628 **** (0.187)	11.318	–0.602 *** (0.225)	7.177
Federalism	0.556 *** (0.205)	7.385	0.540 *** (0.201)	7.186	1.332 ** (0.658)	4.103
Judicial Independence						
Composite power and access measure * Insularity	–4.256 ** (1.669)	6.499	–4.774 *** (1.624)	8.644		
Power * Insularity					–8.002 (7.557)	1.121
Power * Access					0.026 (3.192)	0.000
Insularity					4.164 (3.518)	1.401
Constant	3.061 *** (0.991)	9.543	3.838 **** (0.846)	20.574	0.161 (2.457)	0.004

N	915	915	915
–2LL	913.872	916.371	912.546
Model Chi Square	39.603	37.103	40.929
Prob < chi square	0.000	0.000	0.000
Pseudo R square	0.072	0.068	0.075
Null Model	50.00%	50.00%	50.00%
Predicted Model	66.50%	64.60%	66.20%
Reduction of Error	33.00%	29.20%	32.40%

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After the First Lessons and Experiences – Cases Concerning Hungary before ECJ (2004–2007)

Abstract. The essay attempts to give an overview on the cases relating to Hungary before European Court of Justice in the period between 2004–2007, which are classified into four categories. The first part of the article analyses eleven procedures concerning petitions for preliminary rulings, illustrating the bearings of the cases and pointing out the importance as well as consequences from the point of view of the Hungarian legal order. The essay refers to the fact that activity of Hungarian courts to apply preliminary ruling procedures is exceptionally high comparing with the other nine Member States acceded to EU in 2004 and in almost each cases concerned, the references were profoundly considered by the Hungarian court. The second category described in this paper includes cases, in which Hungarian individual persons participate as litigants (including the cases before Civil Service Tribunal). The experiences of these procedures on the basis of direct complaints indicate the conclusion that in several cases, the attorneys representing the plaintiff before ECJ involve not enough responsibilities to avoid bringing obviously inadmissible actions. In the third part of the paper the reader can get an insight into the cases in which the Republic of Hungary appears as litigant. Finally the fourth category embraces cases with indirect interest relating Hungary. These are referred but not deeply examined in the article.

Keywords: European Union, European law, EC law, European Court of Justice, Hungarian law, case law

I. Introductory remarks

With the accession of Hungary to the European Union, besides law-makers and law-applying organs, Hungarian law-seeker citizens and undertakings must take into consideration that the European Court of Justice (ECJ) bestowed with peremptory legal authority is entitled to make ultimate decisions on the interpretation and effect of EU Law. Thence, the updated monitoring of the judicial practice of the Luxembourg Court becomes indispensable and we need

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to expend more substantial care in cases, in which Hungarian parties are directly concerned.

It can be quoted cases with Hungarian implications in the period before our accession, as well. One of the most familiar ones was the *Balog Case (C-264/98)*[1] also referred abroad. It was initiated by Tibor Balog, a former football player of MTK (a Hungarian League) by reason of the obligation illegally imposed on him to pay fees related to his registration to a European club.

Subsequently to our accession to the EU, the cases concerning Hungary before the ECJ will be classified into four categories. In petitions for preliminary ruling, interested parties are established in the main proceedings conducted by Hungarian judicial organs. The second category as follows includes cases, in which Hungarian individual persons participate as litigants, whereas, in the third category, the Republic of Hungary appears as litigant: either as plaintiff or defendant. Finally, the fourth category consists of cases, in which on the basis of indirect interest, the Hungarian party appears in various statuses in the proceedings, e.g., as an intervener or submitting observation.[2]

II. Petitions for preliminary ruling referred by Hungarian courts

a) The role of the preliminary ruling procedure

References for preliminary ruling under article 234 TEC guarantee the uniform application and interpretation of Community Law within the EU. If the court of a Member State applies Community Law during its proceedings, it may refer the case for preliminary ruling to the European Court of Justice. It may request

[1] The documents related to the specific cases can be searched on the basis of case numbers and downloaded from the homepage of the European Court of Justice, see: www.curia.eu. After having had terminated the proceeding in the referred Balog Case, it has been cancelled in the register of ECJ, thus, the relevant facts can be found only in the print edition of the European Court Reports (ECR).

[2] This last category of cases include proceedings between other parties concerned, in which the Hungarian Government participates as an intervener or has the right to submit observation. These cases will not be analysed in this essay, but with respect to the practice so far, it can be mentioned some example. The Hungarian Government participated as an intervener e.g. in the Case Commission v. Republic of France (C-304/02), and submitted observation in Tokaji I. Case (C-347/03), Suzuki Case (joined with C-23/02, C-24/02, C-25/02), Bondi Case (C-341/04), Mostaza Case (C-168/05), Banca Popolare di Cremona Case (C-475/03), Vorel Case (C-437/05), Wienand Meilicke Case (C-292/04), RUMA GmbH Case (C-183/06) etc.

the interpretation of the acts of Community organs and the establishment of the validity of the latter ones. In some cases, the proceeding court is obligated to have recourse to the ECJ. Whereas, the European Court of Justice can neither make decisions on the merits of the case, nor can it annul national legal norms.

Comparing with the other courts of new Member States acceding to EU in 2004, the Hungarian courts are relatively active to refer cases for preliminary ruling to ECJ. For the time being, eleven petitions have been referred to the ECJ from Hungarian judicial organs, out of which preliminary ruling has been accomplished in eight cases. Among that, there are cases referred in criminal procedures, but the 'hits' of the cases have concerned taxation issues.

b) The 'fallen' of the red star: Fiasco in the first Hungarian case before ECJ

Following the accession of Hungary to the EU, the first concluded proceedings were the Vajnai Case (C-328/04)[3] referred by the Fővárosi Bíróság (Metropolitan Court). The Metropolitan Court initiated criminal proceedings against Mr Attila Vajnai, deputy secretary-general of the Hungarian Communist Workers' Party, on grounds of the charge of the use of totalitarian symbols. That is to say, because according to the Article 269/B. of Hungarian Criminal Code, the person who uses a symbol representing the red star (or other totalitarian symbol[4]) in public or publicly exhibits it commits a minor offence. The order for reference states that criminal proceedings were brought against Mr Vajnai for displaying on his clothing in public a five-point red star, made of cardboard with a diameter of 5 cm, during a demonstration held in Budapest. A police officer who was on duty requested him to remove that symbol, which he agreed to do. By judgment the Pesti Központi Kerületi Bíróság (Central District Court, Pest) found Mr Vajnai guilty of having used a 'totalitarian symbol' in violation of Hungarian Criminal Code. The court decided to impose a one-year suspended sentence and ordered confiscation of the symbol. Hereupon, Mr Vajnai appealed against that judgment to the court which has made the reference for a preliminary ruling.

The referring court, Fővárosi Bíróság, addressed the question to the Luxembourg Court, whether the Criminal Code collides with the provisions of Community Law pertaining to discrimination or with other provisions. In the

[3] The case was commented by Osztovics A.: Az első magyar előzetes döntéshozatali eljárás [The first Hungarian preliminary ruling case]. *Európai jog*, 4/5 (2004) 16–21.

[4] Beside the red star, the swastika, the insignia of the SS, the arrow cross, the hammer and sickle, the five-point red star or any other symbol representing one of those signs fall within this article of Hungarian Criminal Code.

reference was cited Article 6 TEU,[5] Council Directive 2000/43/EC,[6] and Articles 10, 11 and 12 of the Charter of Fundamental Rights,[7] as well. The court has observed that in several Member States, such as the Italian Republic, the symbol of left-wing parties is the red star or the hammer and sickle. It follows that members of Italian left-wing organisations may wear symbols of the labour movement without contravening any prohibition, whereas the Hungarian Criminal Code prohibits the use of those symbols. Therefore, the question arises whether a provision in one Member State prohibiting the use of symbols of the international labour movement on pain of criminal prosecution, whereas the display of those symbols on the territory of another Member State does not give rise to any sanction, is discriminatory.

The Advocate General did not submitted written opinion in the case, then, the ECJ terminated its proceedings with reference to an obvious lack of its jurisdiction on 6th October, 2005. According to the brief reasoning of the order, the questions raised in the main proceedings cannot be interpolated into the frames of EC Law and the elaboration of criminal regulations is basically subject to the separate authorities of the Member States.[8]

Albeit the order has not mentioned because of needlessness of substantial analyse in the case, but it may be emphasized that the referring Hungarian court was at fault not only in the question of ECJ's competence. Namely, the reference was partly based on such of legal ground which is obviously incorrect and irrelevant. The judge has cited some articles of the Charter of Fundamental Rights of European Union. But the Charter had no binding force yet and regarding its not compulsory character it does not belong to the acts of the EC Law.

[5] *Article 6 TEU para 1:* "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

[6] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ L 180, 19.7. 2000. 22–26.

[7] The articles of the Charter mentioned in the reference concern freedom of thought, the freedom of opinion, the freedom of speech, and right of public meeting, right of combination and assembly, as well.

[8] The ECJ referred directly to the doctrine laid down in the Kremzow Case. See *Case C-299/95 Kremzow* ECR [1997] I-2629, paragraph 15.

c) *Reviewing the consumer protection regulation: the Hungarian Civil Code before ECJ*

In the Ynos Case (C-302/04, Ynos Kft. v. János Varga), the facts were constituted by an action taken in connection with a contract of sale of real estate at the Szombathelyi Városi Bíróság (Municipal Court Szombathely). In his petition to the ECJ, the Hungarian judge requested the interpretation of some of the provisions of Council Directive 93/13/EEC on Unfair Agreement Conditions. The two related questions exposed the issue, whether a rule of a member state conforms to the respective directive, according to which an unfair agreement condition can only be considered invalid, if the consumer expressly challenged it, and according to which other parts of the agreement can only persist as valid, if it had been concluded by the parties even without the condition that has proved to be unfair. Nevertheless, the third question was by far more important: does the element that the facts of the case of the main proceedings had been established before the accession of Hungary to the EU, i.e., before 1st May, 2004 influence the judgement of the former questions. The importance of the questions to be answered was indicated by the fact that the case was remitted to the Grand Chamber and that besides the Hungarian Government, the Commission and five other member states also made observations during the proceedings. Related to the third question, the Advocate General in his motion made on 22nd September, 2005 referred to the fact that since Hungary had not been a member of the EU at the time of the main proceedings, i.e., in 2002, the rules of the respective directive were not relevant, consequently, the European Court of Justice did not have competence to answer the questions. In case, nevertheless, the Court did establish its competence and considered the case on the merits, the Advocate General briefly dealt with the first two questions and according to his standpoint, the quoted regulations of the member state would be contrary to the directive.

In its Judgement of 10th January, 2006, the ECJ explicated that it was incompetent to examine the questions on their merits, since it had jurisdiction exclusively in those cases, the underlying facts of the cases of which were established following taking effect of the Accession Treaty.[9] This doctrine had been consequentially adhered to by the ECJ related to former enlargements.[10]

[9] *Cf.* C-321/97. *Andersson and Wåkerås-Andersson*, ECR [1999] I-3551, paragraph 31.

[10] For further comments, see Láncos, P. L.: Case note: Ynos–intertemporality and the jurisdictional jurisprudence of the ECJ. *Acta Juridica Hungarica,* 48/1 (2007) 87–93, Szabó P.: Az Ynos Kft.-ügyben hozott luxemburgi bírósági ítélet előzményei és utóélete – az előterjesztő magyar bíró szemével [The antecedents and the consequences of the judge-

d) Importing cars from the inner European market: the successful attack on the registration tax

The registration tax regulation on import cars introduced after the Hungarian accession to EU was much discussed not only in the theory: several business federations, chambers etc. have heavily criticised the obviously discriminatory character of this Hungarian tax regulation. Two preliminary ruling procedures concerned this matter, which were finally joined and the ECJ passed common judgement in these cases.

Firstly, the *Nádasdy Case* was referred to ECJ, (C-290/05, *Ákos Nádasdy v. Vám és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága*). After the suspension of a procedure concerning the judicial review of an administrative decision, the *Hajdú-Bihar Megyei Bíróság* (County Court Hajdú-Bihar) had recourse to the ECJ. The plea in law exposed the issue, whether the domestic regulation of registration tax was in accordance with EC Law. Namely, whether a kind of tax imposed on motor vehicles imported from other member states is applicable, when it ignores the value of the car and determines the amount of the tax to be paid exclusively on the basis of the technical features of the motor vehicle (engine type, engine capacity) and of its environmental classification. On the other hand, how can the circumstance *in re* EC Law be evaluated, that no registration tax is imposed on motor vehicles placed in circulation before taking effect of the act on registration tax in Hungary. During the proceedings, the Hungarian and Polish Governments as well as the Commission submitted observation. According to the former ones, the regulation was in accordance with Community Law and the ECJ should reject the petition, since it could not reply, so as to promote the conclusion of the main proceedings. Nevertheless, the Commission deemed the Hungarian system of registration taxes discriminative and contrary to Community Law, which was not accidental, since it had conducted a related examination *vis-à-vis* Hungary in so-called breach of obligation proceedings. The Advocate General brought forward his motion on 13th July, 2006. According to his standpoint, the system of registration taxes discriminated against cars imported from other Member States *vis-à-vis* used cars purchased in Hungary, since no registration tax had to be paid in case of

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ment of Luxembourg Court in case Ynos Kft.–from the aspect of the referring judge]. *Európai jog*, 4/5 (2006) 31–36, Kovács, B.–Nemessányi, Z.: Az első magyar előzetes döntéshozatali eljárás margójára: a közösségi jog visszaható hatályának és a Dzodzi-elv alkalmazhatóságának kérdése [To the margin of the first Hungarian preliminary ruling case: the question of the retroactive for of Community Law and the application of doctrine 'Dodzi']. *Európai jog*, 1 (2006) 3–11.

purchases in Hungary. Furthermore, the registration tax was not proportionate to the value, since it was not adjusted to the age of the vehicle, this, however, pertained merely to the period examined during the proceedings, since the respective rule was amended as of 1st January, 2006.

The other case regarding registration tax was the *Németh Case* (C-333/05), *Ilona Németh v. Vám és Pénzügyőrség Dél-Alföldi Regionális Parancsnoksága*). As mentioned before, was lodged independently from the case above, but its subject-matter was similar, therefore the ECJ has jointed the two cases. The Német Case was initiated before the *Bács-Kiskun Megyei Bíróság* (County Court Bács-Kiskun). The court addressed four questions to the European Court of Justice. The first two questions focused on the issue, whether a tax imposed by a member state, such as the Hungarian registration tax may be considered to be a customs duty or a measure having an equivalent effect, or, if it cannot, can it be considered to be a type of import duty. If the former questions are answered in the negative, the third and fourth questions combined were directed at the issue, whether the domestic registration tax can be considered to be in conformity with Community rules. The Advocate General proceeding in the Nádasdy Case made a motion in this case, as well. According to his standpoint, the registration tax can by no means be considered a customs duty, since it was not imposed related to border-crossing, but by reason of the registration of motor vehicles in the territory of a specific member state. The logic of his final conclusion more or less coincided with his opinion explicated in the Nádasdy Case, scilicet, the registration tax was merely admissible in a member state, on condition that it was applied without differentiation, i.e., discrimination.

It was expectable on the basis of the former adjudicational practice of the European Court of Justice, that if it accepted the standpoint of the Advocate General, the Hungarian State would have to reimburse those entitled the amount of the registration tax collected pursuant to the regulation effective between May, 2004 and December, 2005. On the basis of the Judgement of the ECJ pronounced on 5th October, 2006, the registration tax was contrary to EC Law, so far as it imposed a higher amount of tax on used imported cars, than on used cars already registered in Hungary. In other words, the registration tax was contrary to Community Law, so far as its amount was calculated without taking the depreciation of the vehicles into account, in such a way that when applied to used vehicles imported from other member states, it exceeded the amount of the tax included in the residual value of similar used vehicles which have already been registered in the member state of importation.[11]

[11] For the cases concerning Hungarian registration tax, see: Simon, D.: Taxation de l'immatriculation des véhicules automobiles. *Europe,* 2006 Décembre Comm. n° 367.

e) Controversy on compatibility of local business tax with EC Law

Not only registration tax, but the Hungarian local business tax (HIPA) has given rise to much controversy. The first case referred to ECJ was the *Lakép Case* (C-261/05, *Lakép Kft., Pár-Bau Kft., Rottelma Kft. v. Komárom-Esztergom Megyei Közigazgatási Hivatal*) which was taken related to judicial review of administrative decision to impose local business tax by tax authority. In its petition for preliminary ruling, the referring court requested the construction of specific rules of the so-called Sixth Tax Law Directive (Council Directive no. 77/388/EEC). It expected an answer to the question, according to which conditions a kind of tax qualifies as sales tax, or, whether only one kind of sales tax was admissible. The essential question in this case was also the third one, since the main proceedings dealt with tax obligations deriving from legal relations established before our accession to the EU. Consequently, it was questionable, whether a retrospective calculation of taxes on the basis of tax obligations established in the period before the accession was admissible, if in the period before the accession a member state had applied two or more kinds of sales tax. With reference to its ruling on the above-mentioned Ynos Case, the European Court of Justice declared the lack of its competence on 9th February, 2006, since it had competence to construe Council Directives in new member states exclusively as of the date of accession. Whereas, the taxes contested in the main proceedings had been imposed in the period before the EU membership of Hungary.[12]

In the second case relating to local business tax was the *Kögáz Case* (C-283/06, *Kögáz Rt. és tsai v. Zala Megyei Közigazgatási Hivatal*), which was later joined with *OTP Garancia Case* (C-312/06, *OTP Garancia Biztosító Rt. v. Vas Megyei Közigazgatási Hivatal*). Contrast with the Lakép Case analysed

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20–21, Domahidi Á.: Ungarische Zulassungssteuer für Pkw gemeinschaftswidrig. *Europäische. Zeitschrift für Wirtschaftsrecht*, 2007. 127–128, Adobati, E.: *Diritto comunitario e degli scambi internazionali*. 2006. 758–759, Anon.: Az Európai Közösségek Bírósága 2006. október 5-én, a C-290/05. és a C-333/05. számú egyesített Nádasdi Ákos kontra Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága ügyekben hozott ítélete [Judgement of ECJ in the joined cases C-290/05 and C-333/05 Ákos Nádasdi versus Vám- és Pénzügyőrség Észak-Alföldi Regionális Parancsnoksága on 5 October 2006]. *Európai jog*, 6 (2006) 38–45, Vincze A.: Széljegyzetek a regisztráció adóhoz közösségi jogi nézőpontból [Marginal notes to the registration tax from a Community Law's perspective]. *Európai Jog*, 4/5 (2004) 3–9.

[12] See: Anon: Az Európai Közösségek Bírósága 2006. február 9-én, a C-261/05. számú Lakép Kft. ügyben hozott végzése [Judgement of ECJ in the case C-261/05 Lakép Kft. on 9 February 2006]. *Európai jog*, 6/2 (2006) 44–46.

above, a feature of the /Kögáz Case was that it did not concern an obligation obtaining before the accession, but taxes imposed following 1st May, 2004. After suspending its proceedings, the Zala Megyei Bíróság (County Court) had recourse to the European Court of Justice. The first question exposed the issue, whether the provision of our Accession Treaty, according to which Hungary may maintain local business tax allowances to an extent of at most 2 per cent of the tax base until 31st December, 2007 can be interpreted as a provisional exemption from the maintenance of the local business tax or the possibility of the maintenance of the local business tax allowances implies the further applicability of the local business tax. In case of a negative answer to the first question or more exactly, to the two partial questions, the County Court seeks answer to the question, whether according to the correct interpretation of the Sixth Tax Law Directive, according to which criteria can a kind of tax "qualify as not a kind of turnover tax".

The case joined to Kögáz Case has arrived from the Hungarian Supreme Court. In the *OTP Garancia,* the Supreme Court formulated its first question in a similar manner, but logically more precisely, than the Court referring in the Kögáz Case. Accordingly, the first question concerned the issue, whether the pertaining provision of our Accession Treaty concerning allowances in the local business tax can be interpreted as a provisional exemption from the maintenance of the local business tax or does that simultaneously imply that the possibility of the maintenance of local business tax allowances justifies the further maintenance of local business tax. In fact, the second question challenges the compliance of the disputed form of tax with Community Law, however, here again, the Supreme Court formulated its question more precisely: do we need to interpret the Sixth Tax Law Directive "in such a manner that it prohibits the maintenance of local business tax directed at the taxation of activities pursued with the aim of the acquisition of profit and income in the capacity of an undertaker, the main feature of which is that it is imposed on net income, so that it is reduced by the acquisition price of articles sold, by the value of certain intermediary services and by the cost of materials, that is, does such a tax with respect to this article qualify as sales tax."

Consequently, the question was whether the HIPA can be evaluated as type of VAT according to the Sixth Directive. If yes, the HIPA could be incompatible with the EC Law, because the Member States should maintain only one type of VAT in their taxation system. For this reason, the ECJ attempted to make comparison the character of HIPA to which of VAT. The ECJ regarting to this declared that the VAT is levied on individual transactions at the marketing stage and its amount is proportional to the price of the goods or

services supplied,[13] a tax such as the HIPA is, by contrast, based on the difference, calculated under accounting legislation, between the turnover linked to the goods sold or the services supplied during a fiscal period, on the one hand, and the purchase price of the goods sold, the value of the intermediary services and the costs of the materials, on the other. Since a tax such as the HIPA is therefore calculated on the basis of periodic turnover, it is not possible to determine the precise amount of that charge which may be being passed on to the client when each sale is effected or each service supplied, such that the condition that this amount should be proportional to the price charged by the taxable person is not satisfied. Moreover, the legislation on the HIPA includes, with regard to a number of situations, simplified rules, broadly based on a standard rate, for establishing the basis of assessment by reference either to the basis of another tax plus a fixed percentage (for sole traders and small agricultural producers), or to a fixed percentage of another tax (for undertakings subject to simplified business tax). The conclusion of the ECJ was that a tax such as the HIPA is not intended to be passed on to the final consumer in a way which is characteristic of VAT. It means that would not suffice to classify a tax such as the HIPA as a turnover tax within the meaning of the Sixth Directive, inasmuch as it is not levied on transactions in a manner comparable to VAT.

This standpoint declared by ECJ was not a surprise. Although in a very similar case concerning the Italian regional tax (irap),[14] it was considered incompatible with Community Law by the Advocate General, but the Court was later more permissive and did not accept the opinion of the Advocate General. Consequently, the characteristics of turnover taxes is strictly interpreted in the adjudicational praxis of ECJ.

It can be mentioned two other case concerning the HIPA regulation which were not joined with Kögáz and OTP Garancia cases. In the *OTP Bank Case* (C-195/07, *OTP Bank Rt. and Merlin Gerin Zala Kft. v. Zala Megyei Közigazgatási Hivatal*), the Zala Megyei Bíróság (County Court Zala) requested preliminary ruling proceedings. Since the subject of the petition is related to the local business tax, the two questions posed by the Court fully coincide with the formerly formulated ones related to the Kögáz Case. Due to the judgement of the Kögáz Case, the referring court has revoked its reference and the case has been cancelled.

[13] See by analogy: Case C 475/03 *Banca Popolare di Cremona* [2006] ECR I 9373, paragraph 30.

[14] The above referred Case C 475/03 *Banca Popolare di Cremona* [2006] ECR I 9373. I can be mentioned that Hungary has been concerned by this Italian Case as well, because the Government submitted observations.

The other case in this field was the *Vodafone Case* (C-447/06, *Vodafone Magyarország Mobil Távközlési Zrt., Innomed Medical Orvostechnikai Rt. v. Hungarian State, Budapest Főváros Képviselő-testülete, Esztergom Város Önkormányzat Képviselő-testülete*). The referring court was *Fővárosi Bíróság* (Municipal Court). In the questions referred, the Court asked whether the norms of Act of Accession, which allowed to Hungary to apply, up to and including 31 December 2007, local business tax reductions of up to 2% of the net receipts of undertakings, granted by local government for a limited period of time on the basis of Hungarian tax law, must be interpreted as meaning that it concerns a temporary derogation which allows Hungary to maintain the complete business tax until that time. The last question was significantly interesting. The referring court in this case asked the interpretation of ECJ on the practice of Hungary's first and second-level tax authorities, which has consisted in avoiding any examination of the compatibility with Community law of the local business tax (HIPA), by suggesting to taxpayers that they amend their tax returns by means of self-revision, thus making difficult or impossible the practical application of Community law and requiring taxpayers to initiate tax proceedings with uncertain consequences. Namely, the question referred to the compatibility of this administrative practice with Article 10 TEC implying the doctrine of so called 'loyal/sincere cooperation with the Community'.[15]

Unfortunately, the ECJ had not opportunity to pass judgement in this case. After having registered the case, the ECJ ordered to discontinue the procedure, because the referring Court informed ECJ about the appeal of the Parties in the main proceeding against the reference to preliminary ruling. Therefore, the referring court has revoked its reference and the case has been cancelled.

f) Pending cases

Two references from Hungarian courts are actually in process. In the *Cartesio Case* (C-210/06, *the case of Cartesio Oktató és Szolgáltató Bt. related to the registration of change*) the *Szegedi Ítélőtábla* (Court of Appeal Szeged) instituted proceedings related to the Decision of the *Cégbíróság* (Court of Company Registration), which had rejected the transfer of the seat of a limited partnership based in Baja to Italy. The petition for preliminary ruling propounded general

[15] Art 10 TEC: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

and specific questions. The general questions inquired into the issue, whether the Court of Appeal was entitled to refer a case of appeal against the decision of the Court of Company Registration to preliminary ruling to the European Court of Justice. On the other hand, can the Court of Appeal of Second Instance be considered a forum that proceeds in the last instance in re Community Law, scilicet, a court that is obligated to refer a case to the ECJ for preliminary ruling, if a question of interpretation arises. Finally, an interesting problem of procedural law was also exposed: can the entitlement of a court to request preliminary ruling be limited by the fact that an appeal against the decision suspending the proceedings and initiating preliminary ruling is admissible and the forum adjudging such an appeal may supervise this decision, that is, may instruct the court to continue the proceedings. The meritorious questions concerned the specific problems of the main proceedings, scilicet, whether on the basis of EC Law (the right of establishment) a company of a member state is permitted to transfer its seat into another member state and maintain its original nationality. The European Court of Justice registered the case and no further proceedings have been conducted till this time.

Concerning the meritorious question of the case, it is notable that according to the facts of the case of the main proceedings, the transfer of headquarters had not been deemed to be substantiated on grounds of the freedom to settle down in former cases in the adjudicational practice of the European Court of Justice. The transfer of seat and the maintenance of legal entity are deemed to be admissible exclusively in the framework of Community associations, such as European Company (SE, *Societas Europaea*) and European Economic Interest Grouping (EEIG).

The case mentioned at last in this section is connected with the EU's third pillar legislation. A reference for a preliminary ruling from the *Fővárosi Bíróság* (Municipal Court) has been lodged on 7 August 2007 relating to a criminal proceedings (*Katz Case,* C-404/07). The question submitted by the Hungarian Court concerns the compatibility the Hungarian criminal procedure law to the Council Framework Decision 2001/220 of 15 March 2001 on the standing of victims. The dilemma is given by a controversial norm of the Hungarian criminal procedure code which defines the main rules on the so called 'supplementary private prosecution' (a person who can sustain a charges instead of a public prosecutor in certain cases, *e.g.* if the public prosecutor withdraw it etc.). But according to an other general norm, it is forbidden a witness who was heard in a case, to act as a prosecutor in the same case. It means, if a victim was interrogated as a witness (that is often the case), this person would not act supplementary private prosecution in the same procedure. Despite this

Hungarian norms, the Council Framework Decision obliges the Member States to take measure on protect the rights of the victims.

III. Direct Petitions of Hungarian Individual Persons

a) Individuals before the ECJ

Another significant scope of proceedings conducted by the judicial forum in Luxembourg is constituted by proceedings instituted as a consequence of direct petitions. Individual persons may have recourse to the European Court of Justice with five specific types of petitions: with a view to the annulment of specific Community actions in case of direct concern, in case of institutional default, with a view to the compensation of damages incurred by the institutions of the Community and their employees during the accomplishment of their tasks, in case of legal disputes related to agreements concluded by the Community, so far as the European Court of Justice has been designated as an arbitration court, and in case of legal disputes concerning civil service between the Community and its employees.

Adjudication of the first four types of petitions is subject to the competence of the European Court of First Instance (cases registered as type "T"), whereas, in case of a petition of type 5, the Civil Service Tribunal is entitled to proceed (cases registered as type "F"). Upon the submission of direct petitions, representation by a lawyer is obligatory, appeals *vis-à-vis* the decisions of the Court are admissible. The following direct petitions have been submitted to the Court from Hungarian individual persons, scilicet, natural and legal entities.

b) Cases obviously inadmissible

In his action in the *Szolnoki Case* (T-193/05, *A. Szolnoki v. Hungary*), the plaintiff imputed various kinds of breaches of law to Hungary, the defendant, and requested the European Court to obligate the defendant to terminate its unlawful conduct. Before the Court could have reached a decision on the case, which would have by all means been a rejecting judgement with reference to the lack of jurisdiction, the plaintiff withdrew his petition and the case was cancelled from the register. The other case, in which the European forum had obviously no power to pass judgement, was *Varga Case* (T-203/05, *Zsuzsanna Varga v. Hungary/Greece*). On the basis of the action of the plaintiff, the Hungarian Court had obligated the father of the son of the plaintiff living in Greece to pay alimony. Since the implementation of this decision was thwarted

in Greece, the plaintiff took action at the Hungarian Court against the Republic of Greece by reason of alleged defaults during the implementation of the decision above by Greek authorities. Since the latter was also ineffective, she took direct action at the European Court and requested the establishment both of the fact that both Hungary and Greece violated several provisions of international and Community law pertaining to the recognition and enforcement of decisions in civil and commercial cases and of the obligation of those to pay a specific amount of money (practically a compensation equivalent to the amount of the alimony). Under its Judgement of 18th October, 2005, the European Court terminated its proceedings with reference to the obvious lack of its competence and to the fact that the European Court may exclusively decide on the compensation of damages incurred by Community institutions and their employees during the implementation of their duties. And finally, the third case followed by same consequences was the *Tóth Case* (T-153/07, *Tóth v. Hungary*). The case has been registered by the Court of First Instance. The complaint referred to several presumptive unlawfulness at a Hungarian university which caused injure to former student, Ms. Tóth. The proceeding is not closed yet, but its outgoing is absolutely not doubtful: the founding treaties and the Rules of Procedure of the Court do not guarantee individual persons the option of the submission of direct petitions *vis-à-vis* member states. In such cases, petitions are normally rejected by the Court of First Instance by reason of an obvious lack of competence. Supposedly, the Court of First Instance will order to reject this complaint.

c) Annulment procedures

The *Budapesti Erőmű Case* (T-80/06, *Budapesti Erőmű v. Commission*) is linked to proceedings concerning state subsidies. The plaintiff requests that the Court of First Instance annulled the decision of the European Commission to open a formal investigation procedure in the case of state subsidising of the costs of readjustment in Hungary, alternatively annul that decision, so far as it applies to the electric energy purchase agreements concluded by the plaintiff. The Commission decided on launching official proceedings concerning the contested decision on the assumed new state aid provided in the form of electric energy purchase agreements concluded between Hungarian electricity generators and the public Hungarian transmission operator. In its reasoning, the plaintiff refers primarily to a lack of competence, since according to its standpoint, it can be inferred from specific provisions of the Accession Treaty that the Commission has jurisdiction exclusively over state subsidies granted after the accession of the new member state. However, the electric energy purchase agreements had been concluded prior to accession and they are not applicable

after the accession. For the purpose of the justification of its action, the plaintiff refers to a manifest error of law and erronious discretion. According to its viewpoint, it cannot be objectively justified that the electric energy purchase agreements of the plaintiff do contain State Aid. According to the plaintiff, the Commission failed to assess the nature of these agreements, made an inadequate assessment of the notion of economic advantage, of the notion of distortion of the competition and impact on trade. The case has not been adjudged by the Court of First Instance before the completion of the present review.

The other example to this category is the *E.ON Case* (T-57/07, *E.ON Ruhrgas International AG and E.ON Földgáz Trade Zrt. v. Commission*). In their pleas, the plaintiffs requested the partial annulment of specific documents of the European Commission proceeding as a competition authority. In a competition authority procedure, the Commission declared that the acquisition of two Hungarian gas companies by the applicant E.ON Ruhrgas International AG was compatible with the common market and the functioning of the Agreement on the European Economic Area on condition that the parties concerned complied with certain conditions and obligations. As one of the obligations, the plaintiff, E.ON Ruhrgas International AG undertook to organise and implement a gas release programme on the Hungarian market. Furthermore, the initial auction price was to be set at a definite rate of the weighted average cost of gas, so that the applicants did not suffer aggregate losses. In the contested letters, the Commission indicated that the losses made by the applicants in a given auction should be offset by any profits made by the plaintiffs in other auctions. Nevertheless, the applicants contest this and are of the opinion that losses which result from gas release auctions do not need to be offset by potential profits that may derive from future auctions. In support of their arguments, the applicants maintain that the Commission has no legal basis for increasing the financial burdens and thereby, subsequently, change the legal obligations deriving from a former related decision. Furthermore, the applicants contend that the Rules of Procedure of the Commission have been infringed, namely, neither have all the members of the Commission deliberated on the content of the two contested letters, nor has there been a proper delegation of powers to the Directorate General of the Commission. The Court of First Instance has not reached a judgement until the completion of the present review.

d) Civil servants before the ECJ

Quantifying the cases in context with Hungary in point of numbers, its considerable part concerns legal dispute civil servants belonging to the

institutions of the EU. In the following section will be mentioned examples to this type of procedure.

The plaintiff in the *Lesetár Case* (T-453/04, *Péter Lesetár v. European Commission*) intended to undertake employment in an institution of the Community, therefore, he took written and oral entrance examinations. According to his standpoint, the evaluation of his written exam notably underevaluated his performance, furthermore, the oral exam was not adequately conducted. For that reason, he requested in his petition that the Court of First Instance changed the decision of the admissions committee, he was taken in employment and that the Court ordered the payment of his average salary for the lagging time. The Court cancelled the case from the register without conducting the proceedings. In the *Tóth Case* (F-107/05, *Gergely Tóth v. European Commission*), the plaintiff's complaint pertained to his placement on the payroll and his civil service grade as an employee. He challenged his placement with reference to his standpoint, according to which on the one hand, the substantiating Staff Regulations cannot be applied to temporary employees, on the other hand, that it violated equal treatment. He also referred to discrimination on the basis of citizenship and to the infringement of the free movement of employees, since the citizens of new member states are by all means appointed according to more unfavourable provisions. He requested his replacement and a compensation for pecuniary and non-pecuniary damages. The Civil Service Tribunal suspended the proceedings under its Ruling of 6th April, 2006, until a decision in a similar case is passed. The plaintiff in the *Borbély Case* (F-126/05, *Andrea Borbély v. European Commission*) had been formerly employed by the Ministry of Foreign Affairs of Hungary. She was appointed for probation as an official of the European Commission. According to her petition, she had requested her employer to grant her benefits and the reimbursement of travel expenses due on various titles according to the Staff Regulations, however, the Commission rejected this. The Civil Service Tribunal, which had jurisdiction in the proceedings, partially justified the claims of the plaintiff under its Judgement of 16th January, 2007. It considered her claim for installation allowance and daily subsistence allowance substantiated, therefore, it instructed the employer of the plaintiff, i. e., the European Commission to retrospectively compensate the plaintiff for these benefits supplemented by the amount of the interests.

Mr. Simon attempted to claim in two separate proceedings law. In the *Simon I. Case* (F-58/06, *Balázs Dániel Simon v. Court and Commission*), the plaintiff was employed by the European Court as an official being a lawyer-linguist, then he submitted an application to the European Commission for a post. The Commission selected the plaintiff for the position, who requested the Court to transfer him to the European Commission, however, the Court rejected

the repeated requests of the plaintiff, who subsequently lodged an appeal to the Civil Service Tribunal to annul the latter decisions with reference to the deficiencies of the reasoning, obvious errors of discretion and abuse of competence. He also referred to the infringement of the principles of the protection of legitimate expectations and of non-discrimination as legal bases of the annulment. Finally, the plaintiff revoked his action, and subsequently, the Tribunal terminated the proceedings under its Judgement of 15th March, 2007. In the second claim (*Simon II. Case* (F-100/06, *Balázs Dániel Simon v. Court and Commission*), the plaintiff requested that specific decisions of the authority entitled to the appointment were annulled, so far as they deprived the plaintiff of his rights deriving from his appointment to a probationary official (his seniority and grade), as well as of his rights deriving from the confirmation in his position. His reasoning was based on the principle of the prohibition of declining the rights secured under the Staff Regulations, the prohibition of the infringement of obtained rights and the prohibition of the abuse of authority. He explained in his petition that he did not intend to abandon the staff of officials, but wished to change his workplace and sphere of activity, thereby, he would not have lost his obtained rights. The plaintiff later revoked his action, consequently, the Tribunal terminated the proceedings under its Judgement of 15th March, 2007 and prescribed the cancellation of the case from the register.

Lastly, one should refer to the *Dálnoky Case* (F-120/06, *Noémi Dálnoky v. Commission*). Although, in this case the plaintiff is of Romanian nationality, in her claim, she expressly refers to her Hungarian ethnic origin and mother tongue, furthermore, the subject-matter of the case is also related to that aspect, therefore, it is expedient to consider the case to have Hungarian implications. In her plea in law, the plaintiff requested that the Civil Service Tribunal annulled the notice of the European Personnel Selection Office (EPSO) for an open competition aimed at the employment of inter alia counsellors of Romanian citizenship. On the other hand, she requested that the defendant be ordered not to advertise or conduct a competition in the future, according to which the Candidate was expected to have a thorough knowledge of a specific language of the Community, but it should require the thorough knowledge of any language of the Community, disregarding the case, when the knowledge of a specific language is required with regard to the specific nature of the position to be filled. In case the competition requested to be cancelled would be conducted before the decision of the Civil Service Tribunal is passed, she requested that EPSO was obligated to eliminate all disadvantages suffered by the plaintiff or other persons concerned by reason of the discriminatory provision of the notice of the competition (e.g., announcement of a new opportunity for those, who had

been discouraged from the submission of an application by the discriminative provision mentioned above.)

According to the plaintiff, who is of Hungarian ethnic origin and has a Hungarian mother tongue, the contested announcement violated Community Law, since it required that candidates had a thorough knowledge of Romanian. In other words, the announcement violated the right of the plaintiff to equal treatment and the prohibition of discrimination based on nationality, since Romanian citizens with Romanian mother tongue were unreasonably advantaged. Furthermore, according to the reasoning of the plaintiff, the announcement enforced discrimination on grounds of nationality prohibited under Staff Regulations and Article 12 EC, so far as a number of notices for competitions published in the past had permitted the nationals of certain member states to prove the thorough knowledge of an official language of the Community, other than the main language of the member state of which they were nationals. Furthermore, she also mentioned that the announcement of the competition included a requirement precluded under the Staff Regulations, that is, the Staff Regulations permits the prescription of the thorough knowledge of a specific language (cf. any language) of the Community as a requirement, if that is specially necessitated by the position or if that is justified by another impartial and lawful objective. Besides, in a special plea, the plaintiff requested as an interim measure that the Civil Service Tribunal suspended the contested application procedure, until a decision on her plea in the main proceedings was reached.

The Civil Service Tribunal has rejected the plaintiff's plea for interim measures under its Judgement of 14th December, 2006. Then, on 27 September 2007 has ordered that the action of the plaintiff is manifestly inadmissible. As the most important argument, the Tribunal has referred to the too late submit of the plaintiff's claim. The Tribunal pointed out that according to the Staff Regulations, a notice of competition is an act drawn up by the appointing authority. Thus, the challenging of a notice of competition must be preceded by a complaint lodged, in accordance with the Staff Regulations, an action before the Tribunal must be brought within three months of the date of notification of the decision taken in response to the complaint. This time limit is to be extended on account of distance by a single period of 10 days. However in the present case, the Tribunal has found that, the main action was brought after the expiry of the time-limit for doing so.

IV. The Republic of Hungary in a position of a defendant or a plaintiff

a) The procedures concerned

At the European Court of First Instance, any member state including the Republic of Hungary may take action as plaintiff related to complaints against the Commission, furthermore, in issues of state subvention and of commercial protective measures *vis-à-vis* the Council and in proceedings launched following petitions submitted against measures taken by the Council as an executive power. Before the European Court, member states can come up both as defendants and plaintiffs. In proceedings instituted for the purpose of the establishment of a breach of obligation by a member state, the Commission shall proceed as plaintiff *vis-à-vis* the Member State, disregarding the exceptional case, when in lieu of the Commission, another member state initiates proceedings by reason of a breach of obligation. As a matter of course, in such a case, the latter member state will proceed as plaintiff. Furthermore, member states may take action as plaintiffs before the European Court, if they submit a petition with a view to the annulment of an institutional action or to the establishment of an institutional default, or, in case of appeals against the Judgements of Court of First Instance.

b) Criteria of the quality for maize: the first victory of Hungary

In its first direct action, namely in the *Case* T-310/06 (*Republic of Hungary v. Commission*), the Republic of Hungary requested the partial annulment of specific rules pertaining to maize intervention affecting domestic producers expressly detrimentally. According to the reasoning of Hungary, the Commission breached the legitimate expectations of the producers by introducing during the financial year a requirement relating to the specific weight of maize. Furthermore, the Commission failed to take account of the principles of legal certainty and proportionality and the requirement of gradual adjustment, which are incompatible with the inordinately short preparatory period between the date of publication and the date of entry into force. As a conditional viewpoint, the plea of Hungary mentioned that the Commission did not have the authority to lay down the requirement relating to the specific weight of maize. In case the lack of authority cannot be justified, the plea refers to an abuse of power, scilicet, the Commission exceeded its powers, when it substantially altered the intervention regime for maize in practice, under the pretext of amending the qualitative parameters for intervention. Notwithstanding, even if the Commission was empowered to lay down the requirement relating to the specific weight of

maize, according to the Hungarian standpoint, the Commission made a manifest error of assessment by establishing a criterion for the average quality of maize, since it did not take account of the fact that the maize produced in the Community is mainly used for fodder. We have already referred to the fact that the Commission has failed to fulfil its obligation under Article 253 EC to state the reasons on which legal acts are based and has also infringed the procedural rules of the Management Committee for Cereals in not respecting the time limit laid down by those rules.

Hungary, the applicant requested the expedition of procedures as a provisional measure, which was rejected under the Judgement of the Court of 16th February, 2007. The Court acknowledged the argument of the applicant that the date on which the contested provisions entered into force took producers by surprise, for they had reasonably expected to have time in which to adjust to the introduction of such a novel obligation. On this too late date, the producers had no opportunity to modify their structure of production. Because of the short period of the introduction, the Hungarian producers, even if prudent and circumspect, could not, for want of prior information, reasonably have expected that the variety of maize sown and the technology used would no longer enable them to produce maize meeting the quality conditions for buying in intervention. Although farmers produce for the free market, the conditions for intervention buying nevertheless influence their financial decisions. Moreover, the Court pointed out that the Regulation of the Commission does not state clearly and expressly that the introduction of the criterion of specific weight for maize is intended, in addition to the need to ensure consistency with the rules applicable to other cereals, to upgrade the quality criteria for maize. Consequently, the explanations furnished by the Commission during the proceedings, to the effect that specific weight forms a relevant criterion of quality, do not reflect the fundamental reason for the introduction of that criterion as it appears from a close reading of the Regulation. Besides, according to the Court's decision, the Commission was not able to dispel the established contradiction, with the result that not only is its claim that specific weight reflects the nutritional value of maize not supported by any evidence but it constitutes, moreover, a manifest error of assessment in light of the only evidence available to the Court in these proceedings. After that all, the Court declared that the Regulation is vitiated by a manifest error of assessment and the claimed provisions of the Regulation relating to the criterion of specific weight for maize must be annulled.

c) Infringement procedures against Hungary

The first case opened by the Commission was *Case* C-30/07 (*European Commission v. Republic of Hungary*). The proceedings were related to defaults of legal harmonisation and notification. According to the plea of the Commission, the defendant, i. e., the Republic of Hungary did not comply with its obligations deriving from Council Directive no. 2003/109/EC concerning the status of third country nationals who are long-term residents in Hungary, since it failed to adopt respective and compliant law, decrees and administrative provisions and to inform the Commission thereof. The period prescribed for the implementation of the directive in national law expired on 23rd January, 2006. After the Hungarian *Országgyűlés* (Parliament) have passed the required modifications of law at the close of the year 2006, the Commission revoked the claim and the ECJ ordered to cancel this case from the register.

The other infringement procedure, the *Case* C-148/07 (*European Commission v. Republic of Hungary*) was initiated by the Commission before ECJ also because of reason of the breach of obligations deriving from legal harmonisation. Namely, the Commission requested the establishment of the fact that the Hungarian law-maker, by failing to eliminate the restrictions to the provision of cable television services imposed by Para. (4) of Article 115 of Act I of 1996 on Radio and Television, failed to fulfil its obligations under Commission Directive no. 2002/77/EC on Competition in the Markets for Electronic Communications Networks and Services. According to the Commission, pursuant to the above-mentioned law, the Republic of Hungary failed to fulfil its obligations under the above-mentioned directive by restricting the right of cable television service providers to broadcast programmes, so that in territorial coverage it is no more than one third of the population. The obligation of transposing the directive should have been fulfilled by the date of our accession to the EU, scilicet, the period prescribed for transposing the directive into national law expired on 30th April, 2004. The default of the Hungarian legislative organs was also in this case quiet evident. *Országgyűlés* has modified the act complained, then, the claim was revoked and the procedure terminated.

V. Conclusion

From the foregoing it will be seen that the embedment of the Hungarian adjudicational system in the Courts of the European Union is possibly more noteworthy than that was expected before the accession. The participation is especially outstanding in the preliminary ruling procedures. In the first three

years period of our membership, the number of cases referred by Hungarian courts counts almost so much as which of preliminary ruling procedure referred by the other 9 Members States acceded with us in 2004 (Hungary's had 11 references, the other nine Member States had altogether 14 between 2004–2007). Consequently, it can be declared, that Hungarian courts refer most actively to ECJ for interpretation of EU Law within preliminary ruling procedure among the countries of the region, even if the major part of the cases described in this essay were in connection with the local business tax (5 cases) and with registration tax imposing on cars (2 cases). Generally, these preliminary ruling procedures referred by Hungarian courts were well and profoundly prepared, only one case may be regarded as an example for unconsidered reference: in Vajnai Case concerning the use of totalitarian symbols, the ECJ has not examined the substance of the case but refused the request for obvious lack of competence.

The cases relating to procedures initiated by individuals are not of importance until now but one consequence can be formulated. As the cases Varga and Szolnoki have shown the attorneys representing the individuals have significant responsibility for avoid to lodge unnecessary requests before ECJ. In these cases previously mentioned, the plaintiffs claimed for such cause of action which is unquestionably outside the jurisdiction of the ECJ (action for damages against Member States etc.). These cases cause not only superfluous work and costs for ECJ but it gives an awkward evidence of attorney's imperfect professional skills.

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Constitutional Rights: Horizontal Effect and Anti-discrimination Law in Hungary

Abstract. This contribution aims to examine how the Hungarian Constitution applies in private relations through judicial activity and how the anti-discrimination legislation influences this tendency. The current codification procedure of the new civil code calls for a thorough theoretical background in order to answer how its provisions relate to the Constitution. After the general overview of the practice of courts and the Constitutional Court, the criticism of scholars developed on the issue will shed light on the weaknesses, but in spite of them, the overall success of the theory of indirect horizontal effect. The paper will also deal with the horizontal effect of a specific constitutional right, namely the right to equal treatment. I examine the fairly new legal instrument, the act on the prohibition of certain forms of discrimination, and demonstrate how this new practice influences the idea of horizontal effect in constitutional law and what implications it has on the new Civil Code afoot. I argue that the act at first sight exists independently from the requirement of horizontal application of fundamental rights, but, in fact, it implicates the necessity to reconsider in its light how the Constitution applies in private relations.

Keywords: constitutional law, horizontal application, anti-discrimintation legislation

The problem of horizontal effect of constitutional norms[1] arises in many modern democracies.[2] The legislative, the judiciary and constitutional courts seek answers concerning the nature of the modern protection of fundamental rights: what does the constitution command in the judicial assessment of private relations? How are constitutional rules binding if they are binding at all in certain private private relations? How constitutional rules apply exactly in private relations?

The doctrine of horizontal effect is primarily based on the recognition of the dangers posed to human rights by private entities. It is evident that states can

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[1] This problem is referred to in the literature also as horizontal applicability, third-party effect which is a literal translation of the German expression 'Drittwirkung.' All of those terms express the applicability of the constitution in private relations.

[2] E.g, Sajó, A.–Uitz, R. (eds.): *The Constitution in Private Relations: Expanding Constitutionalism.* Utrecht, 2006.

always implement rules in order to protect defenseless individuals from the derogatory conduct of other private entities, as far as this does not contradict the constitution: private law provisions bring good examples for this and the fairly new anti-discrimination legislation also belongs to this category. As the state has this regulatory power, in most of the cases it is not necessary to invoke one's fundamental rights granted by the Constitution in legal debates, but it is enough to call a statutory provision when seeking legal protection. The horizontal effect of constitutional rights is thus a "residual category", which means that the horizontal application of constitutional rights occurs only if ordinary legislation fails to protect fundamental rights.[3] Therefore, the relation of the anti-discrimination legislation and the traditional concept of third party effect is of high interest. The aim of this essay is–regarding the contribution to the debate on how far the constitution applies in private relations–to discover this nexus, and draw the attention to the different context that the new anti-discrimination legislation created for the assessment of the implications of horizontal effect. This analysis will lead to the consideration of the controversies emerging in the codification process of the new Civil Code.

1. The constitution in private relations

The debate in Hungary on the issue of horizontal applicability of the constitution is fairly heated, with special regard at the present codification process of the new Civil Code.[4] The fairely new act on equal treatment and the promotion of equal opportunities[5] adds some interesting additional information to the discussion.

Some authors argue in Hungary that direct horizontal applicability is desirable to develop[6] to gain the full protection of constitutional rights as the Constitution itself suggests, some others contest in favor of the autonomy of

[3] Tushnet, M.: The relationship between judicial review of legislation and the interpretation of non-constitutional law, with reference to third party effect. In: Sajó–Uitz (eds.): *op. cit.* 169.

[4] Vékás, L.: *Az új Polgári Törvénykönyv Elméleti Előkérdései* [The theoretical preliminary problems of the new civil code]. Budapest, 2001.

[5] Act CXXV of 2003 On Equal Treatment and the Promotion of Equal Opportunities, MK 2003/157. XII. 28.

[6] Halmai, G.: Az Alkotmány mint norma a bírói jogalkalmazásban [Constitution as legal norm in jurisprudence]. *Fundamentum* 2 (1998) 77; Kovács, K.: Emberi jogaink magánjogi viszonyokban [Expanding the prohibition of discrimination in the European Convention of Human Rights]. *Fundamentum* 2 (1998) 85.

the civil law, and the impossibility of any kind of third-party effect of the Constitution.[7] The advocates of the indirect horizontal effect state that the German model, Drittwirkung, would possibly suit the Hungarian system.[8] Legal practitioners often find arbitrary solutions in individual cases due to the lack of adequate guidelines.[9]

As to the origins of the problem we must note the following. The first written constitution in the United States was undoubtedly drafted with the aim to govern the relationship of the state and its citizens. The Bill of Rights incorporates limitations on the competencies of the Congress concerning some fundamental rights of citizens, but does not contain any requirement concerning private relations.[10] In the United States, even these days, only the Thirteenth Amendment which prohibits slavery has direct horizontal effect,[11] while in other cases, the "state action doctrine"[12] applies. However, in spite of the clear lack of mandate to apply the Constitution in private relations, U.S. courts tend to find state action in more and more dubious situations.[13] The German social state answers the question of horizontal applicability differently. In the famous LüTh decision,[14] the German Federal Constitutional Court (GFCC) declared that besides individual and collective rights, the post-war 1949 German Constitution incorporates an objective order of values as well. These objective values are present in the entire legal system, thus courts are constitutionally obliged to interpret all norms that apply to private relations in the light of the Constitution.[15] These two examples provide us with two entirely different solutions to our question, namely the role of constitutional norms in private relations.

[7] Vincze, A.: Az alkotmány rendelkezéseinek érvényre juttatása a polgári jogviszonyokban [Enforcing constitutional rules in private relations]. *Polgári Jogi Kodifikáció*, 6 (2004) 3.

[8] Vékás: *Az új Polgári Törvénykönyv... op. cit.* and Sonnevend, P.: Az alapjogi bíráskodás és korlátai [Basic rights adjudication and its limits]. *Fundamentum*, 2 (1998) 79.

[9] Halmai, G.–Tóth, G. (eds.): *Emberi Jogok* [Human Rights]. Budapest, 2003. 224.

[10] *Ibid.*

[11] Tribe, L. H. (ed.): *American Constitutional Law.* St. Paul, Minn. 1988.

[12] E.g. Stone, G. R.–Seidman, L. M.–Sunstein, C. R. et al.: *Constitutional Law.* Boston, 1993. State action doctrine means that the Constitution directly applies if the court finds that the violation is imputable to the action of a state organ, or it occurred while a private actor fulfilled a state obligation.

[13] E.g. Tribe, L. H.: *Constitutional Choices.* Cambridge, Mass. 1985.

[14] *Bundesverfassungsgesetz,* 198 (1958).

[15] Kommers, D. P.: *The Constitutional Jurisprudence of the Federal Republic of Germany.* Durham, North Carolina, 1989.

Similarly, we could mention as further examples Ireland[16] and Poland,[17] where constitutional norms have direct horizontal effect, or Slovakia, where neither ordinary courts nor the constitutional court or the legislature accept that constitutional rights have any effect on private relations.[18] As to the European Union: the „ECJ has developed a limited doctrine of horizontal direct effect for some legal provisions of the Treaties. The principles of non-discrimination on grounds of sex and nationality and the fundamental freedoms–as far as powerful social associations confronting the individual are concerned–have a horizontal direct effect in this jurisdiction."[19]

1.1. The perception of the Hungarian Constitutional Court and ordinary courts

Examining Hungary, an example of the young democracies of Central Eastern Europe, we cannot find final answers for the question of horizontal applicability. The Constitutional Court has never been clear on the general scope of the protection of fundamental rights. However, it implemented the doctrine of the objective institutional protection of fundamental rights.[20] In the 64/1991. AB decision, which dealt with the constitutionality of abortion, the Constitutional Court declared the following: "The state's duty to respect and to protect subjective fundamental rights is not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the condition for their realization."[21]

The Constitutional Court accepts that there is a burden on the state to act as a protective entity of human rights, in some cases in horizontal as well as in vertical relations; however it is not clear to what extent and in what way the

[16] Casey, J. P.: *Constitutional Law In Ireland.* 2. ed. Dublin, 1992.

[17] Kühn, Z.: Making Constitutionalism Horizontal: Three Different Central European Strategies. In: Sajó–Uitz (eds.): *op. cit.* 231–235.

[18] *Ibid.* 229–231.

[19] Case 43/75, Defrenne II v. Sabena, 1989 E.C.R. 455, para. 40; Case 36/74, Walrave v. Ass'n Union Cycliste Internale, 1974 E.C.R. 1405, paras. 16,19; Case 415/93 Union Royal Belge des Societes de Football Ass'n v. Bosman, 1993 E.C.R. I-4921, para. 82; Case 281/98, Agonese v. Cassa di Risparmio di Bolzano SpA, 2000 E.C.R. I-4139, paras. 30–36.

[20] Halmai, G.: The third party effect in Hungarian adjudication. In: Sajó–Uitz (eds.): *op. cit.* 104.

[21] 64/1991. (XII. 17.) AB határozat, *Az Alkotmánybíróság Határozatai,* 1991. 297, 302 translated by Halmai: *ibid.* 104.

state should protect the individuals against each other. Taking a clear stance on these issues has always been postponed so far.[22]

The Constitution contains several articles about the rights of the judiciary in Article 50 and 57.[23] However, article 70/K., in the chapter of fundamental rights and obligations, is in the center of the debates concerning the issue of horizontal effect. It states the following: "claims arising from infringement on fundamental rights, and objections to the decisions of public authorities regarding the fulfillment of duties may be brought before a court of law".

Art. 70/K. is a rule that creates competence for the courts in case of the infringement of fundamental rights. However, the debate concerns the question if it declares that courts have to defend fundamental rights also in case of a conflict between private individuals where no other legal instrument applies. This controversy is rooted in the wording of this article, though it is quite clear that the intent of the framers was not as broad as to imply that the courts should apply constitutional provisions directly or indirectly.

The Constitutional Court declared in its decisions, defining the content of this article that this rule is not even as broad as to open the courts door in front of all claims concerning rights violation of state actors.[24] Hence, it is striking that the Constitutional Court has also never thought about the possibility of getting the judiciary to protect horizontal violations by referring to this article

[22] Holló, A.–Balogh, Zs. (eds.): *Az értelmezett alkotmány* [The constitution interpreted]. Budapest, 2005. XII. chapter.

[23] Art. 57 (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.

(5) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions, which infringe on his rights or justified interests. A law passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time.

50. § (1) The courts of the Republic of Hungary should protect and uphold constitutional order, as well as the rights and lawful interests of natural person, legal persons and unincorporated organizations, and should determine the punishment for those who commit criminal offenses.

(2) The courts should review the legality of the decisions of public administration.

(3) Judges are independent and answer only to the law. Judges may not be members of political parties and may not engage in political activities.

[24] 46/1994. (X. 21.) AB határozat. *Az Alkotmánybíróság Határozatai*, 1994. 260, 267–268; 998/B/1994. AB határozat. *Az Alkotmánybíróság Határozatai*, 2005. 752, 753.

where no other legal instrument applied. In sum, the meaning of this article is definitely diffuse, but could undoubtedly serve as a possible basis if the Constitutional Court wishes to hold that the judiciary is obliged to protect constitutional rights in private relations even if there is not any other applicable law.

However, in this case the Constitutional Court would face, as the German type real constitutional complaint does not exist in Hungary,[25] the problem that it cannot supervise and thus standardize constitutional interpretation. Presently, the Constitutional Court does not have the right to override and repair statutory or, in some courageous cases, constitutional interpretation of ordinary courts, while the ordinary courts does not seem to be competent to decide purely on grounds of constitutional provisions. They usually reject claims based only on the infringement of a constitutional right,[26] usually require a reference to a statute or a sub-statutory legal instrument to handle the case in the merits. Once, for example the state prosecutor argued that courts should take into consideration all legal arguments; hence the Constitution should also apply in private relations. The Supreme Court in its judgment replied that it was the exclusive competence of the Constitutional Court to interpret the Constitution and the task of the ordinary courts are to use all valid, thus presumably constitutional legal instruments.[27]

Several times ordinary judges interpret the Constitution together with the applicable legal rule,[28] though usually do not name constitutional provisions. As the Civil Code, for example, in Art. 76 contains provisions on inherent personality rights,[29] the violation of these rights violates the Constitution as

[25] With the adjective "real" we distinguish here the German and the Hungarian type constitutional complaint, because in Hungary the applicants can solely turn to the Constitutional Court asking for the annulment of the legal instrument applied in their very case, and demand the Constitutional Court to prohibit the application of that unconstitutional law in the case retroactively, but can not ask for the supervision of the constitutionality of the legal procedure, and the interpretation of the ordinary court. Act 1989. XXXII. Art. 48.

[26] Halmai: The third party effect... *op. cit.* 106.

[27] BH 1994. I.

[28] E.g. Gazette of the Supreme Court 1992/14. BH1997. 489; BH 1998. 132; PKKB 29.P.87.533/1996/4. find this in Halmai: The third party effect... *op. cit.* 109.

[29] See Chapter VII of the Civil Code (Act. IV of 1959), the ban on discrimination between individuals according to sex, race, nationality and religion, and prohibition of infringements of personal honor and human dignity.

well. Judges deciding these cases, however, almost never refer to the Constitution, but merely to the Civil Code.[30]

There are only few exceptions which show that the practice of the courts is not carved in stone. In an abortion case in 1998, the judge referred to the right to life provision of the Constitution and based its decision on the fetus's right to life, though no Hungarian statute declared this standpoint, and this view is inconsistent with the interpretation of the Constitutional Court.[31] In another case the issue was gender discrimination in an employment matter. Here the court succesfully referred directly to the constitutional provisions without naming any civil law rule.[32]

These cases shed light on the perils of direct application of constitutional rules, show that there is not any guarantee for an interpretation consistent with the jurisprudence of the Constitutional Court. In the lack of the German type real constitutional complaint when the parties can question the constitutionality of the statutory interpretation of ordinary courts, and the Constitutional Court can revise the decisions of ordinary courts, it is probably not feasible to provide reliable, calculable decisions to the parties seeking the protection of the law.

Although judges usually do not adjudicate pure constitutional matters, in the flow of interpretation they are obliged to interpret the provisions of the legal instruments in conformity with the Constitution. Although this duty is not explicitly stated in any legal instrument, it follows from the competencies of the courts and the legal status of the Constitution as the basic law of Hungary, declared in the last provision of it.

I argue that the means in the Hungarian legal system and legal thinking are sufficient to talk about the indirect horizontal effect of constitutional rights. Although this interpretation does not have a binding force, a slight effort is enough to affirm this theory, because every step of the Constitutional Court and ordinary courts points towards this direction. Ordinary courts if open-minded are capable to carry out statutory interpretation in accordance with constitutional requirements.

[30] See e.g. Góman case, a Roma who was not served in a restaurant, *Fundamentum* 2 (1998) 133; Roma schoolchildren segregated graduation ceremony case, *Fundamentum* 3 (1999) 124.

[31] For the full text of the judgement see *Fundamentum*, 2 (1998) 73. Comments on the decision e.g. Halmai: Az Alkotmány mint norma... *op. cit.* 77. Hanák, A.: Egy különös abortusz után [After a strange abortion]. *Fundamentum*, 2 (1998) 82.

[32] Gender discrimination regarding the admission criterias to a job, *Fundamentum*, 4 (2000) 72.

Art. 38 of the 1989. XXXII. Act on the Constitutional Court ensures that judges can initiate the constitutional review of legal instruments to be applied in the pocedure with the suspension of the case. Under the present rules, judges cannot deny the application of allegedly non-constitutional provisions, but are obliged to refer the case to the Constitutional Court in case of alleged unconstitutionality so that it decides on the constitutionality of the legal instrument. The parties can also initiate this step in the procedure. This would be an excellent vehicle to guarantee not only the constitutionality of the legal instruments,[33] but the constitutional interpretation of the law as well. Ordinary judges must have the right to ask for a constitutional interpretation of the law, if any doubt emerges.

Furthermore, the "law in action doctrine" existing in the jurisprudence of the Constitutional Court, namely that the Constitutional Court can examine and invalidate law if there is a *tendency* of unconstitutional interpretation, approves and helps to secure the guarantees of indirect horizontal effect. The roots of this idea imply the acknowledgment of indirect effect of the Constitution, namely the requirement that ordinary courts interpret legal norms in conformity with the Constitution. This doctrine was quite neglected for a lond time and is rarely used in present jurisdiction as well, however forms the bases of some recent decisions, where the Constitutional Court declared unconstitutional and invalidated the guiding decisions of the Supreme Court, obligatory to lower courts.[34] This jurisprudence also helps to secure the constitutional interpretation of ordinary courts, because the Constitutional Court is able to act if the judiciary is on the wrong track.

In sum, on the surface both the standpoints of ordinary courts and the Constitutional Court are unclear on the issue of horizontal application. However, this overview suggests that the explicit introduction of indirect horizontality would not meet much resistance while it is already comfortable for the actors of the Hungarian courts.

1.2. Scholars' arguments

Having all this in mind, we examine the three main positions taken by Hungarian scholars regarding the horizontal application of constitutional rules de lege ferenda: one argues in favor of the exclusively vertical nature of the

[33] See examples to these motions *in* Uitz, R: Egyéni jogsérelmek és az Alkotmánybíróság [Violation of individual rights and the Constitutional Court]. *Fundamentum* 3 (1999) 39.

[34] 42/2005. (XI. 14.) ABH 2005. 504.

Constitution, and the other two represents direct and indirect horizontal application of it.

János Sári denies the horizontal applicability of the Constitution. He argues that Article 70/K. of the Constitution refers only to the infringement of fundamental rights by governmental bodies, but definitely does not include the right to issue a claim when the fundamental rights of a person are infringed by another private person. Hence the only possible textual ground on which horizontal applicability could be introduced into the Hungarian legal system is not a sound one.[35] Albert Takács's view is slightly less radical, although it leads us in the same direction. He states that it is not possible that ordinary courts base their decisions on the Constitution because practically the statutes must be able to govern private relationships. He claims that under Art. 32/A. of the Constitution, the Constitutional Court is the sole body that may decide on questions of constitutionality. He argues that 70/K. of the Constitution would be applicable only if there were no statutory provisions on fundamental rights, but in this case referring merely to constitutional provisions theoretically would also mean that statutes must be regarded as invalid when they conflict with the Constitution which is not acceptable under the current Constitution.[36]

Contrary to this, Gábor Gadó and Gábor Halmai suggest introducing direct horizontal effect in the Hungarian legal system, where judges may freely interpret the Constitution and disregard unconstitutional rules,[37] what is more, judges should be empowered to base their judgments merely on constitutional provisions. Halmai argues that only the holding of the Constitutional Court's judgments should be binding on everybody, while the reasoning of the decisions, containing the interpretation of the Constitution, should not. The interpretation of the Constitution should belong to the competence of ordinary courts as much as to the Constitutional Court.[38] He also suggests the implementation of the the German type "real constitutional complaint" as a new competence for the Constitutional Court. This solution would bring a similar solution as the one of the German Constitutional Court, where the applicants

[35] Sári J.: *Alapjogok.* Alkotmánytan II. [Fundamental Rights. Constitutional law II], Budapest, 2000. 278.

[36] Takács, A.: Kinek feladata az alkotmány közvetlen alkalmazása? Fórum, [Whose task is the direct application of the constitution? Forum] *Fundamentum,* 2 (1998) 50–56.

[37] On the same opinion see Hanák A.: Egy különös abortusz. *op. cit.,* Halmai: Az alkotmány mint norma... *op. cit.* 77–81.

[38] *Ibid.*

may turn to the Constitutional Court if the law was presumed to be constitutional, but applied in an unconstitutional manner.[39]

Halmai also argues that Art. 77 § (2) of the Constitution implies that judges have to apply the Constitution as much as other rules of the legal system,[40] while others suggest that Art. 77 (2) requires a different interpretation principally because of its historical background.[41] Regarding the Supreme Court decision which stated that solely the Constitutional Court can interpret the Constitution,[42] a counterargument may be that Art. 32/A. of the Constitution[43] does not require the exclusivity of the interpretative power, but purely wishes to fix the exclusive competence on the annulment of unconstitutional legal instruments.[44]

Gábor Attila Tóth suggests that ordinary judges have the right to interpret the Constitution and apply it directly in the decision-making process, although this solution would require the implementation of the German type real constitutional complaint.[45] Krisztina Kovács also argues in favor of the direct horizontal effect of the Constitution. She states–sharing the view of Gábor Kardos–that the fundamental feature of rights requires their direct applicability in private relations as long as it does not interfere with the constitutionally protected sphere of private autonomy. This is how one may gain the full protection of fundamental rights.[46]

Zoltán Lomnici is also in a fight for the rights of ordinary courts to interpret and take constitutional provisions into consideration while carrying out judgments. He respects the separation of powers between ordinary courts and the Constitutional Court, however finds necessary in certain cases to base ordinary court decisions solely on constitutional provisions. He bases his argument on Art. 70/K. of the Constitution, which he interprets as establishing the powers

[39] Halmai G.: The third party effect in Hungarian adjudication. *op. cit.* 112.

[40] Halmai G.: Az Alkotmány mint norma... *op. cit.* 77–81.

[41] Sonnevend: Az alapjogi bíráskodás. *op. cit.* 79–84.

[42] See BH 1994. I.

[43] Constitution 32/A. (1) The Constitutional Court should review the constitutionality of laws and attend to the duties assigned to its jurisdiction by law.

[44] Halmai: Az Alkotmány mint norma... *op. cit.* 80.

[45] Tóth, C. A.: Az emberi jogok bírói védelme [The judicial protection of human rights]. *Társadalmi Szemle,* 50 (1995) 39–44.

[46] Kovács, K.: *Emberi jogaink – magánjogi jogviszonyokban* [Human rights–in private law relations. *Fundamentum,* 2 (1998) 85–90. and Kardos, G.: Az új Alkotmány emberi jogi fejezete [The chapter on human rights in the new Constitution]. In: Ádám A. (ed.): *Alapjogok és alkotmányozás. Az emberi jogok szabályozása az új Alkotmányban* [Fundamental rights and making constitution: the regulation of human rights in the new Consitution]. Budapest, 1996. 17.

of ordinary courts to decide in all cases where there is violation of fundamental rights.[47]

Pál Sonnevend convincingly argues in favor of indirect horizontal effect. He states that judges are not authorised to decide about the conflict of constitutional rights because Art. 8 (2) of the Constitution declares that in the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law. He takes the oneness of fundamental rights a starting point and claims that augmenting the right on one side will definitely lead to the diminishing of rights on the other side of the relation. When a judge has to decide in conflicts of fundamental rights, he will definitely diminish one right in favor of securing the other one. This is, in his view, not acceptable under Art. 8 (2) of the Constitution.[48]

Sonnevend also suggests that a German type Drittwirkung solution should be applicable in Hungary.[49] He argues that Art. 70/K. of the Constitution may not be applied against non-state actors, meanwhile Art. 77 § (2) demands that the courts interpret the applicable rules in the light of the Constitution. Sonnevend also argues that it may follow from the practice of the Constitutional Court that a German type "real constitutional complaint" be implemented in Hungary, while the 23/1998. (VI. 29.) AB decision holds that there must be due reparation if the Constitutional Court has declared an infringement of a constitutional right.[50]

In sum, we may note that it is hard to find the common denominator in the scholars' wiews. This might be reasoned with the different interpretations of constitutional provisions. We observed that horizontal application of constitutional rights could be approached from several points of view and involves a broad range of aspects of modern constitutionality. There is an underlying question about the extent of fundamental rights and the separation of powers, namely who will and should decide on the concrete extent of rights protection. Many authors have fears from the loss or at least the diminishing of private autonomy; however it is very clear that this so called private autonomy is far from being absolute in present legal theory and practice as well. The duty to decide how the constitution applies in private relations should not be solely the task of judges, but burdens the legislative as well, if not primarily.

[47] Lomnici, Z.: Kinek a feladata az alkotmány közvetlen alkalmazása? [Whose task is the direct application of the Constitution?] *Fundamentum*, 2 (1998) 47.

[48] Sonnevend: Az alapjogi bíráskodás. *op. cit.* 80.

[49] *Ibid.* at 79–84.

[50] *Ibid.* at 83.

The essence of direct effect of fundamental rights is that the judiciary can specify rules in the light of the contsitution where the legislation did not intend to regulate. The principal question is thus if the judiciary should have this competence or not. This problem occurs where the legislative has decided to refrain from regulating a certain private relations as a policy consideration, and the court applying this doctrine in fact overrides the decision of the legislative.[51]

The relations in modern societies indeed necessitate expanding the scope of the constitution, because private entities with enormous powers may represent a danger to fundamental rights.[52] Nonetheless, I argue that direct horizontal applicablilty leads to arbitrariness, judicial legislation ahd what is even more important, suggests that there is not any segment of life free from legal intrusion.

It is problematic to demonstrate how fundamental rights in general have indirect horizontal effect, this question should not be forcibly answered in the same manner in case of different constitutional rights. This approach helps to liberate the issue from its dogmatic nature, and examine as a question of classic constitutional interpretation.[53]

2. Constitutional and statutory anti-discrimination

We have learnt so far the most important decisions and scholarly developed ideas which influence the horizontal application of the Constitution. After having recognized that the question of third party effect emerges only in exceptional situations when ordinary laws fail to protect fundamental rights, a further step to make is to ask how ordinary laws protect constitutional rights. In Europe the anti-discrimination legislation is the best example to trace this phenomenon.[54] We have thus two tasks for the rest of this paper. Firstly we examine how the fairly new act on equal treatment interacts with the concept of horizontal applicability. Secondly we try to demonstrate what implications this new tendency has on the new civil code afoot.

[51] Tushnet M.: The relationship between judicial review of legislation and the interpretation of non-constitutional law... *op. cit.* 170–171.

[52] Cf. Walt, J. van der: Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance of Neocolonialism. *Law, Social Justice and Global Development Journal*, 2003 (1) http:// elj.warwick.ac.uk/global/03-1/vanderwalt.html.

[53] Explanatory preamble to the Bill of fundamental rights which was eventually to become part of the Dutch Constitution. Clapham, A.: *Human Rights in the Private Sphere.* Oxford, 1993. 178.

[54] Sajó–Uitz (eds.): *op. cit.* 5.

I wish to demonstrate that anti-discrimination legislation, in fact, directs towards the direct effect of certain provisions of the constitution in certain well-defined matters. It introduces the direct effect in an indirect manner. The area, where the constitution applies with the help of anti-discrimination laws extends beyond the traditional private law protection of parties of generally weaker bargaining position, and aims to protect equal human dignity in these precisely defined private situations. I focus my research on provisions prohibiting discrimination on different grounds concerning the access to and supply of goods and services, which are available to the public, including housing. These new standards are in the crossfire of debates because they prohibit discrimination also in situations where previously the discrimination as such was not explicitly prohibited and the economic analysis of law questions the efficiency of such a rule.[55]

However, I argue that the constitutional protection of equal human dignity indeed requires that the law intrudes into certain private spheres, which were previously free. This, however, cannot interfere unconstitutionally with the freedom to contract, which is a matter of private autonomy and thus rooted in the protection of equal human dignity as well. Having all this in mind, let us see how the horizontal effect of the constitutional right to non-discrimination in private relations develops through legislative vehicles.[56]

[55] Cf. Menyhárd, A.: Diszkrimináció-tilalom és polgári jog [Prohibitation of discrimination and civil law]. *Polgári jogi kodifikáció*, 8 (2006) 8, see generally Posner, R. A.: *Economic Analysis of Law*. 4. edition, Boston, 1992.

[56] I do not differentiate in this paper between non-discrimination and equal treatment, however I am aware of the fact that this difference in language is in the center of certain debates. Equal treatment can be interpreted in two ways: one understands non-discrimination when it comes to equal treatment, thus uses these two as synonyms, and the other means the positive duty to provide equal treatment for others. I argue that nothing in the constitutions leads into the direction to require the application of the second interpretation in relation to private matters, because it would pose a positive duty on citizens to solidaritate, and do help defenseless people in order to provide them equal treatment. I argue that the aim of equal treatment, when it has an additional meaning to non-discrimination can only be understood as the constitutional task and duty of the state. However, to elaborate on this issue would be a subject matter of another thesis, hence now, we need to take this standpoint as granted for the purpose of this paper, and regarded as underlined by the language of the Directive implementing the equal treatment between persons irrespective of racial or ethnic origin. The legislative intent is the following:

"For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin." (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal

2.1. The Constitution and the Act on equal treatment and the promotion of equal opportunities[57]

Art. 70/A. of the Hungarian Constitution states that

> *(1) The Republic of Hungary should respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. (2) The law should provide for strict punishment of discrimination on the basis of Paragraph (1) (3) The Republic of Hungary should endeavor to implement equal rights for everyone through measures that create fair opportunities for all.*[58]

Reading these articles the grammatical interpretation suggests that these provisions do not regulate the entire legal order, but purely circumscribe the tasks of the state. However, the Constitutional Court elaborated on equal dignity of persons concerning this provision, first in the 9/1990. (IV. 25.) AB decision (ABH 1990, 46). This standpoint led to the extension of the scope of the Constitution towards private relations in the 61/1992. (XI. 20.)[59] AB decision (ABH 1992, 280).[60]

The constitutional provision prohibiting discrimination formulates boundaries for the legislation, and thus certainly influences up to a certain level private relations as well.[61] However, the Court refused to determine what precise obligation the legislative has, where must be the discrimination outlawed in order to fulfill the requirements of the Constitution.[62]

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treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Communities, L 180/24. 19. 7. 2000. Art. 2, 1.)

[57] Act. CXXV of 2003 on equal treatment MK 2003/157. XII. 28. Find the english text of the law at http://www.egyenlobanasmod.hu/index.php?g=tej.htm, when it is not otherwise indicated.

[58] 1949. XX. Act on the Constitution, paragraph 70/A.

[59] See further Sólyom L.: *Az alkotmánybíráskodás kezdetei Magyarországon* [Early years of constitutional adjudication in Hungary]. Budapest, 2001. 460, 463.

[60] Menyhárd, A.: *Diszkriminációtilalom és polgári jog* [Prohibition of discrimination and civil law]. In : Sajó, A. (ed.): *Alkotmányosság a magánjogban* [Constitutionality in civil law]. 2006. 132.

[61] E.g. Győrffy, T.: *Az alkotmánybíráskodás politikai karaktere* [The Political Character of Constitutional Adjudication]. Budapest, 2001. 133.

[62] 45/2000 (XII. 8.) AB határozat (ABH 2000, 344.).

Before the accession to the European Union, in 2003, the Hungarian state implemented the Act CXXV. of 2003 on equal treatment and the promotion of equal opportunities (the Act on equal treatment). The birth date of this act is not accidental; it was urged by EU obligations,[63] which among others imposed the content of certain directives (2000/43/EC, 2004/113/EC directives).[64] Scholars state that it tries to touch upon "public private relations"[65] and prohibit discrimination on this field.

The preamble of the Act declares the aim of the legislation:

> *The Parliament, acknowledging every person's right to live as a person of equal dignity, intending to provide effective legal aid to those suffering from negative discrimination, declaring that the promotion of equal opportunities is principally the duty of the State, having regard to Articles 54 (1) and 70/A of the Constitution, the international obligations of the Republic and the legal acts of the European Union, hereby enacts the following Act:*

The Official explanation to the preamble states that according to the decade-long practice of the Constitutional Court, the prohibition of discrimination established in Art. 70/A. (1) in connection with human dignity stated in Art. 54 (1), establishes the duty of the state to protect and provide equal dignity for everybody in the legal system. In accordance with the interpretation of the Constitutional Court, the discrimination violates human dignity if it is arbitrary, does not have a rationally acceptable reason [35/1994 (VI. 24.) AB decision, ABH 1994, 197, 200]. The Constitutional Court declared the basic requirements concerning Art. 70/A. in its early decision, 61/1992 (XI. 20.):

[63] Art. 65 of the law on equal treatment: "This Act contains regulation in harmony with the provisions concerning law approximation of the Europe Agreement establishing an association between the European Communities and their Member States on the one part and the Republic of Hungary on the other part, signed in Brussels on 16 December 1991 and promulgated by in Act I of 1994, compatible with the following legal acts of the European Union".

[64] Bíró, A.: Pro és contra, az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló törvény margójára [Pro and contra, to the margo of the law on equal treatment and promotion of equality of chances]. In: *Parlamenti ösztöndíjasok* [Parliament scholarship]. Budapest, 2004. at 316, 320.

[65] The expression is used first by the Final Concept to the Act, March, 2003. Cf. Farkas L.–Kádár A.-K.–Kárpáti J.: Néhány megjegyzés az egyenlő bánásmódról szól törvény koncepciójához [Some remarks to the conception of the act on equal treatment]. *Fundamentum*, 7 (2003) 121.

...the state as the public authority is obliged to provide equal treatment for all present on the territory of the state. In connection with this in cannot discriminate on grounds of ethnicity, colour, sex, language, religion, political or other opinion, ethnic or social origin, financial, natal or other situation. The prohibition contained in Art. 70/A. of the constitution does not only extend to human or basic citizen's rights, but this prohibition–when the discrimination violates the right to equal human dignity–extends to the whole legal system. (ABH 1992, 280, 281).

The Official explanation also draws the attention to the requirement following from Art. 8 (1) of the Constitution.[66] It declares that it is the principal aim of the state to respect and protect fundamental rights. The Official explanation refers then again to the practice of the Constitutional Court elaborating on the detailed content of this provision providing that the state has the duty under Art. 8 of the Constitution to provide sufficient conditions in order to protect these fundamental rights as the rights to equality and human dignity as well [64/1991 (XII. 17.) AB decision, ABH 1991, 258, 262].

Let us compare this argument to the one of the decision 45/2000 (XII. 8.) (ABH 2000, 344, 351). The Constitutional Court claimed here that the state does not have the duty to provide a uniform law on non-discrimination, there is no omission regarding the required level of rights protection on this field, although the state has not exhausted all possibilites in order to provide legislative protection.[67] It is easy to recognise the ambiguity of this statement. If the state

[66] Reasoning to the Act on equal treatment, Preamble point 2. Translated by the author of this paper.

[67] See the critics of this decision in Halmai G.: Hátrányos passzivizmus [Negative passivism]. *Fundamentum*, 4 (2000), and Halmai G.: Szükség van-e antidiszkriminációs törvényre Magyarországon? [Is an anti-discrimination law necessary in Hungary?] In: Petrétei J. (ed.): *Emlékkönyv Bihari Ottó egyetemi tanár születésének 80. évfordulójára* [Festschrift]. Pécs, 2001 and Kiss, B.: Az egyenlő bánásmód követelménye az Alkotmánybíróság gyakorlatában [The Duty of Equal Treatment in the Practice of The Constitutional Court]. *Acta Universitas Szegediensis. Acta Juridica Et Politica.* 67/12 (2005) 15–16. Gábor Halmai and Balázs Toth suggest that the legislation is indeed in omission, when not enacting rules to protect individuals against every kind of discrimination. They base their arguments on Art. 70/A. (2) of the Constitution, which identifies as a state duty to punish all violation of discrimination enacted in paragraph (1) of the same article. Cf, Halmai, G.: Előszó [Foreword]. In: Halmai G. (ed.): *A hátrányos megkülönböztetés tilalmától a pozitív diszkriminációig – A jog lehetőségei és korlátai* [From the Prohibition of Negative Treatment to Positive Discrimination–Potentials and Limits of Law]. Budapest, 1998. 4; Tóth, B.: *Impossibilum nulla obligatio est, avagy szülessen-e antidiszkriminációs törvény Magyar-*

can do even more than it presently provides in order to protect fundamental rights, namely to protect human dignity violation through discrimination, why does not it commit an unconstitutional omission if it fails to do so? This is a little bit controversial, but definitely demands the conclusion that the Constitutional Court holds, it is the duty of the state to provide protection, although the possible level of the exact constitutional protection has not been established. As a conclusion, the legislative is not constitutionally obliged under the present concept of the Constitutional Court to implement further measures on equal treatment or non-discrimination.

In the light of this, Art. 5 and 6 of the Act on equal treatment brings dogmatic novelty compared to any previous private law rules, because indeed requires the application of constitutional standards in private law matters. Moreover, the act goes much further than the required level by the EU in the above mentioned directives. We cannot find explicit orders in the directives to implement such a wide concept as the Hungarian one, intruding into the private sphere through assigning a barrier on all private actors concerning their choice to decide who they contract with, when they make a proposal to persons not previously selected to enter into contract, or invite such persons for tender or provide services or sell goods at their premises open to customers (Art. 5–6). Furthermore, the prohibition applies to all enlisted grounds (Art. 8), the legislative rejected the idea of the hierarchy of discrimination as well.

According to the original version of the Act, only Art 22 provided the possibility for exception. It is worth to see how constitutional adjudication sneaks into the words of the law.

> *The principle of equal treatment is not violated if*
> *a) the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or*
> *b) the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.*

It is obvious for the first sight that the legislative (indirectly) required the judiciary to apply constitutional standards directly, by giving the same tests as

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országon [Impossibilium nulla obligatio est, or do we want an antidiscrimination law in Hungary]. In: Halmai: *ibid.* 94.

the Constitutional Court has developed as a tool for the assessment of the legal debates.

However, a mistake poisoned the concept, because, it is well known that the test of the Constitutional Court does not sound exactly like this. Hence the rules were modified in 2006. The modification contains that Art. 7 should be completed with the following: if this law does not indicate otherwise, the acts do not violate the requirement of equal treatment

a) if the fundamental right of a person is restricted in inevitable cases in order to provide the prevalence of an other fundamental right if the restriction is capable to reach the aim and proportionate with that.
b) When in cases beyond Art. 1, the act has an objective reason under rational assessment.

The reasoning to the modification of this paragraph explains that the rules follow the jurisprudence of the Constitutional Court, which has stated in several decisions that an act is not discriminative when it restrict a fundamental right necessarily and proportionately, and a non-fundamental right in a not arbitrary manner. (e.g. 30/1997 (IV. 29.) AB decision, ABH 1997, 130, 140.).

Finally the Act indeed requires from the judiciary and the Authority[68] to assess individual cases in the light of the Constitution, applying the tests developed by the Constitutional Court. This phenomenon might be labeled as the "indirect direct" effect of the constitutional provision in a thouroughly circumscribed, but not quite narrow scope.

[68] As to the practice of the Authority established by the act, but working only since February 2005,[68] we must emphasize that the provision stated in Art. 5 a) means in factthat banks and insurance companies can make an offer, which is understood as a proposal to persons not previously selected to enter into contract. However it was not understood as such a contract, when a condominium did not enter into contract with a disabled, or a wholesale trade did not contract with a Roma. Demeter, J.: Az egyenlő bánásmód és az esélyegyenlőség előmozdítása [Equal treatment and the promotion of equal opportunities], *Acta Humana* 17 (2006) 53.

As to the second point b) of Art. 5, it regulates restaurants and pubs or discos, who intend to discriminate against Romas and others on grounds of skin colour. The interpretation problems from this regard has not yet emerged at the authority, and there were not yet many cases concerning the two other points of this statutory provision. Cf. Demeter: *ibid.*

In sum, we can already see that the most problematic point concerning the new law on equal treatment, which touches upon the problems raised in this paper relate to the provision Art. 5 point a), namely concerns the case when someone makes a proposal to persons not previously selected to enter into contract or invite such persons for tender.

2.2. The codification of the new Civil Code: questions to be answered

After having had regard on the interrelated nature of the concept of horizontal applicability and the Act on equal treatment, I would like to draw the attention to the present codification process of the new civil code. The constitutionally required level of protection against discrimination in private matters, and in relation to this the necessity of the declaration of indirect horizontal effect is a matter of current debates. I try to demonstrate that the above draw conclusions might help here to add to the solution of the emerging problems. First of all have a look at the standpoints of the scholars and the leader of the codification procedure, Lajos Vékás.

Vékás argues that it is not possible to measure constitutional rights in civil law adjudication with the tests developed in constitutional law. Civil law litigation, even if it concerns fundamental rights in conflict, is not about the constitutional evaluation of legal instruments. Hence it is a crucial question to answer how civil law courts should reach the required protection of fundamental rights.[69]

Lábady emphasizes that the dogmatic of private law had great effect on the development of the Constitutional Court's jurisprudence. It is a tendency that private law gains the more and more territory from other public branches of the law, namely tries to incorporate important public law rules into its codes, because it feels the more and more concern about the public sphere.[70] This is why it becomes possible to use the same standards in private law as in constitutional law. Lábady argues that the Constitution binds everybody this is why it has to be directly applicable in private litigations as well. The Constitution determines private relations, because otherwise they would not be always consistent with constitutional values. This means first of all that statutes and other legal instruments have to be conform to the Constitution, and if there is no civil law regulation on the matter, the Constitution directly has to protect the individuals against each other.[71] There are many civil lawyers however, who feel that it is impossible to give direct or indirect horizontal effect to the Constitution, because it is completely strange to the logic of private law.[72]

[69] *Ibid.* 160.

[70] Lábady, T.: Alkotmányjogi hatások a készülő Ptk. szabályaira [Effects of constitutional law on the draft Civil Code]. *Polgári jogi kodifikáció,* 2 (2000).

[71] *Ibid.* See also Lábady, T.: Alkotmányos alapjogok és személyiségi jogok [Basic rights and personality rights]. *Jogi Beszélgetések* [(Discussion in law]. Kaposvár, 2000.

[72] Cf. Vincze: Az alkotmány rendelkezéseinek érvényre juttatása. *op. cit.*

Lábady puts the essence of the debate the following way: if the constitutional provisions should apply indirectly to private relations through interpretations of civil law rules, it is the task of the codification and the codificators to tell how and to what extent.

However, if the Constitution applies directly, it is not problematic to exclude any special rules from the Civil Code.[73] Vékás–rejecting Lábady's views– draws the attention to the discretion of the judges in private matters. They intend to decide applying general clauses, and in this process they have the power to interpret legal rules, which will provide anyway the full protection of fundamental rights without any change in the legal system.[74]

At present, the Civil Code in paragraph 76. contains the prohibition of discrimination as a traditional personality right. The ministerial reasoning of the 1959/ IV. Act on the Civil Code makes it explicit that the primary aim of the prohibition of discrimination is to protect individuals in private relations. In 2004, the Act on equal treatment amended this provision requiring equal treatment instead of non-discrimination of individuals.[75]

Some examples from the jurisprudence of ordinary courts show how they interpret this general personality right provision; how far they went in the so called constitutional interpretation. In 2002, the court charged a pub owner to pay for non-pecuniary damage of Roma applicants, who were not allowed to enter to the pub.[76] Also, when Roma students of a school were organized separate farewell parties from non-Roma students, the court based its argumentation on Art. 76 of the Civil Code.[77] A handicapped person, who could not get into a bank building also sued with success.[78]

The bounderies of the freedom to act in private relations are established in the Civil Code as well as in the Constitution, namely we may find obligatory general clauses in the civil law regulations as well. The main question thus refers to the content of these rules in private law, how they should comply with the Constitution if it comes to interpretation. Vékás argues in favour of the explicit codification of indirect horizontal effect, which would necessitate that the judges fill up the content of the general civil law provisions with

[73] Lábady: Alkotmányjogi hatások... *op. cit.*

[74] Vékás: *Az új Polgári Törvénykönyv... op. cit.* 159.

[75] 2003. évi CXXV. törvény 37. §, in effect from 01. 27. 2004, see this in: Menyhárd A.: *Diszkriminációtilalom és polgári jog. op. cit.* 34.

[76] EBH 2002.case 625.

[77] EBH 2001.case 515.

[78] BH 1995/12, 698. In accordance with similar cases and hypotheticals a recent study of Attila Menyhárd tries to prove that the limitation on private liberty will not produce general welfare. Menyhárd A.: *Diszkriminációtilalom és polgái jog. op. cit.* 8–15.

constitutional content.[79] However, it is still not clear what exactly this "constitutional content" means in case of the anti-discrimination provision.

At this point we might be able to refer to the implications of the solution of the anti-discrimination act. We can observe that the idea of indirect horizontality, where the Constitution radiates through the provisions of ordinary civil law, gives certainly less identified protection against non-discrimination in private relations, than the Act on equal treatment, with its "indirect direct" horizontal effect. Hence it is worth to consider that the Civil Code should regulate more extra-contractual relations in accordance with the Act on equal treatment in order to provide as wide protection as other vehicles of law on this field.

Also, it would be possible that the new civil code borrows the idea of the Act on equal treatment and introduces the "indirect direct" horizontal effect. The practical side of this suggestion, as we saw above, that the legislative, the codificators can determine the scope where the constitutional rules may intrude, but the way of constitutional adjudication can facilitates the right balance between the person's liberty and equality in each and every case.

Above, we considered the principal difference between the three solutions and now we try to reconcile those. Namely acknowledge that accepting the direct effect would leave it with the judiciary to decide where the Constitution applies and what that provokes in private matters, even outside the sphere of present judicial intrusion. Contrary to this, in case of the indirect doctrine, the Constitution is not capable to intrude into the private sphere unless the ordinary law, preferably a general clause lives open the door for it.

The highlighted idea brings a new and important trend into this debate because offers a medium way hopefully a golden medium. The solution of the Act on equal treatment offers dogmatically a clear compromise between the three concepts of horizontal applicability of the non-discrimination clause of the Constitution. If the legislative wishes to extend the scope of the protection against arbitrary discrimination in private relations, the implementation of new provisions–declaring the "indirect-direct horizontal effect"–become necessary in order to reach demonstratively the desired level of protection. This solution preserves the idea of value monism, at the same time gives opportunity to the legislation to differenciate between private relations of different nature.

[79] Vékás L.: *Az új Polgári Törvénykönyv... op. cit.* 149, also in Vékás, L.: A szerződési szabadság alkotmányos korlátai [The constitutional limits of freedom of contract]. *Jogtudományi Közlöny* 47 (1992) 56–59 and Vékás, L.: Egyenlő bánásmód polgári jogi jogviszonyokban? [Equal treatment in private law relationships?] *Jogtudományi Közlöny,* 61 (2006) 355.

2.3. Towards a solution

Finally it would be important to give guidelines to the legislative concerning what to bear in mind when determining the scope of the constitutional protection in private law, when reconsiliating guiding constitutional rights.

There is no general right to liberty as such. The argument in case of a particular liberty is an independent argument from any other concerning other liberties.[80] The meaning of anti-discrimination can also be different in relation to property rights as in the context of school or voting.[81] Contrary to the Anglo-Saxon system of constitutional rights, the justification of liberty and equality both root in the concept of equal human dignity in the Hungarian jurisprudence. The state recognizes everybody's right to equal human dignity; this is the basic rule of the Hungarian constitutional system. Furthermore individuals have the right against the legislature that it protects them against other citizens.[82]

As both liberty and equality are grounded in the concept of dignity, and every case differs from the other, the legislative cannot set up more precise norms under the presently ruling constitutional theory than we have seen in the jurisprudence of the Hungarian Constitutional Courts or we found in the text of the Act on equal treatment. Balancing[83] must be the keyword.[84, 85]

We must also consider that one of the principal problems of solving this battle between the right to liberty and equality lies in the fact that there is two equally valid interpretation of equality: "equality–non-discrimination (in the public sphere) and equality–equality in autonomy (in the private sphere)".

[80] Dworkin R.: *Taking Rights Seriously*. Cambridge, Mass. 2001.

[81] Tushnet M.: The relationship between judicial review of legislation and the interpretation of non-constitutional law... *op. cit.* 180.

[82] See the jurisprudence of the Constitutional Court above, and Alexy, R.: *A theory of constitutional rights*. Oxford, 2002. 324, 352.

[83] However, the "reluctance also may be apparent even when constitutional balancing is applied to private law adjudication which may itself sometimes require the balancing of countervailing private rights. To judges brought up in the tradition of the private law, the weighing of countervailing private rights may seem to involve balancing of a mor e limited and familiar kind than the weighing of more capacious public interests required in constitutional balancing." Quint, P. E.: Free speech and private law in German Constitutional Theory. *Maryland Law Review*, 48 (1988) 247, 290.

[84] Alexy: *A theory of constitutional rights... op. cit.* 82

[85] See a contrary opinion from the anglo-saxon heritage in Dworkin: *op. cit.* 184. He describes why constitutional rights should not apply to private relations. According to Dworkin the essence of constitutional rights is to give standards to policy consideration, to determine the limits of policy actions, hence they cannot be balances against each other per se.

Through anti-discrimination laws the legislative introduced equality in the meaning of public law, which has naturally changed the situation, because substituted the choice of the individual with the standards of the community.[86]

The words of the constitutions refer to the duties of the state to do or to refrain from doing something. This would suggest that private actors can behave differently from state actors because the constitution names rules concerning public relations.[87] This paradigm is in alteration now, which makes confusion, and raises the question of value monism. But it is reasonable to accept the changing role of the constitutions, and it will help to understand the new phenomenons.

Even if we reject value pluralism, and accept value monism we can easily differenciate between public and private and within private relations as well with the help of the balancing system. Aharon Barak makes two clear case studies in order to illustrate the solution: The restaurant owner certainly have the right to choose who to contract with, but can not discriminate on the basis of race, gender or religion, meanwhile an owner, who wishes to rent out one room of his flat should have the right to pick whoever he likes. But what is the difference between the two cases? The "proper balance" between the right to get a service without discrimination and the right to freedom of contract will give a solution for the problem; namely, in the former case the right to get the service without discrimination prevails over the right of the owner to choose his guests. Meanwhile in the second case the right to choose freely a person to rent a room in my flat prevails over the others right not to be discriminated arbitrarily.

Barak continues that the root of this balance lies in the concept that the freedom of contract is stronger in relation to a person's privacy, meanwhile it is weaker when directed against the public at large. Per analogiam–he demonstrates–the right not to be discriminated is weaker when offered to a general public. In this case, the discriminated person is segregated from the public on the basis of race, gender, religion etc. However, the right not to be discriminated becomes weaker when the service, in its nature is not open to the public but provided on a personal basis.[88]

In order to understand the idea of the right balance, the assessment of bargaining power relations could also help if taken into account. If one party has power over the other one, if one of the parties is defenseless the sheer

[86] Sommeregger, G.: The Horizontalization of Equality. In: Sajó–Uitz (eds.): *op. cit.*

[87] Garvey, J. H.–Aleinikoff, A. T.: *Modern Constitutional Theory: A Reader.* St. Paul, Minn. Third Edition, 1994. 695.

[88] Barak, A.: Constitutional Human rights and Private law. In: Friedman, D.–Barak-Erez, D.: *Human Rights In Private Law.* Oxford, 2001. 39.

sense tells that the state has to protect the weak one in order to provide the same liberties to everyone because the stronger party is capable to take away the other's constitutional rights.[89]

It is easy to understand that direct horizontal effect denies the public-private divide,[90] although this divide exists, because the results of the balancing will be definitely different on the different fields of laws. The anti-discrimination laws seemingly uphold the public-private divide; just shift the borders of it, meanwhile upholding the theory of value-monism.

Private law has always prohibited certain kinds of discrimination on certain grounds, but this issue at stake calls for a different approach. The legislation has developed the idea that fundamental rights indeed apply in private relations, and thus the legislative and the judiciary will apply the scrutiny developed by the national constitutional court. The standards became the same on both fields of private and public law, however we should not forget about the balancing of constitutional rights, which will provide different end results in cases of fields closer to the public law, than on fields closer to private matters.

We find a gradual system, where between the two ends, controversial cases with public law and private law elements emerge. The legislative must determine this scope of the potencially controversial cases and in those cases guarantee judicial assessment under constitutional standards ("indirect-direct horizontal

[89] This idea is present in many fields of legislation, such as consumer protection, employment matters, or certain rules of the Civil Code. For example, if there is one store in the village and the salesman does not want to serve somebody on the basis of his skin color, or handicap, we feel that the state should intervene and protect the individual. However, if there are several shops in the village and they have the same offer for the same price, and one of the owners does not want to serve a person with colored skin, the situation is slightly different. Here the situation is more horizontal in reality, because the discriminated person can go to the other shops and the discriminative owner is in a worse financial position as a result, because he looses a guest. However this reasoning leads us back finally to the "separate but equal" interpretation of equality, which was declared bad law a long-long time ago. (The idea of separate, but equal came from the U.S. Supreme Court decision, Plessy v. Fergusson (1986, 163 U.S. 537) and was overruled in 1954 by Brown v. Board of education (347 U.S. 483). In the former decision the court concluded that it is constitutional that states could prohibit the use of certain train carriges by blacks, if they were provided with other carrigies.) This example calls our attention to the perils of this interpretation and affirms the view that the discrimination, which violates the human dignity of a person is not much different is horizontal and vertical private relations.

[90] See about these fears more, in Pfeiffer, Th.: Diskriminierung oder Nichtdiskriminierung– Was ist hier eigentlich die Frage? *Zeitschrift für das gesamte Schuldrecht*, (2002) 165; Pickler, E.: Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie? *Juristenzeitung*, 57 (2002) 880.

effect"). In other cases following a constitutional balancing process within its own competence, the legislative can decide on excluding the possibility of the juducial direct application of constitutional norms in order to secure a calculable rights protection respecting the idea of separation of powers. This legislative decision, the Civil code e.g. can be subjected to rewiew by the Constitutional Court. This modern constitutional idea definitely changes the role of the Constitution.

Conclusion

This contribution aimed to analyze the conception of the "horizontal effect of the Constitution", namely how the Constitution applies in private relations through judicial activity and what the positions of the legislative and the constitutional court of Hungary are. I argued that the question as to whether constitutional rights apply in private litigations does not exclusively depend on the acknowledgement of direct or indirect horizontal effect. I suggested that it was better to leave the decision on this problem with the legislation and as to the measure already set up the review of the right balance will stay at constitutional courts as the final instance of constitutionality. In Hungary, where the constitutional court does not have the competence to review the decisions of ordinary courts, it is quite dangerous to require from the judiciary to apply constitutional norms in their vaguely abstract form. However, I demonstrated that the judiciary has to interpret legal provisions in the light of the constitution even if the doctrine of indirect horizontal effect is not explicitely introduced into the constitutional system.

A separation of power point of view supports my position. The constitution's original purpose was to regulate the relation of the state and the individual. If there is intent to extend the scope of the constitution to certain private relations, it should be as well left with the legislative to determine, how far the constitution should apply in private relations. The necessity, proportionality test and the "objective reason" justification, that the constitutional court established as a standard to justify discrimination in certain cases applies thorugh anti-discrimination laws presently as well in the described situations. The legislative in fact orders that judges decide on possible violations under these standards in the scope of cases the legislative previously determined in the Act. This is the "indirect-direct" horizontal application.

This idea could be useful when finding answers to the questions emerging in connection with the codification of the new Civil Code. Following the constitutional requirements of interpretation set up by the Constitutional Court, the

legislative has to take into account the constitutional right to equality and private autonomy, liberty (which is on the other side of the balance) when assessing the problem of discrimination. Hence it is fully possible to develop a different understanding of the principle of non-discrimination in public and private relations, what is more, it is hardly possible to say that it is exactly the same in these two relationships. Thereafter the legislative will determine the scope where the judiciary must be entitled to assess the individual cases, the acts of single private actors under pure constitutional standards.

* * *

This paper tried to offer a response as to whether the private law principles or common constitutional principles serve as a framework for the examination of the above issues. I argue that the present tendencies demand the "constitutional" answer: the fight for the enforcement of equal human dignity must be reconciled with economic and social rationality. This is forced by the inherent development of law, the changing role of the constitutions. However, as far as it is possible the legislative should decide on the just and prescise balance between liberty and equality concerns and thus the traditional idea of "horizontal application of the Constitution" might loose voice.

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BOOK REVIEW

Tamás Nótári: **Studia Iuridico-philologica I.**
Studies in Classical and Medieval Philology and Legal History. Hungarian Polis Studies 14. Debrecen, 2007. 313 pp.

The joint volume of studies of Tamás Nótári, Associate Professor of Károli Gáspár University (Budapest) was published in 2007. The selection gathers twelve works published earlier, so it allows to study these papers together written in ten years and not easily available individually, and to become familiar with the works of the author in a subtler form. The volume presents the studies in chronological order: most of them, as a mater of fact, cover subjects of Roman law and classical philology, the other thematic unit of the volume comprises four studies on medieval subjects.

1) *The Scales as the Symbol of Justice in the Iliad.*[1] The idiom of the scales of justice is well-known, its use is widely spread, Iustitia can be frequently seen with scales in her hand in different representations. The scales as the symbol of justice and administration of justice appear in various places in Greek literature. In the *Iliad* one can encounter a scene presented in context, thus suitable for being more amply analysed, in which Zeus is pronouncing justice over the heroes by using a pair of scales. This paper will first clarifies the concept of law and justice as it appears in the Homeric epic; then, by the structural and comparative analysis of some lines of the weighing scene, decisive in the combat of Achilles and Hector, a few remarks are made on the origin and meaning of the concept of the scales of justice.[2]

2) *Hesiod und die Anfänge der Rechtsphilosophie.*[3] The paper entitled *Hesiod and the beginning of the philosophy of law* highlights a few concepts instructive for legal history and philosophical analysis from excerpts of the main works of Hesiod, who lived at the turn of the 8th and 7th B.C., *Theogonia* and *Erga kai hemerai.* The most valuable part of the study is the examination

[1] Nótári: *op. cit.* 9–20.
[2] Cf. Nótári, T.: The Scales as the Symbol of Justice in the Iliad. *Acta Juridica Hungarica*, 47 (2006) 249 sqq.
[3] Nótári: *op. cit.* 21–44.

of the occurrence and role of *dike*, one of the most diverse concepts of antique legal history in Homeric epics and Hesiod's *Erga*.[4]

3) *Numen and Numinousity–On Some Aspects of the Roman Concept of Authority*.[5] The paper will examine various aspects of *numen*, one of the most important phenomena of Roman religion, its etymology, the institution of *triumphus*, a phenomenon that seems to be relevant from this point of view, and the function of *flamen Dialis*, one of the most numinous phenomena of Roman religion, then the concept of *numen Augusti*, which incorporates these elements of the religious sphere into the legitimation of power. Nótári's study analyses the religious, political and public law aspects of the Roman concept of authority with exemplary thoroughness, magnificently separating the concepts fundamental regarding the subject but often causing difficulties in interpretation: *auctoritas*, *numen*, *genius* and *imperium*.[6]

4) *Summum ius summa iniuria–The Historical Background of a Legal Maxim*.[7] Cicero quotes this *proverbium*, widely spread as early as in the age of the Republic, which remained in use in his formulation until today: *"summum ius summa iniuria"*;[8] i.e., the utmost enforcement of the law leads to the greatest injustice. From the maxims of legal logic as means of legal interpretation, in the present work Nótári made the proverb *"summum ius summa iniuria"* the object of our scrutiny, enumerating its occurences in antique literary sources, namely in Terence, Columella and then in Cicero. In this last formulation the meaning of the proverb became the most clearly crystallized. It signifies the excessive, malevolent legal practice in the course of *interpretatio iuris*, which plays off the letter of the law against its spirit. The Celsian *sententia "ius est ars boni et aequi"* formulates one of the most general, all-encompassing basic principles of *interpretatio* meant to offer protection against the too strictly interpreted and applied *summum ius*. Although jurists never clearly defined the concept of *aequitas*, it became a very important means of legal development as a thought emerging from the interaction of iurisprudence and eloquence. By

[4] Cf. Nótári, T.: Bürgergemeinschaft und Rechtsgedanke bei Hesiod. In: Németh, G.–Forisek, P. (ed.): *Politai et Cives*. Debrecen, 2006. 7 sqq.; Hesiod und die Anfänge der Rechtsphilosophie. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Sectio Iuridica*, 47 (2006) 341 sqq.

[5] Nótári: *op. cit.* 45–74.

[6] Nótári, T.: The Function of the Flamen Dialis in the Marriage Ceremony. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Sectio Iuridica*, 45 (2004) 157 sqq. On Some Aspects of the Roman Concept of Authority. *Acta Juridica Hungarica*, 46 (2005) 95 sqq.

[7] Nótári: *op. cit.* 75–96.

[8] Cicero : *De officiis* 1. 33.

presenting the relevant loci from Erasmus of Rotterdam's *Adagia* as a typical example of the persistence of the *paroemia "summum ius summa iniuria"*, the paper shows the way a proverb turning into *regula iuris*–apart from its direct legal application–became an integral part of today's legal common knowledge.[9]

5) *Die Lanze als Macht- und Eigentumssymbol im antiken Rom.*[10] The present paper deals with the role of the *hasta* in the ceremony of the *legis actio sacramento in rem.* In ancient Rome the *hasta* was the weapon with which in the course of the fights they could win loot, recognition, and hence power, it is no wonder that shortly it became the symbol of power. This is also shown by Verrius Festus's definition: *"hasta summa armorum et imperii est"*,[11] and the reference to *imperium*, especially in connection with the spear, reminds one of its religious character, belonging to the sacred sphere. It is not by chance that the expression *subhastatio* means– the selling of loot, especially the selling of captives, obtained from the enemy through armed fight, and later meant any kind of auction in general.[12]

6) *Remarks on the Origin of the legis actio sacramento in rem.*[13] *Legis actio sacramento in rem* has belonged to the most debated issues of specialised literature on Roman Law up to the present day. Nótári's study highlights the following aspects of this ceremony. The sacred character of *legis actio* procedure is proved by the almost neurotic adherence to the words to be recited, the same phenomenon is also exemplified by Pliny's account of the *dedicatio* of Ops Opifera's temple. Traces of private fight and arbitrary action are shown by the origins of the term *vindicatio* as well as by the rod used in the procedure instead of a spear. All the more so, as Gaius also explains this with the fact that what the Romans considered truly their own was the goods taken from the

[9] Cf. Nótári, T.: *De summo iure summaque iniuria apud Ciceronem.* Vox Latina 43 (2007) 346 sqq.; Summum Ius Summa Iniuria–Comments on the Historical Background of a Legal Maxim of Interpretation. *Acta Juridica Hungarica,* 44 (2004) 301 sqq.; *Comments on the Legal Maxim „Summum ius summa iniuria".* Novy Sad, Serbia, 2006. 107 sqq.; Summum ius summa iniuria. *Magyar Jog,* 51 (2004) 385 sqq.

[10] Nótári: *op. cit.* 97–128.

[11] Fest. 55, 3.

[12] Nótári T.: Festuca autem utebantur quasi hastae loco. *Acta Facultatis Politico-Iuridicae Universitatis Budapestiensis de Rolando Eotvos nominatae,* 45 (2004) 133 sqq.; The Spear as the Symbol of Property and Power in Ancient Rome. *Acta Juridica Hungarica,* 48 (2007) 231 sqq.; Die Lanzensymbolik der legis actio sacramento in rem. *Studia Iuris Caroliensia,* 2 (2007) 135 sqq.; Die Lanze als Eigentums- und Machtsymbol in der legis actio sacramento in rem. In: *Loi et droit dans le gouvernement des sociétés antiques. Résumés des communications.* Catania, 2007. 68 sq.

[13] Nótári: *op. cit.* 129–152.

enemy; i.e., obtained by fight. The structure of *ius fetiale*, which regulated the law of war and of peace in the archaic age, a typical example of the intertwining of peaceful and martial elements, and *rerum repetitio* as well as *clarigatio* show remarkable parallel with *legis sacramento in rem.*[14]

7) *Remarques sur le ius vitae necisque et le ius exponendi.*[15] *Ius vitae ac necis*, the penal authority of the *pater familias* over his (adult) children in potestate, was valid up to the 4th century A.D. It gave the father the right to kill even his own child, but the exercise of this right was restricted and kept within bounds. So the *pater familias* had to conduct proceedings–*iudicium domesticum*–when the *consilium necessariorum* exemined the case and gave the defendant any oportunity to answer the charge *(cognita et audita causa)*. If the crime seemed to deserve capital punishment *(iusta causa)*, the *consilium* decided aubout the guiltiness of the defendant by mayority. The verdict was binding for the pater familias. *Ius exponendi*, the power of the *pater familias* to expose a child, was valid until 374 A.D. There were two reasons why a newborn baby could be exposed. One of these reasons has a religious motivation–the *procuratio prodigii*–and it could not be strictly distinguished from killing a new-born child. In the other case the *pater familias* exposed the child, because he did not want to bring it up, but he did not intend to kill it. He counted on somebody to find the child, and adopt it. If the latter case came true, there was a legal question about the *status libertatis* of the child. The regulation of the status was quite different during the centuries, till emperor Iustinian guaranteed almost every exposed and adopted child the freedom.[16]

8) *Comments on Bishop Virgil's Activity in Bavaria.*[17] Virgil, the bishop of Salzburg of Irish origin (749–784) opened a new chapter in the history of his episcopate: he compiled the earliest works of the historiography of Salzburg: the *Gesta sancti Hrodberti confessoris*, the *Libellus Virgilii* and the *Liber confraternitatum*; he had the Rupert Cathedral constructed, which was consecrated in 774; he extended the rights of the episcopate and that of the Saint Peter Monastery and he organised the mission among the Carantanians. This

[14] Cf. Nótári, T.: *Jog, vallás és retorika (Law, Religion and Rhetoric)*. Szeged, 2006. 50 sqq.; Duellum sacrum–gondolatok a legis actio sacramento in rem eredete kapcsán. (Thoughts on the Origin of the legis actio sacramento inrem). *Állam- és Jogtudomány*, 47 (2006) 87 sqq.; Comments on the Origin of the legis actio sacramento in rem. *Acta Juridica Hungarica*, 47 (2006) 133 sqq.

[15] Nótári: *op. cit.* 153–178.

[16] Cf. Nótári, T.: De iure vitae necisque et exponendi. *Jogtudományi Közlöny*, 53 (1998) 421 sqq.; Remarques sur le ius vitae necisque et le ius exponendi. *Studia Iuris Caroliensia I.* 2006. 151 sqq.

[17] Nótári: *op. cit.* 192–202.

paper deals with three aspects of the activity of Virgil, the abbot and bishop of Salzburg: the conflict between Bonifacius and Virgil; the determination of the date of Virgil's ordaining; and the debates for the goods and rights of the Saint Peter Monastery and the episcopate of Salzburg, which were noted down by Virgil in the *Libellus Virgilii*.[18]

9) *Tasilo III's Dethronement–Remarks on an Early-Medieval Show Trial.*[19] The creation of a unified empire by Charlemagne required quite a number of victims; one of them was Tasilo III, the last duke of the Agilolfing dynasty reigning in Bavaria for two centuries. The Frank monarch dethroned him not by means of a bloody military defeat but by a legal trial (now called show trial) in 788. The main charges brought against Tasilo was *infidelitas*, i.e., unfaithfulness to the liege lord besides *harisliz*, i.e., leaving the (royal) army without permission–though the latter was carried out a quarter of a century before the legal trial. The given work aims to enlighten the legal background of this rather opaque case by contouring the historical context. Nótári first considers Tasilo's reign and the historical background of the trial, then he investigates the Frank–Bavarian conflict and the *sacramenta fidelitatis* of Tasilo. In the end, after highlighting the question of *infidelitas* and of *harisliz* the author analyses the show trial itself.[20]

10) *The Trial of Methodius in the Mirror of the Conversio Bagoariorum et Carantanorum.*[21] This paper deals with the background of the activity of Methodius known as the Apostle of the Slavs and of his conflict with the Archbishopric of Salzburg and its diocesan bishops. At the Council of Regensburg held in the presence of Louis the German in 870, Adalwin, archbishop of Salzburg and his bishops passed a judgment on Methodius, a missionary from Byzantium, then papal legate and archbishop of Sirmium, since they deemed that by his missionary activity pursued in Pannonia Methodius infringed the jurisdiction of Salzburg exercised over this territory for seventy-five years, and after that they held him in captivity for two and a half years. It was this lawsuit regarding which the *Conversio Bagoariorum et Carantanorum* was drafted

[18] Cf. Nótári, T.: *A salzburgi historiográfia kezdetei (Beginnings of the Historiography of Salzburg).* Szeged, 2007; *Források Salzburg kora középkori történetéből (Sources from the early-medieval history of Salzburg).* Szeged, 2005; Gesta Hrodberti. In: Havas, L.–Tegyey, E. (eds): *Classica–Mediaevalia–Neolatina.* Debrecen, 2006. 131 sqq. On Bishop Virgil's Litigations in Bavaria. *Acta Juridica Hungarica,* 48 (2007) 49 sqq.

[19] Nótári: *op. cit.* 203–232.

[20] Cf. Nótári, T.: Tassilo III's dethronement–contributions to an early-middle-age show trial. *Publicationes Universitatis Miskolciensis. Sectio Iuridica et Politica,* 23 (2005) 65 sqq.

[21] Nótári: op. cit. 233–282.

either as a bill of indictment or to legitimate the lawsuit subsequently, it cannot be clarified. The author first highlights the historical background of the conflict between Methodius and the bishops of Bavaria: he outlines the process of Christianization of Carantania, Avaria and Bulgaria. Then, the paper investigates the activity of Methodius in Pannonia and Moravia, and the reasons for the trial held in Regensburg which led to the most shameful captivity of Methodius.[22]

11) *Die Geschichte des Ingo bei Enea Silvio Piccolomini.*[23] The study describes the background of the history of Ingo in Enea Silvio Piccolomini's work *De Europa*. Piccolomini, the later Pope Pius II (1458–1464) misinterpreted–like Iohannes Victoriensis–the description of the Carantanian mission in the *Conversio Bagoariorum et Carantanorum*. Nótári analyses the process that led to the „creation" of the Carantanian duke, Ingo.[24]

12) *Portrait zweier ungarischer Mediävisten, Gyula Kristó und Samu Szádeczky Kardoss.*[25] The last work in the volume, a study that raises a monument to the memory of the internationally renowned scholars Samu Szádeczky-Kardoss and Gyula Kristó is a worthy memorial by the former student Tamás Nótári to his masters not only with this obituary but perhaps with the whole volume.[26]

Tamás Fedeles

[22] Cf. Nótári, T.: Conversio Bagoariorum et Carantanorum. *Aetas* 15 (2000) 93 sqq.; De Consultis Bulgarorum. *Collega*, 6 (2002) 47 sqq.; Conversio Bagoariorum et Carantanorum–Document of an Early Medieval Show Trial. *Publicationes Universitatis Miskolciensis. Sectio Iuridica et Politica*, 25 (2007) 95 sqq.

[23] Nótári: *op. cit.* 283–304.

[24] Cf. Nótári, T.: *Die Geschichte des Grafen Ingo bei Enea Silvio Piccolomini.* In: Varietas Gentium–Communis Latinitas. XIII International Congress for Neo-Latin Studies. Budapest 2006. 96.

[25] Nótári: *op. cit.* 305–313.

[26] Cf. Nótári, T.: In memoriam Samuelis Szádeczky-Kardoss piissimam. *Vox Latina*, 41 (2005) 142 sq.; En memoire de Professeur Samuel Szádeczky-Kardoss. *Acta Antiqua*, 46 (2006) 209 sqq.; Szádeczky-Kardoss Samu (1918–2004). *Aetas*, 20 (2005) 182 sqq.; In memoriam Kristó Gyula. *Jogtörténeti Szemle*, 19 (2004) 63 sq.

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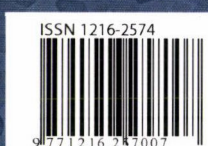

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TAMÁS SÁRKÖZY*

Post-Socialist "Primitive Accumulation of Capital" and the Law

Abstract. The study deals with theoretical questions of the Hungarian privatization law. It clarifies the differences between the economic and legal concept of privatization, the various interpretations of privatization. The Hungarian privatization was the earliest and at the same time–after the German–the quickest completed privatization in the former socialist countries. It reviews the so-called spontaneous privatization between 1988–1990, and the privatization legislature of 1992 and 1995 as well. As a conclusion the study deals with the evaluation of the privatization law, and with the consequences of privatization with regards to social politics.

Keywords: post-socialist privatization, management, business law, investment, foreign capital, AP, rule of law, market economy, competition, state property, national property, administrative modernization, accumulation of capital, EU business law

1. A specific area of the law of political transformation in Central-Eastern-Europe is constituted by *the law of privatisation*, which qualifies as an antithesis to the law of the economic evolution of socialism, scilicet, the law of nationalisation. It is a mere provisional area of law, since it is dispensable in mature capitalism, therefore, it will gradually erode from Hungarian business law.

In economic sociological literature and subsequently, in mass communication, the term of privatisation is applied in a much broader sense than its Hungarian term is circumscribed under positive law. For instance, in American social science literature, privatisation defines the decrease of the intervention of the state into economic and social processes, thereby, as a collective term, it encompasses liberalisation, decentralisation and deregulation.[1] Whereas, in Hungary the establishment of private enterprises that had accrued from their

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[1] See, e.g., Savas, E. S.: *Privatisation. The Key to Better Government.* New Jersey, 1987.; T. Clarke, T.–Pitales, C. (eds.): *The Political Economy of Privatisation.* London–New York, 1994.; Mihályi, P.: *A magyar privatizáció krónikája 1989–1997* (A Chronicle of Hungarian Privatisation between 1989–1997). Budapest, 1998.

own resources, the so-called crop investments of foreign capital and the evolution of the proprietary status of the members of co-operatives within cooperatives have been several times defined as privatisation. As a matter of course, these elements have contributed to the evolution of the "private" character of Hungarian society, but *de jure*, these do not qualify as privatisation. It is not privatisation in a narrower legal sense, either, when the state transfers assets generally for free to other forms of public property, e.g., to the property of regional and local governments, public bodies (e.g., the Hungarian Academy of Sciences) or to the church (albeit, the latter transaction is also termed as reprivatisation, since a significant share of the property of the church had been nationalised during socialism).

In terms of Hungarian positive law, privatisation implies the transfer of state-owned property to private property. Therefore, privatisation shall not encompass the transfer of assets that are not owned by the state, but by other public proprietor (e.g., local government) into private property. Finally, it does not constitute privatisation either, when the private proprietor does not acquire property, but e.g., rights of usufruct (so-called privatisation of rights of commons and functions, e.g., via concessions in case of state monopolies or via the so-called privatisational leasing). The term of private proprietor with respect to privatisation was positively defined under Para. (4) of Article 1 of *Act 39 of 1995* on the Sale of State-Owned Venture Capital (hereinafter: AP).

Nevertheless, we need to further narrow the legal concept of privatisation. Hungarian law pertaining to privatisation (from the outset, but as it is most completely incorporated under Act 39 of 1995, i.e., under AP) renders the concept of privatisation by circumscribing it as *the sale of shares exclusively in state-owned associations* (stocks, business shares in limited liability companies) *to private proprietors* via privatisation agreements. Other forms of the cessation of state-owned property, e.g., the alienation of real estates or art treasures under deeds of sale and selling off via liquidation procedures, etc. (so-called hidden or intangible privatisation)[2] did not fall under the effect of AP. Scilicet, AP endeavoured to regulate exclusively the sale of business shares in state-owned companies, that is, enterprises functioning in the form of joint-stock or limited liability companies. These were defined as the so-called *venture capital* of the state, which could or needed to be sold by the state pursuant to AP. Namely, this property could persist only *provisionally* as state property, since it needed to be privatised with the exception of the narrow scope of public utility companies, which were designed to persist as long-term state property

[2] See, e.g., Szanyi, M.: *Csőd, felszámolás, végelszámolás mint a privatizáció útja* (Bankruptcy, Liquidation and Full Settlement As Ways of Privatisation). Budapest, 1998.

and to be transferred to the scope of government property after the completion of the process of privatisation.[3] Further narrowing of the scope of privatisation consisted in the stipulation under AP that the transfer of assets free of charge shall not qualify as privatisation, either, but that could be effected only exceptionally pursuant to a statute. Privatisation shall be effected on grounds of a mixed and non-typical sales agreement concluded in compliance with the Sale of Goods Act, therefore, the conceptual element of privatisation agreements is countervalue. Privatisation shall be generally implemented at real value in return for cash (therefore, Hungarian privatisation qualified as *market privatisation* as opposed to privatisation by coupons implemented in the great majority of former socialist states). However, concessional privatisation techniques, furthermore, services in kind instead of cash as equivalent (e.g., discharge via environmental protection) were alike admissible.[4]

2. It is a frequent phrase that the underlying dynamics of privatisation in Hungary consisted in the intention of the increase of the income of the central budget and in the claim of company management to retain their positions and acquire property. This assumption, according to my opinion, reflects merely *the surface*. Namely, as opposed to that in Western-European countries, privatisation in Hungary and generally in the former socialist states equalled *a privatisation entailed by political transformation* in two senses of the term, since it both transformed the proprietary structure and it constituted the *sine qua non* of the functioning of civil states founded on the rule of law and of bourgeois market economies.

[3] The distinction of the venture, i.e., business capital of the state from government property to be sold according to more rigorous sales rules did not ensue before 2008. See: Bencze, I.: *A kincstári vagyon a jog tükrében. Számadás a talentumról* (Government Property As Reflected by Law. An Account on Talents). Budapest, 1998. 28–30.

[4] We can refer to e.g., property notes, then the issuance of employees' shares, the purchase of concessional shares by small investors, furthermore, the Existential-Credit Programme and the Employees Share Scheme (MRP). On the conceptual basis of concessional shares, *see*, Diczházi, B.: A népi részvényszocializmus vázlata (A Sketch of People's Share-Socialism). *Figyelő*, 1988. 45, and Lukács, J.: *A gazdaság demokratizálásának útja. A munkavállalók részvénytulajdonlásáról a magyar gazdaságban* (The Process of the Democratisation of Economy. On the Ownership of Shares by Employees in Hungarian Economy). Budapest, 1990. *See further*, Gidai, A.: *Kedvezményes privatizációs technikák* (Concessional Privatisation Techniques). Budapest, 1998.

Thence, without the privatisation of the major part of state property

a) *the Hungarian state founded on the rule of law could not have evolved*, since that would have been hindered by the persisting dual-nature of the state, the unity of the proprietary and executive powers inherited from socialism. Scilicet, what public authorities by reason of the democracy based on the multi-party system and the doctrine of the division of powers cannot implement, could have been enforced by the state as a proprietor via its power of discretion deriving from its right of ownership. *It was the dissolution of the unity of the powers of the state as an executive authority and a proprietor that was essential* and in this sense, it was equally indifferent what the scale of the revenues of the state deriving from privatisation was, or, what kind of background and professions the private persons acceding to power had had.

b) *Hungarian market economy based on competition could not have evolved*, since the monolithic unity of state property, the overwhelming superior economic power of the state would have precluded the evolution and consolidation of real market processes, blocked free market competition, thereby, the state would have gained the upperhand of the private enterprises of its citizens in the market.

Western-European privatisation in those states, where significant nationalisation had indeed ensued, that is, in Austria, Italy, France and England, was *system-immanent* privatisation, since state property anacronistic in the system of private property was reprivatised. These Western states could afford gradual privatisation under auspicious economic conditions, furthermore, a relatively meagre scale of property was concerned, for instance, 17 p.c. of the national property in case of Austria, which disposed of the highest extent of state property. Besides, privatisation *per se* could take place with application of *the methods of the Stock Exchange*, since state ownership concerned not the company, but the stock, therefore, neither company reorganisation, nor asset assessment or the elaboration of special privatisation law was necessary. Whereas, in Hungary, the overwhelming majority of national property needed to be privatised the sooner the better with the initial absence of the methods of the Stock Exchange.[5] *En passant*, by reason of our compliance with the Soviet model of

[5] See, Korányi, T. G.: *Privatizáció a tőzsdén keresztül* (Privatisation via the Stock Exchange). Budapest, 2000.

nationalisation, state-owned companies[6] had had to be artificially reorganised into business associations and only subsequently could they be privatised. With some exceptions, in former socialist states *de jure privatisation*, that is, the adoption of the associational structure, and *social-economic privatisation*, that is, the transfer of the shares of associations into private property *were separated*, furthermore, privatisation could not be effected via the available general instruments of the legal system, but a distinct and provisional area of law had to be elaborated and a distinct system of institutions was also incorporated into the state establishment for the purpose of the enforcement of privatisation entailed by the political transformation. Necessarily, privatisation took place *in two stages* and in the absence of a consolidated system of market relations, therefore, *the available methods of property assessment were anomalous*. According to my view, however, privatisation in Central-Eastern-Europe was *autotelic from a taxonomic point of view*: for the purposes of the evolution of the civil state founded on the rule of law and of bourgeois market economy, privatisation was an "imperative", even if it was deemed detrimental from the point of view of short- or long-term economic policy.[7]

We need to specify some relevant counter-arguments against privatisation. Privatisation should not be effected in a situation of economic crisis (the dissolution of the Council for Mutual Economic Assistance, the loss of the Soviet market, a situation in which the bankruptcy of the central budget is anticipated, etc.). That is valid. Privatisation in Hungary did not dispose of a social-economic strategy, and as a matter of fact, we did not know what the object of and the value of the object of privatisation exactly was. That is valid. However, nor did other former socialist countries dispose of such a strategy, including the former GDR. Privatisation was launched without adequate

[6] Two exceptions: The companies of the former GDR were transformed into joint-stock companies and limited liability companies under the so-called *Mantellgesetz* of 1990, which prescribed them uniform capital stock and nominal capital. (See, Krüger, H. H.–Kühnel, M.–Thomas, S. (eds.): *Transformationsprobleme in Ostdeutschland* (Problems of the Transformation in East Germany). Opladen, 1990. Whereas, in the successor states of the former Yugoslavia, by reason of the system of corporate governance by employees, a three-graded reorganisational process was applied: social governance–state property–legal privatisation–economic privatisation. See, e.g., Büschenfeld, H.: Privatisierung, 'gesellschaftlichen Eigentums' in der Nachfolgerstaaten Jugoslawien (Privatisation and National Property in the Successor States of Former Yugoslavia). *Osteuropa*, 35 (1995) No. 3.

[7] E.g., it is presumably reasonable that Béla Csikós Nagy describes several aspects of the privatisation entailed by the political transformation as detrimental from the point of view of economic policy. *A XX. század magyar gazdaságpolitikája* (Economic Policy in Hungary in the 20th Century). Budapest, 1996. 241–280.

economic, technical and personnel prerequisites, wherefore, an array of cases of abuse could occur in its process. That is also valid, but that was *the smaller evil*, since this way the economic change of regime sooner ensued in Hungary than in any other former socialist state with the exception of the former GDR, furthermore, we could also escape the road of state-capitalism, which emerged in the majority of the successor states of the former Soviet Union. *En passant*, privatisation in Hungary was by far more regulated than in the neighbouring states, and according to estimates, the scale of abuses was also much lower: we did not make it from planned economy back to clans.[8] We may also argue that privatisation ought not to have been implemented as a dumping sale, since thereby, privatisation was marked by the features of a sellout and national assets were considerably devaluated. That is a matter of course, but we did not have an alternative and by way of the early launched privatisation, we markedly and initially left our former socialist rivals behind in the area of the import of capital.[9] The early launch facilitated that massive privatisation in Hungary would be completed by 1996–1997, consequently, Hungarian economy became euro-conform, since the absolute predominance of private property was reified. "Soft" state property had been transformed into "hard" private property and the crucial process of the denationalisation of economy was completed.[10]

[8] See, Stark, D.: Privatizáció Magyarországon. A tervtől a piachoz vagy a tervtől a klánig? (Privatisation in Hungary. From Planned Economy to Market Economy, or, from Planned Economy Back to Clans). *Közgazdasági Szemle*, 38 (1991) No. 9. It was primarily Mihály Tóth, who demonstrated that the majority of economic crime following the political transformation was committed via having recourse to state aid, which, as to its significance, is followed by bankruptcy crime, whereas, explicit privatisational crime occurred relatively rarely. Nevertheless, public opinion takes an opposing viewpoint. Otherwise, simultaneously with drafting the Act on Business Associations, specific facts of the cases of economic crime were adopted in the Penal Code. See, Tóth, M: Piacgazdaság és a büntetőjog (Market Economy and Penal Law). *Magyar Jog*, 42 (1995) 641–646.

[9] See, Diczházi, B.: *A külföldi tőke szerepe a privatizációban* (The Role of Foreign Capital in Privatisation). Budapest, 1997. Diczházi assesses this role basically in an affirmative manner, albeit, he naturally mentions the "colonising" investment of foreign capital with the exclusive objective of "market acquisition". Nonetheless, without foreign capital, our major companies would have gone bankrupt, which would have incurred an enormous scale of unemployment. In Hungary, restructuring the economy and modernisation of the structure of products were based on foreign capital. Obviously, adverse and negative tendencies also manifested themselves, such as the emergence of the so-called hawk-capital, etc.

[10] See, Karsai, G.: "Nem tudták, de tették" ("They Were not Aware of What They were Doing"), and Bager, G.: A magyar privatizáció a pénzügyi ellenőrzés szempontjából

We distributed and plundered public property, the heritage of workers and employees, some people would repeatedly assert. But that is glaring blunder. The Hungarian state had by no means possessed a venture capital of such an extent as that which was finally privatised. Unlawful state property, i.e., the confiscated fortunes of Duke Esterházy and Uncle Schwartz were privatised, the value of which must have rather diminished than increased during the system of planned economy. Namely, a considerable part of state assets at the end of the 1980s was non-working capital. *En passant*, national property has not disappeared, it transformed: state property transformed into private property. In my view, the assets of Peter Kovacs' limited liability company also belong to the property of the nation, just as those of the former State Construction Company no. 43 did. The overwhelming majority of the assets deriving from foreign investment (with the exception of the dividend) also constitutes a part of the property of the nation, since foreign owners cannot transfer the hotel or the factory abroad, furthermore, they mostly employ Hungarian citizens, etc.

As to its social aspects, the process of privatisation was apparently not "mirthful". Scilicet, the task seemed almost unfeasible, or, as the statement made by the Polish Lewandowski that became an adage assessed: unpossessed assets of unknown origin needed to be sold out to buyers, who were out of funds and who, by the way, did not want to purchase the stocks of losing state companies. State property needed to be erased at a time, when the supply was many times higher than the demand. Obviously, it was managed in a paramountly contradictory *modus operandi*, even if we disregard errors deriving from non-preparedness and ignorance.[11] According to my estimates, privatisa-

(Privatisation in Hungary from the Viewpoint of Financial Control). Both studies were published in the volume: *Állami vagyon – privatizáció – gazdasági rendszerváltás* (State Property–Privatisation–Economic Change of Regime). Budapest, 2005. 47–50 and 75–79. For a summary, see, Kovács, Á.–Bager, G.: *Privatizáció Magyarországon* (Privatisation in Hungary). 1–2, Budapest, 2004. Various economic assessments stated that the venture capital of the state in 1990 amounted to 2,400–2,500 million HUF, whereas, the number of the respective companies was 2000. Of course, no precise assessment of the assets was made. According to Ádám Török, the advance of Hungary *in re* transformation achieved at the beginning of the 1990s "could be attributed to more speedily implemented economic and legal reorganisation, to privatisation based on market relations that by large relinquished distribution techniques, to its favourable judgement in terms of international politics and to its auspicious geographical position." Gazdaság Kelet-Közép-Európában 1990–2006 (Economy in Central-Eastern-Europe between 1990–2006). *História*, 29 (2007) No. 4.

[11] *See further*, Voszka, É.: A privatizáció tizenöt éve és jövője (One and a Half Decades and the Future of Privatisation), and *Az Állami vagyon – privatizáció – gazdasági*

tion in Hungary approached the optimum attainable under the prevailing conditions up to a rate of three quarters, nevertheless, it must have offended the sense of justice of the society, since those who were in advantageous positions came off well. What must be recorded as the greatest achievement is that institutional privatisation could be completed so that we took second place subsequently to the Germans, thereby, we were past privatisation entailed by the political transformation.[12] Following 1998, the issues under consideration related to privatisation in Hungary were already "bourgeois" issues, scilicet, we faced the following alternative: we either sustain a relatively powerful public sector with the decisive predominance of private property, like Austria and France, where besides public utility companies, the so-called strategic companies and associations that generate profit for the state coexist, or, we opt for the liberal way, which is characteristic of Scandinavia and the Benelux states, where merely the literally public utility companies are state-owned. In my view, the decision between the two approaches is dependant on *the performance of the state*: if we are able to positively regulate, supervise and enforce compliance with the rules, conclude privatisation agreements safeguarded by adequate guarantees and *de facto* enforce these guarantees, then state property can be minimised, indeed. If, however, the regulation has loopholes, the agreements contain defaults and public administration can be corrupted, we will be better off with a more extensive state sector. This, however, is an issue of the actual economic policy, not of the change of regime.[13]

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rendszerváltás (State Property–Privatisation–Economic Change of Regime). Budapest, 2005, 36–37.

[12] János Kornai qualified privatisation too accelerated as early as in 1989 and challenged its undervalued implementation. See, Kornai, J.: *Indulatos röpirat a gazdasági átmenet ügyében* (A Vehement Pamphlet in the Matter of Economic Transition). Budapest, 1989. He upheld his viewpoint in his volume of studies: *Szocializmus, kapitalizmus, demokrácia és rendszerváltás* (Socialism, Capitalism, Democracy and the Change of Regime). He advised against "shock-therapy via privatisation" and deemed the rate of transformation to be out of measure (77–78). As for my view, I don't share his opinion: I contend that privatisation needed to be accomplished and stable property relations needed to be established the sooner the better, which, as a matter of course, entailed economic and social sacrifices.

[13] Foreign special literature generally considered privatisation in Hungary to be highly successful, whereas, in Hungary, it rather met criticism. Certainly, privatisation that meets general satisfaction is impossible, undoubtedly, there have been erroneous dicisions, e.g., the process of privatisation lacked environmental audit for a long time and aspects of competition policy were also disregarded. Nonetheless, privatisation averted massive unemployment and the great majority of privatised companies proved to be operative in the long-run.

3. The denationalisation of Hungarian economy with respect to the proprietary structure substituted for the primitive accumulation of capital, which had undergone in Western-Europe a couple of centuries before. A great proportion of the private companies of Hungarian new-capitalism needed to originate in state property, since otherwise they could not have been established. Privatisation was substantiated by Hungarian business law drafted parallelly, which guaranteed an operative legal framework for the termination of the dominance of state property and for the formation and consolidation of market economy based on competition and private property. The criticisms that the statutes pertaining to privatisation were not faultless and that the application of the pertinent law was severely inconsistent are well-founded, but on the one hand, this could not be otherwise, since we were not following a beaten track, on the other hand, these faults remained within tolerable limits in comparison with other former socialist states. The faults were inevitable, since we were dealing with unfamiliar legal techniques, improvisation was necessary, and generally, legal regulation was formulated without the necessary economic bases, in defiance of significant political resistance and social-economic tensions. In this status quo, according to my view, the primary factor was that institutional privatisation was relatively rapidly implemented within the available legal framework. With reference to the title of a famous Italian film: privatisation has been accomplished, it's time to forget about it.

The most severe criticism *vis-a-vis* law-making pertaining to privatisation (mainly *in re* the phase encompassing 1988–1990) was that it substantiated "the salvage of power by communists", thereby, it thwarted a substantive political transformation. We will dwell upon that circumstantially later. Now we restrict ourselves to noting that interim sociological research conducted primarily by Tamás Kolosi and Erzsébet Szalai have elucidated that the top-level party-leadership of the Kádár-regime and the party-workers hardly acquired any property via privatisation.[14] However, it was principally the (40–50-year-old) younger technocracy of the twilight of the Kádár-era, crucially the high- and middle-level management of companies and the economic leadership of the state apparatus that did acquire property. They, while cooperating with foreign capital and relying on the actors of Hungarian small-scale industry, of private trade and on small ventures, could become capitalists or retain their positions in the management as well as accede to further management positions. Disregarding some leading figures of the Alliance of Young Communists, we could hardly mention explicit party-workers among Hungarian major

[14] See, Szalai, E.: *Gazdasági elit és társadalom a magyarországi újkapitalizmusban* (Economic Elite and Society in the New-Capitalism of Hungary). Budapest, 2001. 37–41.

entrepreneurs and top managers. Of couse, the stratum of these technocrats and managers belonged to the nomenclature of the Kádár-regime, so far as they were accidentally also party-members, or, if they were independent, filling their positions was dependant on the consent of the respective party-organ. Nevertheless, this is valid with respect to the great majority of the so-called bourgeois political elite of the era following 1990, as well. In case of a peaceful transition and an evolutionary change of regime, which marked the Hungarian transformation, it was almost inevitable that the stratum of younger technocrats and managers, which was acknowledged by the West, spoke foreign languages and was familiar with the sciences of Western business management and organisation, could the most exploit the potentials of privatisation. The respective individuals can be only vaguely considered post-communists by reason of the recollection of their past, they are *de facto* new-capitalists or new capitalist managers. As to my view, "the real winners" of privatisation in Hungary were firstly, the foreign capital, especially major multi-national companies, secondly, former Hungarian company-management and the technocrat bureaucracy consisting of the economic leaders of the socialist state, thirdly, small-scale entrepreneurs possessing some capital (small-scale industry, retailers, workteam associations, complementary workshops of agricultural cooperatives), however, by no means the party-bureaucracy of the Kádár-regime. Which, I assume, in case of an evolutionary (and non-revolutionary) change of regime, was a nearly logical consequence of the Kádár-era *in re* its so-called goulash communism and soft dictatorship.

Could the transition have taken another track? Perhaps, we could have allocated company assets, stocks among people, which would have resulted in people's stock-socialism instead of capitalism. People arguing for that are not aware of the basic realities of international politics, world-economy or of Hungary.[15] What we need to add on the basis of the research of György Matolcsy and Péter Mihályi[16] is that contrary to fallacies, the redistribution of state property was not principally implemented via privatisation and the application of the law concerning privatisation, but implicitly, via long-standing high

[15] Sándor Kopátsy "contends" that state property should have been allocated among people. See, A magyar privatizáció stratégiája (The Strategy of Privatisation in Hungary). *Central European Time*, 1998. No. 6–7. 45–53. *Cf.*, A comprehensive essay on the potentials of "democratic privatisation": Mocsáry, J.: *A dolgozói tulajdon Magyarországon. Múlt, jelen, jövő. A munkavállalói résztulajdon problémája* (The Property of Employees in Hungary–Past, Present and Future–The Problem of the Employees' Share), Budapest, 1998.

[16] See, Matolcsy, Gy.: Emlékeim a privatizációról (My Recollections of Privatisation). *Central European Time*, 1998. No. 6–7. 7–8., and Mihályi: *op. cit.* 125–130.

inflation, import-liberalisation, exchange-rate policies, bankruptcy waves, etc. Privatisation from the outset, undoubtedly also as an aftermath of the communication of the media, had become "the black sheep" of the change of regime, the scapegoat originating in the unfair and unethical enrichment of some, which appalled masses of people. We cannot assume that without privatisation we would have realised a form of capitalism that lacked rich people and capitalists.

Observing the political conflicts that have increasingly unravelled following the mid-'90s and that the outraging passions related to the change of regime have not abated, but have led to scenes of civil war in Hungary, many basically contend that some strata of the society realised as late as the end of the 1990s that the broadly construed privatisation, which substituted the primitive accumulation of capital, had been accomplished and the new bourgeoisie had emerged, therefore, the structure of the social elite could be exclusively modified by the seizure of the acquired property of "winners". In Spain and Portugal, the change of regime, which followed a fascist establishment structure, did not take the character of *property acquisition*, whereas, in former socialist states it did. Subsequently, "the losers" of the change of regime can merely acquire property by taking it away from "the winners". The consequentially emerging political slogan has been that we demand a new, real change of regime and need to square accounts finally with the post-communist elite that had salvaged its power. For some, redistribution would imply a dream come true, however, a change of regime in the property structure cannot be implemented and "bad capitalists" cannot be replaced for "good capitalists" within the system of capitalism every 20 years.[17] Such a replacement can at most be effected by the market via its intangible instruments.

4. Privatisation in Hungary commenced essentially *spontaneously*, since we were not swept into privatisation by a central decision of the state, but by tax-remitting and organisational restructuring transactions of the managers of major companies and by the improvisational utilisation of the power-vacuums that gave way after such transactions. Namely, the idea of privatisation had not even emerged during the drafting of Act 6 of 1988 on Business Associations (hereinafter: ABA).

The so-called spontaneous privatisation was received by inconceivably relentless criticism in Hungarian social science literature. According to Rudolf Tőkés, during the settlement of political problems, the communist elite transformed state-owned companies into management-owned ones and by

[17] See also, Kulcsár, K.: *Az új politikai rendszer és a magyar valóság* (The New Political System and Hungarian Reality). Budapest, 2006. 27.

exploiting defects in law, the inner circle of the managing elite fraudulently peculated via unfair profits the joint ventures established with the participation of Western investors. Concurrent business law facilitated the self-privatisation of state property, therefore, "artful vigilants" with appropriate relations could become billionaires.[18] As Sándor Kopátsy formulates: "The policy, as a consequence of which state property was consigned primarily to foreign ownership, so that at the same time an incredibly large domestic state-debt was generated and some have made revolting fortunes, while two-thirds of the population today live at a substantially lower standard and more hopelessly than they did in the final decade of the failed socialist regime, is to be considered a crime against the Hungarian society."[19] According to Tamás Fricz, the elite of the former party-state and the members of its nomenclature enjoyed the benefits of spontaneous privatisation and therefore, "...the transition to market, or, if you please, capitalist relations had been implemented by the political and economic elite of the Kádár-regime in Hungary, wherefore, the economic leaders of state socialism became the managers of capitalist private property."[20]

At the same time, as Éva Voszka claims, in our days it is unequivocal that facts contradict "the frustrated political charge that the nomenclature has salvaged itself".[21] Furthermore, Péter Mihályi expressly states that spontaneous privatisation is "the most deceptive term" for the description of privatisation in Hungary.[22] Its principal purpose is the pursuit of a publicity campaign against non-fellow post-communists, the grudging lament of those left without fortune, which goes under the slogan: "my state property is just being misappropriated by others, unfortunately, not by me". However, as Árpád Kovács clearly demonstrated on the basis of the examinations of the State Audit Office, the decisive majority of the transactions related to privatisation in 1989–1990 had been lawful.[23]

Nevertheless, we should observe the facts. Act 28 of 1987 permitted that expressly domestic legal entities, that is, state-owned companies established joint-stock companies or limited liability companies pursuant to the Commercial Code of 1875, whereas, the Ministry of Finance guaranteed quite significant

[18] See, Tőkés, R.: *A kialkudott forradalom* (The Haggled Revolution). Budapest, 1998. 345–384.

[19] See, Kopátsy: A magyar privatizáció stratégiája. *op. cit.* 47.

[20] See, Fricz, T.: *Az árok két oldalán* (On Opposite Sides of the Ditch). Budapest, 2006. 68.

[21] See, Voszka, É.: *Spontán privatizáció Magyarországon* (Spontaneous Privatisation in Hungary). Budapest, 1998. 137.

[22] *Cf.*, Mihályi: *op. cit.* 98.

[23] *Cf.*, Kovács, Á.: Számvetés a számvetésről (An Account on Accounts). Kurtán, S.–Sándor, P–Vass, L. (ed.): *Magyarország évtizedkönyve*. Budapest, 1998. 197.

profit tax-allowances for new commercial associations for three years under new taxation law. At the initiation of the management of Medicor and Ganz Danubius companies, the management of major companies launched the transformation of the factory units of the companies into associations and of these corporate centres into holdings for asset administration. Thereby, they did not intend to privatise these companies, but endeavoured partly to gain tax-allowances in the interest of their liquidity and partly to modernise the internal organisational and operational mechanisms of the companies according to Western models. Therefore, this "internal reorganisation into associations" had ensued before the adoption of ABA (and since the Commercial Code of 1875 stipulated more liberal rules than the future ABA, the management of major companies had positively endeavoured to take action before ABA took effect on 1st January, 1989 as the data of the Registry Court clearly demonstrate!). Besides, these transactions implied at most *de jure* privatisation, scilicet, they can be merely described as "pseudo-privatisation" as Mária Móra formulated as early as in 1991.[24]

Before the spring of 1989, the management of major companies had essentially intended to rationalise, not to privatise, since financial regulations expressly motivated them to proceed so. Therefore, the transactions of 1987–1988 can at most be assessed as the non-conscious preparation of privatisation, in substance, however, these had been financial-organisational routine operations.[25] During the spring of 1989, when it could be anticipated that the political transformation was well within reach, the management of major companies united in the Hungarian Economic Chamber elaborated the conception of privatisation, the purpose of which consisted in *the subjection of the established associations to "partial" privatisation.* The scope of this partial privatisation encompassed: *a)* so much as possible, the involvement of foreign and professional minority investors, which could potentially effect capital increase, and thereby, the acquisition of surplus capital, *b)* clearance of the debts of the respective companies via the transfer of debts to the state in return for shares and via the conversion of bank liabilities to stocks, *c)* the nomination of the management of companies (and to a smaller extent of employees via employee stocks) to joint proprietors, *d)* the conveyance of "left-over" stocks to partner companies,

[24] *Cf.*, Móra, M.: Az állami vállalatok (ál)privatizációja [The (Pseudo-)Privatisation of State-Owned Companies]. *Közgazdasági Szemle*, 38 (1991) No. 6.

[25] *Cf.*, Mihályi, P.: A gazdaság államtalanítása 1988–1998 (The Denationalisation of Economy between 1988–1998). In: Kurtán–Sándor–Vass (ed.): *Magyarország évtized-könyve*, *op. cit.* 164.

so that companies and banks assisted one another by cross shares in the implementation of privatisation.

In essence, this conception drew on the system of the self-governance of companies introduced in the state sector in 1984. A contributor to the elaboration of the conception, Ádám Angyal explicitly contended that in 1990, the state property in companies was at most 20 p.c, which was equivalent to the starting capital that the state allocated to companies upon the introduction of corporate governance. The so-called self-governing companies managed by boards of directors were *de facto* no longer state companies and the companies themselves needed to decide voluntarily on their transformation into associations and on privatisation. If privatisation did ensue, managers and employees were due proprietors' shares. The state could also privatise companies under so-called state-management, in which state property equalled at least 20 p.c., whereas, it could merely exercise supervision over the privatisation of self-governing state companies via public authority instruments and could receive cca. 20 p.c. of the revenues deriving from privatisation. If we view this conception objectively, it by no means implied spontaneous privatisation *within the scope of self-governing–self-managing state companies, but voluntary and decentralised privatisation based on the decision of the company* reached in the spirit of corporate autonomy pursuant to State Company Act (Act 6 of 1977 as amended in 1984).

Concurrently with the elaboration of this conception in 1989, the resourceful researchers of the Financial Research Share Company, mainly under the leadership of György Matolcsy, launched the so-called privatisation of non-capital contribution and various company evacuation and redoubling transactions.[26] In many cases, these did not mean privatisation and promoted the foreclosure of the law pertaining to the privatisation of small businesses, nevertheless, by reason of the absurdities of capital assessment, they necessarily involved the possibility of abuse. Therefore, law-making needed to partly guarantee the state control over acts of partial privatisation (e.g., sales of real estates), partly draft the regulation of the reorganisation of state-owned companies into associations.

The conception of the management of major companies was by that time opposed by the aligning ideologists of central economic management, such as The Office of Economic Planning, the financial portfolio, the central issueing bank and by reputed reform economists–in a peculiar manner, all of them–rew

[26] György Matolcsy argued for voluntary company privatisation in several articles in 1989–90. *Cf.*, e.g., Matolcsy, Gy.: A spontán tulajdonreform védelmében (In Defence of Spontaneous Property Reform). *Külgazdaság*, 35 (1990) No. 3.

on the (Stalinist) political doctrine of the unified and indivisible state property. Actually, real financial reasons accounted for the intervention: the privatisated equivalent could not remain in the property of companies by reason of impending insolvency. Therefore, the self-privatisation of companies needed to be prevented. Nonetheless, as it was manifest in former documents of the Financial Research Institute, they had no actual conceptions either concerning the required manner of the reorganisation of state-owned companies into associations, or concerning the structure of state ownership to be established.[27] Besides, state-controlled privatisation, as the pertinent law of 1992 demonstrates, could have been launched exclusively via the dissolution of corporate governance and management. However, the express declaration of this was shunned both by government commissioners entrusted with the task (István Tömpe and János Martonyi) and by their theoretical supporters (László Antal on the part of the Secretariat of Economic Policy of the Council of Ministers), György Surányi (under-secretary of state at the National Planning Office) and Lajos Bokros (Hungarian National Bank). Their disposition was prudent, since corporate governance had considerable social support.[28]

In this situation, the leadership of the Ministry of Justice with the support of the concurrent Prime Minister, Miklós Németh decided that while maintaining the prevailing corporate governance and management, it would amend the State Company Act, so that *the voluntary privatisation of state-owned companies dependant on the decision of the company* would be permitted under increased state control within the purview of a unified, market-oriented Act on Reorganisation. Thereby, law-making resigned the coercive transformation of companies (as Kálmán Kulcsár in his ministerial statement emphatically asserted: the pertinent law concerns reorganisation, not transformation), therefore, the decision on reorganisation at companies under state control was to be made by central organs of state administration, whereas, at self-governing and self-managing companies, the decision on reorganisation lay with corporate organs. The respective statute also established a legal technique of transformation, which did not necessitate two-graded privatisation, since reorganisation could

[27] *Cf.*, Lengyel, L. (ed.): A tulajdon reformja (Property Reform). Pénzügykutató Rt., Budapest, 1988. Csillag, I. (ed.): A társasági törvény, a tulajdonreform és az átalakulás kérdései (The Act on Business Associations, Property Reform and Issues of the Transformation). Budapest, 1988.

[28] We must note that the conception of corporate management started to gain ground in the Soviet Union at that time. *See*, Pethő, R.: Törvény a Szovjetunióban a dolgozói kollektívákról (Law Pertaining to Employees' Collectives in the Soviet Union). *Magyar Jog*, 34 (1987) No. 1. This also provided political support to the backers of corporate autonomy.

simultaneously constitute a process of privatisation. Therefore, the Act on Reorganisation *was based on the maintenance of the former status quo.*

Furthermore, Act 13 of 1989 on Reorganisation (hereinafter: AR) established complicated distribution rules and intended to grant a share to each party. These rules were designed to be experimental by the law-maker (it prescribed a revision after two years), furthermore, it made the majority of rules optional, namely, it was facilitated that the state holding organ and the company agreed on different rules within a specific term. The *modus vivendi* is well-demonstrated by the regulations below:

- the prerequisite of reorganisation was capital increase (outsider investors needed to increase the value of company assets at least by 20 p.c. or by 100 million HUF, therefore, the involvement of outsider investors was required, so that pseudo-privatisation could be precluded),
- 20 p.c. of the company assets calculated on the basis of the balance sheet belonged to the state (the state holding organisation),
- so that the financial basis of local governments to be formed could be secured, on grounds of the location of the estate, the respective local council (following 1990, the local government) was due an associational share equivalent to the value of the inner settlement estates as listed in the company balance sheet (obviously, the full value was to be considered and not the value decreased by company liabilities, as the State Property Agency endeavoured to interpret it later in the interest of the increase of central state revenues),
- the issuance of employees' stocks for employees was obligatory at a value of up to 10 p.c. of the capital stock of the association,
- the rest of the assets could be sold to outsider investors, so that 80 p.c. of the equivalent revenues were due to the state holding organ and 20 p.c. could be retained by the company within the scope of assets beyond the capital stock (the so-called privatisational equivalent quota: PEQ),
- the association share that could not be sold could be retained by the association as a so-called own share.[29]

I dwelt on the above more circumstantially, because these amply demonstrate the desperate attempt of the law-maker to temper people's moods in the spirit

[29] Concerning the Act on Reorganisation, *see*, Sárközy, T.: Egy törvény védelmében I–II. (In Defence of an Act: Parts 1–2). *Figyelő*, 1989. When I generalised the conception unfolding in AR, I was considering such a plural proprietary structure, in which not only the property of business associations, but also the self-managing property and settlement assets have a role. See, Sárközy, T.: A tulajdonreformról a társasági törvény után (On Property Reform Following the Act on Business Associations). Budapest, 1989.

of the principle of "live and let live", so that each party received a share. Nevertheless, by the spring and summer of 1989, people had the impulsion to come to grips, all of them wished to dispose of the whole of the property. Although, the emphasis on the technical features of AR indignified all, AR was not challenged by reason of the fact that it accomplished a covert property reform, on the contrary, it was impugned, since it did not implement the property reform, which would have favoured its critics. As Kálmán Kulcsár stated in the introduction of the act, the starting point of AR was the prevailing status quo and "it did not even by an inch increase the formerly guaranteed entitlements of companies to dispose of property" (but it did not reduce them, either).

The attack against AR was led by Lajos Bokros on the part of the reform circles of the Hungarian Socialist Workers' Party, who, while undimensionally exaggerated the problem, described spontaneous privatisation as a dead end of the complete change of regime. He further dared the absurd statement that "the elite of corporate and economic management" (?) and "the ambitious new elite" reached a *modus vivendi* on the acquisition of public property disregarding the majority of society,[30] albeit, as György Szoboszlai correctly stated concerning the so-called decentralised privatisation, basically, the battle between the "old" apparatus of economic management and the "old" corporate management was at issue,[31] in which the bourgeois opposition got involved primarily by reason of the elections.[32]

Nevertheless, political attack was unvariably directed against AR, albeit, beyond estate manipulations, 95 p.c. of the cases that presumably involved abuse occurred via the application of the Commercial Code or ABA. The mere protraction of the concurrent proceedings of the Registry Court did not allow for considerable pre-election abuses via the implementation of AR, which took effect on 1st July, 1989. Furthermore, by January 1990, pursuant to Acts 7 and 8 of 1990, the *State Property Agency*, a special publicly financed organ established for the management of state property as a Hungarian Treuhand *was*

[30] See, Bokros, L.: Rendszerváltás vakvágányon (The Change of Regime on Tail Track). In: Kurtán, S.–Sándor, P.–Vass, L. (ed.): *Magyarország politikai évkönyve*. Budapest, 1990. 72–78.

[31] Cf., Szoboszlai, Gy.: *A rendszerváltás jogállama* (The State Founded on the Rule of Law during the Change of Regime), in the collection of studies: Bayer, J.–Kovch, I. (szerk.): *A kritikus leltár. A rendszerváltás másfél évtizede* (A Critical Inventory). Budapest, 2005. 24.

[32] See, Tőkés, R.: "For the purposes of their campaigns, both the Hungarian Democrats' Forum and the Alliance of Free Democrats opposed that the insider management elite misappropriated the state-owned industrial, commercial and supplier companies by way of privatisation." In: Tőkés: *op. cit.* 384.

finally founded, furthermore, state control over acts of privatisation construed in a broader scope effected by corporate governance and management (such as estate transactions, contributions in kind, etc.) was also established (obligatory registration, authorisation and the right of veto, etc.). Albeit, certain partial elements failed, such as a market-based act on accountancy for the purposes of the assessment of assets, we can assert that *by the spring of 1990, the institutional system of voluntary, decentralised and state controlled privatisation based on corporate decisions had been established in Hungary*, which, according to my opinion, would have been completely operative in Hungary within a few years. Assumably, Hungary would have been *the only Central-Eastern-European country* (in other former socialist countries, in the absence of corporate autonomy from the outset, merely centralised, state-controlled privatisation could be implemented), in which by reason of the institutionalisation of corporate governance and management in the mid-1980s, such a form of privatisation could have been accomplished, which would have been based on the primacy of voluntary and decentralised privatisation in case of medium- and smaller-scale companies. Crucial companies of strategic importance, which were by all means or could have been controlled by state administration, would have been privatised *by the state,* whereas, the "self-privatisation" of small- and medium-scale companies could have been subjected to proper legality control by the state.

5. This solution was not implemented, which had several political and economic reasons. One of these was the inordinate defamation of decentralised privatisation based on corporate decisions by the mass media and public sentiment and its substantive identification with crime, abuse and communist salvage of power. The other reason was that the circle of the supporters of bourgeois parties that had got into power could be assigned to positions in the economic management merely via interventions by central state administration, which was unfeasible at companies, therefore, privatisation needed to be centralised by the state. Actually, privatisation based on corporate decisions did favour company management and the employees of more profitable companies with greater economic power *vis-a-vis* other strata of society, such as civil servants, retired or young people.

Such a privilege of those in advantageous positions was unacceptable for a considerable part of the society, disregarding the fact, that decentralised privatisation would have precluded reprivatisation and infringed the interests of "the losers" of socialist nationalisations. (It is another issue that compensation finally did not occur, nevertheless, those concerned had not known that at that phase.) The apparatus of the organs of economic management also

appreciated their transfer from positions in "normal public administration" to much more yielding positions created at privatisational organs.

On the other hand, corporate governance can function as an organic part of democratic socialism, nevertheless, it is inevitably anacronistic in a consistent capitalist system. Namely, corporate governance was simply nonsense for Western investors (this was even more manifest in Yugoslavia and its successor states). This corporate structure could accommodate only those professional investors that had had long-standing commercial-cooperational relations with the companies of the socialist states, whereas, it deterred financial investors. Major Western banks and multinational companies (and the adjacent gigantic audit-counselling concerns, major law firms) intended to negotiate with the state itself, but not with corporate management. Apparently, by reason of the enormous domestic and foreign state debts, Government did not intend to share the privatisational equivalent with any party, not in the least degree with corporate management, thereby, it demanded the complete revenue deriving from privatisation for itself. Such a disposition of the then Government was strongly supported by the International Monetary Fund and the World Bank.

At the same time, decentralised privatisation described as spontaneous underwent *de facto in such a small scale* that if communists had based their power on that, the successor party could have hardly won the elections in 1994. Therefore, the communist salvage of power based on spontaneous privatisation is mere fiction. Unequivocal data supplied by György Matolcsy, Éva Voszka and Péter Mihályi show that at most 2 p.c. of the venture capital of the state that could be privatised was affected by a legal form of privatisation based on company decisions (at cca. 150 companies).[33] Mihályi further adds that "considering their proportions, negative examples between 1988–1990 had been not more numerous than between 1990–1992 or in any subsequent three years' period."[34]

Did abuses occur? Yes, they did, however,

a) they were not committed on grounds of AR,

b) it was ABA that substantiated the abuses, nevertheless, if ABA had not been in force, the number and scale of abuses would have been even greater pursuant to the Commercial Code of 1875. The majority of presumed abuses were associated with the privatisation of contributions in kind and company

[33] See, Matolcsy, Gy.: *Lábadozásunk évei* (The Years of Our Convalescence). Budapest, 1991. 227–229., Voszka, É.: *Spontán privatizáció Magyarországon* (Spontaneous Privatisation in Hungary). Budapest, 1998. 130–145., Mihályi, P.: *A magyar privatizáció krónikája. op. cit.* 98–102.

[34] Cf., Mihályi: *A magyar privatizáció krónikája. op. cit.* 100.

evacuation, not with general privatisation, but with those transactions affecting retail industry and catering trade companies concentrated in co-operatives that preceded Act 76 of 1990 on the Privatisation of Commercial, Service, Hotel and Catering Businesses [the so-called Act on Small (Pre-)Privatisation].[35] Another area of abuse was constituted by matters related to the assets of the Communist Party (Hungarian Socialist Workers' Party) and of the associated social organisations (such as the Alliance of Young Communists and the Alliance of Pioneers), which, however, were beyond the scope of legislation concerning privatisation by the state. (The issue of the assets of the Communist Party designated to be inherited by the Hungarian Socialist Party had been transferred to the political portfolio during the so-called Round-Table-Negotiations, which had paved the way for the political transformation, therefore, it was not dealt with during the codification of business law.)

As a matter of course, objective assessments of the spontaneous (decentralised) privatisation were written as early as in the 1990s, as well. György Matolcsy, the under-secretary of state responsible for economic-policy under the Antall-Government formulated the followings: "Spontaneous privatisation belongs to the heritage of the Hungarian path. It is *the logical product of self-destruction* and the result of a permissive policy *in lieu of* aggression. Its spontaneous character was rendered by the fact that it was the corporate management that initiated reorganisation and riddance from state property. Of course, this entailed the salvage of former positions, which was the specific way of escape. The real import of spontaneous privatisation consisted in the fact that it prepared real privatisation."[36] According to Matolcsy, the minor amendments of former law effected by the Antall-Government in the summer of 1990 were designed to soothe the mood and temper of the new parties in Government: "Eventually, the amendments did not modify substantially the legal framework of privatisation. Although, they reinforced the state control of privatisation and guaranteed the state more powerful influence on privatisation, they did not rechannel former processes or obstruct former paths."[37] A similarly objective assessment was rendered by Tibor Pongrácz, the political under-secretary of state of the Antall-Government (and the Chairman of the

[35] The draft of the Act on Small (Pre-)Privatisation was ready in the autumn of 1989, but according to the demand of the parties in opposition, it was only adopted by Government presided by József Antall. In the meantime, the number of businesses to be privatised had decreased by several thousand, since the practical ones had taken action, before the act took effect.

[36] *See*, Matolcsy, *Lábadozásunk évei. op. cit.* 27.

[37] *See*, *ibid.* 103.

Board of Directors of the Hungarian Privatisation and State Holding Company in 1997), albeit, he exaggerated the scale of spontaneous privatisation: "These statutes adopted in 1988 and 1989 ... (ABA and AR, sic) ... did actually guarantee the most consequential prerequisite of bourgeois transformation, since they legitimised private enterprises and did not restrict foreign investment. Nevertheless, they did not provide for the protection of state property and no parallel law pertaining to the protection of assets related to privatisation was drafted." Pongrácz is correct, however, the time for parallel law-making was very limited. But we should follow the train of thought of Pongrácz: "Therefore, the opposition assumed that the purposes of the pertinent statutes were the salvage of power, i.e., the conversion of political power into economic power. We allow that in the period of spontaneous privatisation many unethical and perhaps legally contestable cases occurred, therefore, we can rightly condemn it. Nonetheless, if we view the process in its completeness and from a historical perspective, we can affirm a great deal of it, since what already within the framework of the communist regime did commence were the establishment of private enterprises, the deconstruction of unprofitable and futureless state property and the irreversible conversion to real market economy... For the former elite that had abandoned its political and economic positions, such gaining ground by entrepreneurs, which ensued in many waves, opened up opportunities for escape and according to some experts, that explains why the former elite did not even consider violent intervention against the change of regime."[38]

6. Subsequently to the free elections in the spring of 1990 and the formation of the centre-right Antall-Government, minor legal amendments were effected and for some time, the basically self-initiated decentralised privatisation of companies continued, although, governmental control was more powerful and the active involvement of the State Property Agency into privatisation also increased. Act 76 of 1990 on privatisation in commerce and catering trade (the so-called Act on Small (Pre-)Privatisation) was promulgated. For some time, under the changed political circumstances, the management of companies seemed to acknowledge the increase of the power of the State Property Agency and agreed on a *modus vivendi* with its leadership, according to which, Ferenc Mádl, a minister without a portfolio supervised privatisation, his deputy was János Martonyi (the former government commissioner of the Németh-Government responsible for privatisation), whereas, the managing director of the State

[38] Pongrácz, T.: Privatizáció és kárpótlás (Privatisation and Compensation). In: *Magyarország a XX. században* (Hungary in the 20th Century), Vol. 3., Szekszárd, 1997. 678–682.

Property Agency was Lajos Csepi, a director of the former Price Control Authority. In this respect, Erzsébet Szalai notes correctly that the so-called Kupa-Programme actually acquiesced in decentralised privatisation.[39] At the same time, Buyout by Corporate Management combined with the so-called Employees' Share Scheme had a growing significance, the latter of which was politically supported by government parties, as well.[40] Although, the so-called Government Theses titled "Property and Privatisation" written by Bertalan Diczházi and György Matolcsy in August, 1990 in principle objected to spontaneous privatisation and corporate governance, it reprehended privatisational "shock-therapy" and intended to provide a wide range of property for investors. According to the Theses, "the first wave" of privatisation would consist in active privatisation implemented by the State Property Agency, the second wave of privatisation would be launched by companies, whereas, the third wave would have been a peculiar take-over, when outsider investors could have contested the insider corporate management. Nevertheless, the latter alternative was not realised. Meanwhile, Act 76 of 1990 was being implemented and the considerable merits of the statute, disregarding all its contradictions, included that by cca. 1994, almost the entire segment of retail and catering trades had been transferred into private property and the majority was held by Hungarian individual proprietors, furthermore, the act had been implemented not by way of distribution, but in an open framework of market-based competition.[41] Nevertheless, since the removal of former corporate management had failed in the summer and autumn of 1990, a political decision was made in 1992 on the liquidation of corporate governance and management at state-owned companies, therefore, the coercive transformation of these companies was to be effected pursuant to Acts 53–54–55 of 1992. Furthermore, in 1992–93, the financial empowerment of political supporters was an increasing endeavour, which manifested itself in Small Investment and Existential-Credit

[39] See. Szalai, E.: *Gazdasági elit és társadalom a magyarországi újkapitalizmusban. op. cit.* 79–80. Mihály Kupa as the Minister of Finance of the Antall-Government propagated this as a programme of economic-policy at the turn of 1990/1991.

[40] *See*, Boda, D.–Neumann, L.: *MRP és MBO a hazai privatizációban* ("Employees' Share Scheme and Buyout by Corporate Management Programmes in Hungarian Privatisation"), Budapest, 1998. 69–81.; Karsai, J.: Management Buyout külföldön és itthon (Management Buyout in Hungary and Abroad). *Külgazdaság*, 37 (1993) No. 2.; Boda, D.–Hovorka, J.–Neumann, L.: A munkavállalók, mint a privatizált vállalatok új tulajdonosai (Employees as New Proprietors of Privatised Companies). *Közgazdasági Szemle*, 41 (1994) 1084–1096.

[41] *See*, Karsai, G.: *A fogyasztási cikk kereskedelem privatizációja* (Privatisation of the Retail of Consumer Goods), Budapest, 1993.

Programmes, etc. In 1992, a separate statute, Act 44 of 1992 on the Employees' Share Scheme was enacted, which was based on the principles of the American ESOP Programme (Employees' Stock Ownership Programme).[42]

7. In 1992, three pertinent statutes were adopted, such as *Act 53 of 1992* on the Management and Utilisation of Venture Capital to Be Retained in Long-Term State Ownership, *Act 54 of 1992* on the Sale, Utilisation and Protection of Provisionally State-Owned Assets and *Act 55 of 1992* on the Promulgation of Acts 53 and 54 of 1992 and on Consequential Legal Amendments.[43]

In this legal framework (the drafting of which was supervised by Béla Bártfai), the basically new element was rendered under the act on venture capital to be retained in state property for a long term, within the purview of which, state-owned companies as institutions were dissolved via their reorganisation into business associations and the persisting state-owned companies were also obligated to operate as business associations (the overwhelming majority of them as joint-stock companies and less than 10 p.c. as limited liability companies). Pursuant to the act, a market-conform management-system was applied at persisting state-owned companies, i.e., these business associations were subordinated to the State Holding Company (Limited by Shares). The State Holding Company functioned as the one-entity joint-stock company of Government.

The underlying conception was *the unlimited nature of the power of the state as a proprietor*: Accordingly, state-owned companies are the objects of state property, therefore, they neither have rights, nor earning assets (in a departing manner from the former regulation) *vis-a-vis* the proprietor. These statutes generally refer to venture capital, never to companies, therefore, the guarantees of corporate governance and management and of autonomy established back in 1977 were eliminated.

Neither the venture capital of the state was precisely defined, in the same manner, nor the scope of the companies to be retained in long-term state ownership were itemised, although, Article 2 of Act 53 of 1992 specified some

[42] Concerning the Programme titled "Kisbefektetőket a tőzsdére mindenáron" ("Small Investors to the Stock Exchange at All Costs"), announced in 1992, *see*, Korányi: *op. cit.* 46. On the programme of "stock purchase" free of charge by small investors (practically for free, via the utilisation of compensation vouchers), *see*, Vanicsek, M.: *Elosztásos privatizáció* (Privatisation by Allocation). Budapest, 1998. 44–49. Concerning the Existential-Credit Programme and subsidies for domestic smallholders, *see*, Gidai, A.: *Kedvezményes privatizációs technikák* (Techniques of Preferential Privatisation). Budapest, 1998. 63–66.

[43] For commentaries on the acts, *see*, Sárközy, T. (ed.): Átalakulás és a privatizáció (Reorganisation and Privatisation). Budapest, 1994.

general features. On grounds of the statute, Government Decree no. 126 of 1992 (VIII. 20.) and its Supplements itemised the respective companies, scilicet, a share of cca. 35–40 p.c. of the state-owned sector, including the so-called crucial companies of the state, the inner core. An endeavour of the State Holding Company (Limited by Shares) was to shun the limitations stipulated under ABA, according to the view of Jenő Czuczai, it intended to function as a corporation under public law (*cf.*, the French model), nonetheless, this collided with effective law, furthermore, the Constitutional Court under its Decision no. 33/1993 (IV. 15.) AB also annulled the provisions of Act 53 that established unnecessary exceptions.[44]

Law pertaining to privatisation adopted in 1992 maintained the State Property Agency as a central organ of privatisation. Corporate governance and management was terminated at companies designed to be privatised, thereby, companies were subjected to coercive transformation into business associations. Nevertheless, privatisation was not incorporated into the process of reorganisation, as it had been in 1989, but reorganisation into an association ensued first, and only then was privatisation effected as a "sellout" by the State Property Agency: it sold the state-owned shares in business associations.

Within the purview of the above-mentioned three statutes, all the companies falling under the effect of the Company Act of 1977 dissolved between 1992–1995 with the exception of about 20–30 companies under liquidation or full settlement: state-owned companies were reorganised into associations. All this took place under state direction, and subsequently, privatisation was also subordinated exclusively to state decisions. The decisions on privatisation reached by the State Property Agency were only to a minor extent determined by normative conditions (neither had been Capital Policy Directives formulated except for one), in general, uniform solutions were applied and the absence of normative conditions were meant to be rectified by wide-scale competition procedures. Nevertheless, the further implementation of privatisation was basically and unvariably market-based, albeit, "preferential procedures" (such

[44] Concerning the practice of privatisation between 1992–94, *see*, Czuczai, J.: *A magyar privatizáció alulnézetből. Múltja, jelene, jövője (Javaslat egy új liberális gazdaságpolitikának megfelelő privatizációs jogi szervezeti-intézményei koncepcióra)* [Privatisation in Hungary from the Bottom-View. Its Past–Present–Future (Proposal for a Legal Organisational–Institutional Conception of Privatisation that Conforms to New Liberal Economic Policy)]. Budapest, 1994. 29–37.

as privatisational leasing as a new technique) were adopted at a growing extent.[45]

The situation related to privatisation between 1992–1994 became both from political and economic points of view considerably strained. The reorganisation of companies into business associations had established the *sine qua non* of privatisation, however, privatisation *per se* advanced very slowly. The actually valuable capital was possessed by the State Holding Company (Limited by Shares), the management of which (Count Pál Teleki and Szabolcs Szekeres), having returned from the USA, intended to operate their portfolio as a real monetary holding, which provoked the anger of populist radical politicians.[46] Nevertheless, populist programmes directed at "the support of little man" gave one after the other ground. The tasks of the implementation of massive privatisation, the sellout of the "inner core" (Péter Mihályi) and the conclusion of the process of institutional privatisation awaited the future socialist-liberal Government, which were substantiated by Act 39 of 1995, the so-called uniform act on privatisation.

The draft of the uniform act on privatisation in line with a number of other drafts designed to promote the work of new Government had been formulated by 1993 in the Institute of Political and Legal Sciences of the Hungarian Academy of Sciences,[47] and having been adjusted to the Government Programme, they were handed over by September, 1994 by the Codification Committee consisting of István Csillag, Gábor Komáromi and Tamás Sárközy to the Minister of Finance and to Ferenc Bartha, the respective government commissioner. The state administrative negotiations concerning the draft law and the parliamentary debate of the Bill took more than half a year by reason of prevailing political conflicts and the delay was also influenced by the replacement of Ministers of Finance, i.e., of Békesi by Bokros and by the appointment of Tamás Suchmann to Minister of Privatisation. Eventually, the

[45] Juhász, I.–Vigh, I.: *A privatizációs lízingtechnika kézikönyve* (A Manual for the Technique of Privatisational Leasing). Budapest, 1993.

[46] *See*, more amply, Hoóz, T.: Az ÁV Rt. mozgási szabadsága a privatizációs törvények tükrében (The Scope for Action of the State Holding Company As Reflected by the Acts on Privatisation). *Gazdaság és Jog*, 1 (1993) No. 2–3.; Komlós, J.: *Vezetői kivásárlás (MBO)* (Management Buyout). Budapest, 1993.; Mellár, T.: Vállalati átalakulások és a privatizáció (Company Reorganisations and Privatisation). In: *Bródy András ünnepi kötet* (Memorial Volume Dedicated to András Bródy). Budapest, 1994. 246–268.; Voszka, É.: *Az agyaglábakon álló óriás* (The Giant on Clay Legs). Budapest, 1995.

[47] See, Sárközy, T.: *Javaslat a piacgazdaságot szolgáló modern kormányzás felépítésére* (Proposal for the Establishment of Modern Government Promoting Market Economy). Budapest, 1994.

basic structure and the basic principles of the draft law could be maintained, and in the spring of 1995, the uniform act on privatisation was adopted.[48]

AP also created the uniform organisation for the implementation of privatisation, namely, in the form of a joint-stock close company, the Hungarian Privatisation and State Holding Company Limited by Shares was established (hereinafter: HPSHC). Although, unequivocal detachment from government property did not ensue at that time, either, AP align with the amendment of the Act of 1995 on the Budget considerably increased the scope of the assets to be privatised and simultaneously, the coersion towards privatisation. The primary mission of HPSHC was privatisation and its secondary task consisted in the administration of assets.[49] The scope of companies to be retained in long-term state ownership was already itemised under the act, their number decreased substantially. Other venture capital could merely "provisionally" fall under the category of state property, they were designated to be privatized "the sooner the better": the basic objective of AP was the acceleration of privatisation.[50]

AP basically regulated market privatisation, which was to be implemented in return for cash, thereby, it intended to restrict preferential and "bogus" (István Csillag) privatisation to exceptional cases. In comparison with the law of 1992, AP considerably increased the constitutional guarantees of privatisation (e.g., via the prescription of privatisational memoranda) as well as the publicity and transparency of privatisation. Accordingly, the basic privatisational technique shall unvariably be the announcement of competitions, whereas, the method shall be the conclusion of an atypical deed of sale, i.e., a privatisation agreement.[51]

[48] See, Sárközy, T.: Küzdelem a privatizációs törvény körül (Struggles Concerning the Law of Privatisation). In: Kurtán, S.–Sándor, P–Vass, L. (ed.): *Magyarország Politikai Évkönyve 1994-ről* (The Political Yearbook of Hungary on 1994). Budapest, 1995. 194–212. See further, Mihályi, P.: *A magyar privatizáció krónikája. op. cit.* 199–224. For a detailed analysis of AP *per se*, see, Csillag I.–Komáromi, G.–Sárközy, T.: *Kommentár az új privatizációs törvényhez* (Commentary on the New Law Pertaining to Privatisation). Budapest, 1995.

[49] On the administration of assets, see, Komáromi, G.: Privatizációs technikák, vagyonkezelés (Privatisational Techniques and Property Management). In: *Az új privatizációs törvény* (The New Law Pertaining to Privatisation). Budapest, 1995. 138–158.; Mihályi, P.: Privatizáció és vagyonkezelés (Privatisation and Property Management). *Közgazdasági Szemle*, 44 (1996) No. 3.

[50] *See*, Csillag, I.: Az ÁPV Rt. vagyona és gazdálkodása (The Assets and the Management of HPSHC). In: *Az új privatizációs törvény. op. cit.* 98–111.

[51] Concerning the invitation of tenders related to privatisation and privatisation agreements, see, Wellmann, Gy. A privatizációs pályázatokkal kapcsolatos jogkérdések (Legal Issues Concerning Tenders Related to Privatisation). *Gazdaság és Jog*, 2 (1995) No. 12.,

The position of Government and HPSHC in the issue of privatisation was unvariably Janus-faced. That consisted in the followings: on the one hand, privatisation was an interest of the state, since revenues and results were indispensable for HPSHC, on the other hand, privatisation curtailed the power of the state and shortened the term of the sustainability of HPSHC. In the recent 17 years, the so-called privatisational jacket has undoubtedly and several times meant the life-belt of the budget policies of Governments. Nevertheless, in defiance of the above, the great majority of the state sector was privatised, the so-called strategic privatisation was accomplished between 1995 and 1997. By 1998, thereby, *the privatisation entailed by political transformation was concluded*,[52] therefore, problems related to privatisation were for the time being removed from the basic agenda of economic policy. This fact was extremely appreciated in the accession process of Hungary to the EU, since we significantly preceded the neighbouring countries.[53]

8. Pursuant to AP, which took effect in June, 1995, the most efficient phase of Hungarian privatisation *in re* sales ensued between the summers of 1995 and 1996. As an irreversible process, the privatisation of the "inner core" of the state sector, i.e., of the so-called strategic companies took place in the following crucial areas: electric energy, gas and oil industry, mass media (radio, television), telecommunication and the bank sector. The most important element of this process is not the fact that a privatisational income exceeding 450 billion HUF was produced in 1995, without which, however, the situation of the annual budget would have been critical and financial stabilisation could have hardly been achieved. What is considered more essential is that strategic privatisation also affecting national public utilities dispelled the political uncertainty prevailing in the West *vis-a-vis* Hungary, therefore, foreign investment was relaunched, the extent of which accreted to 16 billion USD by 1997. Furthermore, the series of privatisations effected in 1995 and 1996 did really swung Hungarian privatisation over the impasse, therefore, by 1997, the

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Csillag, I.: Privatizációs szerződések (Privatisation Agreements). *Gazdaság és Jog*, 2 (1995) No. 7.

[52] For an analysis of the process broken down according to companies, see, Mihályi, P.: *A magyar privatizáció krónikája. op. cit.* 251–350. See further, Csáki, Gy.–Macher, Á.: A magyarországi privatizáció 10 éve (1988–1997) (A Decade of Privatisation in Hungary: 1988–1997). In: Kurtán–Sándor–Vass (ed.): *Magyarország évtizedkönyve. op. cit.* 116–130.

[53] For an analysis of the comparison of the law pertaining to privatisation elaborated by the mid-1990s in other former socialist states and in Hungary, see, Sárközy, T.: Rendszerváltozás és a privatizáció joga (The Change of Regime and Law Pertaining to Privatisation). Budapest, 1997.

expectation that institutional privatisation would be approaching its end was fulfilled. Private property attained a decisive majority in Hungary, thereby, the share of long-term state property in the entrepreneurial sector could be restricted by the millenium to an extent similar to that prevailing in Austria, Italy and France. This has also been brought forth by an increasing scale of privatisation effected by local governments in 1996–1997.

According to my opinion, AP of 1995 (despite its deficiencies also criticised by us) had a paramount role in this internationally recognised result, which was also appreciated in the country report related to the accession of Hungary to the EU. On the basis of the norms set forth under the pertinent statutes of 1992, which were basically focused on the processes of reorganisation, "strategic privatisation" would have been much more circumstantially implementable. According to my view, the criticisms that AP was mere *skeleton law*, some of its solutions were roughly drafted and allowed for *multifarious constructions* cannot be substantiated. Undubiously and mainly by reason of the numerous motions for its amendment, there were misformulated rules as well as unravelled provisions under the AP in the absence of practical experience, therefore, they required active contribution on the part of law-appliers (so-called directive norms). At the same time, in the majority of cases, the problems were properly solvable with the generally applied instruments of the interpretation of law assuming that the provisions were benevolently enforced.

Of course, the privatisation of strategic major companies and banks between 1995 and 1997 involved numerous contestable elements. Although, privatisation in principle ensued after several years' preparation, its major part was low-standard, the overpaid counsellors generally carried out quite slipshod work, the preparation of pertinent regulations (the amendments of acts pertaining to energy and gas supply and to price-formation by authorities, etc.) was also rather ad hoc and a number of legal objections can be made *vis-a-vis* the concluded agreements. Regrettably, issues were still unvariably *over-politicised*, the consideration of political aspects was excessively emphatic, which resulted primarily from the composition of the management board of HPSHC. From the outset, the staff of HPSHC in view of its activity was over-dimensioned (it consisted of almost 500 employees), its internal organisational structure was tangled and bureaucratic. The multiple-level system of decision-making was too protracted and involved lots of default possibilities. Fluctuation mainly at the management level of HPSHC was considerable between 1995–2005, the expertise of the apparatus was generally feeble, therefore, it was exposed to external counsellors. Thence, this apparatus was too expensive and inefficient.

Nevertheless, this relatively feeble state apparatus of privatisation and poorly structured organisation did implement the progress of privatisation.

Succeeding the German privatisation completed by 1995, Hungary was the second socialist state, which, essentially within 10 years, could establish the proprietary structure marking the states of the EU, i.e., which is based on the decisive majority of private property, even if the process included major financial losses, contradictions, sordid social phenomena (albeit, the scale of these, according to my view, was substantially outstripped by those discernible in other former socialist states). First and foremost, we escaped the state-capitalist path. Which, I assume, is *a significant achievement* in defiance of all well-founded criticisms. The anomalous unity of the roles of the state as public authority and proprietor ceased to exist in Hungary by the end of the 1990s owing to the completion of institutional privatisation, since the change of the proprietary structure of the economic regime had been accomplished, which was regarded as a common irreversible guarantee both of a multi-party parliamentary democratic system and of an economic order based on market competition. In this situation, on the one hand, *the legal method of the conclusion* of the former intermittent and massive privatisation needed to be elaborated, on the other hand, the new structural, economic and legal order of the utilisation of the persisting state property also needed to be legally regulated.

Within the purview of the statutes of 1991–92, state property had been divided into "government" and "venture" capital, however, this distinction was never supported by refined principal grounds. Theoretically, government property can be essentially divided into two parts: on the one hand, the so-called *public property* in the strict sense of the phrase (roads, public places, rivers, lakes, etc., which are managed by the state with a view to the benefit of the entire population of the country), on the other hand, the so-called *fiscal capital* of the state, which substantively constitutes the capital allocated to the budgetary organs of central state administration and local governments. The part of the venture capital of the state not designed to be privatised is essentially not constituted by "free" assets (e.g., real estates), but for the purposes of national economy, it is allocated to the associations, in which the state has a majority ownership, therefore, any regulation concerning these assets essentially implies the determination of the management system of these companies. The basic contradiction of the system established pursuant to Acts 53 and 54 of 1992 (and sustained under AP of 1995) was that these statutes regulated venture capital to be retained in long-term state ownership, but upon the concrete determination of these assets (itemised under the Supplement to AP), they referred exclusively to companies. Therefore, upon the conclusion of institutional privatisation, the capital to be retained in state property permanently, scilicet, for a long term and stably, needed to be recircumscribed. However, that is an issue that basically determines the future economic policy of a

country, thereby, it may constitute a battleground for social democratic, Christian Democratic or liberal ideologies.

9. Nevertheless, the conclusion of institutional privatisation was deferred by the Horn-Government to the post-election period, whereas, the Orbán-Government in power between 1998–2002 privatised relatively little, what is more, renationalisation was also effected in a low scale. However, the socialist-liberal Governments following 2002 laid a renewed emphasis on the privatisation of the remains of state property that did not belong to government property. By 2005, the law pertaining to the conclusion of institutional privatisation, the cessation of HPSHC and to the organisation of a state holding company (publicly financed institution or joint-venture company) had been drafted, nevertheless, there was a pertinent, fierce, three years' controversy even within the coalition. Therefore, Act 116 of 2007 on the Conclusion of Institutional Privatisation And on a Single State Property Management Organisation took effect as late as on 1st January, 2008. Within the purview of this act, AP of 2005 was annulled and the new organisational and operational order of the management of state property was determined.

N.B., Hungarian experts had reached a consensus already at the end of the 1990s that the scattered management of state property needed to be terminated. Therefore, by the early 2000s, the modern Hungarian *fiscus*, the Hungarian State Treasury had been established, which has managed the whole range of monetary assets of (the organs of) the Hungarian state deposited on the unified fiscal account. State debts are managed by the Government Debt Management Agency Private Company Limited by Shares. Nonetheless, *the real assets of the state* were scattered: HPSHC, the Treasury Property Directorate and the Ministries themselves also held state-owned real estates and association shares. Therefore, the establishment of a single organisational and operational structure for the management of the real assets of the state was deemed reasonable. Nonetheless, a dispute emerged *in re* the organisational form of that trustee:

a) In my view, a State Holding Organisation would have expediently functioned as a publicly financed institution, which, as a so-called Real State Treasury could have later united with the *fiscus*,

b) According to the other standpoint, the Real State Treasury needed to be established as a joint-stock company for the purpose of the expedient utilisation of the remnants of state property. In this case, the unified management of property would not be governed by the more flexible rules pertaining to government property, which, however, is contestable from a constitutional point of view.

Eventually, following long disputes and a veto by the Head of State, pursuant to Act 116 of 2007 the second standpoint was adopted and the Hungarian State Holding Company was established as of 1st January, 2008. This close company limited by shares and functioning as a one-entity business association of Government, is not subordinated to a Board of Directors or a Supervisory Board, but its management is accomplished by the State Holding Council consisting of seven members appointed by Government. This company limited by shares manages basically state property, but it is also entitled to its sale, as a matter of course, under safeguarding regulations.

10. I contend that implied the final stage of the history of Hungarian privatisation. We may ponder, whether Hungarian privatisation was a sequence of successes. From institutional-taxonomic and macro-economic points of view and *in re* the final outcome, I assume *the answer is* by all means *affirmative*. Under extremely difficult social-economic and political conditions, the anomalous unity of the roles of the state as public authority and proprietor was *de facto* terminated and the proprietary structure based on the predominance of private property necessary for the sound functioning of modern market economy emerged. From a strategic point of view, subsequently to the conclusion of privatisation, the future Hungarian state will need to function in a basically different manner from that it did formerly. The state as a proprietor frames a different economic policy from that of the state that establishes a regulatory framework, that can motivate and provide services. The altered task will necessarily and in return affect the organisational and operational mechanisms of the state. Thus, we must be facing a consequential reform *in re* state organisation and administrative modernisation.

As to its manner of implementation, Hungarian privatisation was naturally not a sequence of successes, either, *basically on objective grounds* and from the outset, it could not be. In such a profound economic crisis even the chance of optimal privatisation was precluded, assets of such a massive scale could not be so rapidly privatised at an adequate price. Furthermore, as a matter of course, objective reasons were substantially supplemented by *subjective flaws*: unpreparedness, the absence of experience and of a long-term strategy of privatisation, the standard change of the "conception" concerning privatisation, economic and legal-technical defaults, detriments entailed by over-politicisation, etc. We can also refer to the element that also had a role, namely, that capitalists (i.e., foreign investors) did not know socialist management (scilicet, they ignored socialist precedence), whereas, former socialists did not know capitalist management, scilicet, they could not conform to market economy. Therefore, we have undergone *a long-standing process of learning* and we

have learnt severe lessons during privatisation, indeed: in several cases, we could have imposed higher prices, we could have economised on expenditure, we could have elaborated more efficient and skillful privatisational processes and we could have applied more effective privatisational schemes. Finally, what does not entirely belong to the scope of subjective flaws: corruption and abuse could have been more efficiently foreclosed, even if we admit that in the majority of other former socialist states more scandals, corruption and criminality could be discerned than in Hungary, in which we can find scarce solace.

What we can certainly set forth is that our national property has not disappeared, it merely transformed during the process of privatisation. National property seems to have been lost only for those who identify national property with state property and do not recognise that the property of private enterprises and foreign investments in Hungary do become incorporated into our national property. The facts that GDP decreased in the first period of political transformation and that significant unemployment occurred were basically not the consequences of privatisation (on the contrary, in my view, these would have emerged more stringently without privatisation), and in the long-run, privatisation *per se* actually facilitated the development of our economy. Finally, we could expatiate on the element of social justice. Without doubt, it could not be sufficiently guaranteed by way of privatisation, since individuals in auspicious circumstances and in powerful positions, individuals who realised their social capital (naturally, in many cases these persons belonged to the former state party, to the former state apparatus or company management) could surely acquire much more than others (we do not have precise sociological figures). However, no capitalist system has persisted so far, which would have been based on the property of the majority of the population (which is valid even in case of the most prosperous countries of the world). Why should we suppose that this could have been achieved via a privatisational strategy in Hungary? Even the critics of privatisation acknowledge that "the winners" of privatisation constitute a "mere" 20 p.c. of the population, which as a proportion is not a bad achievement, in my view. Anyway, we are certainly not dealing with a history of privatisation, which has produced some hundreds of millionaire criminals and several millions of deprivated. This is also valid, even if real social considerations should have been more effectively enforced in various areas of economic policy. We must acknowledge that a peculiar form of *primitive accumulation of capital* ensued (which derived from state property, since we did not possess other property) during an unexpected restructuring from "semi-socialism" into modern capitalism due to world political (and not intrinsic) factors. Just like the English, German, American, etc. primitive accumulation of capital at the dawn of capitalism were ethically quite filthy

processes taking many decades, the accelerated process of the primitive accumulation of capital taking merely some years could exclusively undergo in an ethically contestable manner. (Its dimension is a moot point.) Nevertheless, the histrorically belated Hungarian system of new-capitalism having evolved by the millenium can eventually prove to be a liveable and habitable society (which is not a groundless expectation), the social dejection brought forth by the shock owing to restructuring may disappear and we may ascend towards "Europe", even if not the entire society, as some presumed, but at least a large segment of the society, mostly the younger generations.

Naturally, the proprietary structure adequate for privatisation and market economy *per se* does not constitute a guarantee for social-economic success. This framework also allows for faulty economic policies and world economic processes may still destroy national economies. But our new proprietary structure is more viable for facing the challenges of modernisation and globalisation than our economy preceding privatisation was. Namely, in the future private enterprises will rival private enterprises, the possibility of easy acquisition from "soft" state-owned property has been precluded. We allow that several citizens may have acquired great fortunes in the course of privatisation by abusing their positions. Nevertheless, many already demonstrate the inability to hold their grounds in the market, thereby, they will relentlessly fail and the state or politics will not or will hardly be able to "subsidise" them.

We still need time to compile an inventory of and to render a complete, scientific processing of Hungarian privatisation. As far as I am concerned, I would be inclined to qualify it as "optimistically impropitious". In the meantime, passions may also abate, the majority will recognise that not everybody can be a proprietor and that efficient work is more appreciated by private enterprises than by state-owned companies.

As the above elucidate, Hungarian business law was an active contributor to Hungarian privatisation, which took 10 years, and I think it was capable of guaranteeing an operative legal framework for shaping market economy, partially by renewing itself. As a matter of course, there have been mistakes and errors both in law-making and the application of law. Nevertheless, by way of striving towards evolution, maintaining the long-standing elements, simultaneously modernising itself and conforming to the business law of the European Union, law-making could secure appropriate bases for the consolidation of Hungarian private enterprises.

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Neutrality and Legal Certainty in Tax Law and the Effective Protection of Taxpayers' Rights

Abstract. Taxation and tax law cannot exist without biases because tax law can be seen per definition as a set of biases. Even if the state pursuing its fiscal policy cannot be neutral, one can expect to enforce the principle of equal treatment before the law. Besides, state intervention need be in proportion to the objectives of the policy of redistribution or economic stabilization. Also, fiscal policy need rely on a system of tax administration that operates in accordance with the principles of openness, good governance and legal certainty. It is ideal if the legal regulation of the procedure of tax administration is fully fledged. The legal regulation of the tax liability need be comprehensive and cover all the processes of gathering tax information, identifying the tax liability and collection of taxes. Moreover, tax administration and administrative law are inadvertently in a need of being completed by private law. Where tax authorities are not explicitly authorised by statutory law to act, they must rely on the principles that are in accordance with the constitutional order. Notably, in Hungary, there is no statutory law that would preclude the universal effect of the Civil Code, covering all the financial relations whether to be made between private persons or between private persons and the representative of the public. Finally, for the purposes of approximating an ideal tax system, the possibility of horizontal coordination must not be left out of consideration. In this context, legal and tax planning and the choice of legal and tax regimes by parties have come to the forefront. Bargaining (e.g., advance ruling) has not been strange from tax law either.

Keywords: fiscal neutrality, rule of law and due process rights, legality of the tax administration procedure, the interconnectedness of tax law with private law horizontal coordination in tax law

Taxpayer rights can be exercised effectively in a well-established system of tax law. It is important to look for the quality of tax legislation, in other words, to know about the conditions in which the tax law can be considered as ideal. It should apparently rest on a sound normative basis. For example, in the EC practice of state aid and tax competition it is crucial if certain tax law measures can be seen as part of "the nature or general scheme of the system" (Italian textile

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industry subsidy in case 173/73).[1] Yet, the question remains unfortunately open what can be considered as the general scheme of a tax system. It cannot be precluded that there are competing schemes to be found in one and the same tax system or that there are different schemes, to be seen as general, in different tax systems.

Taxation policy and law is at ever time developed according to the changing needs of the public budget and fiscal policy in general. It is thus integral part of the economic and social policy a country can pursue in specific conditions. However, scholars may have ideas about a good professional quality of tax legislation. Then one can expect that a tax system has the following features: it is

- neutral (including all the less biases);
- regulated comprehensively (there is no or minimal interim legislation);
- interconnected with (supported and completed by) private law; and
- operating not only with vertical, but also with horizontal coordination

(tax planning and the choice of tax regimes are possible).

In the following, these features will be explained. Examples for (or against) the principles of a good tax system as depicted below will be delivered from the Hungarian legal practice.

I. Theoretical considerations

1. Neutrality in tax law

(i) Ideal legal system and tax law

Taxation cannot operate without legal regulation. Tax law is thus part of the law of a country. It can even appear in cross-border cases. It is thus reasonable to anticipate an ideal tax system as a tax law system, part of the legal system, whether in a purely internal or international (cross-border) context. The question of an ideal tax system is thus preceded by that of an ideal legal system.

An ideal legal system can obviously be determined by making reference to meta-juridical values. Where a legal system is oriented to right moral and democratic political values, the legal system itself will tend to operate in an ideal way. Alternatively, one cannot be pleased to be confined to non-legal values while describing a legal system. It is also necessary that the legal system itself negotiate integrity and coherence.

The law appears in the official gazette as statutory law. Moreover, it is part of an order of legal and non-legal conventions, being embedded in the traditions

[1] European Court Reports (1974), 709, Para 15.

of the legal profession. At the same time, the law is part of the official life, being subject to the expectations of politically organized communities. This is the positive aspect of law, crucial in a society organized by means of instrumental rationality. Besides, the law is able to negotiate both legitimate interests and subjective rights in a network of recognized rights and duties. The law can eventually be substantiated by transcendental values. Examples for such an explanation can be delivered from Kelsen who referred to a basic hypothetical norm or from Rawls who introduced the notion of the so-called reflective equilibrium (to be achieved not only by bargaining, but also by reaching agreement on noumenal values). The law can also be substantiated by natural law values, yet purely procedurally, dispensing with transcendent values. This way, one can arrive at the notion introduced by Fuller of the inner morality of law.

One can see that the legal tradition can be delineated from bottom up by the layer of law directly influenced by political and ideological expectations and from top down by the high values of morality and human dignity. Any way, it is important that the law need be intact to a certain extent at least both from politics and morality. This independence is required in order to achieve consistency in the legal system and reach legal certainty.

The law can be presented not only in a course of moving from the communities organized by law to those organized by non-juridical values. The law can be described by another movement as well: it appears as a means of organized coercion, as a system of the enforcement of the respect of legal norms (like in the system of purely positive law described by Kelsen). This is the catechistic aspect–actually the hard core–of law: law appears in the body of norms that can be acknowledged and observed by means of sound reason. The law also means, however, a system of the conditions in which the interpretation of law can be authentic (as suggested by Talcott Parsons). Law is thus not only a matter of norms. It is also a matter of process. It is manifested in the aspirations to recognize and follow values inherent in the view on society of certain groups of people. Seeking for perfection is part of human life in the same way as being subjected to basic duties. This way, the law that appears in the body of norms tends to be manifested in the mind of the virtuous individual as well who will accept and follow the values negotiated by law. The latter is the aretaic (virtue-based) aspect of law.

As it can be seen, law can be delineated both in the trends of moving from positive to natural law and from the catechistic layer to the aretaic expression of law. Tax law can also be placed in the system of law as discussed above. It is integral part of the official life. It is crucial in a country to secure the collection of taxes and the administration of social justice. Taxation policy is normally subject to the fluctuation in the economic and budgetary policy. However, in a

well-established legal system, the tax system is based on professional logic and enjoys relative independence from outward considerations. The technical aspect of tax law suggests neutrality towards political preferences.

Similarly, a good tax system can be identified not only by stressing independence from politics. It is also important to try to go beyond the enforced application of the norms of tax law and start referring to virtues. It is not voluntary to pay taxes. Coercion is thus presupposed upon the application of tax law. However, normally an agreement can be reached nationwide or even internationally on how to distribute the public burden and benefits.

It comes from the above that a good tax system tends get rid of the harmful effect of the abrupt changes in economic policy and of particular ideological considerations and move to professionalism and technicalities. Importantly, tax law need be regulated on a high level of proficiency. It cannot lack a well-established normative basis. This is the means of achieving legal certainty in taxation and the effective protection of taxpayer rights. However, a good tax system relies not only on coercion, but also on the propensity of people for perfection, based on a broad agreement on how to administer social justice. From this perspective, it is not only coercion, but also virtues that can be referred to upon the administration of the liability to pay tax.

(ii) Tax neutrality and its social environment

The concept of tax neutrality can be determined according to Richard Epstein as follows: "The ideal of tax neutrality simply provides that the system of taxation, as far as possible, should preserve the relative priorities that individuals attach to various activities. The function of the state is to protect liberty and property. It is not to aid one group or another in skewing the uses to which individuals put their natural endowments."[2] The approach Epstein has assumed can be criticized. In an egalitarian, market-based world, fiscal neutrality is presupposed by the consideration that equal starting chances need be secured in a social scale. The traditional idea of horizontal equity, defined as equal treatment of the equal, embodies a mistake, that is, to take pre-tax income, or consumption or wealth as the moral baseline and then try to formulate a standard of fairness, Liam Murphy and Thomas Nagel assert.[3] Attention to the costs of rights leads us not only into problems of budgetary calculation, but also into basic philosophical issues of distributive justice and democratic

[2] Epstein, R.: Taxation in a Lockean world. In: Coleman J.–Frankel, E. (eds): *Philosophy and law.* 49–74, Oxford and New York, 1987. 55; Murphy, L.–Nagel, Th.: *The myth of ownership; Taxes and justice.* Oxford, New York, 2002. 104.

[3] Murphy–Nagel: *op. cit.* 163.

accountability. The basic question is what the relationship is between democracy and justice, between the principles of collective decision-making and the norms of fairness because all that depends on collective contributions, Steven Holmes and Cass Sunstein argue.[4]

As in a market economy taxation is a factor inadvertently to distort economic decisions, it is a bias per definition, compared to the idea of free trade and the freedom of contracting. A tax policy can be insufficient to the particular extent as well that the implementation of tax rules will result in side effects. E.g., tax expenditures do not only suggest reduction in tax base but also trigger differences to the debit of those who are not able to benefit from tax expenditures. The alternative to a tax measure would be in this respect not to look for a better tax law measure but to seek to eliminate taxation as such. For this reason, there is no country where taxation policy could rely on a genuine normative basis, and so there is no room for discussing neutrality in taxation that would be explicated systematically.

The tax policy ideal of neutrality can be approximated by means of the economic concept of income as drafted by Georg von Schanz, Robert Haig and Henry Simons. It is comprehensive and encompassing all income as the positive differential between the stocks of financial values as measured at two different points of time. Unfortunately, even this concept of income is fraught with inconsistencies to the extent that it is difficult to reconcile the bundle of the rights of consumption with that of making savings. The same problem happens to the income generated periodically, compared to capital gains.[5]

As it can be seen, tax policy is always fraught with inconsistencies due to the conflict between efficiency and equity considerations and because the concept of comprehensive income itself also suffers from inherent conflicts. Given the inner constraints on tax policy formulation, tax policy cannot be justified but on a basis exceeding the scope of taxation itself. Tax policy need be assessed in the broader context of the institutional order of property, entitlements to profits and distributive justice.

[4] Holmes, S.–Sunstein, C. S.: *The cost of rights; Why liberty depends on taxes.* New York, 2000. 131.

[5] von Schanz, G.: "Der Einkommensbegriff und die Einkommensteuergesetze". Finanz-Archiv, 13 (1896) 1–87., Haig, R. M.: The Concept of income–Economic and legal aspects. In: Musgrave, R. A.–Shoup, C. S. (eds): *Readings in the economics of taxation.* London, 1966.; Simons, H. C.: The comprehensive definition of income. In: Houghton, R. W.: (ed.): *Public finance; Selected readings.* Harmondsworth, 1970. 38–45.

Where tax policy is subject to contradictions for objective reasons even in the time of economic prosperity, it is in a need of seeking for mitigation. It is public administration, or rather tax administration and tax law, which can be mentioned among the factors that can provide such mitigation. Good public administration can largely promote the easy enforcement of taxpayer rights. The efficiency-based standards of a market economy cannot be implemented without non-economic considerations. It is thus important to try to avoid falling into the trap what is called by Schumpeter as a Ricardian vice, that is, to pursue economic policy without taking into account the institutional environment.[6]

In taxation policy, the issues of allocation and distribution need be distinguished from each other. The first question concerns the size of redistribution, the second one the way in which redistribution can take place. It is illusionary to think about a private economy that would be just as long is it is not subject to budgetary policy and that redistribution would suggest a bias from a notional benchmark. One has to take into consideration[7] that

– it is reasonable to seek to achieve vertical equity (there are reasons for apportioning the cost of public expenditures unequally among those with unequal resources);

– the term of public goods implies a social structure which need be balanced; and

– the provision of a social minimum should be accomplished by transfer payments.

Apparently, there is no market without state and there is no state without taxation.[8] From this perspective, it is clear that neutrality in taxation can be legitimized on a high level of libertarian abstraction only, isolated from its social environment.

A search for tax policy options includes the paradox that a course of tax policy cannot be assessed taken by itself, or rather that a tax policy question cannot be expected to be answered but after having examined taxation within an institutional framework that goes beyond taxation itself. In considering the economic foundations of the social life, the first question that arises is that of property. Thus, the question can be raised what relationships are among people developed upon the acquisition and disposal of the single objects of nature.

[6] Backhaus, J. G.: Legal and economic principles for the common administrative law in Europe. In: Marciano, A.–Josselin. J.-M. (eds): *The economics of harmonizing European law*. Northampton, MA, 2002. 249.

[7] Murphy–Nagel: *op. cit.* 94–95.

[8] Murphy–Nagel: *op. cit.* 32.

The right to ownership can be derived from natural law, or even from the fundamental moral requirement that everyone has the right to follow a life worthy for a human being. This means in practice the right to get access to the minimum of social protection. What is expressed by the positive law–as property rights–suggests more and belongs to the realm of decisions motivated by ideologies.

From the viewpoint of general economic policy, in addition to property and the private and public forms of the mechanisms of the appropriation of goods, one has to pay attention to the institutions of the centralization of social production and the redistribution of surplus value. They can be studied from the viewpoint of different theories. In an approach based on formal and immanent values, the review of specific historic circumstances is underestimated. In this respect the development of property is seen simply as an incidental question of "first occupation". So, the considerations of justice and morality cannot be raised (like with Hume or Coase). In an approach established on formal and transcendental values (Kant), property is, even though isolated from specific historic circumstances, deemed to develop due to the noumenal will of universal nature that emerges over individual wills while generating norms.

In an approach based on material and immanent values, the acquisition of property can be legitimized by means of a presumptive social contract (like with Rousseau) or by reference to the individual performance of work (Locke). In the former case, it is not possible to get rid of being compelled to maintain enforcement mechanisms of equality or rather direct and permanent state intervention. The frictions arising from these constraints can be mitigated, provided, however, that it is not directly goods that are distributed. Instead, distribution need be preceded by the preliminary choice of certain social institutions (i.e., rights or basic liberties like with Rawls). Individual appropriation can be interpreted in a social environment, although not necessarily supported by positive rights. This is because the appropriation of natural objects is allegedly possible without the intervention of the law or the institutional system of the state. In an approach based on transcendental and material values, it is not only the person, identifying himself or herself by means of ethical or religious values, who can be highlighted, compared to individuals orientated merely by their financial interests. In modern times, the social practice susceptible to transcendental values can also be substantiated during the distinct processes of ethical discourses in the instance that those who observe a situation and those who are observed cooperate in determining the effective order of values relevant to individual cases.

2. *The rule of law and legal certainty in taxation*

(i) The emerging notion of administrative law

Tax administration is part of public administration. It is therefore a question of tax administration, in addition to the enforcement of the tax law vis-a-vis the taxpayer, of how to operate tax administration as an organization. Modern public administration is governed by the principles of openness, good governance and legal certainty. The principle of openness suggests that public administration is expected to be open to democratic values and to support the participation of citizens in the management of public matters. The idea of good governance can be traced back to the requirement that public administration need be transparent. For tax law purposes, it is the principle of legal certainty, which is of particular relevance. The tax authority as an agency of public administration is bound to the law (subject to legality) while entering into a relationship with the taxpayer who may exercise in the procedure of tax administration the rights of a client.

The above principles are generally applicable in western societies, even if differences can be developed in different jurisdictions. In France, public administration is provided with prerogatives. This is from which the rights of administrative agencies are emanated to exercise discretion. Discretion is still subject to legality. In Germany, administrative agencies are also allowed to exercise discretion. They are subject, however, to the requirement that the individual rights of citizens need be protected. In common law jurisdictions, public administration is traditionally not subject to legal regulation. However, the decisions of administrative agencies are subject to judicial review. These decisions will be assessed by courts in the light of due process rights.[9]

Substantive administrative law was developed at the modern time when it became necessary to depart from normal civil law provisions in order to create a legal background for the state liability. This law has been evolved alongside with the reduction and precision of state immunity. Administrative law was developed in France as long as it was necessary to implement and specify in the practice of public administration the constitutional principle of the division of power into the branches of legislation, administration and the judiciary power.[10] In fact, it was important to determine the conditions in which the

[9] Harlow, C.: Global administrative law: The quest for principles and values. *The European Journal of International Law,* 17 (2006) 190–192.

[10] Schwarze, J.: Europäisches Verwaltungsrecht; Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft, Baden-Baden, 2005 (2. erweiterte Auflage; 1. Auflage in 1988), 97–98.

decisions of public authorities can be challenged before court. To this end, the courts of public administration were established with competences different from those of normal civil courts. The courts with the particular power of making the review of public authority decisions were in a need of a material of substantive administrative law. Substantive administrative law has thus been developed due to the distinction of the courts of public administration from civil court. In Germany, substantive administrative law has been the result of the specification of the principles of constitutional law with regard to the protection of subjective rights. More importantly, the law of public administration is designed to represent a kind of permanency compared to the political values, subject to fluctuation, that can appear in terms of constitutional law.

In common law systems, public administration was not covered by a particular legal material for a long time due to the lack of the division of the legal system into the branches of civil and public law. The law was invoked by citizens before normal courts, depending on their claims, no matter whether of private or public law nature. By the time when the state has undertaken to assume responsibility for the administration of social welfare by the means of public law, the independent material of administrative law has also been developed. In North America, public administration was already in the early 20th century expected to develop regulatory power (to exercise review over tax administration, securities exchanges, anti-trust, consumer protection, etc.). In the UK, the branch of administrative law has been developed much later. In America, the development of administrative law also received fresh impetus due to the adoption of the Federal Administrative Procedure Act of 1946, missing in England.[11]

(ii) Rule of law and due process rights

From a sociological point of view, the rule of law principle concerns the issue of the law and its social environment. In this respect, one can distinguish four types of relations between the legal system and its social environment:

- undifferentiated (archaic) system;
- subordinate (e.g., feudal) system;
- autonomous system; and
- partially independent system.

The latter means procedural independence, that is, a case where the system is sufficiently insulated to permit independence in some spheres, but not so protected as to prevent adaptive responses to the needs of other sectors of the

[11] Schwartz, B.: *Administrative law.* David L. Sills (ed.): *International encyclopaedia of the social sciences,* Vol. 1, Basingstoke, Hants, 1968. 79–80.

society.[12] The law is thus functionally differentiated as a system, while preserving its ability for communication with its environment as a self-referential system. In this context, the principle of the rule of law can be interpreted as a kind of guarantee for the functional differentiation of the law as a subsystem of society.

For the lawyer, it is more common to grasp the notion of the rule of law from the viewpoint of natural law rather than from the perspective of sociological functionalism. An example for this natural law-based approach is delivered by Albert Dicey who holds: "We mean ... that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense, the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint";[13] Quite similarly, the rule of law as "Rechtsstaat" means the following:[14]

– independence of the law from politics;

– a system that is based on the respect of human rights and liberties; and

– being different from the political system, a kind of predictability and regularity.

In fact, the rule of law does not have the same meaning, of course, in such countries as England and Germany, so much different from each other. In a traditional common law system, the rule of law negotiates a criterion according to which the legality of the decisions of public authorities can be measured with regard the protection of subjective rights. The legality of the claims established before the court can be assessed not to the (statutory) law that exists beforehand, like on the European continent, but it is compared to relevant legal rules and principles developed from case to case.

In Hungary, legal rules can be declared as unconstitutional on the sole grounds that the rule of law principle is infringed.[15] This means

– first that the rule of law is a meta-principle that is of significance for the purposes of the operation of the whole legal system; and

[12] Mayhew, L.: II. The legal system. Sills, D. L. (ed.): *International encyclopaedia of the social sciences,* Vol. 9, Basingstoke, Hants, 1968. 61–62.

[13] Long, N.: II. The administrative process. Sills, D. L. (ed.): *International encyclopaedia of the social sciences,* Vol. 1, Basingstoke, Hants, 1968. 68.; Dicey, A, V.: *Introduction to the study of the law of the Constitution.* London–New York, 1964 (1885; 10th edition), 188.

[14] Leibholz, G.: Der Rechtsstaat und die Freiheit des Individuums. Meyers enzyklopädisches Lexikon, Band 19, Mannheim, 1977. 677.

[15] Sólyom, L.: *Az alkotmánybíráskodás kezdetei Magyarországon* (The origins of the constitutional judiciary activity in Hungary). Budapest, 2001. 706.

– secondly that it is not required to refer to particular legal rules in addition to the rule of law principle in order to enforce subjective rights.

The notion of legal certainty is in the heart of the concept of the rule of law. It can be seen not simply as part of the rule of law. Instead, the principle of legal certainty can be considered as the particular manifestation of the rule of law principle, László Sólyom asserts (who was the first president of the Hungarian Constitutional Court).

The rule of law is guiding not only for the constitutional order in general, but also for the organization of public administration in particular. Even the democracy principle cannot be respected where the rule of law is not observed. The focus on due process rights triggers the appreciation of procedural issues. Substantive law problems have been all the more converted into procedural law issues (an example for this is in the tax law area to file for advance rulings). In common law jurisdictions, this is a normal development. On the European continent, proceduralization can be imputed to the general trend of development that distributive justice has been converted into procedural one in many instances. The respect of the due process principle has received particular impetus in Community law where the principle of legitimate expectation has been proliferated.

Due process rights are incorporated into the Hungarian law of public administration by Section 4 (1) of the Public Administrative Procedure Act. They are formulated as the right to fair trial. Due process rights have been protected by the EC Court of Justice as well since the early time.[16] They are recognised in a range of international law documents as well that can be enumerated as follows:

– Universal Declaration of Human Rigths, Article 10;[17]
– European Convention on Human Rights, Article 6;[18]
– draft of the European Charter of Fundamental Rights, Article 41.[19]

Due process and related rights emerge in the practice of the European Court of Human Rights in implementing ECHR in tax matters as well. Article 1 (2) of Protocol No. 1 of ECHR on the protection of property cannot be applied to tax matters as such, being of public law nature. However, the question can

[16] Early examples for the application of these principles are 222/84 Johnston, ECR 1986. 1651.; 222/86 Heylens, European Court Reports, 1987. 4097.

[17] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

[18] European Court of Human Rights signed at Rome on 4 November 1950; Protocol No. 1, signed at Paris on 20 March 1952.

[19] 2000 OJ C364/01.

be raised whether tax legislation is consistent with the principles of legal certainty, proportionality and the duty to give reasons for the decisions of public administrative agencies. In the matters of tax administration, the usual issue that can appear before this court is, of course, Article 6 ECHR on fair treatment. However, it does not apply to tax administration. This is because the review of the decisions of tax authorities before courts is precluded from the application of Article 6. It can still apply exceptionally, that is, to the extent that the legal nature of the administrative procedure itself can be challenged. For example, it can apply to the question whether the administrative procedure at issue was too lengthy or the tax authority was not correct in applying sanctions. Article 14 ECHR on non-discrimination, Article 8 ECHR on the respect of privacy or Article 9 ECHR on the freedom of conscience can also be taken into account in tax matters.[20]

In common law systems, the public administration is expected to operate in accordance with the principle of due process (a principle of natural justice or fairness) which is a procedural guarantee for the legality in the operation of public administration. As the principle of due process means the higher criterion of legality according to which the administrative procedure can be assessed with regard to the protection of individual rights, there is no existing statutory law by which it would be preceded. Where the idea is to apply this principle in a civil law system, however, it can be problematic that one has to encounter the existing statutory law provisions which are not necessarily in accordance with the conclusion that can be made as a result of the application of the due process principle.

The due process principle has been built recently in civil law systems, now as part of the relevant statutory law system. The problem cannot be avoided, however, that it would be required to explain why a universal rule, uttering the due process requirement, could take priority over particular legal rules which are otherwise valid. The due process principle can be placed smoothly in a common law system because such a legal system is open to outward values that can be digested and transformed into law from time to time. In contrast, a civil law system is not open to non-legal values. They cannot be integrated unless they will be made explicit law in a particular procedure of legislation. Similar problems of the application of a principle of natural justice can be realised where the true and fair view principle is applicable in the accounting law of a civil law system. Again, consistency problems between the valid particular legal rules and the higher-level principle seem to be inevitable.

[20] Baker, Ph.: Taxation and the European Convention on Human Rights. *European Taxation*, 40 (2000) 299.

In the light of openness, public administration has created new fora of democracy in terms of the so-called deliberative polyarchy.[21] In the arena of European bureaucracy, a kind of public administration can be created which is directly established on deliberation and operates in a pluralistic political system. It promises to substitute deliberative techniques for the missing political consensus of Member States to create a genuine organization of the people's representation at a federal level. Under such circumstances, public administration implies the possibility of introducing procedures by means of which conflict-laden substantive matters can be handled. The comitology developed by Community institutions contributes to the development of the patterns of deliberative democracy.[22] There is a line of European bureaucrats, and the representatives of professions and the organizations of interests safeguarding who can initiate communication with a view to achieving checks and balances even in the absence of political authorisation.

The idea of good governance derives mainly from the liberal movement of the so-called New Public Management (NPM). It is comparable to the so-called New Economy (e.g., networking industries, environmental protection, etc.) to the extent that it can be traced back in the same way to deregulation and privatization.[23] The measures of public administration, and the interests associated with them, can be differentiated similarly to the requirement of unbundling relevant to competition law. The goal to be achieved is thus to prevent public administration from concentrating too much power of decision by differentiating the single forms of activities. As a result, the structure of activities will be more transparent and discretion can be replaced by the technically-minded, semi-automated forms of public supervision. Notably, Community institutions do not enjoy universal authorisation. Instead, they may act, based on the specific conferment of power. In these circumstances, professional expertise is to be pooled both on the side of public and business administration.

[21] Harlow: *op. cit.* 201.

[22] Report from the Commission on the working of the Committees during 2001, COM (2002) 733 final.

[23] Giuliano Amato and Laraine Laudati: The protection of public interests and regulation of economic activities. In: Snyder, F. (ed.): *The Europeanisation of law: The legal effects of European integration.* Oxford–Portland–Oregon, 2000. 142.

3. The interconnectedness of tax law with private law

Acts of public administration are designed to trigger specific legal consequences to be associated with the facts of the past in particular forms. They are not necessarily regulated by the law of public administration (for example, the acts of the agencies of public administration as employers are covered by labour law). These acts are not always dispositions, that is, one-sided decisions of public agencies on the determination of rights and obligations (for example, the agencies of public administration can enter into agreements with private parties). It can be seen from these examples that the agencies of public administration cannot be intact from private law, which is applicable in normal circumstances to all pecuniary relations, no matter what the legal status of the affected person is. In tax law, the enforcement of the logic of civil law can be seen paradoxically very normal. Although tax law negotiates the liability to make payment to the state budget, it is the market players who are liable to pay tax. While observing tax law, they consider to optimize their structures of business in order to minimize the liability to pay tax, although within legal boundaries.

Where it is doubtful if a legal institution is of public or private law nature, one can rely on a doctrine known in Germany according to which the obligation of public law cannot be recognised unless it is explicitly covered by statutory law.[24] If not, it is the private law principles that are guiding. In a democratic political system, everything is free what is not prohibited. Furthermore, people are bound to the promises they made (pacta sunt servanda). One can argue: in the absence of positive public law provisions, public law cannot be enforced, and it is the civil law principles in the light of which the legal implications for particular cases can be assessed. Public law regulation is inadvertently subject to the guidance private law can provide. This is because it is not possible that public law is addressed to all details in a changing world. Then it is the private law principles of the respect of personality, property and contractual promises only that can be authoritative. Public agencies do not have the power to act unless they are explicitly authorised to do that in particular conditions. Based on the principle of subsidiarity, civil law considerations are the very basics of the conduct regulated by law. The agencies of public administration are bound to contractual obligations in the same way as private persons. They can be enforced by law even if it is burdensome for the public body. Democracy cannot operate but within the boundaries of the rule of law.

[24] Verwaltungsrecht, Band 1, begründet von Hans J. Wolff, fortgeführt von Otto Bachof, neu bearbeitet von Rolf Stober, C. H. München, 1999, elfte, neubearb. Auflage, 267.

In common law systems, the law has not been structured as clearly according to the different branches of private and public law as the case is in civil law systems. The question is therefore not reasonable if private law principles can serve as a background for the public administration to fill the gaps arising from the legal rules relevant to its operation. Albert Dicey is categorical in this respect: "in England ... the system of administrative law and the very principles on which it rests are in truth unknown.".[25] The point to the rule of law is highlighted by Dicey[26] not only in terms of the public administration subject to laws. The principle of the rule of law also implies

– the unity of the legal system, and the exclusion of the possibility accordingly that a branch of administrative law could be distinguished; and

– the statement that the constitution is nothing but the consequence of the application of private law, binding both to ordinary courts and the agents of the crown.

It is noteworthy, however, that tort liability of the state is excluded due to the state immunity doctrine, and this is the case until the adoption of the Crown Proceedings Act of 1947. The legal system as described by Dicey provides nevertheless room for the application of the "pacta sunt servanda" principle in a more ideal way than it can happen wherever else.

Substantive law has been developed in England in correspondence with particular legal actions. For example, the decisions of public authorities could be challenged by claiming "orders of certiorari" (lodging objections to administrative decisions), "prohibition" or "mandamus" (claiming administrative inaction or action, respectively). These legal actions were different from those to be filed in the forms of "damages", "declarations" or "injunctions". Since 1978 the above distinction has lost its significance due to the unification of legal actions.[27] It is useful, however, to remember them in order to get deeper understanding between the normal and special competences of courts in the matters of public administration.

In France, it has been the standard already since the Blanco decision (T.C. 8.2.1873. G.A. No. 1, S. 5.) , as held by the Tribunal des Conflits that the state liability need not be assessed according to the Code Civil, but according to the "règles spéciales qui varient suivant les besoins du service et la nécessité de concilier les droits de l'Etat avec les droits privés".[28] Hence, it has been the practice that the matters of public administration are to be discussed by the

[25] Schwarze: *op. cit.* 133.; Dicey: *op. cit.* 330.
[26] Schwarze: *op. cit.* 133.; Dicey: *op. cit.* 188., 193 and 195, respectively.
[27] Schwarze: *op. cit.* 140–141.
[28] Schwarze: *op. cit.* 98.

special courts of public administration (recours administratif), and a resort to civil courts (recours contentieux) is in the matters of public administration exceptional.

In Germany, there are special courts of public administration as well. However, they do not derive from the needs of the legal review of the decisions made by public administration, but rather from the need of implementing the constitutional principles. It is exceptional also in Germany that citizens have a resort to civil courts in the matters of public administration (this is the case, e.g., in the matters of expropriation).

In Hungary, public law has been departed from private law in a similar way as in Germany. It is thus based on the distinction between the branches of substantive public and private law. Although there are no special courts of public administration in this country, one can find particular chambers of the normal courts specialising in the matters of public administration, and the Civil Procedure Act also contains particular rules applicable to the litigation between public authorities and citizens, challenging the decisions of public authorities. However, civil law has net been broken down into as many different branches as the case is in many other jurisdictions on the European continent. In particular, no code or doctrine of commercial law or business law has been recognised in this country that would be different from civil law. This way of historical development may suggest more chances for the application of the civil law principles (prohibition of the abuse of law, theory of estoppel, etc.) even in the matters of public administration than in civil law systems which are more structured than the Hungarian one. Notably, the Hungarian Civil Code is applicable to financial relationships of anybody without limitation. No particular law can thus be ascertained according to which this universal effect of the Hungarian Civil Code would be constrained.

In Italy, distinction between the competences of the courts of public administration and civil courts has also been recognised in the matters of public administration, and even supported by the well-established doctrine on the distinction between the matters related to the protection of legitimate interests (interessi legittimi) and subjective rights (diritti soggettivi). In the first case, it is normal that the courts of public administration are competent. In the second case, however, it is possible to get resort to civil courts.[29]

Distinction between the competences of normal and special courts in the matters of public administration is problematic in general in modern legal systems. This is because it is difficult to reconcile such a distinction with the trend of development of the modern law that legal actions have been unified

[29] Schwarze: *op. cit.* 128; Nigro, M.: *Giustizia amministrativa.* Bologna, 1983. 115–116.

(ubi remedium, ibi ius). However, the legal orders that exist out of the reach of the nation state may well rely on particular legal actions. For example, under Community law there are particular legal actions (in infringement procedures, annulment procedures, etc.). Also, the European Court of Human Rights can be mentioned which does not have competence in public matters with the exception of the cases where citizens are prevented from exercising their basic rights due to the disorder of public administration or legislation.

In the Netherlands, public and private law have been clearly separated from each other already in the 19th century. The principle was also developed at the turn of the 19th and 20th centuries that public law was of complementary and exceptional nature, compared to private law which had universal effect. This is the pure expression of a "Vermutungstheorie". However, this theory has been given up in accordance with the development of the state responsibility for the administration of social welfare. Hence, currently the legal review of the decisions of public administration can purely be established on the rules of public administrative law.

4. Vertical and horizontal coordination in tax law

Law cannot be confined to what is applied by force, that is, by means of public coercion. Indeed, legal compliance is to be presupposed first in terms of vertical co-ordination where the nation state determines the way in which sacrifice need be made for the public. Law also suggests, however, functioning as a means of promoting bargaining. This is the aspect of horizontal co-ordination.[30] Law can be identified this way in the sense that consistency and coherence can be achieved in a functional system where the facts of particular cases are juridified due to the self-regulatory force of the parties involved in particular cases.[31]

Law is indeterminate to the extent that the conduct of individuals cannot be necessarily imputed to the legal norm. Law cannot be understood simply by studying legal norms. It is also important to try to understand the individual conduct effectuated in compliance with law. It is then possible to turn back to the legal norm and try to explore its meaning. It occurs frequently that the schemes invented by companies (e.g., innovation in financial products, planning

[30] Zürn, M.: Introduction: Law and compliance at different levels. In: Zürn, M.–Joerges, Ch.: *Law and governance in postnational Europe*; Compliance beyond the nation-state, Cambridge, 2005. 6.

[31] Joerges, Ch.: Compliance research in legal perspectives. In: Zürn–Joerges (eds.): *op. cit.* 221.

hybrid entities, etc.) shed light on the problems of legal interpretation. Then the legislation is expected to react in the affirmative to the innovation achieved in legal practice.

Tax law compliance cannot be reduced to the issue of vertical co-ordination. While on the surface tax law seems to be extremely categorical, in fact taxpayers enjoy much freedom in choosing the tax law status, depending on what is more beneficial for them. The specific tax law consequences can be traced back to the horizontal activity contracting parties show in their pre-tax life. Tax rules cannot be understood clearly, but from the perspective of the taxpayers' conduct, oriented to tax planning. The taxpayer conduct is a test of the enforcement of tax law.

Tax legislation heavily relies on the economic policy considerations a government prefers in certain circumstances. Tax law can then be changed where there are alterations in economic policies. Tax law facts are actually emanated from the annual budget law. It is required, however, that the creation of the tax liability can be independent of the abrupt changes in budgetary policies.

Election of tax regimes has been all the more frequent. For example, in accordance with the EC Merger Directive, taxpayers may elect to defer the taxation of the capital gains derived from the contribution of the appreciated branch of assets and liabilities, provided that no step-up will be made in the financial attributes like the acquisition price of tangible assets taken over from the branch (roll-over relief). In sophisticated tax systems, the election of a tax regime has been significant. The best example for this is the check-the-box rules in the US federal tax law.[32] Taxpayers can thus elect in certain conditions whether they enter the system of company taxation or choose to be taxed at the level of shareholders. The introduction of such statutory election comes from the experience that statutory law is sometimes not flexible enough. The rigid categorical order of tax law provisions prevents taxpayers from achieving high compliance with tax law.

Election can be hosted by a national tax system only where the legal culture implies the possibility of providing alternatives in legislation and legal rules of facilitating nature. In Hungary, it would be more than difficult, for example, to introduce a tax regime like the check-the-box-rules. This is because a corporate taxpayer is not identified according to the economic contents of the activities carried on. Instead, there is an exhaustive list of corporate tax payers who are identified by reference to their non-tax law status. It depends on the civil-law qualification whether an entity is subject to corporate taxation. This is

[32] 26 C.F.R. Sec. 301.7701 of Treasury Regulations.

a practice that can be far from the reality of living business. A civil law association, not subject to company tax, can be engaged in significant business while small companies are subject to company taxation, whether they like it or not.

II. Hungarian issues

1. Legality of the Hungarian tax administration procedure

According to Section 4 (1) of Taxation Order Act, taxation means a procedure in which the taxes and subsidies payable by, or repayable to, taxpayers are managed in terms of the determination, collection, transfer or return, and audit of taxes by tax authorities. Taxation is covered by the Act on the Procedure of Public Administration unless a tax law, including the Taxation Order Act, provides otherwise [Section 5 (1) of Taxation Order Act]. The Act on the Procedure of Public Administration is addressed to the procedure (or rather jurisdiction) of, and the services provided by, the agency of public administration. The procedure of the agency of public administration, different from the simple procedure of public administration, envisages the relationship to be established between the agency of public administration and the client (the private party to public administration) which is covered by law. This is a procedure, in which the agency of public administration explores the facts relevant to the legal qualification of the case brought before the agency, and at the end of which the public agency arrives at a formal decision. The procedure of public administration cannot be interpreted in Hungarian law as other than a procedure of an agency of public administration. The rights and obligations of both parties to the procedure of public administration are emanated precisely from this procedure of the agency of public administration.

In contrast, in tax matters, a procedure of public administration other than a procedure of an agency of public administration cannot be precluded. Under Section 85 of Taxation Order Act – a procedure of tax administration can take place in which the tax authority (i) determines the taxpayer's rights and obligations, (ii) makes an audit of the performance of tax liabilities, and (iii) keeps records on the facts relevant to the tax liability. This is a procedure, different from a tax authority (agency of public administration) procedure. In the procedure of tax administration, not identical to a tax authority procedure, the tax authority deals with the matters enumerated as items from (ii) – (iii). In the tax authority procedure, the tax authority is responsible to deal with the matters enumerated as item (i). The tax authority procedure as regulated by Section 120 of Taxation Order Act covers the determination of the tax base,

the tax (advance tax) and the tax relief, if any, the right to receive subsidies and to get access to the return of taxes. A tax authority procedure usually appears as a result of the determination of the unpaid tax following the completion of a tax audit. The tax liability can also be determined by the tax authority in extraordinary cases or in terms of advance rulings. In addition, a tax authority procedure can imply the management of tax records. A tax authority procedure can normally be initiated "ex officio" where the tax authority decides for keeping tax records or the determination of the tax liability. The tax authority procedure can also start upon the taxpayer's request. Then the tax authority decides for keeping tax records or for the reduction of the tax liability by equity reasons or for the reason of allowing the payment of tax in instalments.

Where tax audits are conducted and tax records are handled in a simple procedure of tax administration, the taxpayer does not enjoy a higher level of legal protection, which would be granted to the taxpayer in a tax authority procedure only. This is because in the latter case the taxpayer is provided with the client's rights and duties and may challenge the tax authority's decision arrived at the end of this procedure, first at a higher instance of tax administration, secondly, before a court. During a tax audit, and in the procedure where tax records are managed, the taxpayer cannot enjoy the status of a client. As a consequence, the taxpayer cannot meet the tax authority's formal decision that could otherwise be challenged at a higher instance. One can conclude therefrom that the procedure of tax administration as regulated in terms of the tax audit and the management of tax records is subject not only to legal considerations, but also to the considerations of efficiency.

Apparently, tax authorities take decisions both in terms of the procedure of tax administration (e.g., during a tax audit) and of the tax authority procedure. In the first case, they may take important decisions, for example, while exploring the facts relevant to the tax liability. For example, the tax authority may decide for the application or non-application of certain means of evidence. The taxpayer, whether agrees or not on these measures, is not able by law to prevent the tax authority from taking such decisions. As a maximum, the taxpayer may make comments on the tax authority conduct in the proceedings at the end of the procedure of tax audit. In later stages of the tax dispute, both the higher-instance tax authority and the court heavily rely on the evidence produced by the tax authority during the audit, not still covered by a higher level of legal protection. At a later stage, the dispute between the tax authority and the taxpayer can hardly be solved as to whether the tax authority has observed its obligation plainly to explore the facts relevant to the tax liability or that the taxpayer's conduct has been consistent with the obligation of good

cooperation with the tax authority. It would be easier to administer justice in these matters if even the tax audit is subject to a tax authority procedure. One can realise that during a procedure of tax administration other than tax authority procedure, the measures taken by the tax authority are legally regulated as interim ones, even if they may be of high importance for the purposes of the final decision of the tax liability.

Based on the above, one can criticise, for example, the provision of Section 93 (1) of Taxation Order Act on the commencement of tax audit. The tax authority is by this provision not obliged to arrive at a formal decision of the commencement of tax audit. The tax authority is even not obliged by law to inform the taxpayer of the commencement of audit. This provision is not subject to criticism as to its contents. It is problematic, however, that the tax authority's right to take such a decision is not regulated by the Taxation Order Act precisely. It would be reasonable to provide in detail for the conditions in which the tax authority may take such a decision.

In Hungarian law, the taxpayer is not allowed to initiate a dispute concerning the legality of the tax liability without making a tax return with zero tax liability. Failing to declare tax liability, the taxpayer is not able to get rid of the determination by the tax authority of the unpaid tax and the application by the tax authority of sanctions, associated with the unpaid tax. A solution for the problem would be either that the taxpayer could file a tax return with the reservation of the right to challenge the validity of the tax liability or that the taxpayer could opt out of self-assessment by asking the tax authority to determine the tax liability by a formal decision. None of these opportunities is currently available in Hungary for taxpayers, however.

According to Section 124B of Taxation Order Act, the taxpayer may make self-audit by raising the only issue whether the legal basis for the tax liability as assessed is legal. Then the tax authority confines itself to dealing with this only issue. Where the tax authority does not agree on the taxpayer's standpoint as reflected in the tax return, decides for the unpaid tax. Then a tax authority procedure commences in which the taxpayer can challenge the tax authority's standpoint even up to the instance of a court decision. Nevertheless, the taxpayer cannot avoid even in this case assuming the risk that the unpaid tax will be identified.

Interim decisions may well affect the position held by the taxpayer, even if not eventually. Both the taxpayer and the tax authority may be engaged in taking interim measures.[33] The taxpayer may not change the assessment of the

[33] González, E.: The administrative procedure for determining tax liability. In: Amatucci, A. (ed.): *International tax law*. Alphen an den Rijn, 2006. 127.

tax liability but via a tax audit, decided not by the taxpayer, and the taxpayer may not change his or her decision taken as a result of a self-audit. The tax authority cannot change it decision either but in specific conditions as determined by law. The tax authority, realising that it deems to be necessary for any reason to change its decision, may make the amendment or revocation of its former decision within the conditions as determined by Section 135 (1) of Taxation Order Act.

2. *The example of Hungary for the interplay between tax law and civil law*

The Hungarian law on tax administration (Taxation Order Act) suggests more than regulating tax administration only. Similarly to the German law pattern of "Abgabenordnungsgesetz",[34] it implies the general part of tax law, compared to the particular laws on single taxes. This general part implies the common legal rules on the facts of a tax law case (Tatbestand), that is, on the taxpayer, the taxable basis, the tax rate, the possible tax relief and the way of tax collection. The legal regulation of tax law-related facts is of importance even for constitutional purposes. For example, general tax law may provide for the prohibition of confiscation. The Hungarian general tax law as appears in terms of the Taxation Order Act is extended to the major principles of taxation. Placed into a block of provisions, these principles are appropriate for constituting a basis for the taxpayers' rights, even if it does not contain a broad catalogue of taxpayer rights.

The Taxation Order Act provides for that both taxpayers and the tax authority are bound to legal provisions. It also asserts the principle of legal certainty [Section 1 (2)]. The tax authority shall exercise its right of discretion within the boundaries of equity [Section 1 (6)]. It must not treat taxpayers in a discriminatory manner either [Section 1 (3)–(4)]. Both the tax authority and the taxpayer shall act in good faith [Section 1 (5)]. This implies the legal obligation that the parties to tax administration shall act in co-operation. This is similar to the contracting parties who shall by civil law act in co-operation as well. The Taxation Order Act prevents taxpayers from getting involved in tax avoidance, invoking two principles. First, simulated transactions must be disregarded for tax law purposes [Section 1 (7)]. This is designed to solve the conflict between the legal form the parties apply on the surface and the real legal form, which is concealed. Secondly, the legal form must be disregarded where it does not reflect the economic contents of certain transactions [Section 2 (1)]. This is designed to solve the conflict between the legal form and the

[34] Abgabenordnungsgesetz vom 29. August 1997 m. mehrf. Änd.

economic contents of the same transactions. The tax authority is free to arrive at the tax law qualification consistently with the economic contents, no matter what the civil law form as applied by parties suggests. The tax authority is obliged, however, to take into account both the civil law and tax law aspects of a tax avoidance case related to the problem of simulation. The tax law issue cannot thus be extricated from the civil law question of simulated contracts.

Where taxpayers notify certain facts to the tax authority or disclose their particulars to the tax authority, they remain to be protected by civil law. The tax authority is thus obliged to keep the data communicated by taxpayers confidentially and manage them in accordance with the civil law protection of personality. Even the tax authority may claim by tax law the protection of personality. Section 55 (1) of Taxation Order Act provides for that the tax authority may before the public rebut the information the taxpayer has delivered and the tax authority thinks to be false and appropriate to shake the faith in the tax administration before the public. Another link of tax law to civil law is that the calculations used in accounting law can be relevant to the tax liability. Since commercial accounting is part of the civil law, broadly speaking, this is another piece of evidence for the close connection of tax law with civil law.

Apparently, advance rulings–as a matter of bargaining–are managed in accordance with civil law standards. This is an example for the case where substantive law problems are converted into procedural ones. In this instance, public law prescriptions cease to operate and will be replaced by private law techniques of dispute resolution. Again, the fact that tax authority decisions can be challenged before civil courts suggests the interconnectedness of tax law with civil law. The significance of civil law as a background has been enhanced by the EU accession of Hungary to the extent that the malfunction of both the fiscal legislator and the tax authority can be sanctioned in terms of the compensation (or restitution) for damages, to be regulated by the Civil Code in Hungary.

III. Summary and conclusions

Taxation and tax law cannot exist without biases because taxation can be seen per definition as a set of biases. The question can only be posed if a tax system can rest on a sound normative basis with the possibly least interference with the decisions of market players, yet with enough allocation and just redistribution of the tax burden with regard to the protection of the poor. Even if the state pursuing its fiscal policy cannot be neutral, one can expect to enforce

the principle of equal treatment before the law. Besides, it must not apply means that are not absolutely necessary in order to achieve the legislative goals. State intervention need thus be in proportion to the objectives of the policy of redistribution or economic stabilization. Furthermore, the law of taxation is expected to show stability. Also, fiscal policy need rely on a system of tax administration that operates in accordance with the principles of openness, good governance and legal certainty.

Furthermore, it is ideal if the legal regulation of the procedure of tax administration is fully fledged. In other words, it is not ideal where for example the process of tax audit is covered by interim legal measures only. The legal regulation of the tax liability need be comprehensive and cover all the processes of gathering tax information, identifying the tax liability and collection of taxes.

Moreover, tax administration and administrative law are inadvertently in a need of being completed by private law. Civil law principles can be helpful to guide both taxpayers and tax authorities, for example where it is important to interpret what the proper way of exercising taxpayer rights means in specific circumstances. Where tax authorities are not explicitly authorised by statutory law to act, they must rely on the principles that are in accordance with the constitutional order. In a country with a market economy and a system of political democracy, competences need be established on the subsidiarity principle and legal obligations need eventually be assessed, based on the principle of "pacta sunt servanda". This means that the final criterion according to which even the actions of public administration can be assessed is whether it is reasonable for a public authority to act, and if so, whether it has observed any contractual obligations. Notably, in Hungary, there is no statutory law that would preclude the universal effect of the Civil Code, covering all the financial relations whether to be made between private persons or between private persons and the representative of the public.

Finally, for the purposes of approximating an ideal tax system, the possibility of horizontal coordination must not be left out of consideration. Businesses have to encounter the problem that they have been internationalized while the legal and tax systems operate basically in isolation from each other. The nation state is not able longer to provide contracting parties entering international markets with sufficient legal munitions. These parties are then compelled to start negotiating a legal background (a set of the rules of game) on the basis of which they can find coherence and legal certainty. Under these circumstances, law can be understood all the more from the conduct of the parties who have followed legal rules and related norms. Objective law can then be explored in its entirety subsequently, from the study of the conduct of parties. In this

context, legal and tax planning and the choice of legal and tax regimes by parties have come to the forefront. Bargaining (e.g., advance ruling) has not been strange from tax law either. It is another example for alternatives in tax law that the tax liability can be determined in all the more instances depending on the taxpayer's choice.


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Verba Carminis – On a Cardinal Point of Archaic Roman Law

Abstract. Beginning with the well-known fact that one lost a lawsuit if he made even a single verbal mistake in his speech during the process of the legis actio (Gai. inst. 4, 11. 30), we have to examine through some examples the power of verbality in ius sacrum. (I.) We study the development of the concept of fatum (II.), a narration of Plinius maior concerning the dedicatio of the templum of Ops Opifera (III.), another narration based on a source of Plinius related to a special interpretation of prodigium (IV.), as well as parallels that can be discovered between "fruges excantare" and the ceremony of the evocatio (V.). From these one could gain a picture of connection between Roman religion and jurisprudence of the Archaic Age and the spoken word.

Keywords: legis actio sacramento, ius sacrum, dedicatio, evocatio, procuraio prodigii

I. The description of the ritual of legis actio sacramento im rem is provided by Gaius.[1] This is the locus that should be brought into harmony with the explanation of the meaning of manum conserere given by Gellius, and with the

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[1] Gaius, Institutiones 4, 16. Si in rem agebatur, mobilia quidem et moventia, quae modo in ius afferri adducive possent, in iure vindicabantur ad hunc modum: qui vindicabat, festucam tenebat; deinde ipsam rem apprehendebat, velut hominem, et ita dicebat: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM; SICUT DIXI, ECCE TIBI, VINDICTAM IMPOSUI, et simul homini festucam imponebat, adversarius eadem similiter dicebat: MITTITE AMBO HOMINEM. Illi mittebant. qui prior vindicaverat sic dicebat: POSTULO, ANNE DICAS, QUA EX CAUSA VINDICAVERIS? ille respondebat: IUS FECI, SICUT VINDICTAM IMPOSUI. Deinde qui prior vindicaverat, dicebat: QUANDO TU INIURIA VINDICAVISTI D AERIS SACRAMENTO TE PROVOCO; adversarius quoque dicebat similiter: ET EGO TE; aut si res infra mille asses erat, scilicet L asses sacramentum nominabant. deinde eadem sequebantur, quae cum in personam ageretur. Postea praetor secundum alterum eorum vindicias dicebat, id est interim aliquem possessorem constituebat, eumque iubebat praedes adversario dare litis et vindiciarum, id est rei et fructuum; alios autem praedes ipse praetor

above presented text. Aulus Gellius in Noctes Atticae[2] wants to get an explanation for the origin and meaning of "ex iure manum consertum", an expression coming from the old legis actio claims, from a renowned grammaticus, who first refuses to answer the question since he deals with grammatica, Vergilius, Plautus and Ennius. In reply, Gellius remarks that it was exactly chapter eight of Ennius's Annales where he found the phrase; in turn the grammaticus asserts that Ennius drew this expression not from legal but poetic language. The actual explanation follows after that.[3] Consequently, according to Gellius, manum conserere means grasping the object of dispute manually (manu prendere), which corresponds to Gaius's phrase rem apprehendere; however, in view of its purpose it has definitely separated from that in the course of time.[4] According to Gaius's locus, the assertion of "property" or "stronger right to possess"[5] by both parties through uttering the sentence "HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO" refers to things present in iure and grasped manually. Thus, initially vindicatio–just as mancipatio[6]–was created for transactions involving chattels of greater value (i.e., slaves and draught animals) since the thought that rule over a single land can be exercised merely by placing a rod or hands on it would suppose considerable abstraction of generally accepted formalism, hardly reconciled with the way of thinking of

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ab utroque accipiebat sacramenti causa, quod id in publicum cedebat. Festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, quando iusto dominio ea maxime sua esse credebant, quae ex hostibus cepissent; unde in centumviralibus iudiciis hasta proponitur.

[2] Gellius, Noctes Atticae 20, 10, 1–10.

[3] Gellius, Noctes Atticae 20, 10, 7. sqq. "Manum conserere." Nam de qua re disceptatur in iure in re praesenti sive ager sive quid aliud est, cum adversario simul manu prendere et in ea re sollemnibus verbis vindicare, id est vindicia. Correptio manus in re atque in loco praesenti apud praetorem ex duodecim tabulis fiebat, in quibus ita scriptum est: 'si qui in iure manum conserunt.' Sed postquam praetores propagatis Italiae finibus datis iurisdictionibus negotiis occupati proficisci vindiciarum dicendarum causa ad longinquas res gravabantur, institutum est contra duodecim tabulas tacito consensu, ut litigantes non in iure apud praetorem manum consererent, sed 'ex iure manum consertum' vocarent, id est alter alterum ex iure ad conserendam manum in rem, de qua ageretur, vocaret atque profecti simul in agrum, de quo litigabatur, terrae aliquid ex eo, uti unam glebam, in ius in urbem ad praetorem deferrent et in ea gleba tamquam in toto agro vindicarent.

[4] Kaser, M.: Zur "legis actio sacramento in rem". *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* 104 (1987) 57.

[5] Kaser, M.: *Eigentum und Besitz im älteren römischen Recht.* Weimar, 1956. 16.

[6] Gaius, Institutiones 1, 119.

the archaic age.[7] Therefore, the obligation that the object of dispute should be present before the magistratus applied to any and all things; and regarding the things that could be brought there without any difficulty this requirement continued to be in force without any changes.[8] In the event of lands and things, or totality of things that could not be taken to comitium–according to Gellius, in order for the proceedings to comply with the provisions of the Twelve Table Law,[9] which stipulated that the act of manum conserere had to be implemented in iure, i.e., before the law–both the magistratus and the parties to the dispute went to the land in order to implement vindicatio there by which the given land became ius, i.e., venue of jurisdiction. As the power of Rome was extended, the burden on the magistratus increased, and so it was no longer possible to apply the above procedure; therefore, a new solution was looked for.

Contrary to the provision of the Twelve Table Law, through tacitus consensus the act of *manum conserere* was no longer implemented *in iure*; instead, to this end the parties called each other from before the law.[10] The party claiming the thing (the latter plaintiff) called the owner of the thing (the later defendant) from the *comitium* to the place where the object of dispute lay; the parties went there together, and took a piece of the thing, then brought it to Rome before the *magistratus* where *vindicatio* described by Gaius was carried out as if the entire land had stood before the law. (Gaius is silent about the procedure of *manum conserere* since the narration of *legis actio* lawsuits provides a historical outlook for those who study *iurisprudentia*, and not an antiquarian who carries out research like Gellius.)[11] So the ritual of *manum conserere* was applied only in the case of certain objects of dispute as it were to prepare *vindicatio*. The reference made to *praetor* in Gellius's text with respect to the time of the Twelve Table Law is, of course, anachronism.[12] The territory of the State of Rome, the *ager Romanus antiquus* did not go beyond a five-six mile strip of land surrounding the *pomerium* on the left bank of the Tiberis;[13] this strip was extended to ten miles only through the occupation of

[7] Thür, G.: Vindicatio und deductio im frührömischen Grundstückstreit. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* 94 (1977) 296.

[8] Kaser: *op. cit.* 1987. 57.

[9] Leges XII tabularum 6, 5/a SI (QUI) IN IURE MANUM CONSERUNT.

[10] Cf. Cicero, M. T.: De oratore. Cambridge, 1959–1968. 1, 10, 4; Epistulae ad familiares 7, 13, 2; Epistulae ad Atticum 15, 7.

[11] Kaser: *op. cit.* 1987. 59.

[12] Wieacker, F: Die XII Tafeln in ihrem Jahrhundert. *Les origines de la république Romaine. Entretiens sur l'antiquité classique,* 13 (1968) 303. sqq.

[13] Thür: *op. cit.* 1977. 298.

Fidenae in 426;[14] it is probable that merely this increase in territory made it necessary to create the procedure of *ex iure manum consertum vocare* instead of *in iure manum conserere*.[15]

The development described by Gellius perfectly corresponds to the changes in the procedure described in *Pro Murena*, implemented *in iure*; likewise they can be brought into harmony with the ritual of *vindicatio* presented by Gaius, if the sentences bequeathed by Cicero are interpreted as the preparatory procedure of the actual *vindicatio*.[16] Accordingly, for picking up a lump of earth, that is, to implement *manum conserere* the assistance of the *magistratus* was no longer required since he could set out from the assumption that the witnesses present when the act was carried out[17] would report during the proceedings any irregularity that might have occurred. By that the land no longer represented *ius*, venue of jurisdiction.[18] Now *manum conserere* was used in the meaning of *vindicias sumere*; in the sense of *vindicatio*,[19] i.e., grasping the object of dispute by the parties in the form of *manum conserere* and bringing it before the law. Just as the *magistratus* made his job easier, the parties did the same provided that an agreement was reached between them regarding the issue; if they wanted to bring an action regarding a definite land, they brought a lump of earth from the land needed later for *vindicatio*, and at the instruction of the *magistratus* they only pretended to leave from before the law.[20]

II. The overt insistence on text of *legis actio sacramento* is widely known since–as Gaius himself stressed it–one who misquoted a single word of the text lost the lawsuit.[21] In Roman thinking faith in the impact of spoken words

[14] Alföldi, A.: Hasta – Summa Imperii. The Spear as Embodiment of Sovereignty in Rome. *American Journal of Archeology*, 63 (1959) 304.

[15] Thür: *op. cit.* 1977. 298.

[16] Kaser: *op. cit.* 1987. 63.

[17] Festus, De verborum significatione 394. Superstites testes praesentes significat. Cuius rei testimonium est, quod superstitibus praesentibus i, inter quos controversia est, vindicias sumere iubentur.

[18] Kaser: *op. cit.* 1987. 64.

[19] Festus, De verborum significatione 516. Vindiciae appellantur res eae, de quibus controversia est. De quo verbo Cincius sic ait: 'Vindiciae olim dicebantur illae, quae ex fundo emptae in ius adlatae erant.' At Ser. Sulpicius vindiciam esse ait qua de re controversia est, ab eo quod vindicatur. ... XII: 'Si vindiciam falsam tulit, si velit is ... tor arbitros tris dato, eorum arbitrio fructus duplione damnum decidito.'

[20] Thür: *op. cit.* 1977. 298.

[21] Gaius, Insitutiones 4, 11. Actiones ... ideo quia ipsarum legum verbis accomodatae erant et ideo inmutabiles proinde atque leges obseervabantur; unde eum qui de vitibus succisi ita egisset, ut in actione vites nominaret, responsum est rem perdidisse, cum debuisset

constituting reality bore high significance.[22] *"The reason for that was the Romans' unshakeable faith in the numinous force of uttered words; it is our firm belief that all things considered existence is identical with the existence uttered, complete reality is no other than reality cast into words."*[23]

Regarding the origin of the word *fatum* several Roman authors can be quoted. Varro believes the term *fatum* comes from the fact that the Parcae determine the lifespan of infants by stating their decision;[24] which is confirmed by Fronto who asserts that destiny is called *fatum* after the spoken word. This recognition of Antique people that *fatum* derives from the verb *for, fari, fatus sum* has been confirmed by modern linguistics.[25] The commentary written by Servius on Vergilius's Aeneis helps to go into deeper analysis by asserting that *fatum* is participium, and denotes what the gods have said;[26] consequently, the term itself means *divine word, divine decision (Götterspruch).*[27] On the other hand, there is a goddess called Fata: on the territory of Lavinium three altar inscriptions from the 4th–3rd c. B.C. were found which prove the cult of the Goddess Fata;[28] her name is Neuna (Nona), which is known from several literary sources. Here, Gellius quotes Varro and Caesellius Vindex, who describes the name of the Parcae, and, on the grounds of Livius Andronicus's quotation from the *Odysseia*, the coming of a day foretold by Morta.[29] The Parca Morta/Maurtia named by Caesellius Vindex is also known from the inscription from Lavinium;[30]

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arbores nominare eo quod lex XII tabularum ... generaliter de arboribus succisis loqueretur; 30. Sed istae omnes legis actiones paulatim in odium venerunt, namque ex nimia subtilitate veterum qui tunc iura condiderunt eo res perducta est, ut vel qui minimum errasset litem perderet.

[22] Kaser, M.: *Das altrömische ius.* Göttingen, 1949. 309. sqq.

[23] Köves-Zulauf, Th.: *Reden und Schweigen. Römische Religion bei Plinius maior.* München, 1972. 312; Köves-Zulauf, Th.: *Bevezetés a római vallás és monda történetébe* (Introduction to the History of Roman Religion and Myth). Budapest, 1995. 207.

[24] Varro, De lingua Latina 6.52. Ab hoc ... fari, tempora quod tum pueris constituant Parcae fando, dictum fatum et res fatales.

[25] Walde, A.–Hofmann, J. B.: *Lateinisches Etymologisches Wörterbuch.* Heidelberg, 1954. I. 463. sqq.

[26] Servius, Commentarius in Verg. Aen. 2, 54. Modo participium est, hoc est, quae dii loquuntur.

[27] Pötscher, W.: Das römische Fatum – Begriff und Verwendung. In: Pötscher, W.: *Hellas und Rom.* Hildesheim, 1988. 490.

[28] Vetter 1953. I. 322. 1. Neuna. Fata; 2. Neuna. Dono; 3. Parca Martia/Dono.

[29] Gellius, Noctes Atticae 3, 16, 10. Parca ... Nona et Decima a partus tempestivi tempore; 11. Tria nomina Parcarum sunt Nona, Decuma, Morta et versum hinc Livii ponit ex Odysseia: quando dies adveniet, quem profata est Morta?

[30] Latte, K.: *Römische Religionsgeschichte.* München, 1967. 53.

the question arises if the goddess Fata can be called Parca; more specifically: if we are talking abut the same goddess when referring Fata and Parca?[31] Nona is named Fata on the inscriptions, and Parca by literary sources; Morta is referred to as Parca both on inscriptions and in literary sources. On the other hand, the fragment from Livius Andronicus talks about Maurtia with Fata being as it were her interpreter; that is, her scope of activity is *fari*. Through Gellius it is known from Varro that the name of Parca comes from the word *"partus"* by changing one sound thereof,[32] so her name was originally Parica; that is, she was adored as the goddess of delivery, birth. Parca, however, can be also Morta/Maurtia; consequently, she is in close relation with death, which is highly stressed for a goddess of delivery and birth when a child is born dead; but the sources reveal that Morta/Maurtia can stand beside goddess Fata as an interpreter, which is not much surprising when considering Fata's relation to *fatum*, whose meanings include: *death, destruction, perishing*.

In Greek faith the Moirai measured out mortals' *moira*, portion of life; and since they followed up human life, they were active at birth too. Roman thinking split this function into two; goddesses carried out tasks related to birth as Parcae, they made decisions over human fate as Fatae; while the Greek Moirai united both aspects in themselves, Roman religion–using the methodology known from the creation of the image of *Sondergötter*[33]–expressed these two functions through two goddesses (Parca and Fata); the difference between them is based only on shift of emphasis since, as the comparison of the three inscriptions and the literary sources has revealed, the Parca is at the same time Fata, and the Fata is at the same time Parca,[34] depending on which *numen* of which aspect comes to the front.[35]

It is a fact that both the word *fatum*, the *divine word* and *Fata*, the *goddess who has spoken* come from the verb *fari*; their form with their suffix is participium perfectum. In classic Latin this form usually denotes passive voice, except for *deponens* verbs; on the other hand, for certain verbs with form and denotation in the active voice grammar books define participium perfectum

[31] Pötscher: *op. cit.* 1988. 487.

[32] Gellius, Noctes Atticae 3, 16, 10. Nam Parca, inquit, inmutata una littera a partu nominata.

[33] Usener, H.: *Götternamen. Versuch einer Lehre von der religiösen Begriffsbildung.* Bonn, 1896. 75.

[34] Pötscher, W.: Person-Bereichdenken und Personifikation. *Literaturwissenschaftliche Jahrbücher,* 19 (1978) 481. Dh. dass die Parca auch Fata und die Fata auch Parca ist (oder sein kann).

[35] Cf. Pötscher, W.: *Vergil und die göttlichen Mächte – Aspekte seiner Weltanschauung.* Hildesheim–New York, 1977. 33. sqq.

as denoting active voice (although this form, as shown above, is primarily passive). Even without exploring the roots of the problem in the history of language it is unambiguously clear that participium perfectum in ancient Indo-German language was exempt from diathesis,[36] it could be used either in active, or passive voice, or in intransitive meaning. For deponens verbs, which include *fari*, active is the primary meaning but passive is also allowed.[37] The relation between *fatum* and *Fata* does not seem to be an accident; what is more, it is quite probable that what they manifest is the active and passive aspects of the same uniform experience;[38] *fatum* is the divine word, *Fata* is the result of the activity of the goddess who utters this word. The act of *fari* is possessed by each god who utters a given divine decision;[39] in line with this interpretation, Isidorus Hispalensis also calls everything that the gods tell and Iuppiter says *fatum*.[40] Therefore, *fatum* is the giving of the divine decision uttered; *fari* was not limited to Fataere, or to Parcaere; *fatum* can be given, for example, by Iuppiter,[41] Iuno,[42] Apollo[43] and gods in general.[44]

It was not by accident that the concepts of the Romans formed of destiny, fate were so strongly attached to the uttered divine word's force to create reality; they identified human existence with the formulation of existence, casting existence into words; this fundamental experience may bring closer to understanding the Roman thinking *ex asse*.

III. In his account Plinius maior describes that Ops Opifera's Temple was consecrated by *pontifex maximus* Metellus, but due to his difficulties in speaking fluently he was compelled to suffer for months until he was able to utter the words of the *dedicatio*.[45] Sometime between 123 B.C. and 104 B.C. another, the fourth temple was raised for goddess Ops in Rome–it cannot be

[36] Brugmann, K.: *Griechische Grammatik*. München, 1913. 535.

[37] Vö. Priscianus, Institutiones grammaticae 2, 379, 11.

[38] Pötscher: *op. cit.* 1978. 490.

[39] Cicero, De fato 30. si ita fatum erit; Livius, Ab Urbe condita 25, 12, 6. mihi ita Iuppiter fatus est; Vergilius, Aeneis 10, 621. cui rex aetherii breviter sic fatur Olympi.

[40] Isidorus, Etymologiae 8, 11, 90. Fatum dicunt esse, quidquid dii fantur, quidquid Iuppiter fatur.

[41] Vergilius, Aeneis 4, 612. si ... necesse est, et sic fata Iovis poscunt.

[42] Vergilius, Aeneis 7, 294. fata Iunonis iniquae.

[43] Accius, Tragoediae 481. veter fatorum terminus sic iusserat.

[44] Vergilius, Aeneies 2, 54. et si fata deum si mens non laeva fuisset.

[45] Plinius, Naturalis historia 11, 174. Metellum pontificem adeo inexplanatae (sc. linguae) fuisse accipimus, ut multis mensibus tortus credatur, dum mediatur in dedicanda aede Opi Opiferae dicere.

excluded but seems not much probable that her temple on the Capitolium was restored–and it was *pontifex maximus* L. Caecilius Metellus Delmaticus who had to consecrate this temple, of whose career no more is known for sure than that he fulfilled the office of the high priest in 114 B.C.[46] Plinius's text gives an account of Metellus's difficulties in using language, which does not seem to have any historical significance, but in terms of religion it turns the attention to a cardinal point of Roman *religio*; specifically, the requirement of *"the pre-determined, accurate form, exact order of the utterance of the words to be spoken"*.[47] Complete physical health was in Rome–as in several other religions–a prerequisite for fulfilling priestly functions,[48] which seems all the less surprising since this requirement held both with respect to sacrificial animals,[49] and the official participants of sacrifices.[50]

The question may arise how come that Metellus acted as *pontifex maximus*; all the more, as he was the only *pontifex* who had some physical disability from birth as sources reveal. (Albeit, tradition maintains the memory of another *pontifex maximus* L. Caecilius Metellus, who fulfilled this office between 243 B.C. and 221 B.C., and who got blind after having been elected, as he saved the Palladium guaranteeing the existence of Rome from Vesta' temple during a fire, which was not allowed to be seen by anybody, including the *pontifex maximus*.[51] After he had got blind, being scrupulously precise in complying with religious requirements, and elected *dictator* seventeen years after he had been alleged to got blind, this high priest[52] did not resign; because–as rhetoric *controversiae* reveal[53]–a man with physical handicaps *was not permitted to become pontifex*, but in case of accidents that occurred when he had already fulfilled the office he was not obliged to resign.[54] It is, however, highly probable that the narrative on *pontifex maximus* L. Caecilius Metellus's blindness is nothing else but rendering the myth of Caeculus, the ancestor of the *gens*

[46] Wissowa, G.: *Religion und Kultus der Römer*. München, 1912. 203; Latte: *op. cit.* 73.

[47] Köves-Zulauf: *op. cit.* 1995. 71.

[48] Wissowa: *op. cit.* 491.

[49] Seneca, Controversiae 4, 2. Sacerdos non integri corporis quasi mali ominis res vitanda est. Hoc etiam in victimis notatur, quanto magis in sacerdotibus?

[50] Plinius, Naturalis historia 7, 105. (Sc. M. Sergius Silus) in praetura sacris arceretur a collegis ut debilis.

[51] Plinius, Naturalis historia 7, 139.

[52] Valerius Maximus 8, 13, 2. Metellus ... pontifex maximus tutelam caeremoniarum per duo et XX annos neque ore in votis nuncupandis haesitante neque in sacrificiis faciendis tremula manu gessit.

[53] Seneca, Controversiae 4, 2.

[54] Köves-Zulauf: *op. cit.* 1995. 72.

Caecilia, coming from Vulcanus and found next to the public hearth dedicated to Vesta as a historical fact.[55]) L. Caecilius Metellus Delmaticus becoming *pontifex maximus* might have been made possible partly by the growing rationality of the age, on the one hand; as a result of this rationality certain religious requirements were no longer seriously observed, or they tried to evade them in some form or other;[56] and by the fact that most of the texts to be spoken by Roman priests were pre-determined, and so could be learned by heart even by the *pontifex* afflicted with inherent speech difficulty through lengthy and tiring exercise;[57] as a matter of fact, this would not have been possible in a religion based on spontaneous sacred speech, free preaching and prophetic prayer.[58]

The text of the *dedicatio* most probably contained the name of goddess Ops Opifera, which must have posed a double challenge to *pontifex maximus* with his difficulties in speaking fluently *(inexplanata lingua)*: to utter an alliterating name was certainly not an easy task for a man with speech difficulties and perhaps stuttering; furthermore, it was exactly during the *dedicatio* that the accurate naming of the goddess was highly important since Ops Opifera belonged to the deities of sowing.[59] The significance of the goddess Ops was never doubtful to the Romans for–as her name shows[60]–it was attached to richness; more exactly, to the richness of the produce; in other words, Ops incorporated the rich yield of the arable land, manifested the helping aspect of the mother earth;[61] as a matter of fact, in line with the inclination to go into details inherent in Roman religion various forms of manifestation of the soil were distinguished, so the soil was adored in general as Tellus, in its aspect enhancing life as Ceres, and in its capacity to produce crop as Ops.[62]

Roman religion, however, divided the aspects of Ops into further parts, as it was customary for it to assign so-called *Sondergottheiten* to the chronologically succeeding elements of various events and actions.[63] On 25 August, they held the festivity of Ops Consiva, i.e., of the goddess who *"has carried out gathering of the crop"*; and two days earlier, on 23 August, the festivity of Ops

[55] Köves-Zulauf: *op. cit.* 1995. 74.

[56] See Latte: *op. cit.* 276.

[57] Latte: *op. cit.* 198. 392; Wissowa: *op. cit.* 397; Dumézil, G.: *La religion romaine archaïque*. Paris, 1973. 53. sqq.

[58] Köves-Zulauf: *op. cit.* 1972. 77.

[59] Köves-Zulauf: *op. cit.* 1972. 78.

[60] Walde–Hofmann: *op. cit.* II. 205. sq.

[61] Radke, G.: *Die Götter Altitaliens*. Münster, 1965. 238. sqq.

[62] Köves-Zulauf: *op. cit.* 1995. 76.

[63] Latte: *op. cit.* 51. sqq.; Radke: *op. cit.* 23. sqq.

Opifera was celebrated,[64] from which it can be unambiguously deduced that the name Ops Opifera–its second part is connected with the verb *"ferre"*–should be interpreted as the goddess[65] *"bringing abundance of heavy crop"*.[66] On that same day, 23 August, they celebrated Volcanalia, and its logical connection with the festivity of Ops Opifera becomes clear when considering that it is wheat not collected yet in pitfalls that is the most exposed to fire, and is in need of Ops Opifera's resolute protection against Vulcanus.[67] Today it is no longer possible to explore in every detail why the Romans thought it was especially dangerous to call the deities of sowing by their names; however, it indicates the importance of the goddess Ops that in the course of searching for the secret guardian deity of Rome–this name was not known by the public just to prevent *evocatio* by the enemy–Ops has also arisen as a deity who might have fulfilled this function.[68]

The findings summed here clearly show that the validity of *dedicatio* as an integral institution of *ius sacrum* was inseparably attached to the exact utterance and proper order of the words to be spoken; as a parallel this phenomenon makes it more definite that *legis actio sacramento in rem* was strongly focused on the text.

IV. A peculiar interpretation of *prodigium* provides an interesting parallel with the reality creating function of the spoken word. First, a brief examination of the significance of *prodigium* will be given. The Romans called the accustomed order, peaceful state of the world *pax de(or)um*, which meant the gods' peaceful relation to humans; and if this order was upset, it was always deducible to the gods' stepping out of this peaceful state.[69] The breakdown of the cosmic order, that is, any extraordinary, new event was considered *prodigium*.[70] The etymology of the word is dubious–in Walde–Hofmann's interpretation *prodigium* derives from the compound *"prod-aio"*; consequently, *prodigium* means foretelling, or pointing ahead. This interpretation does not seem satisfying because *prodigium* was a term that always had to be inter-

[64] Radke: *op. cit.* 239.

[65] Köves-Zulauf: *op. cit.* 1995. 77.

[66] Köves-Zulauf: *op. cit.* 1972. 79.

[67] Latte: *op. cit.* 73. 129; Köves-Zulauf: *op. cit.* 1972. 79.

[68] Macrobius, Saturnalia 3, 9, 3–4. Deum in cuius tutela urbs Roma est ... ignotum alii Iovem crediderunt, alii Lunam, sunt qui Ageronam, ... alii autem quorum fides mihi videtur firmior Opem Consivam esse dixerunt.

[69] Köves-Zulauf: *op. cit.* 1995. 61.

[70] Zintzen, C.: Prodigium. In: Ziegler, K. et. al (ed,.): *Der Kleine Pauly*. München, 1979. IV. 1151.

preted, and that is why in Rome they always used the help of *pontifices, libri Sibyllini* or *haruspices* to carry out this task, since *prodigium* itself does not state anything; apparently another interpretation is more proper that asserts that the word derives from the compound *"prod-agere"*, so *prodigium* means the process of moving ahead; accordingly, *prodigium* is nothing else than the act when *"breaking through this shell, transcendental forces hiding behind the surface come forth and become manifest"*.[71]

Among the forms of interpretation of *prodigium* Plinius maior discusses the following case at a highlighted point: when laying the foundations of the Capitolium the Romans found a human head on the Tarpeius Hill; they sent delegates to the most famous oracle of Etruria, Olenus Calenus, who tried to transpose the *prodigium* with fortunate significance to his own people. In front his feet he drew the image of the temple with his cane and said: *"So you say so, Romans? This is where Iuppiter Optimus Maximus's temple will be, we found the head here?"* The oracle's son warned the delegates about his father's trick–if they had given improper answer, the prediction would have passed on Etruria: *"We do not say that the head was found exactly here but in Rome"*, replied the delegates.[72] In his account Plinius refers to the concordant evidence in the *Annales*, and research has established that he took the description from Valerius Antias, who used Piso and Fabius Pictor as sources;[73] accordingly, this legend had existed as early as the 3rd c. B.C.[74] The author does not intend to analyse the symbolism of the head in detail, just notes that the durability of buildings (the Capitolium was the symbol the city of Rome and so the empire itself) was meant to be ensured by people living in Europe since the Neolithic age through the ritual of walling up live persons. As certain versions of the text report not only on a human head but a healthy human body, it can be made probable that the story intended to refer to such a ritual.[75] The oracle wanted to rob *fatum* from Rome, and pointed at the outlined layout, and tried to convince

[71] Köves-Zulauf: *op. cit.* 1995. 62.

[72] Plinius, Naturalis historia 28, 15. Cum in Tarpeio fodientes delubro fundamenta caput humanum invenissent, missis ob id ad se legatis Etruriae celeberrimus vates Olenus Calenus, praeclarum id fortunatumque cernens, interrogatione in suam gentem transferre temptavit, scipione determinata prius templi imagine in solo ante se: 'Hoc ergo dicitis, Romani? hic templum Iovis optimi maxumi futurum est, hic caput invenimus?' Constantissima Annalium adfirmatione, transiturum fuisse fatum in Etruriam, ni praemoniti a filio vatis legati respondissent: 'Non plane hic, sed Romane inventum caput dicimus.'

[73] Münzer, F.: *Beiträge zur Quellenkritik der Naturgeschichte des Plinius.* Berlin, 1897. 149.

[74] Cf. Livius, Ab Urbe condita 1, 55, 5–6.

[75] Köves-Zulauf: *op. cit.* 1995. 205. sqq.

the Romans to say that the head had been found at the oracle's feet, on the land of Etruria. If the Romans had made such a statement, the impacts of the *prodigium* would have been produced on the Etruscans; the head would have stayed in Rome but not the *fatum* related to it.

So human word in Roman thinking had magical impact creating and changing reality; in this respect it is enough to think of the statements made on *fatum*.[76] In our present way of thinking, we would of course interpret the oracle' words interpreting the *prodigium* in terms of sense and not word for word; the people of the age of the legend, however, did not do so. *"The reason for that was the Romans' unshakeable faith in the numinous force of uttered words; it is our firm belief that all things considered existence is identical with the existence uttered, complete reality is no other than reality cast into words."*[77]

V. Among the norms of table eight of the Twelve Table Law containing criminal law rules several original provisions can be found that are in close connection with verbality: *"QUI MALUM CARMEN INCANTASSIT..."*,[78] and related to it there is a norm that imposes capital punishment on those who conjure up *carmen* reviling others.[79] The law also provides for those who enchant and allure others' crop to come to them: *"QUI FRUGES EXCANTASSIT"*,[80] *"NEVE ALIENAM SEGETEM PELLEXERIS"*[81] With this latter source it is possible to connect the remark of Servius's commentary on Vergilius,[82] and with the loci 1/a. and 8/a. Plinius maior's thought.[83] It was not by accident that the author of this paper quoted the relevant paragraph in *Naturalis historia*, because Plinius compares the relevant provisions of the

[76] Köves-Zulauf: *op. cit.* 1972. 308. sqq.

[77] Köves-Zulauf: *op. cit.* 1972. 312; 1995. 207.

[78] Leges XII tabularum 8, 1/a.

[79] Leges XII tabularum 8, 1/b (Cicero, De re publica 4, 10, 12.) Nostrae XII tabulae, cum perpaucas res capite sanxissent, in his hanc quoque sanciendam putaverunt: si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiumve alteri.

[80] Leges XII tabularum 8, 8/a.

[81] Leges XII tabularum 8, 8/b.

[82] Servius, Commentarius in Verg. Aen. 8, 99. Atque satas alio vidi traducere messes. Magicis quibusdam artibus hoc fiebat, unde est in XII tabulis: neve – pellexeris.

[83] Plinius, Naturalis historia 28, 18. Quid? Non et legum ipsarum in XII tabulis verba sunt: Qui fruges excantassit, et alibi: Qui malum carmen incantassit? Verrius Flaccus auctores ponit, quibus credat in oppugnationibus ante omnia solitum a Romanis sacerdotibus evocari deum cuius in tutela id oppidum esset, promittique illi eundem aut ampliorem apud Romanos cultum. Et durat in pontificum disciplina id sacrum, constatque ideo occultatum in cuius dei tutela Roma esset, ne qui hostium simili modo agerent.

Twelve Table Law with the ritual regarding which his source, Verrius Flaccus names several authors: in the siege of a town the Roman priests first of all *"evoked"* the god (this is the so-called *evocatio*) under whose patronage the given town stood, since in Rome they promised the same or greater cult to the god; furthermore, this ceremony had survived in the *pontifices'* science, and that is why they kept the name of the god in secret under whose patronage Rome stood to avoid that the enemy should act the same way.[84] To have better understanding of these provisions of the Twelve Table Law, it is worth making some remarks concerning the locus regarding *evocatio.*

With respect to *evocatio* the text contains two unambiguous statements: on the one hand, the ceremony of *evocatio*; on the other hand, its practice that had existed–in theory–until his own age, i.e., the 1st c. This latter statement on the survival of the custom might be the author's own thought and does not go back to the *auctores* referred to above by him;[85] at the same time, it cannot be excluded that Plinius simply took over Verrius's statement without any critical note or comment.[86] Even if presuming that the comment on the survival of the ritual was indeed Plinius's own assertion, it does not necessarily mean that he himself were allowed to inspect pontifical writings, much rather he might have supposed–relying on what he read in Verrius–that it had not changed until his age.[87] Plinius did not disclose the text of the ceremony, but it can be found in Macrobius, who described *in concreto carmen evocationis* applied to Carthago.[88] Concerning *evocatio* Plinius speaks about *oppidum–the ceremony of evocatio* could be used against a town, i.e., *urbs*, founded by complying with sacred rituals similarly to Rome,[89] but as sources reveal it could be used against *oppida* too; the term *"solitum"* seems to imply that *evocatio* occurred much more often in the course of Roman history than the specific cases supported by documentary evidence imply.[90] Furthermore, the author clearly states that the ceremony of *evocatio* was performed by *sacerdotes*, contrary to the ritual of *devotio urbis* which fell in the competence of the *dictator*, or the *imperator.*[91]

[84] About ius fetiale see Fusinato, G.: *Dei feziali e del diritto feziale.* Macerata, 1884; Heuss, A.: *Die völkerrechtlichen Grundlagen der römischen Aussenpolitik in republikanischer Zeit.* Leipzig, 1927.

[85] Rohde, G.: *Die Kultursatzungen der römischen Pontifices.* Berlin, 1936. 26.

[86] Münzer: *op. cit.* 1897. 38. 47. 60. 121.

[87] Köves-Zulauf: *op. cit.* 1972. 86.

[88] Macrobius, Saturnalia 3, 9, 7–8.

[89] Basanoff, V.: *Evocatio.* Paris, 1947. 21.

[90] Latte: *op. cit.* 1967. 125.

[91] Macrobius, Saturnalia 3, 9, 9.

While in Roman beliefs *evocatio*–being *carmen* addressed to a deity having a specifically determined personality–prepared the destruction of the enemy's town as a religious act, *devotio urbis* did that as *consecratio* addressed to magical, that is, impersonal forces of the underworld;[92] most frequently aimed against the town already deprived of its guardian deities.[93] The *carmen* of *devotio urbis* is also known from Macrobius.[94] At the same time, it is not possible to set up unambiguously a *nulla devotio sine evocatione*[95] thesis since *devotio* was frequently applied without *evocatio*–as the latter could be carried out only regarding *urbes*–here Macrobius intended to set a logical sequence only, rather than determine a *cogens* norm of *ius sacrum*. The source cited also states that to avoid *evocatio* carried out by the enemy they kept the identity of the deity who protected Rome in secret. It is in line with Plinius's statements, which can be read in Macrobius[96] and Servius,[97] albeit, regarding the issue if their content corresponds to the facts contradictory views are entertained in the literature because the name of the guardian deity is unknown; some experts brand the ideas about it pure fiction or relatively late borrowing from the East;[98] however, others dismissing this standpoint of supercriticism suppose that it was not to support the ritual of *evocatio* that the sources created a secret deity for Rome but it was the thinking of people of the age–which accepted the notion that enemies' towns could be destructed though *evocatio*–that deemed it necessary to keep Rome's guardian deity's name in secret in order to protect it against possible *evocatio* carried out by enemies.[99]

Rome's other (secret) name–*nomen alterum*–is referred to by Plinius maior also at other points;[100] the *"nisi"* inserted by Mommsen, held quite uncertain in

[92] Wagenvoort 1956. 31. sqq.; cf. Cicero, De domo sua 128. ...ut imperator agros de hostibus captos consecraret.

[93] Macrobius, Saturnalia 3, 9, 6. 9.

[94] Macrobius, Saturnalia 3, 9, 10–11.

[95] Basanoff: *op. cit.* 5.

[96] Macrobius, Saturnalia 3, 9, 3. propterea ... ignotum esse voluerunt.

[97] Servius, Commentarius in Verg. Aen. 2, 351. inde est, quod ... celatum esse voluerunt.

[98] Latte: *op. cit.* 125.

[99] Brelich, A.: *Die geheime Schutzgottheit von Rom.* Zürich, 1949. 9. sqq; Wissowa: *op. cit.* 1912. 179. 203. 338; Köves-Zulauf: *op. cit.* 1972. 95.

[100] Plinius, Naturalis historia 3, 65. Roma ipsa, cuius nomen alterum dicere nisi in arcanis caeremoniaerum nefas habetur optimaque et salutari fide abolitum enuntiavit Valerius Soranus luitque mox poenas. Non alienum videtur inserere hoc loco exemplum religionis antique ob hoc maxime silentium institutae. Namque diva Angerona, cui sacrificatur a.d. XII kal. Ian., ore obligato obsignatoque simulacrum habet.

inherited texts, affects the core of the content of the source,[101] which might make it probable that the secret name of the city of Rome was permitted to be uttered solely in secret ceremonies. This assumption, i.e., Mommsen's addition, is basically in conflict with and made unnecessary by the image of the goddess since she was portrayed both with covered eyes and sealed mouth to indicate complete silence that referred to her name, and with/by the sources that confirm that this secret name was not permitted to be uttered even in religious ceremonies.[102] On the grounds of the above it seems logical to ignore the insertion *"nisi"* when reviewing the text. The source contains three data: first, the existence of the secret name of the city of Rome; secondly, that it was betrayed by Valerius Soranus and the betrayer was punished–Plinius traces this information back to Varro–thirdly, the cult of goddess Angerona; the latter is taken by the author from Verrius; the second and third fact will be touched on only to the extent that they are related to the controversial issue of *nomen alterum.*[103] The existence of the secret name of the city of Rome can be supported from several points of view: dismissing the standpoint of hypercrticism, as in the case of *evocatio*, until the contrary has been proved, the ritual of *devotio urbis* can be accepted as an element actually used and constituting an integral part of Roman religion. Regarding secret names, research has explored several parallels between the names of persons, tribes and towns, whose secrecy in each case was rooted in the belief in the possibility of abusing the name through magical means, and it was meant to protect the bearer of the name against such abuse.[104]

(The phrase *"dicere arcanis caeremoniarum nefas habetur"* raises the question which nominativus the expression *arcanis caeremoniarum* can be deduced to: to the peculiar genitivus partitivus *arcanae caeremoniarum*, or to *arcana caeremoniarum*, where the genitivus allows interpretation either as explicativus, or possessivus or partitivus. That is, does Plinius mean totally secret ceremonies by it, or only rituals that had parts including secret elements but their entirety was performed in public. Whichever interpretation is accepted, it seems certain that the ceremony, or ceremonies mentioned by Plinius was/were somehow connected with the secret name of Rome and the prohibition to utter it.) Although Plinius does not specify here what ceremony he meant, there is

[101] Corpus Insciptionum Latinarum I. 409.

[102] Servius, Commentarius in Verg. Aen. 1, 277. Urbis ... verum nomen nemo vel in sacris enuntiat. Georg. 1, 498. Verum nomen eius numinis ... sacrorum lege prohibetur.

[103] About nomen alterum see Plinius, Naturalis historia 2, 15; 2, 37; 3, 2; 4, 28; 5, 115; 16, 48; 21, 52; 23, 35.

[104] Wissowa: *op. cit.* 69.

only one ritual known considered indeed strictly secret that was so closely related to the secret name of the city as *evocatio* to the secret guardian deities of the city, and that is *devotio urbis*. In a similar spirit Macrobius comments upon the issue.[105] Just as Macrobius somewhat mingles the ceremonies of *evocatio* and *devotio urbis*, Plinius does not clearly separate the two rituals from one another either; it must have been the essential secrecy of both cases that made the author to draw parallel with the portrayal of goddess Angerona, which is involved in the text definitely as the symbol of silent secrecy without making it possible to determine clearly whose secret the goddess preserves.

Returning to the quoted loci of the Twelve Table Law, it does not seem unnecessary to recall what meanings the term *carmen* carries when occurring in the sources. The term *carmen* can have very different meanings: work song,[106] children' song, game rhyme,[107] love song,[108] satirical poem, funny song,[109] legend, sentence,[110] magical rhyme, healing song,[111] cultic song, prayer,[112] prophecy,[113] song on the deceased, ancestors,[114] ancient law,[115] entering into an alliance, declaration of war and military oath.[116] On the grounds of this ranking it is possible to accept the interpretation that the relevant provision of the Twelve Table[117] imposed capital punishment on those using abusive songs;[118] in other of the case *"fruges excantassit"* and *"segetem pellexerit"* are properly

[105] Macrobius, Saturnalia 3, 9, 5–6. 9. Ipsius vero urbis nomen etiam doctissimis ignoratum est, caventibus Romanis, ne quod saepe adversus urbes hostium fecisse se noverant, idem ipsi quoque hostili evocatione paterentur, si tutelae suae nomen divulgaretur. Sed videndum, ne, quod non nulli male aestimaverunt, nos quoque confundat opinantes uno carmine et evocari ex aliqua urbe deos, et ipsam devotam fieri civitatem. ... Urbes vero ... sic devoventur iam numinibus evocatis.

[106] Tibullus 2, 6, 21–26; Vergilius, Georgica 1, 287–294.

[107] Porphyrio, Commentarius in Hor. Epist. 1, 1, 62; in Hor. ars 417.

[108] Horatius, Satirae 1, 5, 14–21.

[109] Suetonius, Divus Iulius 49. 51; Horatius, Epistulae 2, 1, 139–155; Augustinus, De civitate Dei 2, 9.

[110] Gellius, Noctes Atticae 4, 9, 1–2; Isidorus, Etymologiae 6, 8, 12.

[111] Varro, De lingua Latina 6, 21; Plinius, Naturalis historia 28, 2, 29; 28, 2, 10. 17–18.

[112] Quintilianus, Institutio oratoria 1, 6, 40; Varro, De lingua Latina 7, 27; Cato, De agricultura 141, 1–3; Macrobius, Saturnalia 3, 9, 6.

[113] Festus, De significatione verborum 325; Livius, Ab Urbe condita 25, 12, 2–14.

[114] Cicero, Brutus 19. 75.

[115] Gellius, Noctes Atticae 20, 1, 42–49.

[116] Livius, Ab Urbe condita 1, 24, 4–9; 1, 32, 5–14.

[117] Leges XII tabularum 8, 1/b

[118] Cicero, De re publica 4, 10, 12; Cf. Porphyrio, Commentarius in Hor. Sat. 2, 1, 82. Lege XII tabulis cautum erat, ne quis in quemquam maledicum carmen scriberet.

cases[119] the law uses the term *carmen* in the sense of magical rhyme. The facts highlighted by another locus in Plinius;[120] this source adduces to the three goddesses of harvesting grain without naming two of them (Seia, Segesta), and refers to the third one asserting that it is prohibited to utter her name in a house, or in any roofed place *(sub tecto)*. It is known from other parallel loci that the third goddess bore the name Tutilina.[121] Most probably what we have here is a permanent triad of goddesses. The function of the first two goddesses is quite clear: Seia protects the seed sown and resting in the soil, and Segesta protects grain ripening, still standing, which seems to be confirmed by the etymology of the two names.[122] In the examination of Tutilina's name and role it is most fortunate to set out from the analytical approach quite typical of Roman religion by which it splits certain processes of life into the minutest units, and assigns each phase of these actions or events to the powers of a particular *Sondergott*[123] by naming a Usener, individual deity specially allocated to them.[124]

This triad undoubtedly belongs to the phases of the ripening of grain, and it logically comes from that that having knowledge of the roles of the first and second *Sondergöttin* the role of the third one can be determined; specifically, it is the task of harvesting grain, and bringing it to the barn, and guarding it there. This is in harmony with Augustinus's statement taken over from Varro,[125] which asserts that naming Tutilina in a closed space–just as naming the other two goddess presumably elsewhere, on the meadow which ripens grain–could be connected with the fact that uttering the name was identical with evoking the given *numen*. Naming the deity–which was in a certain aspect identical with the material reality represented by it according to the peculiarly Greek-Roman *Person-Bereichdenken*[126]–might make it possible to commit abuse with

[119] Leges XII tabularum 8, 1/a; 8/a; 8/b

[120] Plinius, Naturalis historia 18, 8. Hos enim deos tum maxime noverant, Seiamque a serendo, Segestam a segetibus appellabant, quarum simulacra in circo videmus ... tertiam ex his nominare sub tecto religio est.

[121] Varro, De lingua Latina 5, 163; Macrobis, Saturnalia 1, 16, 8; Augustinus, De civitate Dei 4, 8; Tertullianus, De spectaculis 8, 3.

[122] Latte: *op. cit.* 51. Der etymologische Zusammenhang mit semen, bzw. seges, dürfte für die ersten sicher sein.

[123] Usener, H.: *Götternamen. Versuch einer Lehre von der religiösen Begriffsbildung.* Bonn, 1896. 75.

[124] Köves-Zulauf: *op. cit.* 1972. 81; Latte: *op. cit.* 50.

[125] Augustinus, De civitate Dei 4, 8. Frumentis vero collectis atque reconditis ... deam Tutilinam praeposuerunt.

[126] Pötscher: *op. cit.* 1978. 229.

the grain protected by it; so, for example, enchanting sowing to come to someone else's land, or charming the already harvested grain to come to someone else's building. The independent existence of deities assigned to each phase of the life cycle of the grain shows that their names were not absolutely taboo, instead they were tabooed only under certain circumstances and at certain places since only then and there did they produce their impact. As a matter of fact, it is not possible to separate strictly and systematically the religious and the magical approaches regarding these phenomenon of Antique beliefs for naming the deity implies religious, and the *excantatio* performed by it magical motifs, presumably the co-existence of the two approaches should be reckoned with here too just as in the case of *evocatio* and *devotio urbis*.

Conclusion. What consequences can be drawn with regard to the subject of the investigation of this paper? The words of the *vindicatio* of *legis actio sacramento in rem* developed for real estate properties were called *carmen* also by Cicero.[127] Setting out from the numerous meanings of the word *carmen* the words of *legis actio sacramento in rem* were qualified as a text with legal content of sacred–magical, numinous–nature.[128] The relation of the Romans to sacred texts, or spoken words is determined by Köves-Zulauf as follows: *"Roman religion is the religion of ... discipline, anxiety, suppression, and not of relieved relaxation as the Greek. ... That is where, one might say, the neurotic insistence on speech of the Roman religion comes from."*[129]

[127] Cicero, Pro Murena 26.

[128] See also the distinction in Greek religion between hiereys and arétér: arétér – precator, sacerdos, qui pro populo precatur deos ... Homerus, Ilias 1, 11. 94. 5, 78; hiereys – sacerdos unius e diis, qui certo fungitur munere ... Homerus, Ilias 1, 23. (Eberling, H.: *Lexicon Homericum I–II.* Hildesheim, 1963. I. 172. 585.) See also Muth, R.: *Einführung in die griechische und römische Religion.* Darmstadt, 1988. 70.

[129] Köves-Zulauf: *op. cit.* 1995. 249.

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The Concepts of State Responsibility and Liability in Nuclear Law

Abstract. The legal concept and the doctrinal theory of state responsibility and liability have been in the focus of public international law for a long while. By means of domestic legislation, national law–regardless of the relevance of the international legal framework–governs the system of civil liability within the area of civil law of each state. Whereas, as opposed to the framework of civil liability governed by diverse domestic rules, exclusively a standard regulation framed at an inter-state level can secure a uniform system of state liability. The issue of state responsibility for nuclear damages raises specific questions to be examined in the framework of general international regulations (e.g., Conventions adopted within the area of nuclear law) related to responsibility and liability. Thus, answering or the clarification of these specific pivotal questions within the scope of public international law shall be our starting point, which may also entail the modification of the matter of state responsibility and liability (not only in the concerned branch of law).

Keywords: ILC's Draft Articles, state responsibility, primary and secondary rules, civil liability, transboundary damages, the Chernobyl accident, Paris Convention of 1960, Vienna Convention of 1963

The Issue of State Responsibility in the Practice of the International Law Commission

The concept of state responsibility and liability[1] had formerly been considered by the international (academic) community, when, as a result of the efforts made by various forums of international policy-makers and actors,[2] the International

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[1] As for the traditional, brief history of 'state responsibility', cf. Bodansky, D.–Crook, J. R.: Symposium: the ILC's State Responsibility Articles. *American Journal of International Law* 96 (2002), 773–779.

[2] E.g. the substantial discussion in the Sixth Committee of the UN General Assembly, written comments by a number of Governments, as well as by a study of the International Law Association. Cf. *Fourth Report on State Responsibility*. Para. 1.

Law Commission (hereinafter: ILC) adopted a quasi-treaty text[3] designated as ILC's Draft Articles on the issue of state responsibility.[4] It is the very general and legally non-binding character of ILC's Draft Articles (regarding that these articles have not yet been materialised in the form of a convention or any international legal document) that accounts for the fact that in research work, ILC's Draft Articles have been ignored, nevertheless, we should take them into account as a communis opinio doctorum and as a summary containing the main theoretical concepts of state responsibility, which need to manifest themselves either in international customary law or in international state practices, or, in both of these. Thus, it is deemed essential that the provisions of the ILC's Draft Articles are surveyed and analysed in view of the concerned legal area parallelly to nuclear legal conventions, on the one hand, if the regulation of issues of state responsibility and liability lacks instruments of nuclear law, or, on the other hand, the governing regulation would not be able to encompass all relevant aspects of the aforementioned responsibility and liability under the framework of nuclear law.

In general, the ILC adopted the traditional *state-to-state approach*[5] irrespective of the increasingly emerging question of the responsibility of non-state actors, such as terrorist groups and individuals. A key question in this respect is whether under international law a state is responsible for damages or injuries incurred to another state and, if so, to what extent it bears international respon-

[3] As for the proof of this phrase, ILC annexed lengthy and comprehensive commentaries and the draft had been made in the dominant working style of the ILC, so these articles "had the look and feel of a treaty." See Caron, D.: The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority, *American Journal of International Law* 96 (2002), 861–862. But the draft does not recommend to the General Assembly that the articles be considered for adoption as a treaty. See *ibid.* On the theoretical approaches of its form, see *ibid.* 862–866. The Resolution 56/83 (December 12, 2001) adopted by the General Assembly commends the articles to the "*attention of Governments without prejudice to the question of their future adoption or other appropriate action.*" See Point 3 of the GA Res. 56/83.

[4] About the draft, see particularly Crawford, J.: *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries.* Cambridge, 2002. 381. Following the ILC's Draft Articles, a diplomatic conference has not been convened by the UN General Assembly to create a treaty on the basis of the ILC's Draft Articles. That was the reason for being legally non-binding instrument. At this stage, it shall have been emphasized that the ILC's Draft Articles exclusively uses the term 'responsibility' or 'responsible' even if the use of 'liability' or 'liable' would be expedient in such cases for avoiding the possible problems arising from this legally non-precise usage.

[5] Cf. Weiss, E. B.: Invoking State Responsibility in the Twenty-first Century. *American Journal of International Law* 96 (2002), 798.

sibility for its actions.[6] Generally, under public international law, if an act of any state has been wilfully and maliciously committed, or that act would has been committed in a gravely negligent manner and implies a breach of an international obligation, these facts (causal relation between cause and the result of a conduct imputable to the state as damage or harm[7]) would entail that state responsibility obtains, therefore, compensation and reparations shall supervene pursuant to the legal regulation of state liability.[8] So, firstly, the term and meaning of state responsibility shall be distinguished from state liability by means of exact concept-formation in the general area of international law (*lex generalis*) and specifically, under nuclear law (*lex specialis*).

The codification process conducted by ILC was frequently self-contradictory by reason of the departing legal thinking of the five rapporteurs, scilicet, their different conceptions deriving from their diverse backgrounds as to state establishments and legal systems. Therefore, in the domain of the problematic distinction to be made between state responsibility and liability debates often flared up, which basically influenced the fundamental approach of this subject-matter (*see*, particularly *Riphagen*'s thoughts concerning this dilemma[9]). The final draft unambiguously contains only rules concerning state responsibility because of the "state's responsibility for internationally wrongful acts" phrase, which means that the draft precluded the possibility of raising liability-issues upon the interpretation of the articles, since it used the phrase of "wrongful act". The term of "responsibility" postulates the wrongful act of a state,[10] while the term of "liability" for injuries is attached to lawful acts. For this reason, it is generally accepted that the codification of state liability would have been the subject of a separate ILC work.

[6] See Jabbari-Gharabagh, M.: Type of State Responsibility for Environmental Matters in International Law. *Revue juridique Thémis* (1999) 63.

[7] See Article 2 of the Draft Articles.

[8] As an international customary norm, the Permanent Court of International Justice stated *„it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.*" See Chorzów Factory Judgment, No. 8 (1927) 21.

[9] See Bodansky–Crook: *op. cit.* 778.

[10] ILC's Draft Articles state a logical equation: conduct not in conformity with an international obligation and attributable to a state equals an internationally wrongful act resulting in state responsibility. See Bodansky–Crook: *op. cit.* 782. Cf. Article 12 of the ILC's Draft Articles.

Another cardinal problem is also deemed of considerable importance. *Ago* distinguished *"secondary"* rules from *"primary"* rules of obligation.[11] This scheme was taken over by Crawford apart from the fact that ILC had not decided to emphasize the primary rules, furthermore, it declared that *"state responsibility should be dealt with within the purview of secondary rules."*[12]

1. State Responsibility in General

The international responsibility of a state manifests an 'objective' character, "in the absence of any specific requirement of a mental element in terms of primary obligation, it is only the act of a State that matters, independently of any intention" – pursuant to the ILC.[13]

The exact distinction between the notions of responsibility and liability implies two different approaches to the same problem.[14] In the following, for the purpose of the differentiation of the dual meaning by means of a semantic overview,[15] the terms of responsibility and liability must be clearly circumscribed. Nevertheless, these terms are sometimes applied without discretion to questions of liability or responsibility in manners, which indicate that the occurrence of damages or losses is not a sufficient or even a necessary basis for responsibility.[16]

According to the strict viewpoint of international law, however, liability and responsibility obtains, when a breach of an obligation laid down under

[11] Secondary rules determine the legal consequences arising out of failure to perform obligations set forth in the primary rules. Cf. *Yearbook of the International Law Commission.* New York, 1 (1974) 5.

[12] Cf. *Yearbook of the International Law Commission.* United Nations, New York, 1 (2001) 106.

[13] Cf. *ibid.* 249.

[14] But the traditional principles of state responsibility could merge with the concept of state liability, particularly in instances such as ultra-hazardous activities where states must meet such a strict standard of care that for all practical purposes they will be responsible (and so, liable) for any activity leading to harm. Cf. Hunter, D.–Sommer, J.–Vaughan, S.: *United Nations Environment Programme. Concepts and Principles of International Law: An Introduction.* New York, 1994.

[15] Cf. Horbach, N.: The Confusion about State Responsibility and Liability, *Leiden Journal of International Law*, 4 (1991) 47–74. English and German–opposed to the French (*responsabilité*) and Hungarian (*felelősség*)–language draw a distinctive word-form between the two notions (*responsibility* and *liability–Haftung* and *Verantwortlichkeit*).

[16] See *Fourth Report on State responsibility.* Para. 30.

international law has occurred, which per se does not need to involve the requirement of the element of either negligence or malice.[17]

As for the standpoint of ILC, as it is manifest in the legally non-binding draft in the abstract, every internationally wrongful act of a state entails the international responsibility of that state (according to Article 1 of ILC's Draft Articles). On the other hand, the term of "state liability" does not necessitate that the facts of the case of an internationally wrongful act of a state obtains. Subsequently, every act of a specific state, regardless of its possible legal grounds, can effectuate the liability of the state irrespective of the fact whether it has caused transboundary damages.[18]

The international responsibility of a state implies its duty to make reparations for the damages, which result from a failure to comply with its international obligations–as it was everlastingly drafted in the 1930 Hague Conference on State Responsibility (and has prevailed thence). The term 'responsibility' was based upon the general rule of international law that states are legally accountable for breaching international obligations imposed on them. Former determination refers to the so-called 'primary obligation' under international law, which is formulated under Article 1 of ILC's Draft Articles as follows:

> *"Every internationally wrongful act of a state entails the international responsibility of the state."*[19]

Consequently, the rules of state responsibility stipulate and determine whether international obligations have been breached,[20] moreover, an internationally

[17] In the early literature, *Hardy* regarded that fault-based liability had been always required in opposition to the argumentation that state had automatically incurred responsibility for whatever it had been done, so it appeared preferable to say that liability is in all cases to be determined by international law – or rather according to the legal literature of the 50's and 60's. Cf. Hardy, M.: International Protection against Nuclear Risks. *International and Comparative Law Quarterly* 10 (1961) 755.

[18] As for *de la Fayette*'s position, she thought that 'responsibility' is to prevent damage (to take care of control of a person, thing, installation, activity), while 'liability' almost exclusively concentrates for compensating the victims (obligation to repair the damage or to compensate the innocent victim). See de la Fayette, L.: Towards a New Regime of State Responsibility for Nuclear Activities. *Nuclear Law Bulletinc* 50 (1992) 21.

[19] As for the imperative conditions of 'internationally wrongful act', cf. Article 2 of the Draft Articles.

[20] Breach of an international obligation is defined as "an act (...) not in conformity with what is required (...) by that obligation"–as the ILC's Draft Articles state. See Crawford: *op. cit.* Note 1, Article 12. The breach of an international obligation entails two types of legal consequences. Firstly, it creates new obligations for the breaching state, principally, duties

wrongful act entailing state responsibility through the breach of an obligation has to be followed by sanctions (such as restitution, reparation, compensation, therefore, as to the ensuant consequences, no relevant difference between the notions of responsibility and liability obtains).

Traditional principles of state responsibility may merge with state liability that arises from lawful acts, particularly in instances such as ultra-hazardous activities, in the case of which states need to proceed with such a strict standard of care that for all practical purposes they will be "responsible" for any activity leading to (transboundary) harm.[21]

2. State Responsibility in the Area of Nuclear Law

Under international law, states are responsible for damages arising from the nuclear installations operating under their authority or control, because the absolute liable operator[22] does not function independently of governmental control.[23]

Generally, as it has been expressly pointed in the foregoing out, the concept of responsibility in both branches of nuclear law and of environmental law derives from unlawful acts, principally from an intentional international breach of obligation. So, the applicability of the term of 'state responsibility' requires the effective breach of obligation by states, whereupon a nuclear accident or radiological emergency occurs and the damages and losses are ascertainably the results of breaching obligations (direct causality is necessary between the breach, as a cause and the damage, as an effect). As an outcome of this statement, state responsibility shall entail an obligation for the wrongdoing state to make full reparation[24] for the internationally wrongful act in the form of restitution,[25] compensation[26] and satisfaction.[27]

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of cessation and non-repetition (cf. Article 30 of the ILC's Draft Articles) and secondly, a duty to make full reparation (cf. Article 31 of the ILC's Draft Articles).

[21] See Hunter, D.–Sommer, J.–Vaughan, S.: *Concepts and Principles of International Law: An Introduction*. New York, 1996.

[22] The notion of 'operator' incorporates the licensee or other designated or recognized entity. The duty of designation or recognition is within the competence of the national government or the legislator body.

[23] See de la Fayette: *op. cit.* 18.

[24] Cf. Article 31 of the ILC's Draft Articles.

[25] Cf. *ibid.* Article 35.

[26] Cf. *ibid.* Article 36.

[27] Cf. *ibid.* Article 37.

Article 34 of ILC's Draft Articles reads as follows:

> *"Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this* (Reparation for injury under Chapter II–the author) *Chapter."*[28]

In the area of nuclear law, the issue of state responsibility for nuclear damages and for breaching obligations remains in the background compared to the concept of state liability. Its reasons are multifarious.

Firstly, nuclear accidents and radiological emergencies with transboundary effects are not direct consequences of breaching obligations committed intentionally by states on the whole (e.g., 1986 Chernobyl disaster).

Secondly, in addition to the previous paragraph, the damages and losses including the loss of human life and huge amounts of damages prevent the states from breaching obligations framed by international instruments. As a rule, the financial consequences (determined under conventions and other instruments) of a nuclear accident or radiological emergency caused by a state by breaching an obligation are severe for states. It is also for that reason that the relevance of state responsibility falls behind the relevance of state liability, when the cause of contingent damages is a lawful act as a rule.

Thirdly, 'liability' is classified (fault-based, strict or absolute, exclusive, vicarious, residual, etc.) with regard to the extent of the negligence of a state that effected damages. In the case of state responsibility, similar distinction cannot be made, since a state either committed or did not commit an internationally wrongful act that substantiate claims for reparation. In the latter case, the state shall not be responsible for its action.

Finally, while 'liability' is circumscribed within a refined system defined at an international level (such as the Paris and Vienna Conventions on liability, etc.), the circumscription of 'responsibility' has been accomplished in a scattered manner in various separate international instruments. These instruments will be discussed in the following.

[28] But it could be far from easy to hold another state effectively responsible for a breach of a norm of international (environmental) law. Consequently, the injured state has the burden of proof that the responsible state has breached an international obligation.

2.1. The appearance of the term of 'state responsibility' under several significant documents of nuclear law

The international community followed the evolution of the concept of and rules pertaining to 'state responsibility' within the area of nuclear law for a long time. Nevertheless, no document of the special sub-systems within the framework of nuclear law contains a specific and legally binding regulation of the special nuclear (and general) responsibility of states that distinguishes cases of responsibility from these of liability.

In general, we need to point out that in the area of nuclear law the state has primary responsibility for emergency preparedness in the event when radioactive materials are not under the control of the entity in charge, but, for example, they disappear or are abandoned in the state illicitly.

The tragedy at the Chernobyl Nuclear Power Plant in 1986 motivated the entire international nuclear community to provide for guarantees that countries would be well prepared in the future to manage (by means of the establishment of standard emergency preparedness and post-emergency management programmes) the physical, psychological and financial consequences of severe nuclear accidents. Therefore, it was the Chernobyl accident of 1986 that aroused the international community and the legislative organs, hence the regulation process, which also encompassed the definition of the concept of state responsibility in re the horrific transboundary effects of that "milestone accident", uniformly commenced. It was recognised that civil responsibility (liability) per se cannot prevent or remedy the humanitarian and environmental consequences of nuclear damages.[29]

The first signs of this change in the approach were the reconsideration and revision of the effective legal framework, mainly in the area of liability, which we will discuss later. Other impulses also referred to the necessity of the adoption of new regulations in specific areas that were highlighted by the mournful experiences of the Chernobyl accident.[30] The new regulations were designated

[29] Pursuant to Xue Hanqin's opinion, the effect of the Chernobyl accident was the discrepancy between theory and practice that raised several questions, e.g. what kind of responsibility a state should bear under international law to prevent and remedy damage caused to other states. On further questions with attributed relevance by Hanqin, cf. Hanqin, X.: *Transboundary Damage in International Law*. Cambridge, 2003. 2.

[30] Strictly speaking, these intentions were not the very first endeavours occurred within international and national level. Following the 1979 Three Mile Islands accident, there was a need to create a framework for reporting and mutual assistance in nuclear accidents. But the real breakthrough had been practically succeeded after 1986 Chernobyl accident. Cf.

to remedy the defects in significant rules pertaining to the areas noticeably concerned in the accident.[31]

The appearance of the term of 'state responsibility' (in the concerned conventions under nuclear law discussed thereinafter) indicates that the respective obligations of states deriving from the conventions were defined with respect to their differing character.

2.1.1. The concept of state responsibility under the Convention of 1986 on Early Notification of a Nuclear Accident and under the Convention of 1986 on Assistance in the Case of a Nuclear Accident or Radiological Emergency

These instruments were adopted in response to the Chernobyl accident in 1986, so that they required the contracting states to notify early and immediately the potentially affected states and IAEA about the accident, which needs to be followed by assistance on the part of the installation state or of the responsible state. The new global recognition of nuclear danger (an accident somewhere is an accident everywhere) motivated the states to establish obligations under two separate conventions concerning prompt and necessary arrangements in the event of a nuclear accident or radiological emergency.

Upon the consideration of these documents, it can be clearly stated that the problem of state responsibility is crucial in their scope of application. The requirements of notification and assistance are primarily not typical issues of liability, however, these dual obligations have de facto relevance in re responsibility under nuclear law. Actually, damages and losses may arise from the breach of the obligations of notification[32] and assistance,[33] which shall

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ElBaradei, M.–Nwogugu, E.–Rames, J.: International Law and Nuclear Energy: Overview of the legal framework. *IAEA Bulletin* 37 (1995) 16–25.

[31] Cf. Schwartz, J.: Emergency Preparedness and Response: Compensating Victims of a Nuclear Accident. *Journal of Hazardous Materials* 111 (2004) 89.

[32] Article 2 of the Early Notification Convention establishes the obligation in respect of the notification and information. According to the Article 2, *in the event of a nuclear accident*, the state referred to in that article *shall* forthwith *notify*, directly or though the IAEA, those States which are or may be physically affected and the Agency of the nuclear accident, its nature, the time of its occurrence and its exact location where appropriate. Furthermore, it promptly *provides the states*, directly or through the IAEA, and the IAEA with such available information relevant *to minimizing the radiological consequences* in the states.

[33] Paragraph 1 of Article 1 of the Assistance Convention provides general provisions (no legal obligations) for states *to cooperate between themselves and with the IAEA* in accordance with the provisions of the convention *to facilitate prompt assistance in the*

establish the responsibility and liability of the respective state for compensation to victims of another state, in which damages and losses are unambiguous consequences of the failure to comply with the dual aforementioned obligations (as an issue of liability). On the other hand, we need to emphasise the issue of responsibility in the scope of the following argumentation.

The obligation of notification under the *Early Notification Convention* is irrespective of the damages and losses caused by the accident or emergency in the event of the omission of notification. Thus, a breach of an obligation (or obligations) on the part of a state can be established, if the facts of the case of an omission (regardless of its cause, such as unintentional negligence or intentional character) obtain, therefore, that act shall qualify as a wrongful and intentional act of a state, which shall entail the international responsibility of a state. In that case, other aftermaths, such as damages, financial consequences and pecuniary losses, which are essential for the establishment of liability, have been disregarded.

Merely one requirement may tinge the notification obligation, which further defines the applicability of the responsibility of a state, namely, the information to be provided pursuant to Article 2 shall contain determined data as concurrently available to the notifying state.[34]

As for the *Assistance Convention*, the main provisions and conditions are akin to the rules delineated above in the discussion of the relevant rules of the Early Notification Convention. The definition of state responsibility is designated to provide an international framework for the comprehensive direction, control, coordination and supervision of the assistance[35] and for the promotion of prompt assistance by states and IAEA in the event of a nuclear accident or radiological emergency.

However, the Assistance Convention clearly differs from the Early Notification Convention, so far as Articles 1 and 2 of the Assistance Convention substantiate no legal obligation, since the objective of the Assistance Convention is merely the establishment of a framework for the facilitation of the provision of assistance by a state to another state (which accounts for a lack of state responsibility in re concrete, specific assistance mechanisms). Therefore, the Assistance Convention is also a framework agreement designed to establish

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event of a nuclear accident or radiological emergency to minimize its consequences and to protect life, property and the environment from the effects of radioactive releases.

[34] On the detailed enumeration, cf. Article 5 of Early Notification Convention.

[35] Cf. Article 3 (a) of the Assistance Convention.

a general basis for mutual assistance in the event of a nuclear accident or radiological emergency.

As opposed to the Early Notification Convention, the Assistance Convention applies the term of 'responsibility'. It expressly stipulates that the direction and control of assistance are the duties (the relevant responsibility) of the state concerned, since in the absence of that rule, the international responsibility of a state could not be established.

2.1.2. The concept of state responsibility under the *Convention of 1994 on Nuclear Safety*

The Convention of 1994 is considerably general so far as the issue of responsibility is concerned. In accordance with its purpose, its provisions are neither peremptory, nor sanctioning, but typically incentive (quoting the reviews under its effect), which may complicate and supersede the regulation of issues related to responsibility. For that reason, issues of the responsibility of states are closely and strictly attached to the breach of basic obligations regulated under Articles 4 and 5.

As opposed to the missing conception of state responsibility, the concept of the responsibility of the license holder is defined under the Convention, so that the unambiguous duty of the license holder is established, since it has primary responsibility for the safety of the nuclear installation under Article 9.

As Paragraph 2 of Article 21 stipulates:

> *"If there is no such licence holder or other responsible party, the responsibility rests with the Contracting Party which has jurisdiction over the spent fuel or over the radioactive waste."*

Accordingly, states have *subsidiary* responsibility overshadowed by the primary responsibility of the license holder. Such a definition of the responsibility of states has been influenced by the general attitude of states supported by the following rule: "whoever was responsible for the generation of the waste should bear the responsibility for its disposal."

Therefore, 'responsibility' under nuclear law is construed as a relevant, but subsidiary attribute of the state. Relevant, because during the previous decades, states have recognized that they bear responsibility at an international level and have concluded international agreements on supplementary compensation, if the means of the operator are exhausted.

The primary elements underlying state responsibility have been principally codified in the area of international environmental law related to transboundary

damages caused by states. In my view, and let me refer to the subject-matter of the present study, the damages deriving from the breach of a concrete instrument of environmental law and the injurious effects of nuclear accidents or radiological emergency correlate. Strictly speaking, the same criteria prevail in both areas.

Generally, for the establishment of the responsibility of a state, four basic elements need to be available. Thus, if the following criteria are uniformly attained in the event of a nuclear accident or radiological emergency causing damages and losses, the state shall be responsible for their transboundary effects, which supervene in the territory of another state. All of the following criteria should be construed in line with the general rules of public international law and with the legally non-binding rules of ILC's Draft Articles.

Criterion 1: Transboundary environmental damages or losses must result from a violation of international (nuclear) legal instruments.[36] The damages or losses must be direct consequences of a nuclear accident or radiological emergency. Accordingly, the causality between the accident or emergency (cause) and the damages or losses (effect) can be established. External influences are not admitted to interfere so that the responsibility of a state can be applicable.

Criterion 2: A state is responsible both for its respective activities and for the activities of private corporations or individuals under its authority or control. Thus, even if a state is not polluting directly, the state can still be held responsible for the failure to stop or control pollution by other entities. According to this rule, states may be held responsible for the failure to enact or enforce the necessary environmental law, to terminate dangerous activities, or, to sanction violations.

Criterion 3: No justifying circumstances are admitted, such as consent by the affected state or an intervening cause, such as an act of God (*vis major* or *force majeure*). That criterion is not so relevant under nuclear law, because of the extreme contingency of damages, so the affectedness of a state in whose territory the transboundary effects appear is a considerably rare status quo (and that kind of affliction is scarcely ever intentional).[37]

Criterion 4: Damages must be "significant", which may entail serious problems of proof and quantification. In the area of nuclear law, damages may affect individuals, property and the environment in several states. Damages caused by radiation may not be immediately and easily recognised. Furthermore, even at

[36] Cf. the provisions of Article 1 of the ILC's Draft Articles. See further Crawford: *op. cit.* 77–80.

[37] Cf. the provisions of Article 10, Article 16–18, Article 20 and Article 23 of the ILC Draft Articles. See further Crawford: *op. cit.* 116–120, 148–158, 163–165 and 170–173.

nuclear power plants, at which the highest safety standard has been guaranteed, the occurrence of nuclear and radiological accidents cannot be completely excluded. That constitutes the unique feature of transboundary effects caused by nuclear accidents or radiological emergency.

The term 'state responsibility' appears in a significant but subsidiary way within the nuclear scope. Significant, because in the previous decades, states have recognized that they carry responsibility at international level too, and have also concluded international agreements on supplementary compensation if the means of the operator are exhausted.[38]

3. State Liability in a General Context

The term of 'liability' is applied in cases where damage or loss was incurred as a result of an activity that had been conducted neither in breach of an international obligation, nor in breach of the states' due diligence obligations (lawful act that involves risks and transboundary damage[39]). ILC's Draft Articles clarify the uncertainties persisting in connection with the existence of a breach of an international obligation. Article 12 reads as follows:

> *"There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."*

As ILC's codification work clearly demonstrates, a State can be liable even for acts that are perfectly lawful, but in the event of injurious consequences, they can entail liability.[40] As opposed to State responsibility, which arises exclusively from acts prohibited by international law, the facts of the matter of the international liability of a State may arise from both lawful and unlawful acts.

The main distinctive characteristics, which are markedly separated in pursuance of the delimitation of the concept and content of these regimes, consist in the followings:

[38] See Pelzer, N.: *Modernizing the International Regime Governing Nuclear Third Party Liability*. Montpellier, 2007. 10.

[39] The ILC's activities and the Draft Articles within this field published under the title of *"International liability for injurious consequences arising from out of acts not prohibited by international law"*.

[40] Cf. *Yearbook of the International Law Commission*. New York, 1980. 246.

a) In a general context, the term of 'responsibility' encompasses the omission of acts that cause damage attributable to a State under international law and these acts (or omissions) constitute severe breaches of obligations.

b) State liability entails adequate compensation for damage suffered by victims (liability for pecuniary compensation obtains, even if inadequate resources for compensation are available at the operator's disposal). Rules of State liability for harmful and transboundary consequences of e.g. nuclear activities are construed in a broad scope in comparison with the restricted field of State responsibility.

Accordingly, rules of liability for acts not prohibited by international law are irrespective of whether the activity was faulty or lawful, they emphasise the harm, rather than the conduct.

4. State Liability in the Area of Nuclear Law

In a general scope, pursuant to various documents of international law including Conventions, State liability establishes a legal relationship between the State as perpetrator of the internationally wrongful act and the injured State(s).

During the debates and the legislation process within the framework of the Sixth Committee of the UN General Assembly in the 1990s, several possible options were dealt with in the work of the Committee based upon the idea that liability ensues from significant transboundary harm and gives rise to liability for reparation.[41] It was generally acknowledged that the residual liability of the State was essential in situations in which the primarily liable operators did not have sufficient financial resources to provide adequate compensation to the victims of injuries caused by transboundary damages.[42] The range of various classes of liability specified in the Committee's position was different from the customary classification of the fault-based, strict, exclusive liability in pertinent Conventions and legal history. Absolute liability and the channelled liability of (a) State(s) were extinguished, since they were only applicable in the regime of civil liability, where exclusively the operator was responsible for activities causing transboundary effects, including nuclear accidents or radiological emergency for the duration of the operator's control over those

[41] See *International Liability for Injurious Consequences arising out of Acts Not Prohibited By International Law*. at http://www.un.org/law/1990–1999/.

[42] See *James Baxter*'s position from the Sixth Committee, *Press Release* GA/L/2871 20th Meeting (PM) 20 October 1995. 7.

activities.[43] According to the objectives of ILC, residual (subsidiary) and joint or multiple liability shall govern the regime in which States compensate victims not satisfied by the operator (after the exploitation of the insufficient subsidiary compensation fund) on the basis that the State concerned has failed to meet its obligations and a causal relation between that failure and the damage caused obtains.[44]

Providing compensation for victims on a residual basis was considered, since States are deemed liable to remedy the defects of a civil liability regime according to the specific restrictions related to the tiers of compensation. The required compensation should be raised from public funds, when the claim for damages resulting in the operator's liability would not be covered by the available amount for the ensuant damages and losses, therefore, the requirement of compensation would not be met. When the liability of the operator had been legally exclusive and absolute, the real and effective guarantees to pay compensation for damages were missing from legal instruments related to the operator's liability within the regime of civil liability. In response to that problem and contradiction prevailing formerly, the concept of State liability was formulated.

In the scope of the basic principles of liability related to nuclear energy, the explicit expression of State liability has not been formulated. Nevertheless, relevant steps have been taken to frame the liability of States within the scope of obligations. E.g., the 1963 Brussels Supplementary Convention was adopted for the admission of the provision of supplementary compensation from public funds. This measure exceeded the scope of the regulation of civil liability and foreshadowed further support and compensation to be secured by States. Consequently, it can easily supervene that a State is not legally liable for the damage, but as opposed to this unambiguous fact, it has the duty to compensate the victims through its public funds and resources regardless of the fact whether it carried out activities that could cause damages. At that time, the term of 'State liability' was not introduced during the discussions, which impeded the appearance and evolution of this notion.

Nevertheless, during the previous decades (especially in the 1990s) a change of approach supervened, since the term of 'State liability' was incorporated into pivotal provisions of the Conventions. The 1997 Vienna Convention and the 1997 Convention on Supplementary Compensation were the sequels of the recognition that in the event of nuclear accidents and radiological emergency

[43] Cf. *International Liability for Injurious Consequences arising out of Acts Not Prohibited By International Law*. at http://www.un.org/law/1990–1999/.

[44] See in details *Yearbook of the International Law Commission*. 1994, Vol. II. 155–158.

international State liability obtains, furthermore, it was frequently alluded to in the context of the international civil liability regime.[45]

Finally, the last relevant amendment related to the liability regime based upon the Paris and Vienna Conventions was adopted in 2004. The Contracting Parties signed the Amending Protocols in order to ensure that the Paris Convention was more in accordance with the Conventions amended or adopted in 1997 under the auspices of the IAEA. The main objective of the 1997 Protocol to Amend the Vienna Convention was the intention of the provision of more compensation to more victims in the event of a nuclear accident with a graver effect than the one as conceptualised in the original and later amended regime. Thereby, the mechanism and the procedure were still in effect, but the definition, the measures and the requirements of effectiveness changed (including the amount of compensation), which were the most serious steps taken as to purposes, which was to provide the world community with the opportunity to deal legal liability and compensation for nuclear damage through a free-standing global regime.

4.1. Role and relevance of the Price-Anderson Act in the field of nuclear energy

The epoch-making *Price-Anderson Nuclear Industries Indemnity Act* (hereinafter: Price-Anderson Act or Act) constitutes federal law in the United States (passed in 1957 by the Congress pursuant to Chapter 8 of the U.S. Constitution amended several times, last time in 2005 for a 25-year-period), which has been governing liability issues in re non-military nuclear facilities in the territory of the United States.

This national (federal), legally binding law (the first comprehensive nuclear liability law in the world adopted by domestic legislation) preceded later Conventions[46] on nuclear liability and was declared[47] to have promoted the establishment of a unique private insurance scheme[48] and the indemnity of the U.S. Government (that demonstrates the dichotomy of civil and State liability)

[45] Cf. *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage–Explanatory Texts.* IAEA International Law Series No. 3, Vienna, 2007. 18.

[46] Cf. The so-called "grandfather clause" in the Article 2 of the Annex attached to the *1997 Convention on Supplementary Compensation for Nuclear Damage.*

[47] As to proof of this statement, see the U.S. Supreme Court's conclusions in the case of *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978).

[48] See in details Quattrocchi, J.: Nuclear Liability Insurance in the United States: An Insurer's Perspectives. In: *Reform of Civil Nuclear Liability.* Budapest, 1999. 383–398.

in order to compensate the persons who had been injured in nuclear accidents within or outside the United States.

American literature on law almost uniformly state that this norm aimed to create the so-called *vicarious liability* of the State (the indemnity of the U.S. Government for nuclear liability parallelled by the system of private insurance), whilst pursuant to the Act, in the event of a major accident, all nuclear facilities would be required to contribute, irrespective of the place where the accident occurred. If certain operators would decline to contribute, the State would intervene to ensure that financial resources would be made available.[49] On the score of the Act, its purpose is to provide coverage for "anyone liable" and for "any legal liability arising out of or resulting from a nuclear incident", but the burden of proof lies with the claimant.[50] The Congress of the United States supported the idea that an international fund will be set up with the exclusive objective of compensation for transboundary damages and losses.[51]

The Act based on an insurance scheme (not fault-based as within system of the Common Law) establishes a system in which the payment of 10 billion USD shall be subject to the liability of the industries (operator) as opposed to the basic *civil liability approach.* Any claims exceeding the limit of 10 billion USD shall be covered by the U.S. federal Government, specifically, by the Energy Department (accordingly, *vicarious liability* figures as a type of State liability).[52] In the event of a nuclear accident causing damages in excess of the limits of the Act, the U.S. Congress shall take further actions, e.g., insurance of appropriate funds. U.S. nuclear companies, nuclear industries are relieved of any liability beyond the limit of the amount of indemnity for any nuclear accident, including radiation or radioactive releases, regardless of fault or cause and causality.

By the adoption of the Price-Anderson Act with the annexed amendments, the U.S. Congress encouraged private participation (private insurance companies, operators) in the field of nuclear energy, while it also provided compensation from public funds (Federal, State liability).

If we accept the aforesaid opinion on the initially and basically challenged, controversial, dual-faced mechanism, the Price-Anderson Act could serve as a model for the endeavours of regulation not only on a national, but also on an

[49] See *Reform of Civil Nuclear Liability... op. cit.* 220.

[50] This is the so-called "omnibus" feature of the U.S. system based upon Price-Anderson Act what is often referred to as *"economic channelling of liability"* instead of the term "legal channelling".

[51] See *Reform of Civil Nuclear Liability... op. cit.* 221.

[52] Cf. *ibid.* 252–253.

international level. But this dual-faced mechanism has not completely attained its purpose, because of the unwillingness of taking federal financial measures, consequently, the traditional civil liability regime has persisted and prevailed. De la Fayette pointed out the contradictory situation: "although, the U.S. is a strong opponent of State liability for transboundary nuclear damage, its nuclear liability law, scilicet, the Price-Anderson Act is based upon a State liability regime."[53] Nevertheless, the legislator's pursuit per se to construe the Act does not necessarily verify the fact that the Act intended to establish and introduce the term and doctrine of State liability.

4.2. The Pre-Chernobyl-period, the 1986 Chernobyl accident and its consequences in the nuclear liability regime

Preceding 1986, no real experience of a nuclear accident with relevant transboundary effects was available to urge the States to consider (or reconsider) the relevant issues of responsibility regimes in the examined field. In the 1960s, the IAEA Board of Governors adopted a draft multilateral agreement on emergency assistance, but this initiative was deemed to be unfeasible. It must be mentioned that at that time neither the *1960 Paris Convention on Third Party Liability in the Field of Nuclear Energy* (hereinafter: Paris Convention), nor the *1963 Vienna Convention on Civil Liability for Nuclear Damage* (hereinafter: 1963 Vienna Convention) was in effect.[54] Thus, before 1968 (when the Paris Convention entered into force) no relevant multilateral instrument governing problems of nuclear law obtained with special regard to the issues of responsibility and liability.

The Paris Convention was the first international instrument dealing with nuclear (third party) liability involving exclusively Western states within the framework of the OECD. Whereas, the Vienna Convention was open for accession by all States, but worldwide adherence was not achieved (it is a thought-provoking fact that its entry into force took 14 years, although, only 5 ratifications were required).

Subsequently to the entry into force of both the Paris Convention and the Vienna Convention, a nuclear accident intrigued the attention of the international community. After the 1979 Three-Mile Island accident in Pennsylvania, USA (without human victims) the intention to cooperate on an international

[53] See de la Fayette: *op. cit.* 24.

[54] The Paris Convention entered into force in 1 April 1968, while the 1963 Vienna Convention entered into force in 12 November 1977.

level remarkably increased,[55] but no significant breakthrough (in comparison with the aftermath of the 1986 Chernobyl accident) ensued.

As a matter of fact, it was the 1986 Chernobyl accident with its transboundary consequences[56] that highlighted most of the defects in law in the concurrent effective international instruments and therefore alerted the international community to finally arrive at an understanding of the need to reinforce the international framework of regulations, so that the consequences of nuclear accidents via timely and adequate compensation could be mitigated.

The Chernobyl disaster demonstrated the fact that a nuclear accident may cause unprecedented damage of an extreme dimension, that damage may be caused in regions far beyond the territory of the installation State and that in addition to inevitable transboundary damage to individuals, property and to the environment irrespective of borders, to the member States of the Paris and the Vienna Conventions, as well. Owing to the well-known fact that the former Soviet Union (the installation State) was not a Party to either of the respective Conventions, the issues of due reparation mechanisms in line with issues of responsibility and/or liability were disregarded. Nonetheless, it has to be mentioned that both liability regimes set the upper limit of the operator's liability at 5 million USD, thus, in case we assume that the Soviet Union would have been a Party to either of the liability regimes, the contingent amount of compensation would have been insignificant, bearing the considerable value of harmful transboundary effects in mind.

The awakening of international concern (as a result of the aftermaths of the Chernobyl accident) within the framework of the IAEA and other organisations foreshadowed the impending reform of the nuclear liability regime. Two issues were raised promptly after the Chernobyl disaster: firstly, the requirement of the wide international recognition of the nuclear liability regime, secondly,

[55] On the purposes arising after the Three Mile Island accident, see Rautenbach, J.–Tonhauser, W.–Wetherall, A.: Overview of the International Legal Framework Governing the Safe and Peaceful Uses of Nuclear Energy–Some Practical Steps. In: *International Nuclear Law in the Post-Chernobyl Period.* Paris, 2006. 7–36.

[56] The accident had serious detrimental effects upon human health, property and the natural environment and damage was suffered in several neighbouring countries and in some cases, far beyond. See Schwartz, J.: International Nuclear Third Party Liability Law: The Response to Chernobyl. In: *International Nuclear Law in the Post-Chernobyl Period. op. cit.* 37.

the imperative to make the regime adequate to cope with the transboundary consequences of a grave nuclear accident.[57]

Finally, after the Chernobyl accident, the requirement of the provision of supplementary funding at an international level aroused renewed concern. At that time, it was deemed imperative to establish a new international instrument of State liability for transboundary damage, which complemented civil liability Conventions and provided a framework for a comprehensive nuclear liability regime.[58]

4.3. State liability vs. civil liability

From a highly general viewpoint, State liability consists in a liability for damages caused to another State according to international law, while civil liability implies the liability of a natural or legal entity for damages caused to another natural or legal entity on grounds of national law.

The concerned regimes basically converge, since 'State liability' arises from transboundary effects, which create inter-states legal relations, in which the rules pursuant to special, supplementary principles and provisions differ from the rules of civil liability regimes based upon the distinction between State and civil liability. For instance, civil liability regimes are divided into separate branches pursuant to the classification of liability, whereas, within the scope of (*residual*) State liability, similar classification is considered to be redundant (en passant, the so-called *vicarious liability* could be mentioned in re State liability).

This can be substantiated by the role of public international law within the domain State liability, as opposed to the role of the civil law regime in the domain of civil liability. While civil law, as a rule, distinguishes various forms of liability (the classification derives from the character of civil law), public international law establishes merely two categories (responsibility and liability, in the regimes of which no further divisions obtain, since even this separation is ambiguous).

The problem in 1961 consisted in answering the question of "who shall bear the loss in the event of harm", which was fundamental to all questions of responsibility. On a national level four entities could be made accountable: the manufacturer or supplier, the operator, the State and members of the general

[57] Cf. *The 1997 Vienna Convention on Civil Liability for Nuclear Damage and the 1997 Convention on Supplementary Compensation for Nuclear Damage–Explanatory Texts.* IAEA International Law Series No. 3, Vienna, 2007. 17.

[58] See *ibid.* 62.

public who incurred the injury.[59] Currently, international legal instruments almost exclusively set out from the generally accepted approach of the operator's absolute liability (civil liability) pursuant to effective nuclear liability Conventions, which regulate liability in respect of third parties under international law, since the regulation is conceptually analogous to liability for activities involving increased danger under national laws of States.[60]

However, after the 1986 Chernobyl accident, it was indisputable that the civil liability regime was seriously deficient and needed rectification and that States needed to make a public commitment to nuclear safety including the prevention of accidents and the mitigation of consequences.[61] The system of civil liability abounded in fundamental flaws, therefore framing a new Convention on State responsibility for nuclear activities was inevitable, with special regard to safety, accident prevention and response to emergency.

The fundamental underlying idea of the subsequent regulatory work derived from the general recognition that exclusively sufficient financial resources made available for the State could ensure the compensation of victims of an accident of such a scale.[62] Although, law-making was committed to the aforementioned recognition, the final outcome of the debates consisted in the rejection of an express State liability regime, instead, the civil liability regime was reinforced via resources from the States, which were channelled to public funds.[63] That mechanism underlay the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (*see*, Paragraph 2 of Article 7 of the Protocol) but, of course, that step could not even mean the express acceptance of the term of 'State liability' in lieu of the prevalent civil liability.

The objective of ensuring compensation from the resources of States (in re the residual amount that could not be covered by the operator's limited amount) is formulated under Compensation Conventions (*see*, Amendments of the 1963 Brussels Supplementary Convention to the Paris Convention and the 1997 Convention on Supplementary Compensation). That also implies the expectation of the submission of uniform claims based on the so-called three compensation tiers (mainly in the context of 1963 Brussels Supplementary Convention, *see*,

[59] Cf. Hardy: *ibid.* 747.

[60] See Lamm, V.: The Reform of the Nuclear Liability Regime. *Acta Juridica Hungarica* 40 (1999), 173.

[61] See de la Fayette: *op. cit.* 7.

[62] Cf. Lamm: *op. cit.* 174.

[63] See *ibid.*

Paragraph b) of Article 3).[64] Nevertheless, the three-level mechanism discussed hereinafter (with special regard to the third tier) does not invoke the term of 'State liability', but it is considered as a first step taken in the direction of the process aiming to restrict the operator's absolute liability and to simultaneously increase the role of state liability.

4.4. The concept of liability under the regime of the Paris Convention ('Paris regime')

In the event a nuclear accident supervenes in the territory of a State Party to the Paris Convention and damage or loss is unanimously caused in another State, which is also a Party to Paris Convention, the provisions of the Paris Convention will be applicable.

According to Articles 3, 4 and 5, the Paris Convention establishes the maximum liability of the operator irrespective of the commission of an error, the liability for compensation shall be covered by insurance or other financial security, while *"no other person shall be liable for damage caused by a nuclear incident"* as Article 6 provides. Subsequently, the term of State liability has been excluded from its domain, therefore, the Paris Convention should be ignored in our discussion by reason of the establishment of the operator's liability in the general scope of the Convention (entirely civil liability regime). As to proof of this characterization, liability under the Paris Convention is *channelled to the operator* of the specific nuclear installation, with no regard to whether causality obtains between the cause as the operator's fault and the damage. So that these strict and financially effective rules pertaining to the operator's liability are counterbalanced, the focal and substantial provisions of the liability regime stipulate time limitation for the submission of claims and limitation of the amount of liability, which narrow the scope of the absolute liability of the operator.

Within the purview of the Paris Convention, the rudimentary purpose was the ensure that in the event of a nuclear accident in a State, adequate compensation shall be made available for victims in the Installation State as well as in affected States. That mechanism does by no means demonstrate the tangible duty or obligation of States, however, States have assumed responsibility to establish an adequate legal regime (in accord with the norms of international

[64] Cf. Dussart-Desart, R.: The Reform of the Paris Convention on Third Party Liability in the Field of Nuclear Energy, and of the Brussels Supplementary Convention: an Overview of the Main Features of the Modernisation of the Two Conventions. In: *International Nuclear Law in the Post-Chernobyl Period. op. cit.* 21, 27, 30.

law) by means of the stipulation of the availability of compensation for victims residing within and outside the territory of the Installation State.

The Paris Convention per se does not contain provisions from which the later codified conception of State liability could be generated.

4.4.1. The Brussels Supplementary Convention

The Paris Convention that stipulated the operator's absolute liability has been amended three times (by Protocols adopted in 1964,[65] 1982[66] and 2004[67]), but the Parties had realised already before the first amending Protocol that the system of civil liability cannot be rectified via a mere revision of the effective nuclear liability law.[68]

As a result of the efforts to make the amounts of compensation for liability of operators proportionate to the scale of the consequences of nuclear incidents, many of the members of the Paris Convention adopted the *1963 Brussels Supplementary Convention*, an international instrument that functions in full compliance with the Paris Convention via securing public funds for the compensation of victims, in case the amounts determined and claimed under the latter instrument are insufficient. Thus, within the purview of the Brussels Supplementary Convention, State liability is incorporated into the liability regime governed by the Paris Convention, because the Signatories of the Brussels Supplementary Convention[69] recognised that the liability of the operator limited in time and the amount of compensation under the Paris Convention would not be adequate.

The pivotal novelty of this instrument is the tier-based funding mechanism, which supplements the operator's absolute legal liability with financial measures based on external resources, which entails the liability of the State(s) to guarantee the availability of these resources. This system operates as follows:

a) The first tier determines the operator's maximum financial liability, so that compensation claims are covered by insurance or other financial security according to the operator's limited compensation amount.

b) The second tier requires the Installation State, in the territory of which the operator of the concerned nuclear power plant is situated, to make public funds available under national law. Thus, at the level of the second

[65] 1960 Convention and the 1964 Protocol entered into force on 1 April 1968.

[66] The 1982 Protocol entered into force on 7 October 1988.

[67] The 2004 Protocol has not yet entered into force.

[68] Cf. de la Fayette: *op. cit.* 7.

[69] Signed by 13 states bound by the Paris Convention (16 states).

tier under an unlimited legal liability regime, the amount of compensation supplied by the operator will be supplemented by public funds secured by the Contracting Party.

c) The third tier draws on international public funds made available by the States pursuant to Para. b) of Article 3 and Article 12 of the Brussels Supplementary Convention. The three-tier mechanism imposes absolute legal liability on the operator, which means that no demonstration of a fault or negligence is necessary, therefore, no instrument concerns the exclusive liability of States in the scope of nuclear law, but exclusive jurisdiction is granted to courts of the Installation State.

Hence, under the Paris-Brussels system, if the amount of the operator's liability does not cover all the damage or the amount at the operator's disposal is not sufficient for the full-scale compensation as a consequence of the absolute liability of the operator, firstly, the Installation State, secondly, all the Contracting Parties contribute certain amounts up to a fixed limit according to the three-tier compensation scheme, nevertheless, the insurance or the financial security of the operator has prior obligations.[70]

4.5. The concept of State liability under the regime of the Vienna Convention *('Vienna regime')*

As far as the Vienna Convention is concerned, the conceptual basis governing the Vienna and Paris Conventions is identical,[71] since the fundamental and crucial principles coincide. As to the framework of these liability Conventions, both are based on four central pillars, namely, on the absolute liability of the operator of a nuclear installation (Article IV), on channelling exclusive liability (Article II), on the limitation of liability in amount and time (Articles V and VI) and on the establishment of the exclusive jurisdiction of the courts of the Installation State (Articles XI and XII).

[70] Cf. Dussart-Desart: *op. cit.* 14.

[71] After 1986 Chernobyl accident, there had been adopted a Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, in 1988, relating to the Paris and Vienna Conventions for the sake of establishing *"a link between the Vienna Convention and the Paris Convention by mutually extending the benefit of the special regime of civil liability for nuclear damage set forth under each Convention and to eliminate conflicts arising from the simultaneous applications of both Conventions to a nuclear incident."* See the Preamble of the Joint Protocol.

4.5.1. The 1988 Joint Protocol Relating to the Application of the Vienna and Paris Conventions on Liability for Nuclear Damage

In view of the problems deriving from the 1986 Chernobyl accident, the gaps in the regulation became manifest. It was generally accepted by the Contracting Parties either to the Paris or to the Vienna Convention that an urgent revision of the instruments of nuclear liability was imperative. Several States submitted proposals for framing a new Convention on State liability for damage arising from nuclear incidents, but the clarification of the relationship between civil and state liability was thwarted by some States that refused to assume responsibility for transboundary harm caused by nuclear facilities under their jurisdiction or control.[72]

Consequently, the Paris and Vienna Conventions were designed to be linked by a *de lege ferenda* instrument, which uniformly formulated the legal regime of nuclear liability,[73] however, upon the actual adoption of the *1988 Joint Protocol Relating to the Application of the Vienna Convention and Paris Conventions*, the doctrine of *de lege lata* was applied.

The Joint Protocol, which is based upon the operator's absolute liability in a similar manner to the liability Conventions forming the basis of the Joint Protocol, links the Vienna Convention and the Paris Convention (encompassing both Conventions, so as to create a rectified liability regime) for the purpose of ensuring that the benefits of one Convention were extended to the Parties to the other Convention. Moreover, the problems arising from the differences between the two regimes were designed to be solved according to the Preamble of the Joint Protocol. As the final clause of the Preamble spells out,

> *"The Contracting Parties desirous to establish a link between the Vienna Convention and the Paris Convention by mutually extending the benefit of the special regime of civil liability for nuclear damage set forth under each Convention and to eliminate conflicts arising from the simultaneous applications of both Conventions to a nuclear incident."*

Accordingly, the possible conflict arising from the simultaneous applications of these Conventions implied no longer a problem pursuant to Articles II and

[72] Cf. de la Fayette: *op. cit.* 8.

[73] Recognizing the fact, that "the Vienna Convention and the Paris Convention are similar in substance and that no State is at present a Party to both Conventions", as it reads in the Preamble.

III of the Joint Protocol.[74] Under Article II: *"The operator of a nuclear installation situated in the territory of a Party to the Vienna Convention shall be liable in accordance with that Convention for nuclear damage suffered in the territory of a Party to both the Paris Convention and this Protocol"*, and vice versa *mutatis mutandis*. Consequently, the Parties to the Paris Convention and to the Joint Protocol are no longer regarded as non-member States within the purview of the Vienna Convention, furthermore, they are mutually regarded as Contracting Parties, whenever the operative provisions of either Convention are applicable and both Parties may claim compensation, if the States affected by the incident are Parties to the Joint Protocol.

Therefore, the Joint Protocol provides the legal basis for eliminating the difficulties and impediments arising from the two distinct legal regimes and can extinguish the contradictions between the effects of the two liability Conventions.

4.5.2. The 1997 Protocol to Amend the Vienna Convention

While the Paris Convention was adopted as the first instrument that incorporated elements of the nuclear liability of States (the 1963 Brussels Supplementary Convention and the Paris Convention entered into force in the same year), it persisted as an operative instrument with an increasing number of acceding States, since its amendments followed the changing circumstances. The Vienna regime, scilicet, the Vienna Convention, however, entered into force 14 years after its formulation, which entailed prospective anomalies by reason of the long interval between its codification and taking effect. This fact and the relatively low number of Parties to the Vienna Convention prompted the international community to amend the Vienna Convention, in order to respond the technological developments achieved by that time and to eliminate the deficiencies of regulation emerging mainly after the Chernobyl disaster.

After the signature of the 1988 Joint Protocol (in 1988), the IAEA Working Group was set up (in 1989 for the purposes of the examination and revision of the civil liability regimes) simultaneously with the IAEA Standing Committee on Liability for Nuclear Damage with the comprehensive mandate to revise the

[74] According to the Article III of the Joint Protocol: *„either the Vienna Convention or the Paris Convention shall apply to a nuclear incident to the exclusion of the other."* On the number of remaining differences between the two conventions, cf. von Busekist, O.: A Bridge Between Two Conventions on Civil Liability for Nuclear Damage: the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention. In: *International Nuclear Law in the Post-Chernobyl Period. op. cit.* 131.

regime of international liability for nuclear damage, including international civil liability, international State liability and the relationship between international civil and State liability.[75]

In 1997, the large majority of States (although, its membership is considerably restricted) adopted the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (hereinafter: Protocol).[76] International initiatives designated to supplement and revise the Vienna Convention in a broader scope aimed to attain three main objectives: as the requirement of more compensation for damage (cf., Para. 2 of Article 2 extended the content of nuclear damage, which was one of the most desired novelty), more money to compensate victims (the redefinition of nuclear damage reflected the intention to secure full compensation for victims), of more people entitled to compensation (due to the revised concept of nuclear damage, more entities can claim compensation for the injuries and damages caused by nuclear incidents).[77]

The other milestone revision by the Protocol setting the possible limit of the operator's liability at not less than 300 million SDRs (Paragraph 1 of Article 7), but not less than 150 million SDRs provided that in excess of that amount and up to at least 300 million SDRs public funds shall be made available by that state to compensate nuclear damage (unambiguously, the exceeding of the traditional approach of strict civil liability represented by e.g. the Vienna Convention).

Similarly, the Protocol revised the provisions of the Vienna Convention on the time limit for submission of claims for nuclear damage; 30 years from the date of the nuclear incident for compensation for loss of life and personal injury, while the time limit concerning the other types of damages remained unamanded (10 years from the date of the nuclear incident).[78]

Since the Vienna regime was substantially revised in 1997, the problematic anomalies no longer influenced the behaviour of states in the intentional non-attendance from this regime. Thus, future prospects on the basis of the newly formulated Vienna regime as amended by the Protocol held out the promise to manage to settle the controversial questions.

[75] Cf. Lamm: *op. cit.* 170.

[76] On general remarks and contributions as well as differences of the Protocol, during the phase of regulation in line with Vienna Convention, see further Lamm: *op. cit.* 172–175.

[77] See in details Schwartz: *International Nuclear Third Party Liability Law...* 46–57.

[78] Article 8 Para. 1.

4.5.3. The 1997 Convention on Supplementary Compensation for Nuclear Damage

The *Convention on Supplementary Compensation for Nuclear Damage* (hereinafter CSC) had been adopted in 1997 under the auspices of the IAEA (chiefly due to the efficacious support of the United States), simultaneously with the Protocol to Amend the Vienna Convention (discussed above).[79] Albeit, the CSC–not yet in force–is freestanding[80] with respect to other liability conventions, according to its Article XVIII Paragraph 1, *firstly* an instrument of ratification, acceptance or approval *shall be accepted only from* a State which is a Party to either the Vienna Convention or the Paris Convention, or *secondly*, from a State which declares that its national law complies with the provisions of the Annex to this Convention.

The CSC oversteps the generally accepted priority relating to the exclusive and absolute liability of the operator by means of providing for additional compensation out of international public funds in excess of the operator's liability limit amount.[81] Adopting the CSC, a state must bind oneself to enact laws for guaranteeing the availability of compensation amounts as a result of transboundary damages caused by states to be a contracting party to the CSC and if the installation state would establish international public funds (with about 600 million SDRs of which 150 million SDRs shall be reserved exclusively for transboundary damages).[82]

The CSC regulates, similarly to the Brussels Supplementary Convention, the tier-based system, with the difference that the first (private insurance) and second (member countries contribution) tier of compensation have been established by the CSC (Article III), while the CSC does not govern the distribution of the third tier.

The provisions of CSC incorporated into Article 5 of the Annex serve a *double purpose*. On the one hand, they ensure the availability of state funds for compensation of nuclear damage (pursuant to the mechanism written in the previous paragraph), which is to the benefit of victims. On the other hand, CSC

[79] On the CSC in details, see McRae, B.: The Compensation Convention: Path to a Global Regime for Dealing with Legal Liability and Compensation for Nuclear Damage. In: *International Nuclear Law in the Post-Chernobyl Period. op. cit.* 187–200.

[80] On its relevance, see *ibid.* 188.

[81] While the CSC is consistent with the basic principles of nuclear liability law set forth in the Paris and Vienna regime in consideration with the keystone regulation system (channelling liability to the operator, imposing absolute liability, granting exclusive jurisdiction, limiting liability in amount and in time) of them.

[82] See further McRae: *op. cit.* 191–193.

protects the operator against ruinous claims, as well. This so-called principle of congruence between liability and coverage is one of the internationally agreed pillars of nuclear liability law[83] in which the primary liability of operator and subsidiary liability of state have been appeared. The adoption of CSC has been motivated by the recognition of the essential importance of the measures provided in the liability conventions as well as in national legislation on compensation for nuclear damage consistent with the principles of the liability conventions (cf. Preamble of the CSC).

Recognizing the fact, if a nuclear accident or a radiological emergency occurs in the territory of a CSC member state causing transboundary damages and losses, and the amount of damages exceeds the limit amount of the absolute responsible operator, the claims for damages shall have been compensated from international public funds ensured by the CSC member state. So, the liability of the installation state is subsidiary as a consequence of the absolute liability of the operator that extends to provide for the exceeding amount exclusively irrespective of the fault or negligence to be attributable to the state and without dealing the possible liable state manner. In this case, the state's duty for compensation is, as a matter of fact, absolute but not under the provisions of the CSC, furthermore not exclusive and not full-scale (for the reason that the fund provides for amounts to compensate damages exceeding the maximum liability amount and the limited time period of the operator's liability) as it has been basically determined in Article 15.

4.6. Attempts relating to codify the rules on state liability (with special regard to the concepts of state liability in the nuclear field)

In the 1970s and 1980s, in the midst of the ILC's activities related to elaboration of the notion of state responsibility by giving its expression to establish a new topic of *International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law,*[84] and furthermore, in the Preliminary Report on that theme prepared to 1985, the ILC divided the topic of

[83] Pelzer, N.: International Pooling of Operators' Funds: An Option to Increase the Amount of Financial Security to Cover Nuclear Liability. Discussion *Paper for the IAEA INLEX Group Meeting on 21–22 June 2007. 2.*

[84] See *Yearbook of International Law Commission.* New York, 1985. 1–143.

liability into the issues of the prevention of transboundary harm from hazardous activities, and of liability for injurious consequences.[85]

The *1985 Preliminary Report* of the ILC found that "past trends demonstrate that states have been held liable for injuries caused to other states and their nationals as a result of activities occurring within their territorial jurisdiction or under their control."[86] According to the same Paragraph, the concept of absolute and strict liability of operators (license holders) based upon the most instruments dealing with nuclear liability issues (especially Paris and Vienna Convention), had been damaged due to a pivotal provision of the Preliminary Report which reads as follows: "even treaties imposing liability on the operators of activities have not in all cases exempted states from liability."[87]

Seeing that, several multilateral conventions impose certain responsibilities upon the state in order to ensure that the liable operators abide by the conventions containing relative rules. And, if a state fails to do that required activity, it is held liable for the injuries the operator causes. This kind of channelling method transforming operator's liability to residual liability of states serves as a basis for recognizing and promoting the concept of state liability.

Two years later, ILC published its *Third Report* (*Second Report* prepared to 1986) on the aforementioned subject taking serious steps towards a comprehensive liability regime by means of defining the term 'liability' but without the explicit usage of term 'state liability'. No phrase of 'state liability' occurs in the text of the Report pointing ahead the subsidiary role of that in comparison with the primary private (civil as operator or license holder) liability.

Also, for that reason the IAEA Board of Governors decided to set up the *Standing Committee on Liability for Nuclear Damage* in 1990. It was expressly requested to consider international liability for nuclear damage, including international civil liability, international state liability and the relationship between international civil and state liability.

The work on regulating state liability has soon concentrated on the one hand, on the revision of the Vienna Convention and, on the other hand, on the establishment of a system of supplementary funding. At least, no general agreement has been accepted on the basis of the Committee's work, especially in view of regulation concerning state liability regime. During the discussions on the

[85] Cf. Rao, S. P.: *First report on the legal regime for allocation of loss in case of transboundary harms arising out of hazardous activities*. UN Doc. A/CN.4/532 (21 March 2003) Para. 33.

[86] See *Yearbook of International Law Commission. op. cit.* 94.

[87] Cf. *ibid.*

coherency between state and civil liability, several options were considered by the Commission for the sake of giving rise to some form of reparation.

Until 1997, within the scope of nuclear liability regime, two main instruments had governed the liability regulation operating under the auspices of the IAEA (Vienna Convention on Civil Liability for Nuclear Damages) and OECD (Paris Convention on Third Party Liability in the Field of Nuclear Energy) that involved the complexity of liability rules with the problem of the separate (Paris and Vienna) mechanisms incorporated into the conventions dealing with the similar questions but in significantly different level. Furthermore, the state participation is different in the relation of the two conventions, because Paris Convention had been signed by a group of states of the Organization for Economic Cooperation and Development, whereas the Vienna Convention was intended to regulate the related issues on a worldwide scale.[88]

As opposed to the general acceptance of the operator's absolute liability, similarly to the Paris and Vienna Convention combined by the provisions of the Joint Protocol, the commitment required from the states to create public funds is considered to be a special form of the appearance of the term 'state liability'. But this term has not been incorporated into the expressed scope of the CSC because it lays the rules on compensation mechanisms down, in which making clear, that this instrument deals only with civil liability,[89] so the concept of state liability has been unambiguously excluded from the text of the CSC.

Conclusion

After the 1986 Chernobyl accident, scilicet, when the international community recognised that there was no effective (State) liability legal regime, attempts were made mainly within the scope of the competent body, namely, in the work of the IAEA. Nuclear accidents and radiological emergencies with transboundary effects causing increasingly serious damages reassessed the (almost exclusively civil) liability regime of that time.

The Vienna Convention imposes the obligation on the Installation State of guaranteeing compensation for victims that suffered nuclear damages due to nuclear accidents *"which have been established against the operator by providing the necessary funds to the extent that the yield of insurance or other financial security is inadequate to satisfy such claims, but not in excess of the limit"* (Paras. 1–2 of Article 9 of the Protocol to Amend the 1963 Vienna Convention).

[88] See Lamm: *op. cit.* 170.
[89] Cf. Article 15 of the CSC.

Thereby, the ensuant transboundary effects of nuclear accidents demanded the review of nuclear law with special regard to the experiences that occurred in 1986 and to the fact of the inadequate regulation of liability (and/or responsibility). In the period after Chernobyl, it became unambiguous that a civil liability system (the Paris and Vienna regimes) based upon the primary liability of the operator cannot be maintained in itself by reason of the high amount of damages to be paid for the victims of an accident or emergency involving transboundary effects.

The purpose of the subsequent regulation has been to eliminate these problems by means of establishing public funds, extending limitation periods, clarifying the main rules concerning issues of jurisdiction, etc. These objectives have been manifest in initiatives aimed at amending and reconceptualising the system of the Vienna Convention, which as an intention has been realised and are available as legal instruments in force or as drafts.[90]

Nevertheless, with reference to the prospective regulation, we have to observe *de la Fayette*'s apt remark, which reads as follows: *"some States are willing to pay, but unwilling to admit they are liable to pay."*[91]

[90] Julia Schwartz offers a survey of these instruments, cf. Schwartz: *International Nuclear Third Party Liability Law... op. cit.*

[91] See de la Fayette: *op. cit.* 25.

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CSABA VARGA*

Law and its Doctrinal Study

(On Legal Dogmatics)

Abstract. A theoretically motivated reasoning leaving its mark on legal dogmatics producing some derivative through a methodical process, the doctrinal study of law is a parasite contingent upon the law in force. For it converts law positedly built by consecutive structuring of words into some sort of a uniform conceptual system. Therefore it is an authored product mostly in a historical chain. Its novelty is lending logicality to what is inadvertent itself. As a reconstruction providing logically added meaning to a subject not carrying this itself, it too is contingent with by chance variations competing amongst themselves. Its goal is to establish consequentiality for deductive derivations in order to guarantee certainty in/of the law. Consequently, in arrangements without conceptualization there is no dogmatics either. In European history, the continental tradition has retraced *ius* to *lex* for the law to be embodied by posited texts. Dogmatics is a meta-structure logified upon them.

Keywords: interpretive context; meta-system; second reality; law as language & as logic; conceptualization & systematization; Civil Law / Common Law; rules / principles

1. Legal Dogmatics in a Science-theoretical Perspective

The doctrinal study of law is not a scientific field on its own–is not a discipline in either academic sense–, rather it is a pursuit, and the product thereof as its formulation.

One can hardly find a more exacting proclamation of the various possible manifestations of law than that given of the variety of the "languages of law" more than half a century ago by the father of our friend Jerzy Wróblewski (who passed on fifteen years ago), who–similarly to his son–was also a professor of law. According to this1 there is, on the one hand, the law, and on the other hand, the *application of law*, and in between them one finds the *doctrinal study of law* and *jurisprudence*, with their respective languages. In other words, we

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[1] Wróblewski, H. B.: *Jezyk prawny i prawniczy.* Kraków, 1948. 184.

have the *law in books*, the stuff of desiderata with normativity derived from its valid positivation, and we have also the *law in action* composed of series of deductions based on the former in form of actual decisions to convert positive rules into practical reality, within the social understanding of the law's final ordering force in society. Or, the latter as the fulfilment of an expectation is therefore also reality while it keeps on to represent a kind of normativity as well, able to exert normative effects indirectly. Within the domain of law, logically speaking there is nothing other between and above these than mere words (speech-acts) used to represent and operate them in a discourse treating and processing them, which forms a meta-system by reformulating them at a higher systemic level. In fact, the very goal of carrying this discourse is exactly this *meta-system:* to discover and to construct–within a *dogmatic* approach–contents believed to be hidden behind the authoritatively manifested nominal forms of the law; contents which can be construed as organized into a coherent system by the tools of linguistic-logical analysis. Or, the goal of such a focus on building some *scientific* re-representation is to identify "essential" correlations in the law's verbal manifestation of authority, from its phenomenal expression taken as an empirically experiencable (and therefore scientifically reconstruable) aggregate of facts.

It is important to realize that the law and its application are here understood to be two distinct components that either complement or compete with one another, albeit to study the law without simultaneously studying its application could at best be relevant as a within itself contrasted partial analytical investigation covering only particular issues (e.g. in order to analyze the applied law from the perspective of criteria native to positive law, or in order to allow for the formulation of dogmatics built exclusively on the positive law). Apart from that, in every other case the two need to be investigated as parts of one single and integrated unit, since the parallel existence of two separate dogmatics–that of written law & that of jurisprudence–would at the least be simply without reason.

Accordingly, the doctrinal study of law cannot be a scientific field on its own. It too is, instead, *practical action* itself. It is a part, extension, completion, and augmentation of the *praxis* which, almost singularly in the world, treats–artificially–whatever given textual form of the law as the embodiment of the law itself, by inducing whatever legal [*ius*] from the posited texture of the law [*lex*], thereby treating the latter as the starting point of all departures and theoretical developments, i.e. all reflexive intellectual exercise in law. When students of law, aware of the fallible nature of any textual form, are setting off to produce linguistic-logical projections on (while the systemic reinterpretation of) such texts–and by doing so they inevitably also carry out a critical analysis

thereof, increase the rigorousness of the in-built presuppositions, resolve latent contradictions, fill in the obvious gaps, and decode the meaning of (or, properly speaking, gives professional meaning to) their terms and concepts along the line of a uniform logic, and then produce a coherent logical system based on and as an ultimate result of all of these–, they play a role in the *development of law,* in its timely *completion.* When doing so, the scholar does work that naturally could in fact have been done by those having drafted the law (since the desire for and expectation of just such a finalization could already be detected as early as in the compilation of 15th century European customary law, similarly to other compilations akin to Werbőczy's *Tripartitum,*[2] in order to then–starting with the large codification work dated to the French *Code civil*–eventually reach its perfect form hardly surpassed to this day); all of this, however, did not and can in fact not render unnecessary the subsequent integration of the refining feedback (repeatedly, as conditions and practices do change incessantly) by those demanding cultivators of theorized praxis who undertake this doctrinal system-building as *authors.* For it is to be remembered that not one single attempt at it is logically necessary but is alternative and concurrent, i.e. displaying a certain (practice-boundly theorized) optimum at the most.

Most of our large operational systems (our factories, bridges, hydroelectric power generating plants, similarly to our computer-based capacities) have once been designed by scientific talents, nevertheless, their related products are not the stuff of science, rather, at the most these are purely practical applications borne out of the marriage of science and certain results of various other forms of human understanding. So not even the doctrinal study of law does "cognitively recognize", instead it gives a more sophisticated, linguistically-logically organized, thus *higher-level form* to a formal manifestation, which otherwise bears meaning just in and as bound to its given arbitrary appearance. Consequently, no results of dogmatics can be verified or falsified. We must make our surroundings habitable, we must cleanse our things, and it is a sign of careful practice and good practicality as well if we organize our beads and buttons according to some principle. Furthermore, while we are busy at work we may come to gain some deep understanding; however with all of this–either at the time of the process itself or at a later revisiting of the issue–we do not advance the knowledge itself, instead we merely reduce the incidental nature or somewhat increase the utility of our things by our act of creating order via organization.

[2] Cf. as an entry in <http://en.wikipedia.org/wiki/Istv%C3%A1n_Werb%C5%91czy>, and Bak, J. M.–Banyó, P.–Rady, M. (eds.): The "Tripartitum". Budapest, 2005. 473.

Thus, the cultivation of legal dogmatics is a practical step in the direction of the positivism's geometrical law-ideal, which goes past the mere positing of law, which in all of its attempted forms remains *contingent*. Occasionally, of course, it can be increasingly tight, but it cannot reach such a degree of correlation, equivalency and systemic coherence that would by its very nature exclude the possibility of other (re)constructions.[3]

As soon as this attempt at refining the system by way of internal clarification reaches a certain depth, it could in fact require further breaking-down which can either manifest itself at the level of the whole of the legal system, or distributed among the various branches of law. Nevertheless, we are well advised to remember that as soon as we elevate our attention from the level of a given branch of law (which is tied together by a singular set of professional specifications) to the level of the entire legal system (which is comprised of the units of the branches, and which is rather more randomized in nature), we are proportionally less likely to encounter the systemic self-discipline that could be characteristic of the lower levels, and as a result we are left with fewer and fewer items that would be (otherwise) required for the comprehensive and methodical development of a systemic conceptual re-construction of the law.[4]

[3] For the immanent limits of axiomatism in law cf., by the author, 'A kódex mint rendszer (A kódex rendszer-jellege és rendszerkénti felfogásának lehetetlensége)' [Code as system (Its systemic nature and the unfeasibility of its understanding as a system)] *Állam- és Jogtudomány* XVI (1973) 268–299 and 'Heuristic Value of the Axiomatic Model in Law', forthcoming in Jakob, R.–Philipps, L.–Schweighofer, E.–Varga, Cs. (eds.): *Rechtstheorieband in memoriam Ilmar Tammelo*. Münster, 2008.

[4] We can only introduce this as a distant analogy: an attempt to repeat the axiomatic founding and deductibility-expectation, which was thought to have been achieved in individual branches of science (physics, chemistry, biology, etc.)–spellbound by the allure of "unified science"–, in hope of reaching a supposed *final founding* that would unify (by bringing to a common denominator) the paradigms of all the various branches of science, has already led to a disappointing failure, since human science itself in its fallible human manifestation has eventually proven to be contingent.

Similarly, it is theoretically possible to attempt to establish a final doctrinal assessment of the various stylistic ideals that may have characterized a certain art form in different historical periods, but to do so in a general sense, and in the broader context of perhaps differing styles, and even more so, with regard to different branches of art, seems like an unreasonable effort in the long run.

For their first classical syntheses, cf. Neurath, O. (ed.): *International Encyclopedia of Unified Science*. Chicago, 1938. and Wölfflin, H.: *Kunstgeschichtliche Grundbegriffe*. Das Problem der Stilentwicklung in der neueren Kunst. München, 1915. 255, respectively.

2. The Process of Advancing Conceptualization

Consequently, when we conceptualize available linguistic material–to be treated with semantics and logics–according to some legal systemicity, we are in fact creating some taxonomic *locus/loci* comprised of what is/are essentially random word/s, which is/are used for lack of a better way of communication. However, this way of forming taxonomic units itself is potentially in a constant change and flux, since the matter of what and where (at which level) will end up becoming a demarcating item (i.e. a taxonomic identifier) is contingent on–among other things–a certain internal dynamic, and is dependent on a certain fluctuation; and the issue of what will function in quality of exactly what will have only been defined by the entire contexture of the system (e.g. the mere functionality of what can serve as rule or principle, or the way in which the same words used in different branches can indeed have differing meanings).[5] Similarly, it is the whole system that is at potential stake as a result of conceptual division, classification, categorization, hierarchization, in result of mental operations. Yet, it is not the case that simply *words* turn into *concepts*[6] and are then manipulated further within some logical chain; what is at the heart of the matter is rather that all these can serve as building blocks of and foundations for a *meta*-system, the properties of which will have been defined through their integration into this *meta*-system. Furthermore, it is such a *meta*-system which is the tighter the more contingent; hence, it could potentially be different (differently executed and construed) based on the same posited material underneath it.

It is certainly an overly simplified approach if we imagine a vision of bipolar existence, where on the one end there is the "stuff of language"–clothed in its given form at any given time–, and on the other end, legal dogmatics, as a sort of dressing up of the previous in the cloak of "legal taxonomy". In reality, however, they can be pictured as flowing waves that are always

[5] Cf., by the author: Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context, *Acta Juridica Hungarica* 43 (2002) 219–232 and <http://www.akademiai.com/content/r27863g6u01q777u/fulltext.pdf> as well as in *La structure des systèmes juridiques* [Collection des rapports, XVI[e] Congrès de l'Académie internationale de droit comparé, Brisbane 2002] dir. O. Moréteau & J. Vanderlinden. Bruxelles, 2003. 291–300.

[6] This is what I have already attempted to show when stating that the concept of 'rule' is common to all arrangements in Western law, while the concept of 'norm' is specific only to the Continent. Cf., by the author: Rule and/or Norm, or the Conceptualisibility and Logifiability of Law. In: Schweighofer, E.–Liebwald, D.–Angeneder, S.–Menzel, T. (eds.): *Effizienz von e-Lösungen in Staat und Gesellschaft.* Stuttgart–München–Hannover et. al. 2005. 58–65.

positioned at opposing phases of some sort of a 'vision of existence'. As soon as we have "law", its very first analytical understanding brings about the sprouting of some sort of "dogmatics"; and as soon as this understanding is transposed into the dogmatic realm, its very first practical application will in turn also contribute to having a richer legal quality. Consequently, whatever advancement is exhibited, the given law and its dogmatic counterpart prove *to be mutually preconditioned.* When making choices in the presence of alternatives, choosing according to preferences, siding with one of several differing (competing) conceptualizations, and opting for one technical procedure over another, it always increases the contingency of the given doctrinal variant; while, by the same token, the broader contexts of policy efforts directed at law or of social order-ideals manifested in law may also re-posit dogmatic arrangements at a higher taxonomic place.

Nevertheless, this counteracting wave-like dynamic formed between the law and its dogmatics not only acts as a constantly relativising force, which makes law dependent on dogmatics and vice versa, but it also prevents the formation of such a static state, where there could be any reasonable discussion of systemic immutability, a fixed state of constancy, or even any ultimate linguistical-logical equivalency. Therefore, we can only address the *systemic nature of the actual state* or its tightness, in which the major strands and sidetracks of the act of system-creation–regardless of whether we speak of logical or linguistic correlation (deduction or any act of connection: assignment or co-ordination)–can, theoretically, be reconstituted by other components in a new order, as a result of any actual (formal or hermeneutical) change occurring at either the "top" or the "bottom" of the original operational chain. Regardless of what great strides Continental law (the rule-set of which is made normative also through its dogmatics while reestablished as a sphere of interrelated norms) has made toward distancing itself from the traditions of classic Roman law (which was developed further by way of the classic Anglo-Saxon law doctrine in its own manner), it is, nevertheless, subject to change with respect to its dogmatics, initiated by whatever new challenge, or newly manifested factor rising out of the application of law (or any force of theoretical nature having an effect on the application of law), and this change can lead to reorganization of the dogmatic structure of Continental law. Somewhat this is similar to how in Anglo-Saxon case-law the method of *distinguishing* can result in the reevaluation, or reinterpretation of the message that can be deciphered from any newly presented particular case, more precisely, the judge's rendering of the law ("by declaring what the law is") is always conditional on the case-specific evaluation of prior decisions, when the actual adjudicative assessment of facts may alter the message presented by precedents.

Consequently, dogmatics, on the one hand (and as such, at the same time, we can state that dogmatics remains dogmatics so long as and because it) carries the promise of *completeness,* and on the other hand, is always transient in nature, because at any given time it is *merely* in the state of *development.* Dogmatics has an inalienable dual nature, regardless of the fact that we either deduce its existence from the notion that "we must make a decision that results in action, and in our decision-making we cannot rely on certainty",[7] or we ascribe it an allegedly completed systemic quality derived from its being (as it is) the exclusive form of the manifestation of law–one that therefore (for all intents and purposes) is an axiomatically established given, as it is simply posited that way–while being cognizant of the brutal fact that the same exclusive form through which the law has been normatively posited and thereby also materialized is arbitrary; and thus eventually we do recognize just in its random and fallible character a hypothetized systemic quality, which at the same time may require expounding, clarification, and the process of making it explicit.[8] Regardless of whatever extent its structure is conceptually completed, in relation to meeting specific practical challenges it still manifests itself in casual answers; and this too do therefore mean that–similarly to English law–it

[7] Szabó, M.: *Ars Iuris* A jogdogmatika alapjai [The foundations of legal dogmatics]. Miskolc, 2005. 18.

[8] And this is the essence of the long debated Hungarian doctrine of the *"invisible constitution"* as well: it postulates an undefined dogmatics, as if it were something floating above the text of the posited constitution, and as such as something that the Constitutional Court relies on in its decision making, when it passes down rulings without sufficient normative basis (i.e. in absence of a specific constitutional rule). Cf., by the author, 'Legal Renovation through Constitutional Judiciary?' in Sadakata, M. (ed.): *Hungary's Legal Assistance Experiences in the Age of Globalization.* Nagoya, 2006. 287–312 as well as 'Creeping Renovation of Law through Constitutional Judiciary?' in his *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central and Eastern Europe. Pomáz, 2008. 117–160. In this sense the doctrine of the "invisible constitution" is a retrospective substitute justification, and is not a prospective product borne out of the progress demonstrated by the functioning of the Constitutional Court; and this is exactly why the practice of relying on these virtual rules quickly died off as soon as the Constitutional Court disassociated itself from the ambitions of its first, founding president, and thus distanced itself from the concept that its primary role would be to expand the constitution in a latent but active manner, yet without appropriate mandate. Consequently, the claim that this "invisible constitution" too is part of the "hierarchy of the sources of the law", as "a possible (and since held by the Constitutional Court: binding) interpretation of the Constitution" Jakab, A.: *A magyar jogrendszer szerkezete* [The structure of the Hungarian legal system]. Miskolc, 2005. 99–100 and <http://www.unimiskolc.hu/~wwwdeak/dolg_ja.pdf>–is fundamentally misleading when observed from this perspective.

only serves up *examples*, from the outset foregoing the expectation of exhaustive comprehensiveness. (It can only be explained as an example of our human fallibility that when acting, we believe our response to be comprehensively completed, while its completeness is merely a given, dependent on whatever we have in our imagination about normality, about what we expect to occur and therefore whatever we deem ought to be subject to regulation.[9]) To put it differently, it is of an open texture, since–as stated earlier, when discussing culture[10]–it carries the potential that "it could have been otherwise as well", even if it happens not yet or already not to become something else. By the same token, however–and this is the other pole of the dogmatics' dual nature–at any given time it *claims to be finite and final (self-closing) in its given state,* as if–although probably it may reopen the very next day–it were to live on unchanged forever as the very stuff of eternity.

Finally, there is yet another factor in the systemicity of legal dogmatics. Namely, even its relative permanence is just a matter of reconstruction, a function of the chosen perspective. Perhaps one may find fixed structural points in a system carrying the promise of remaining unchanged over time only provided that we identify the root of permanence in its *logical* nature, as a systemic axiom. However, once–just as with theologies constructed on revelations, which are the models for the doctrinal study of law[11]–we start searching for decoding, understanding, or giving meaning(s) behind the authoritativity imposed by the holy text (the dogmatics of which, although, still may appear in a logically constructed conceptualized form, nevertheless, already in a *hermeneutic* context, thus, all in all, in the culturally predetermined duality comprised by the historical permanence of the physical nature of its signs and

[9] As methodic precursor of the American "Law and Literature" movement, White, J. B.: *The Legal Imagination Studies in the Nature of Legal Thought and Expression.* Boston–Toronto, 1973. 986. was only to reinvent the quasi ontological significance of "legal imagination", which had already represented–for Schmitt, C.: *Gesetz und Urteil.* Berlin, 1912. 129–the genuine borderline (never either improved or surpassed by Kelsen) within which juridicity might at all be conceived. Cf., by the author: 'Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)' in Wahlgren, P. (ed.): *Perspectives on Jurisprudence* Essays in Honor of Jes Bjarup. Stockholm, 2005. [= Scandinavian Studies in Law 48]. 517–529 and *Rivista internazionale di Filosofia del Diritto.* LXXXI (2004) 691–707.

[10] Karácsony, A.: A jog mint kulturális jelenség [Law as a cultural phenomenon]. *Jogelméleti Szemle,* 2002/4 <http://jesz.ajk.elte.hu/karacsony11.html>.

[11] Cf., e.g., Kraft, J.: Über das methodische Verhältnis der Jurisprudenz zur Theologie. *Revue internationale de la théorie du droit* 3 (1928–29) 52–56 and On the Methodical Relationship between Jurisprudence and Theology. *Law and Critique* 4 (1993) 117–123.

the historically bound and self-fixingly varying nature of their meanings),[12] we must recognize that we are faced with a progressive chain of development. This is merely to recapture the world of the acting man which he had previously positioned in the past to be beyond his personal sphere of influence–of course without having more or a different influence over the end result of the process (due to having been elevated to being the subject from the position of being just a mere reference), than the amount he had previously believed (at least according to his subjective perception) to have had.

However, if in fact every newly evolved state of the law does indeed (theoratically speaking) reorganize the doctrinal study of law–i.e. if law and its doctrinal study are in constant interaction and are therefore moving following a wave-like pattern with relation to one another, and thus constantly providing each other with new *impetus*es–, it can also be supposed that *legal policy* has a similar relationship of accompaniment with dogmatics. This is so because the latter is not an independent acting factor: it only demonstrates the extent and direction to which law in action is established, planned, harmonized, and co-ordinated in either legislation or the application of law.[13] Well, even in this respect the doctrinal study of law does not herald creative novelty, neither does it exhibit an independent character, since all the while the effort to render the conceptual base and systemic potentialities as uniform and coherent as possible still happens in this very same sphere and is taking place in this context.

3. Ideality v. Practicality in Legal Systemicity

It is worth pausing for a moment to consider, what is the exact status of those sets of meanings which are suggested by those kinds of differentiations, according to which–for example–"the thinking governing the doctrinal study of law is limited not by *rules of positive law* as 'dogmas', rather by those

[12] Cf., by the author: Legal Traditions? In Search for Families and Cultures of Law in Moreso, J. J. (ed.): *Legal Theory / Teoría del derecho* Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada, 2005, I, Stuttgart, 2007. 181–193 [ARSP Beiheft 106] and in <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf> as well as *Acta Juridica Hungarica* 46 (2005) 177–197 and <http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>.

[13] Cf., by the author: 'Towards an Autonomous Legal Policy?' [abstract] in [23rd World IVR Congress of Philosophy of Law and Social Philosophy] *Law and Legal Cultures* in the 21st Century: Diversity and Unity Working Groups Abstracts. Kraków, 2007. 111 and <www.law.uj.edu.pl/ivr2007/Abstracts_WG.pdf>.

background category sets which may have affected the shaping of these rules in the process of their formation".[14] I guess the very heart of this matter is that on an analytical level we first distinguish two different kinds of intellectual representations and subsequently we discern an effect/result-type primacy, or temporal priority between them.

If we *understand* something, this understanding can only stem from the fact that we already possess the ability to intellectually conquer the subject of our theoretical investigation by the means of categorization and classification, i.e. by way of comparing it to something already decoded and thereby subjected to relative identification and differentiation. Or, on the one hand we have the intellectual *facultas* to do processing, and on the other we are in possession of the results of prior processing (as *experimentum*). Consequently, we have already a certain degree of routinized (and to a great extent also confirmed) practice, following which this *comparatio* can be carried out sufficiently. It would, however, not be meaningful to identify either pole or section as an absolute starting point, thereby attributing primacy or priority to any of them,[15] since–as far as it can at all be meaningful to establish such differentiation once a given degree of complexity has been reached–we cannot think more of the process than one developing in native *reciprocity* and necessary *complementarity,* becoming increasingly more complex in its potential. Therefore, there is no factor that would prevent the linguistic manifestation of such 'background category sets' to–coincidentally–correspond exactly to the way those 'rules of positive law' are posited verbally. At the same time it is obvious that any act of drafting new regulation rests on an existing doctrinal assumption, and in most cases it will carry the potential of integration of the new (conceptually split or divided) doctrinal relations into the systemic structure of the existing scheme.

There are always theoretical possibilities, but the law does not and cannot have an idealistically perfect, finished, and closed system, due to the fact that law itself is practical action, a response given to particular challenges, and thereby a model creation achieved by way of normatively ascribing prospective targets to retrospective fundaments. When the wise men of early modern times were contemplating the comprehensive description of the world in terms of natural laws, they could posit the presumptive existence of a "mathematical

[14] Szabó: *Ars Iuris... ob. cit.* 155 [the emphasis is by Cs. V.].

[15] In contrast with the view of Hayek, F. A.: The Primacy of the Abstract [1968] in his *New Studies* In Philosophy, Politics, Economics and the History of Ideas. London–Henley, 1978. 35–49, attributing primacy to the ability of abstraction–versus concrete observation–in his debating on cognition.

value" within the system as something that would necessarily follow from their having comprehensively discovered the nature of economic processes. However, as they quickly recognized it as well, no large degree of comprehension is realistic, due to the ever changing disposition of the infinite number of players and further relevant factors involved, which is to render the system too complex for the human faculties of comprehension to have a sufficient match.[16] While they did in fact accept the task of trying to realize some sort of an ideal, yet they also accepted the foreseeably inevitable defeat in their effort to directly realize it. Therefore, although we may indeed have ideals, but only ones that are necessarily bound as constrained by the presence of finite objectives and surrounded by adequate practical conditions. For we can hardly do more at any given instance than gravitate toward the next challenge in trying to meet it, thus attempting to give meaning to our presence here on this planet.

4. Conceptualization, Systematization, Dogmatization

The Roman law's reception sprouting mostly from Italian seeds and spreading over the course of centuries led to the development of two fundamentals on the European continent, and the tracing of the ideal of *ius* back to *lex* was to implicitly contain both.

First and foremost, whatever the legislator has posited constitutes law itself, comprehensively, exhaustively, and with exclusivity. This is the common mental core relied on originally when the European doctrine on the sources of law started to develop, in terms of which the *legislative act of positing* a law is to be treated as the source of the law. In ontic terms, for the continental tradition law is manifested with and by this; and from a gnoseological perspective this provides the starting point for all inquiries into law. It is in this that the idea exclusive to the Continental law's *applicatio iuris* is born: law is something artificially established as physically perceptible, objectified, discreetly separate entity, valid on its own, which, when applied, is transformed to be of utility for a derivative product prepared by the judge for adjudicating–as a synthetic construct–on a statement of fact.[17] This being in vivid contrast

[16] Or, all this complexity is cognizable only for God–as opinioned both by Molina, L. de: *De iustitia et iure.* Cuenca, 1593 and Lugo, J. de: *Disputationum de iustitia et iure.* Lyon, 1642. See Hayek: The Primacy of the Abstract... *op. cit.* 28, note 5.

[17] It follows directly form this that the concept of *Tatbestand* [the statement of those facts that constitute a case in law] has been included in the conceptual set of Continental law–and only of Continental law–with due cause in due time. The so-called conclusion of

with the Anglo-Saxon model, which (in contrast with the late republican and imperial periods) having derived inspiration from Roman models older still, is only capable of capturing the presence of law in the case-by-case actualization of the ideal of justice through the judge's decision itself, "declaring" the search to find *a posteriori* the *dikaion*–the most fitting, fair and just resolution in the given individual situation–to have culminated in attainment.

Secondly, the continental tradition perceives in law a message that has already reached a certain level of *generality,* a set of experiences of prior decisions which have been captured in the form of *regolas*, which–if objectified–can govern, make uniform, and guide into preestablishedly foreseeable and predictable channels any procedure carried out in the name of the law. Accordingly, law is *a pattern of future decisions formulated in generality.* All this in contrast with the Anglo-Saxon perception, which does not discern more in what is manifested as law than a particular case-specific and exemplary manifestation, which–if we or anyone else were to have perceived the case at hand differently from the way the presiding judge saw it–just as well could have been different. Thus, continental *Rechtssetzung* always constructs against the force of some sort of *vacuum*, because wherever *création du droit* enters with *legis latio*, there law appears in place of what had previously been empty space–all this in contrast to the Anglo-Saxon mentality, where even the feasible professionalization of law-making and its conversion into industrial-scale production does not result in any completion of "the law" (with senses of finality, roundedness or fulfillment), rather at best it only exemplifies: it merely sheds (recalls, manifests) an exemplary and rather commendable light on a smaller portion of what is presumed to have ever existed as law behind it, through the occasional judicial act of eventually naming it.[18]

The *conceptualization* of law–that is, the elaboration and treatment of linguistic elements describing legal relations in sets of concepts as components

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fact is a product of legal dogmatics: a logically constructed complementary pair of the norm concept, which allows the schematization mounted on a syllogistic conclusion–set off from the act of *Rechtssetzung* [*création du droit*, etc.]–in the operation called *Rechtsanwendung* [*application du droit*, etc.].

[18] For instance, according to Oliver Wendell Holmes, generalization means reduction. On his turn, Justice BRANDEIS had concluded therefrom that "The process of inclusion and exclusion, so often applied in developing a rule, cannot end with its first enunciation. The rule as announced must be tentative. For the many and varying facts to which it will be applied cannot be foreseen. Modification implies growth. It is the life of the law." *Washington v. Dawson & Co.*, 264 U.S. 219, 236. Cf. also Cardozo, B. N.: Law and Literature [1925] in his *Law and Literature* and *Other Essays and Addresses*. New York, 1931. 8 and 15.

of logically erected constructs, organized into some coherently arranged overall set to build up its *systemicity*–will be achieved in such an understanding of the law as exhaustively *embodied by its posited generality,* and as the outcome of mental operations with texts of the law itself in its reconstruction at a *meta*-level which is intellectually erected upon it. Well, the doctrinal study of law can be characterized as system of interrelations mentally deconstructed from the primary manifestations of the law, that is, as a secondary *meta*-level fortified by its own comprehensive systemic construct built upon the primary text core.[19] It follows directly therefrom that legal dogmatics only formed, could have formed, and does in fact form where the law manifests itself in form of textual objectification; consequently all procedures carried out in the name of law have to be based on formal linguistic-logical operations of text-processing. Wherever the current ideal of law and order spreads beyond the mere (formal) quality of text-conformity–either due simply to the actual lack of such textuality (as in the Anglo-Saxon tradition), or because the text, in addition to its own self-referential finality, sets the prerequisite additional requirement of a personal ethical conviction in sync with or directed at the fulfilment of given values, sourced from the transcendental power having revealed the text itself (as in classic Jewish or Islamic law)[20]–, there is (and can be) no legal dogmatics. The thought of legal dogmatics is simply alien to the *ordo*-ideal and operational principles of such classicm non-systemic arrangements. As the Common Law has for long established it, guidance derived from relatable precedents (properly speaking, from their judicial evaluation) is dependent on the singularity of particular cases; and the model cases used as examples for referencing represent a set of unrelated unique circumstances, among which nothing would necessarily tie them together in a formal way, so there is no logical connection between them either.[21] (Characteristically enough, it was the English approach to logic–as opposed to its German understanding–which made it obvious that logic itself is not the study of entities, occurrences, or any other capacities taken in their by chance aggregate, rather it is the inquiry into relations that are said to prevail exclusively within the one same system amongst its theorized elements, accepted as potentially arguable as proven

[19] Cf. Pokol, B.: *Jogbölcseleti vizsgálódások* [Legal-philosophical inquiries]. Budapest, 1998. 44.

[20] Cf. Varga: Legal Traditions? *op. cit.* passim.

[21] *Ibid.*

or valid in order to test their infrasystemic coherence, i.e. consequentiality to the exclusion of latent contradictions.[22])

This is why the doctrinal study of law is a characteristically continental product of Middle Ages and early Modern Times in Europe. It formed as a result of how, starting from 15th century Bologna, our ancestors received Roman law according to the contemporaneous scientific ideal and the consequentialism in their order-ideal. This essentially axiomatic ideal of order following the methodology of geometry and mathematics was continuously cultivated for centuries, leading to the formation of such a solid secondary tear in scientific analytical work (providing the law with a self-referential framework for interpretation) built around (and above) the actual primary tear of the law, which in the early Modern Times, when the law codification of nation-states (as an act of reestablishing national unity) was done with an attempt to link specifically the law, as well as its application and scholarly processing, back to the exegesis of those posited codes of national laws. Well, at that time jurisprudence itself was proposed for a model of dogmatics, *Begriffsjurisprudenz* or *conceptual jurisprudence*, containing both its own genesis and actual self-realization within itself as in a sort of "conceptual heaven" [*Begriffshimmel*], complete and sufficient in and of itself. The building of its conceptual framework is done by a new branch of scholarship: *Rechtslehre*, which if (and when) having reached whatever level of systemic self-formulation was attainable, can then naturally go on to attempt to do an investigation into the branches as well.[23]

[22] Cf., by the author: Az ellentmondás természete [The nature of contradictions, 1989]. In his *Útkeresés. Kísérletek – kéziratban* [Searching for a path: unpublished essays]. Budapest, 2001. 138–139.

[23] The concept of *Rechts|lehre* is derivative of *iuris|prudentia*, presuming transformation by scholars, whereby law, the conceptual phenomenon, turns into scholarship, with a concept-set created according to some scientific ideal. On its turn, the doctrinal study of law is derivative of the law posited: it is *meta*-order thereof.

Scholarship disposes of its own procedure of verification/falsification, freed of interventions. In contrast, the doctrinal study of law is *parasitic* a form. As a higher level reformulation of the law with implements of logic and the requirements of systemization, it takes into account the law's contexture as well, and as a *reflex*-phenomenon in a meta-reconstruction of the law, it is reformulated continuously in harmony with all finite (mentally fixed) states of the law.

If it is true that by one fell stroke of the legislator's pen, whole libraries are vulnerable to be rendered out-of-date [as formulated by von Kirchmann. J. H. in his *Die Wertlosigkeit der Jurisprudenz als Wissenschaft.* Heidelberg, 1848 striking the peak of legal positivism: *„Drei Worte des Gesetzgebers, und ganze Bibliotheken werden zur Makulatur*"]–as recently happened with Quebec's *Code civil*, when shortly after its enormous doctrinal processing

We need not simply reiterate that wherever law is posited in a continental sense, this involves the parallel birth and reciprocal coexistence of its doctrinal study, but moreover we need to point as far as claiming that in our arrangements dogmatics provides the *interpretive context* of and for the law posited. By the way, this automatically renders the question illogical whether or not dogmatics itself may have any mandatory force. Obviously, it has none. Yet one still may not step forward with radically new legal understandings in hope of success, expecting far more than flat rejection. (Our life follows this tradition. Its understanding and following in practice secure our life the necessary bounds– like river banks hold the flow of water–; even our freedom is contextualized by it, directing our actions into ready-made or self-reforming channels. In contrast with the Anglo-Saxon mentality, which guarantees the sense of constancy in an ever-evolving world, without any superstructure erected. In law, the latter rather achieves consistency directly, by way of relying on the cross-referential use of judicial discourse in argumentation and justification.)

Moreover, although it is one single given corpus of the laws upon which a dogmatics is elevated, doctrinal studies continuously develop in time with competing strands (directions or variations) according to authors. In choosing amongst concurrent variants one may naturally use whatever criteria (including the one used to rank scientific explanations), the final criterion is however always provided by willful decision within the canon of institutional discipline,[24] harmonizing restitutive conservatism and the renewal's practical intents.

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had finally been completed spanning a period of some 150 years [Brierley, J.-E. C.– Macdonald, R. A. (ed.): *Quebec Civil Law*. Toronto, 1993. 728], it rapidly became obsolete with the enactment of a new code replacing it–, then this can only target legal dogmatics, even if cultivated under the aegis of and by means of scholarship, just as this mostly happened with countries (in the 19th century exegetic nations-centered upswing) that had already completed their law codification process.

[24] For instance, the disciplinary entitlements of the Teaching Church, including the option to declare anyone a heretic and the institution of censorship as well; or, in a special area of law, those preference-orders that are non-official but are definitely to be taken into consideration, and which are to function in both basic examinations and higher level court procedures in countries rich in literature comprised of competing works in the doctrinal study of law (especially Germany).

5. Rules and Principles in Law

We spoke above of the manifestation of law being posited in general, because this is the pattern in continental Europe to become–slowly but systematically– the foundation for law to be manifested as sets of rules. *To be rule-based* is one of the feasible directions of development, rather self-evident by the way, knowing, from the past, the developmental trends of *scientia* in general and of *theologia* in particular, knowing logical reasoning based on systemic conceptual constructs, and knowing how much idealized the use of axiomatic patterns was in history.

Being rule-based, however, has never been exclusive, although to this day it persistently remains the basic form of posited law. The circumstance that principle-based and individual equity-based methods of decision making appear to be competing directions in our time, is just a sign of tactics (in a historical context then: signaling the trend of daily battles) of a struggle for supremacy, i.e. how to achieve primacy; since it activates an already available potential in order to use it for constructing while de-constructing, according to those *desiderata* within its reach. Its elements had been known since the earliest of ancient times: reference to values, clauses marking community contents of common good and interest and public safety, adjudication according to consequence or derived from undefinedly flexible legal concepts. This new development working to loosen the positivity of law (as signaled by the worldwide effect of Dworkin[25]) is nevertheless almost completely irrelevant from the point of view of dogmatics.

Because as soon as law is fundamentally rule-based, even competing perspectives signal the existence of rules, or the presence of the mandate to apply given rules in given situations. Moreover, even the integration of such competing perspectives into the underlying system is mostly mediated by the construction of critical gaps of rules–only to develop their own mediatory forms, from being case-specific (and therefore incidental and feeble) to gradually becoming defined as quasi-rules themselves. Consequently, even the logic behind their dogmatics has no other target than to advance their own genuine or quasi rule-set to a higher developmental level in this way (Rule Set_1 converted into Rule Set_2, and thereby creating a construct valid for use in whatever given present time). Or, all their verbal attacking or mode of phrasing aims to form a canon diversifying Rule Set_2 from Rule Set_1, but in the

[25] See in particular Dworkin, R. M.: Hart's Postscript and the Character of Political Philosophy. *Oxford Journal of Legal Studies*, 24 (2004) 1–37.

perspective of some Rule Set_x (the targeted–albeit always temporary–result of such tactical procedures).

Accordingly, the dogmatics of current mainstreams is exactly neither of a new type nor one offering alternatives. It is perhaps its radical style reminiscent of battle alarm that makes it at first glance unusual (just as the truly brutal *ad hominem* arguments of Engels or Lenin[26] did not change philosophizing at their time, at most they signaled its instrumentalised use as an available tool of class-struggle). Since it remains a common element that in law the *termini of decisions are eventually determined by the law itself*–even if the law does not define anything further in specification. Unless–in terms of procedural options–it turns to the alternative of appointing an outside forum of arbitration, it does not even turn over the territory to other materialities (homogeneities) contrasted to its own "distinctively legal"[27] one. Even its potentially undefined nature is no other than that of the determined undetermined [*bestimmte Unbestimmtheit*] described by Lukács,[28] the filling with content of which on the terrain of law is given as an exclusive power to the judge appointed to the case, and paired with appropriate discretion. Therefore, without the false construct of some mechanicity, we cannot even claim a chance that "a legal regulation would be filled with content by non-legal rules of another social sphere".[29]

6. Correlation between Legal Cultures and Legal Theories

Our experiences have grown exponentially in the past half century, and especially in the last quarter century. Our theoretical legal thinking has by now gone away beyond the boundaries of the previously deeply entrenched positivist legal thought, and now–founded by the philosophy and methodology of sciences, substantiated by comparative historical, anthropological and sociological investigations, enhanced in problem-sensitivity, with a particular emphasis given on differentiation between separation and concurrence of ontological and epistemological aspects–it is ready to fully understand what it could already perceive in germs (of more intuition and hesitation than of scientific

[26] Cf. Szabó, S.: A lenini stílus a gyakorlatban [Practice of the Leninist style]. *Korunk*, 1960. 375–382.

[27] Cf. Selznick, Ph.: The Sociology of Law. In: Sills, D. L. (ed.): *International Encyclopedia of the Social Sciences*, 9. New York, 1968. 51 et seq.

[28] Lukács, G.: *Ästhetik* I. Berlin, 1963. 720.

[29] Pokol, B.: *Jogelmélet* [Legal theory]. Budapest, 2005. 31.

categoricity) in the literary products of the debate between formalism and anti-formalism back in the 1960's.[30]

An internal reorganization has occurred among the modes of legal reasoning and argumentation in the process of competing for the position of getting accepted as canon, so that the ruling of the law's territory could be reallocated via the reassignment of leading positions. In order for this to happen, new legal policies, ideals and ideologies, as well as professional world views (in the sense of *juristische Weltbilden*) were formulated, which can, naturally, one day in the future end up consolidating into (temporarily come to a rest as) a new legal world view, which will be a new balance, establishing a new professional deontology, replacing (or, to be sure, at least sublating) past normativism.[31]

What is constantly implied by the above is the outcome that the chances of a theoretical-methodological reconsideration (once formulated by Chaïm Perelman and Michel Villey upon the stand of anti-formalism in argumentation) are steadily growing and so does the chance of reaching a more complex answer in hermeneutics. A new element is the English–American consciousness, which for the first time in history responds to the call to investigate the feasible connections among law, language, and logic; and in its haste to quickly come to possess this construct and in the midst of its focus on wanting to rule over the practical development of law, it has started systematic efforts at integrating into its working legal system a mass of new methodological options. While its law is "floating" and practically disappears into a mist,[32] its legal professionals have been put in the position of a gladiator and are left to rely solely on the awareness of the solid methodical nature of their procedures.

Our globalization has caused our theories to converge, yet our law has failed to follow suit. The excitingly complex methodology which is crusted onto the core of a still remarkably non-conceptualized *English–American* legal corpus of a merely denotative function has slowly started to dissolve the body of *Continental* law, which has for centuries been extremely conceptualized and enclosed by the walls of an axiomatic systemic discipline. And what is an unusual cultural intermixture and interflow produced by a comedy of errors

[30] For an overview, cf. Horovitz, J.: *Law and Logic.* A Critical Account of Legal Argument. New York–Wien, 1972. 213.

[31] Cf., by the author: *Lectures on the Paradigms of Legal Thinking.* Budapest, 1999. and What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of 'The Judicial Establishment of Facts'. In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–Wyduckel, D. (Hrsg.): *Theorie des Rechts und der Gesellschaft. Festschrift für Werner Krawietz zum 70. Geburtstag.* Berlin, 2003. 657–676.

[32] Cf. Varga: Legal Traditions? *op. cit.* passim.

from a comparatist's perspective observing from a point far off in the distance, is in this very context a remarkably likable and almost ideal study target for a thinker using cognitive mechanisms geared toward a methodic and paradigmatic reconstructive approach. All this is now given added importance–beyond the currently forming global-village dimension–by the issue of the convergence trend, present within the increasingly homogenized legal domains currently fought for in our unifying Europe, with former diverging traditions turned into interaction between Civil Law and Common Law, as observed in part in their daily interfacing and in part in their common foundations, their functioning and increasingly more conscious cultivation, on common platforms, fora and discourses.

7. Theoretical and Socio-philosophical Perspectives

It appears that the understanding reached in the Hegelian "cunning of reason"[33] (which suspects both a conscious and an unaware force at work in the shaping of the world, expressed by the Marxian paradox in that "they do not know it but they do it"[34]) has been serving as one of the explanatory principles of the development of science.

We know from linguistics that specialized languages making use of jargons even on the most homogenized fields are rooted in general language usage, and wherever they reach a boundary they borrow from the latter. Despite the theoretical universality and self-sufficient validity of its logical-mathematical toolset, the effort to construct the pure and unified language of science has failed.[35] As mentioned already,[36] linguistically speaking *law* is *law*, not reducible to anything other, so it *cannot be substituted with any other statement concerning the law*. Consequently, anything built on the law is at a *meta*-level in relation to it. But as also concluded then, parallel to the law (that can be referenced with ultimate validity) three further law-related homogeneities are built on everyday heterogeneity through complicated and uninterruptible (inseparable) interrelations as to their respective languages:

[33] *"List of Vernunft"* in Hegel, G. W. F.: *Lectures on the Philosophy of History.* Section II (2), § 36 in <http://www.marxists.org/reference/archive/hegel/works/hi/history3.htm#036>.

[34] *"Sie wissen es nicht, aber sie tun es"* in Marx, K.: *Das Kapital* I in Marx & Engels *Werke.* 23. 88.

[35] See, e.g., 'Frege, G.' in <http://plato,stanford.edu/entries/frege/> and the reference to *unified science* in note 4.

[36] Wróblewski: *op. cit.*

ordinary language

language of law	language of the practice of law

language of the doctrinal study of law	language of the science of law

ordinary language

Relative to the law, the practice of law is at a *meta*-level similarly to how it works in validity references, while it is also an ascertainable fact that the authoritative practicing of the law is capable of overwriting that what it claims only to apply. The doctrinal study of law is in a similar position, and the science of law–so to speak–observes all this from a distance. All of these four components, on the one hand, exert effects on one another, while on the other hand, all they are floating in the medium of ordinary language as stimulating it and stimulated by it at the same time.

Well, if it is true that on the foundation stretching from ordinary language to the language of jurisprudence there are four, partly and relatively separated (because constantly self-rehomogenizing) levels of *meta*-systems, then–even if this is valid only for an intellectual reconstruction in language-based symbolization–this allows the suggestion of some sorts of differing "modes of existence" of the legal phenomenon with "socio-ontological differences" as systemic counterparts.[37]

I have long entertained the thought of proposing the existence of competing components of law.[38] And *voilá*, here we are faced with the law's intimidating complexity, hardly supportable social weight, and the total web of inter-mediaries[39] of being legally disciplined and socially standardized, which are continuously reproduced and managed by largely separated blocks in the sector

[37] E.g., Schulz-Schaeffer, I.: Rechtsdogmatik als Gegenstand der Rechtssoziologie. *Zeitschrift für Rechtssoziologie* 25 (2004) 141–174–recognizes (p. 141) that "Established rules of interpreting the codified law have their part in constituting the social reality of law–provided that they are observed by the courts."

[38] Cf., by the author: Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures. In: *Law in East and West* On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University, Tokyo, 1988. 265–285 and 'Law', or 'More or Less Legal'? *Acta Juridica Hungarica,* 34 (1992) 139–146 as well as his *Lectures on the Paradigms of Legal Thinking. op. cit.*, para. 6.1. For another attempt, see Pokol, B.: *The Concept of Law.* The Multi-layered Legal System. Budapest, 2001. 152.

[39] '*Vermittlung*' in George Lukács' posthumous *The Ontology of Social Being.* Cf., from the author: *The Place of Law in Lukács' World Concept.* Budapest, 1985. 193, especially para. 5.1.3, 107 et seq.

assigned to law by the division of labor within society. Well, some keenly exact sensitive conclusions[40] resulting from considerations just surfaced allow the possibility for the law's socio-ontology to further develop its foundations, known from Lukács and Niklas Luhmann, among others.

What are exactly legal professionals doing in a complex society when receiving a large heap of texts in order to be used as a basis of referencing in their practical decision making? What kind of understanding legal professionals form when with firmly established doctrinal understanding in the background, they define meanings able to be presented as premises of decisions made according to their particular hierarchy-expectations and practical testing?

It is to be known that sectors separated (though working together) in the social division of labor while also separated from one another (though working together) are to produce and incessantly reproduce a *framework of understanding*, which despite forming from the incidentals of everyday practice, nevertheless is to reflect determinations manifest in it, creating such a web which is although not independent of all active forces in the given sphere but as a concentrate of them it too steps forward as an *intermediary* medium, and as such will to a great extent become independent of all the particular definitions. Furthermore, it will step forward as such a factor–a *second reality*–produced by man based on hierarchical structures originally imbedded in reality, which has a distinct chance to effectively direct the law's understanding into its proper artificial channels and preestablished groupings. And this way–making use of fundamentally educational and socialization-generating instruments–it can finally manufacture a certain practical sense of human security (in all sectors being disciplined and standardized) out of something that had in and of itself ever been a silent sign: out of language used by law, out of the way language conveys law in given forms.

Or, so far we have talked about dogmatics as the contextualizing grouping of the further definition of the intellectual environment of one possible determination of legal mediation, which is positivation. Thus we have contemplated the

[40] To quote but one example: "all particular areas of action (practices) have a correlative verbal activity attached, through which an efficiently practice-oriented communication can take place among participants. The key to this is the conceptual set of language rendering the interrelation prevailing between signs and meanings in language to accord to mental correlations corresponding to those modes of action which are relevant to the said practice. In this very sense all social practices have such a conceptual system which may quite reasonably be termed dogmatics." Bódig, M.: Jogdogmatika és jogtudomány [Legal dogmatics and legal science] and A jogdogmatika tág és szűk fogalma [The large and narrow notions of legal dogmatics]. In Szabó, M. (ed.): *Jogdogmatika és jogelmélet* [Legal dogmatics and legal theory]. Miskolc, 2007. 32–33, respectively 255–256.

issue from a single perspective, on the path of the chances of the formally posited law's further formalization. Therefore we must be cognizant that when doing so, we are giving preference to analytical requirements, and are quite a long distance away from gaining an understanding of the law's social aspects, of the nature of its truly sociological existence, and even farther away from being able to get insight into law's mystery in its true complexity.

What really takes place here is hardly other than us projecting, distanced by materializing (as alienated into reified objectivities)–and thereby transferring into the fetishized role of a pseudo-deity or substitute sense of security–that which is in fact us ourselves. Instead of the autopoietic reliability of human practice self-reproducing at a societal level, we transpose our desire for safety into conceptualized constructs, into logic and taxonomy, and with this ultimately, in a metaphysical dimension. Thereby we can hardly go beyond what has already been described by Frank as a psychoanalytical projection,[41] fulfilling the needs of our most human and therefore quite ineradicable innate atavism that will transpose our want for authority in a father complex into the enchantment by artificial creatures we are stressed at incessantly and instantly producing. This, even if considered in the sense of scientific reconstruction to be the demystification of an idol, is at the same time, however–and exactly in its own duality[42]–a necessity. This is exactly the reason why law was at all formed, since exactly such and similar kinds of reasons led to humanity constructing so called *second nature* to surround itself with, exemplified, among others, by doctrines.[43]

[41] Cf. Frank, J.: *Law and the Modern Mind.* New York, 1963. 404.

[42] Referring here to the deeply socio-philosophical debates regarding what the role and the genuine ontological status of ideologies are.

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A Legislative Power of the UN Security Council?

Abstract. The activities of the UN Security Council after the 11 September attacks provided subject for an extensive theoretic debate on the ongoing 'transformation' of international law. Whether and how much international terrorism constitutes a new (legal) threat and whether the current system of international law is appropriate to respond to these threats, has been analysed in many studies.

However, another aspect also deserves an in-depth examination; two resolutions of the UN Security Council [1373 (2001) and 1540(2004)] imposing general-abstract legal obligations, including the obligation to adopt certain domestic legal norms, for all the member States of the UN. That is to say, for the first time, the Security Council assumed legislative powers, practically, for the whole membership. Nevertheless, so far the adoption of legislative measures remained rather exceptional, the issue shall not be left ignored. The study focuses on the basic question, namely whether the Security Council has the power to adopt legislative measures - on the established basis of the notion of 'legislation'.

Keywords: Security Council; international law-making; legislation; United Nations; UN Charter

Introduction

After the terrorist attacks of 11 September 2001, many scholars were of the view, that mankind has arrived at a historical landmark–the beginning of a new (political and security) era.[1]

One may plausibly state that the real effects of the events can be measured through the (legal) responses given to the challenges they cause. Without aiming to provide an exhaustive overview of all the specific actions taken,[2] one shall

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[1] See, e.g.: Heisbourg, F.: The war against terrorism and the transformation of the world order: a European view. In: Emerson, M.–Becher, K. (eds.): *The war against terrorism and the transformation of the world order.* Brussels, 2002.

[2] For a broad overview see: Kovács, P.: The United Nations in the fight against international terrorism. *Sectio Juridica et Politica Miskolc*, Tomus XXI/2. 421–434;

take into account the individual responses of States–recognizing a (somewhat odd) case of the right of States to self-defence; the collective responses of regional and universal international organisations–including the invoking of Article V of the North-atlantic Treaty by NATO and the several resolutions adopted by the UN Security Council.

Examining Security Council Resolution 1373 (2001),[3] one of the first, and perhaps most significant resolutions of the Security Council in response to the attacks, most of the authors accentuate the substantive measures to combat terrorist financing. Apart from those substantive measures, there is another, perhaps less conspicuous, aspect not strictly linked to the previous one, that undoubtedly constitutes a novelty in the practice of the Security Council, or–as Paul C. Szasz noted–where the Security Council obviously "broke new ground".[4]

For the first time since its establishment, the Security Council imposed abstract legal obligations on all the member States. Therefore, from another point of view, the real novelty by the Security Council in Resolution 1373, is, that it acts unbound by a specific situation or conflict (though, the political backgrounds were and are obvious) and establishes general legal obligations on States for the future. This, according to most of the authors on the topic, constitutes an international legislative action, *i.e.* the Security Council, on its own initiative, makes new international legal norms binding on all States, irrespective their consent.

However, the enactment of 'legislative measures' by the Security Council did not remain an exceptional action desired by a particular moment, whereas in 2004, Resolution 1540 (2004)[5] again imposed general legal obligations on States, at that time, concerning the fight against the proliferation of weapons of mass destruction. Moreover, the latter resolution goes further into the domain of State sovereignty, insofar as it imposes a detailed obligation for States to enact domestic laws and administrative measures, which may directly concern the rights of natural or legal persons in their own countries. Although their subjects are different, there is a clear relationship between the resolutions; Resolution 1540 (2004) can obviously be deemed as a continuation of a process

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Jimeno-Bulnes, M.: After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples. *European Law Journal*, 10 (2004) 235.

[3] S/RES/1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 September 2001.

[4] Szasz, P. C.: The Security Council starts legislating. *American Journal of International Law*, 96 (2002) 901.

[5] S/RES/1540 (2004), adopted by the Security Council at its 4956th meeting, on 28 April 2004.

begun with Resolution 1373 (2001), broadening the Security Council's instruments in the maintenance of international peace and security, however, there is only an indirect reference to the previous resolution. Instead, as a much broader, but more meaningful background, Resolution 1540 (2004) refers back to an earlier statement (and not resolution!) of the Security Council, adopted at the meeting on 31 January 1992 held "at the level of Heads of State and Government".[6] The importance of this reference lies within that this statement is today commonly known as the promulgation of the Security Council's aim to enhance and broaden its own responsibility and powers in order to meet the new challenges of the post-cold war era. Beside that, as an equally important element, the referred statement is the first manifestation of the broad interpretation of international security.[7]

Consequently, the 'legislative measures' taken, albeit novels in the practice of the Security Council, are obviously not without any antecedents; therefore, further examples also cannot be excluded. However, it shall be added that the referred statement cannot be seen as a precedent in the legal but only in the political sense.

There may be as many arguments *pro*, as *contra* a legislative power of the Security Council. But, is the absence of an expressed prohibition on legislation a convincing argument in itself, or is it essential to provide at least an implied attribution of powers? Inasmuch as the UN Charter is constantly claimed to be a "living instrument",[8] the answer cannot be given properly without examining the legal influence of the subsequent practice of the Security Council and the position of the member States. After all, if the questions on the details can somehow be answered, the general issue may, however, remain: is the legislative power of the Security Council compatible with its proper role, or, more

[6] S/23500, 31 January 1992, Note by the President of the Security Council.

[7] "[...] The absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security. The United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters. [...]" *Ibid.*, perational para. 10.

[8] See also: Dissenting Opinion of Judge Schwebel, International Court of Justice, Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom), Preliminary Objections, Judgment of 27 February 1998, *ICJ Reports*, 1998. 80. [Hereinafter referred to as 'Lockerbie Case']. Professor Thomas M. Franck's opinion on the UN Charter as a "living tree", cited in: Malone, D. M.: The Security Council in the post-cold war era: A study in the creative interpretation of the UN Charter. *New York University Journal of International Law & Politics*, 35 (2003) 487.

broadly, with the constitutional order of the United Nations? Can it transfer itself from an essentially political organ to the position of a law-making body?

I. The Meaning of 'Legislation' for the Purpose of the Study

One shall see that eventually the essence of the problem concerning the contents of a legislative power does lie within the interpretation of the term 'legislation'; however, admitting that this is not simply a semantic question.

On the one hand, the broad interpretation of the notion, proceeding from the specific nature of the international legal system, considers legislation as equal with general law-making processes. From that perspective, the two terms are deemed synonyms, both referring to the adoption and enactment of any new norm or rule of international law. Hence, legislation receives a new, independent meaning in the international plane, only applicable within that system.

On the other hand, the narrow interpretation, through an analogy with domestic legal theory, treats legislation as a unique form of the general law-making processes beside treaty-making and the creation of customary international law. While in the broad interpretation rules enacted through legislative processes become general sources of international law, as those in Article 38 of the Statute of the ICJ, in the narrow interpretation, legislative acts become *sui generis* sources of international law.

For the purposes of the present study, *legislation* shall mean *the adoption of binding resolutions by international organizations with general-abstract subject-matter and addressees (regarding member States; irrespective their consent), setting out legal obligations for a defined or undefined future period of time*. As the necessity or validity of two further elements may be disputed, I do not include the requirements of an expressed authorization in the constituting treaty and a clear-cut determination of procedural rules.

II. A Legislative Power of the Security Council? – *Pros* and *Cons* in a Critical Analysis

In the international literature concerning the legislative powers of the Security Council, there are several opinions and arguments both pro and contra the existence of such powers. Among them there are views e.g. that the Council lacks the expressed power for legislation and there are also opinions for the opposite; others argue that the Council may have at least an implied legislative power, while others bring up the unsuitability of the Council for acting as a

legislature. Moreover, there are also authors arguing that a legislative power of the Council would impair the basic principles of international law.

Most of these views can be originated in the general attitudes regarding the role and functions of the Security Council.

1. Absence of an Expressed Prohibition v. a Need for an Expressed Authorization

The core problem of this section might be tersely formulated in two questions. Firstly, is there a need for an expressed attribution of legislative powers in the Charter as a prerequisite of legitimacy? Secondly, can the terms concerning the Security Council's general or specific powers be interpreted plausibly in a way to include a legislative power? Authors are utterly divided on these questions. On the one hand, there are some, considering a legislative power for the Council almost as self-evident, however, one shall be cautious in this regard; the notion of 'legislation' often has a quite different meaning in their context.[9]

According to the first question, namely the requirement of an expressed attribution of power, one core aspect has been presented by Krzysztof Skubiszewski, by stating that:

> the organization must have an explicit and unequivocal treaty authorisation in order to have the competence to enact law for States by virtue of its resolutions. The power to make law for States cannot be founded on any doctrine of implicit or implied powers.[10]

The main reason behind it must be that–following from the horizontal character of the international community and sovereignty–States may only be bound by general international legal norms if previously they consented to be bound. As pointed out by the PCIJ in the *SS. Lotus* case:

[9] See e.g., P. Hulsroj, P.: The legal function of the Security Council. *Chinese Journal of International Law*, 1 (2002) 59.

[10] Skubiszewski also notes in his study that the adoption of internal law of international organisations may be based on implied powers. Skubiszewski, K.: A new source of the law of nations: resolutions of international organisations. *Recueil d'ètudes de droit international – En hommage à Paul Guggenheim*, Genève, 1968. 510.

> The rules of law binding upon States emanate from their own free will ... Restrictions upon the independence of States cannot therefore be presumed.[11]

Consequently, member States of an organization may only be bound by legislative acts of the organization if they have previously given their consent to be bound, *i.e.* the member States have expressly attributed legislative powers to the organization.

The specific requirement that legislative powers shall be explicitly granted has the primary role as a safeguard against uncontrolled and perhaps too far-fetched powers of an organization in matters seriously penetrating into the sovereignty of its member States.

On the other hand, there may be found voices, arguing that general, or, moreover, also implied powers of an international organization can serve the basis of legislative powers. In my view, basing an organization's legislative powers solely on the argument that it is necessary for the fulfilment of the purposes and functions of the organization would be too far-fetched and lack legal certainty. Therefore, it is inevitable to find expressed provisions in the constituting document of the organization as a legal basis for legislative powers.

At that point, we may turn to the second question, as to whether the expressed powers of the Security Council include the power to legislate. It must be noted in advance that the text of the Charter does not refer explicitly to the terms 'legislation', 'law-making' or 'legal norm' in relation to the powers of the Council. However, this per se does not necessarily exclude to existence of legislative powers.[12] It must also be added that, undoubtedly, the Council has the power to adopt binding measures for the member States. To begin with, there are several opinions–including that of the ICJ[13]–that the Security Council

[11] The Case concerning the SS. Lotus, (France v. Turkey), *Permanent Court of International Justice*, Judgement of 7 Sept. 1927, *PCIJ Ser. A. No. 10.* [Hereafter: Lotus case].

[12] As a contrast, it might be of interest that the Treaty Establishing the European Community in its Article 249 expressly empowers the institutions of the organisation to adopt specific acts which are commonly understood as legal acts. However, this analogy shall be used carefully, because the EC and the UN are of entirely different nature concerning their purpose and functions, and concerning the aim and effect of their acts. The different nature of the two legal systems is also noted in the Opinion 1/91 EEA-I of the ECJ, [1991] ECR I-6079. [„The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals."]

[13] Advisory Opinion on the Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), *ICJ Reports,* 1971. 52.

has the power to adopt binding decisions under its general powers set out in Articles 24 and 25 of the UN Charter. Accepting that the Council possesses general powers to enact binding decisions for the maintenance of international peace and security–without the restrictions in Chapter VII–there cannot be seen any objection to expand the Council's powers in order to cover legislation. However, this rather extensive interpretation would contradict the limitation in Article 2(7) and, more importantly, it might validly be seen too far-fetched and general to form the basis of legislative powers. Beside that, assuming a general power of the Security Council to adopt binding (also legislative) decisions would render the restrictions in Article 39 superfluous. In my opinion, Article 25 cannot be interpreted to include the power of the Council to adopt legislative acts. Nevertheless, the specific powers of the Council under Chapter VII leave open a much broader space for valid interpretation. Concerning the first part of that specific question, namely, whether Article 39 of the UN Charter can be interpreted in a way to include the power of general-abstract determinations, a core argument may be the fact that the powers of the Council at that point have been left open intentionally. Applying Article 39 one may choose between the interpretation stating that determinations shall always be applied concerning one particular situation[14] and the interpretation allowing a wider discretion for the Council.[15]

Following from the proactive or preventive nature of the notion 'threat to the peace' and the lack of any reference suggesting the limitation of such determination (aside the general constraints on the powers of the Council), it cannot be stated validly that the Council would be bound to a particular situation. Consequently, there is a clear and plausible interpretation of Article 39 to include the power to make general determinations if required by the situation.

The second part of that particular question is whether measures to be adopted under Article 41 may also include general-abstract obligations applying equally for all member States. Here, one shall take a side whether those measures are essentially sanctions with one or more explicit target State or they can be generally enforcement measures not necessarily restricted to the form of sanctions but including all non-military measures the Council deems necessary for the maintenance of international peace and security. Neither the non-

[14] For this aspect see Happold, M.: Security Council Resolution 1373 and the Constitution of the United Nations, *Leyden Journal of International Law*, 16 (2003) 599.

[15] For this opinion see e.g., Sossai, M.: UNSC Res. 1373 (2001) and International Law-making: A Transformation in the Nature of the Legal Obligations for the Fight against Terrorism? Florence, 2004. 4–5, <www.esil-sedi.org/english/pdf/Sossai.PDF> (visited on 19 August 2005).

exhaustive list provided in Article 41 nor the context of the Article suggest this kind of limitation, however the terms in the Article 41 are generally interpreted as 'enforcement measures', that is to say, binding, moreover, 'coercive' acts, even against the will of the member States, eventually applying equally to them. In that regard, in my view, the concept of 'coercive measures' may be seen as measures binding upon member States even against their will. In a more strict interpretation, coercive measures shall directly indicate possible counter-measures in cases of non-compliance. It is true, that the two adopted legislative resolutions do not directly indicate such countermeasures. However, it does not necessarily exclude the possibility for the Council to adopt legislative measures which may indicate further sanctions if States fail to comply.

Consequently, it can plausibly be argued that there is not any expressed or implied limitation in the text of the Charter to strictly devoid the Council from the possibility and power to enact legislative measures. Beside that, the relevant provisions of the Charter do allow eventually a 'wide' interpretation of the Council's powers to include the possibility to legislate.[16] At this point, these determinations are nonetheless not conclusive in themselves pro a legislative power of the Council. On the other hand, they do indicate that the text of the Charter may be open for such interpretation and that legislative powers of the Council could eventually find their basis in specific expressed provisions of the Charter.

2. *The Possible Intentions of the Founders–Power by Necessary Implication*

The possible intentions of the founders of an international organization expressed in the travaux préparatoires and the doctrine of implied powers are by now generally accepted and applied not only as subsidiary but also as supplementary means of interpretation of specific powers of the organization.

It has been argued by many authors that it was not in the mind of the founders to create a world government with extremely wide powers, and, more specifically, with the power to legislate.[17] The text of the travaux préparatoires

[16] This view may be discovered in the statements in Dekker, I. F.–Wessel, R.: Governance by international organizations: rethinking the normative force of international decisions. In: Dekker, I. F.–Werner, W. G. (eds.): *Governance and international legal theory*. Leiden, 2004. 227. For this opinion see also Fassbender, B.: The United Nations Charter as constitution of the international community. *Columbia Journal of Transnational Law*, 36 (1998) 574.

[17] On the possible characterizations of the UN see Ross, A.: *Constitution of the United Nations–Analysis of structure and function.* Copenhagen, 1950. 189–200. Wright, Q.: *International law and the United Nations.* Bombay, 1960. 7.

concerning the powers of the Council, albeit comprehensive, cannot be deemed conclusive or supportive at all cases, for instance at the determination of the notions used in Article 39. There was an extensive debate on the specific powers and their extension at the San Francisco conference, however, one line of argument can be seen undoubtedly; the founders had in mind an essentially effective and capable organization with all the necessary powers for the maintenance of international peace and security.

Regarding the specific powers, especially a possible legislative power of the Council, one particularly interesting point shall be mentioned:

> Numerous amendments were proposed .... All of them referred to the powers of the Security Council as compared with, and in relation to, the powers of the General Assembly. The need of determining with greater precision the functions and powers of the Security Council was stressed in many proposed amendments. Some other propositions may be briefly stated as follows:
>
> ...
>
> (d) That the Security Council should not establish or modify principles or rules of law;[18]

This particular proposal–among many others–was defeated during the negotiations in Committee III/1. The refusal of this proposal may, however, still be interpreted at least in two different ways. On the one hand, it may mean that the founders did not find it important to add an explicit provision concerning such limitation, considering it as evidently inherent in the expressed provisions. On the other hand, especially in the context of the proposal, the founders did not want to establish that particular limitation on the powers of the Council. This interpretation may be underpinned by the fact that point (c) in the list of the proposals, stating "[t]hat the powers of the Security Council should be reduced" was also defeated. Consequently, following the principle of 'negatio negationis est licitas', the defeat of a proposed limitation logically implies the acceptance of the positive power, i.e. in this case the power to legislate. Beside that, it cannot be argued plausibly that the text of the travaux préparatoires would in any way imply the restriction of the Council's powers either concerning the determinations in Article 39 or the nature of measures in Article 41. It can rather be seen that all possible specific restrictions on the powers of the Council were removed for the sake of efficiency, leaving only one explicit limitation, namely the obligation to comply with the 'purposes and principles

[18] UNCIO Docs., Vol. XI., 556. [Emphasis added.]

of the United Nations'. Therefore, the text of the preparatory works tends to support the view in favorem a possible legislative power of the Security Council.

Other means of interpretation–with growing importance–may be the application of the doctrine of implied powers. However, some preliminary remarks shall be added concerning the scope and content of implied powers. To begin with, even the exact scope of this power is subject of constant debate. In the view of the supporters of a broader interpretation, as set out in the *Reparation for Injuries* opinion of the ICJ, the standard of review shall be the necessity of the power in relation to the duties of the organization. Nevertheless, this opinion was essentially aimed to describe the nature of the powers of the UN, but may also be applied for the organs of the UN. On the other hand, according to the restrictive interpretation, presented in Judge Hackworth's dissenting opinion to the *Reparation for Injuries* advisory opinion, "implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted".[19] The primary difference between the two interpretations lies within the standard itself, *i.e.* what shall be the exercise of that specific power necessary for. In order to establish a legitimate basis, the possible power of the Council to legislate shall be subject to both tests.

Another important element is that implied powers shall be 'founded on powers attributed to the organization *at its creation*';[20] implied powers cannot be the result of practical development of the organization's competences. Analysing the possible legislative powers of the Council in the light of implied powers, the first question shall be, whether legislative powers are 'necessary' or 'essential' for the Council to fulfil its duties under the Charter. On the one hand, the Council has been vested with extremely wide discretion and powers in order to fulfil its primary responsibility, *i.e.* the maintenance of international peace and security. As seen above, it includes the adoption of binding resolutions, making determinations and applying non-military or military measures if it deems necessary. Therefore, it might be argued that the expressed powers of the Council cover all the necessary means the Council needs to fulfil its tasks. On the other hand, this opinion has been contradicted, for instance, by the emergence and general acceptance concerning the rather implied power of the Council to organize and execute peace-keeping operations.[21] Practically, it

[19] Reparation for Injuries case, dissenting opinion of Judge Hackworth, *ICJ Reports*, 1949. 174, at 198.

[20] Schermers, H. G.–Blokker, N.: *International Institutional Law*. Leiden, 2003. 176.

[21] See e.g., Certain Expenses opinion, *ICJ Reports*, 1962. 151. Khan, R.: *Implied powers of the United Nations*. Delhi, 1970. 41.

always depends on the requirements of a problem the Security Council has to face, whether its expressed powers provide all the necessary and essential means. If a particular issue raises the question for the Council to use means not explicitly provided, it shall have the power to apply other, more efficient and necessary means. When the Council adopted Resolutions 1373 (2001) and 1540 (2004), it did not choose the abstract form incidentally; in the light of the challenges raised by the spread and danger of international terrorism and the proliferation of weapons of mass destruction to non-state actors, its expressed powers did not seem sufficient enough to meet those challenges. In that case, it may plausibly be argued, therefore, that the exercise of legislative powers by the Council were at that time necessary for the fulfilment of its duties. Nevertheless, it shall be added that it is upon the Council to determine its own means, namely what measures it deems 'necessary for the maintenance of international peace and security'; however, also taking into account the limits set by the Charter itself.

An additional question shall be raised at that point concerning the broad and narrow interpretation of the standard, namely the need for express provision as basis of implied powers. *Prima facie* it may be argued that Articles 39 and 41 contain these expressed powers, however, this assumption needs further clarification. The possible legislative powers of the Council shall be deemed necessary to exercise its powers to adopt non-military measures 'to give effect to its decisions' (it deems necessary) to 'maintain or restore international peace and security'. Here, it is uneasy to find further arguments *pro* or *contra*, the choice of aspects largely depends on one's attitude towards the extension of the powers of the Council. Nevertheless, as pointed out above, if the challenges raised by a particular security concern can only be met by adopting general-abstract decisions being the most proper means to 'maintain or restore international peace and security', the Council shall have the power to legislate in order to exercise its powers in Article 41. The reason behind the similarity between the arguments made concerning both the broad and narrow interpretation must lie within the fact that the general purposes and functions of the UN are practically identical with the primary powers of the Security Council. It cannot be deemed too far-fetched to argue for a possible implied power of the Council to legislate, based upon the classic qualifications of the implied powers doctrine. However, I still uphold the view that the general powers or the purposes and principles of the organization do not necessarily provide sufficient legitimacy for the Council's legislative actions. Therefore, in the application of both possible expressed and implied powers, specific provisions (containing specific, relevant powers) are to be shown in order to form a potential legal basis for legislative acts. In that regard, only the strict interpretation of

the doctrine of implied powers may be acceptable *prima facie* as the basis of further examinations.

As it can be seen, the doctrine of implied powers may also be applied in connection with the establishment of legislative powers for the Council; however, this argument shall be used extremely carefully in order to avoid unlikely conclusions and vague legitimacy. I fully agree with those views requiring specific expressed powers as a legal basis for legislative acts, however, space shall be left for the organ concerned to fulfil its duties under those provisions. In that regard, latent powers shall also be taken into account.

3. *The 'Subsequent Practice' of the Security Council and the* Ex Post Facto *Observance by Member States*

The use of subsequent practice as means of interpretation and at the same time as an argument *pro* or *contra* the existence of specific powers has further implications. Its independent application relates to the concept of 'assumed powers'. As the ICJ stated in its *Certain Expenses* opinion:

> when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization.[22]

On the other hand, subsequent practice may also supplement an argument *pro* implied or even inherent powers supporting the legitimisation of certain powers. However, in my opinion, in both cases the value of subsequent practice in that meaning largely depends on the attitude of the member States, namely the *ex post facto* observance or acceptance of the existence of such powers.[23]

However, it shall also be added, that there are certain differences and ambiguities concerning the exact influence and weight of State acceptance. In our case, the subsequent practice of the UN Security Council shall be examined both pro- and retrospectively. On the one hand, it shall be analysed how determinant is the practice of the Council before its legislative acts on the scope of its powers; on the other hand, it shall also be treated, whether and how an emerging practice of the Council may contribute to the legitimization of its powers. The primary conclusion that may be drawn from the practice of

[22] Certain Expenses opinion. *Ibid.* 168.

[23] For this opinion see also Amerasinghe, C. F.: *Principles of the institutional law of international organizations.* 2nd ed., Cambridge, 2005. 49.

the Council, especially in the post-Cold War period is the clear effort to expand its own capabilities and powers. Starting from the often-cited political statement in 1992 by the Heads of State in the Council, the Security Council never disguised its goals to adapt itself to the new challenges, eventually through the re-interpretation of fundamental concepts. This expansion of powers, obviously, may be best seen in the development of the Council's Chapter VII powers.[24]

It shall be noted at this point, that in these cases the Security Council generally attempted to base its motion on expressed provisions and specific powers granted by the UN Charter. Consequently, the Council's practice was and is by and large understood as the interpretation of its specific powers, and, at the same time, the filling in the lacunae in the text of the Charter. In my opinion, it is only the minority of the cases when it may be argued that, through its practice, the Council rather expanded and supplemented its expressed or implied powers. Beside that, it may also be subject of debate, whether and how much the Council's post-Cold War practice was and is an expansion of its powers and not the exploitation of them, originally attributed to it but prevented by the political environment to be used for a long period of time. Therefore, concerning our case, the practice of the Council prior its legislative acts can only be interpreted properly as an evidence for further possibilities and capabilities and cannot be seen as determinative regarding the scope of the Security Council's existing powers. In my view, taking the Council's previous practice as a standard is only plausible in the permissive and not the restrictive meaning. Taking a specific example, the fact that the Security Council referred so far to specific cases concerning the determination of a 'threat to the peace' does not in any way prevent it to refer to general threats in the future, if it is compatible with the text of the Charter and is necessary for the restoration or maintenance of international peace and security.

The second part of the question refers to the legal value and legitimacy of the subsequent legislative practice by the Security Council; the examination of the *ex post facto* observance by the member States bears an essential importance in this regard. However, it shall be determined in advance, which factors generally characterize the legal value of subsequent practice. A description and test may be found in the ICJ's *Namibia* opinion:

> the proceedings of the Security Council *extending over a long period* supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have *consistently and uniformly interpreted the practice* [...]. This procedure

[24] For a proper and comprehensive overview see Malone: *op. cit.*

> followed by the Security Council, which has *continued unchanged* [...], *has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.*[25]

However, this test and its standards shall be applied carefully, because there is a significant difference between the practices the Court referred to and a possible legislative practice. In the latter case, the terms 'long period' and 'continued unchanged' practice shall be interpreted differently, considering that the adoption of legislative acts is not a procedural question but rather a substantive one. In my view, therefore, it shall not be required of all or the majority of the Security Council resolutions to be legislative, especially considering the extensive discretional power of the Council in choosing its own measures. Consequently, in that specific case, already a few examples may contribute to the existence of a practice by the Council; however, a general acceptance in this case would be much more difficult to prove. To see whether a supposed practice by the Council should be considered in itself as the basis of interpreting the Charter in order to include a (legislative) power, or there may be found other arguments underpinning this interpretation, we shall refer to C.F. Amerasinghe, according to whom in the former case a longer period of time, (*i.e.* several cases of legislative activity) and extensive coherency is required for a stable legitimacy.[26]

As pointed out above, the legitimacy of the Security Council's practice and especially of a legislative practice essentially depends on the acceptance and observance by the member States. The attitude of the member States may be best shown from their statements and practical reactions or protests before, during and after the adoption of the resolutions in question. Regarding the first act, namely Security Council Resolution 1373 (2001), neither the procedure prior the adoption of the resolution, nor the adoption procedure itself implies much debate. The resolution was adopted after a quite short discussion, with unanimity within the Council.[27] Another additional element may be the compliance with the provisions of the resolution. As pointed out above, Resolution 1373 (2001) established a so-called Counter-Terrorism Committee in order to coordinate and organize the efforts of the member States under the resolution. The attitude of the member States may be seen from the fact that:

[25] Advisory Opinion on the Legal Consequences... *op. cit. ICJ Reports*, 1971. 22.

[26] Amerasinghe: *op. cit.* 51.

[27] However, some may argue that there have been essentially political and not legal considerations behind this unanimity, triggered by the general sympathy after the 11 September attacks.

> 191 states submitted first round reports called for by the resolution, self-assessments on implementation of Resolution 1373.[28]

On the other hand, the case of Resolution 1540 (2004) shows a somewhat different approach. To begin with, prior the actual adoption there was about a half a year of informal and formal consultations, involving some fifty member States of the UN. As it may be seen from the records of two open meetings, the opinions of the member States concerning a possible legislative function of the Security Council were in many aspects entirely different.[29] There were opinions expressly or at least implicitly recognizing a possible legislative power and function of the Security Council, and views expressly opposing it. However, not all the contributing member States have expressly addressed this question.[30] On one hand, for example, expressly accepting and supporting a legislative function of the Council, the representative of Switzerland stated:

> It is acceptable for the Security Council to assume such a legislative role only in exceptional circumstances and in response to an urgent need.[31]

Others presented a much more neutral point of view, however, still, at least implicitly accepting such a function, for example, the representative of South Africa, by stating that:

> The current draft resolution imposes obligations on United Nations Member States and attempts to legislate on behalf of States by prescribing the nature and type of measures that will have to be implemented by States. ... South Africa believes that the draft resolution could have far-reaching legal and practical implications for Member States,[32]

[28] For an overview on the work of the CTC see Rosand, E.: Security Council resolution 1373, the Counter-Terrorism Committee, and the fight against terrorism, *American Journal of International Law*, 97 (2003) 337.

[29] For the records of the meetings see UN Doc. S/PV. 4950. Record of the Security Council's 4950th meeting, Thursday, 22 April 2004, 9.50 a.m., New York, and UN Doc. S/PV. 4965. Record of the Security Council's 4956th meeting, Wednesday, 28 April 2004, 12.45 p.m., New York.

[30] For an overview see Lavalle, R.: A novel, if awkward exercise in international law-making: Security Council Resolution 1540 (2004). *Netherlands International Law Review*, 51 (2004) 425.

[31] UN Doc. S/PV.4950, Record of the Security Council's 4950th meeting, Thursday, 22 April 2004, 9.50 a.m., *op. cit.* 28.

[32] *Ibid.* 22.

On the other side, there were also several opinions to be found, which could not accept a legislative power for the Security Council. As, for example, the representative of the Islamic Republic of Iran stated:

The United Nations Charter entrusts the Security Council with the huge responsibility to maintain international peace and security, but it does not confer authority on the Council to act as a global legislature imposing obligations on States without their participation in the process. The draft resolution, in its present form, is a clear manifestation of the Council's departure from its Charter-based mandate.[33]

As it can be seen, the adoption of legislative acts by the Security Council was not at all accompanied by unanimous support and acceptance; however, the proportions of the different opinions may have further implications. From the fifty-one States making a statement during the open meetings, some ten made an expressly opposing view against the legislative function of the Council, while other States either did not mention that aspect of the resolution, or accepted generally the urgent need and necessity to adopt the measure in question, or even, supported expressly a limited power of the Council to eventually adopt legislative acts.[34] In my view, this proportion reflects a qualified majority of the views supporting or at least accepting (in the meaning of 'not opposing') such a function by the Council. It must be added that the supporting opinions also contained references that the Council should only apply its powers in exceptional cases when there is an existing and serious threat and there are gaps in the relevant international legal regulations and it is necessary for the maintenance of international peace and security to act immediately. In some arguments, it was also added that preferably the widest majority of the membership is to be involved in the adoption of such measures, in order to ensure its general legitimacy. In the end, this resolution was also adopted by unanimity.

After the debate, one may still argue the value of member State acceptance, which is probably substantial. Therefore, further examples and debates are needed to formulate a general conclusion on the attitude of the member States; so far it may only be observed that the first reactions of the States may be seen as supportive, as long as the legislative practice of the Council remains exceptional.

[33] *Ibid.* 32.

[34] The determination whether an opinion is supporting or opposing, reflects the interpretation of the author of this study.

4. *The Unsuitability of the Security Council–as a Political Organ–to Legislate*

According to Judge Schwebel's dissenting opinion in the *Nicaragua* case:

> The Security Council is a political organ which acts for political reasons. It may take legal considerations into account but, unlike a court, it is not bound to apply them.[35]

In the view of some authors, and even member States of the UN, the essentially political character of the Security Council as an organ makes it legally and constitutionally unsuitable to adopt legislative measures.[36] There are arguments that the Council is generally unbound by law, consequently, it cannot guarantee the rule of law in its legislative function. Beside that, its lack of representativity and the democratic deficit of its decision-making procedure are also brought up against its possible legislative function. However, in my opinion, there are several deficiencies of these arguments. To begin with, the qualification of the Security Council as a political organ is generally understood and mentioned in relation to the International Court of Justice as a judicial organ. Referring back to Judge Schwebel's dissenting opinion, even his determination is based on the comparison of the Council and the Court. Therefore, when arguing that the Council is essentially a political organ, it shall be interpreted in the meaning that the Council is not suited to act as a court, but it does not necessarily excludes its possible capability to act as a legislature. Beside that, as Judge Schwebel pointed out, the Council has the power and the capability to 'take legal considerations into account' which may also mean that in specific cases the Council is capable to comply with the principle of rule of law, which may be interpreted as an evidence *pro* its very wide discretional powers regarding the elements of its decision-making.

The other part of its argument, namely that the Council is unbound by legal considerations in its decision-making, in my opinion, is rather connected with the problem of the lack of judicial review and the wide margin of the Council in making its determinations, but it does not necessarily eliminate its possible legislative power *per se*. Perhaps a more important aspect of the problem is

[35] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. USA), Merits, dissenting opinion of Judge Schwebel, *ICJ Reports*, 1986. 90. [Hereinafter referred to as Nicaragua case.]

[36] See e.g., Happold: *op. cit.*; E.g., Pakistan's view prior the adoption of SC/RES/1540 (2004), *op. cit.*

that, despite its alleged lack of representativity, the Security Council is the primary organ within the UN empowered to adopt binding decisions for the member States. The primary role of the Council is to lead the organization in the field of international peace and security, and to make all the necessary measures for its restoration or maintenance.

Summing up, in my opinion, based on its political nature *per se*, it cannot be stated that the Security Council may not adopt legislative acts; nevertheless, its practice may have constitutional and democratic deficiencies.

5. *Incompatibility with the Basic Principles of International Law*

During the open meetings before the adoption of Security Council Resolution 1540 (2004), the representative of Japan, nevertheless generally accepting a possible legislative function of the Council, made an observation, which actually can be used as a counter-argument or an element of it:

> In adopting a binding Security Council resolution under Chapter VII of the United Nations Charter, the Security Council assumes a lawmaking function. The Security Council should, therefore, be cautious *not to undermine the stability of the international legal framework.*[37]

At the same meeting, the representative of Cuba, generally opposing a legislative power of the Council, stated that:

> Several elements of this initiative *do not correspond to the basic principles* contained in the United Nations Charter and *recognized in international law* that prohibit interference in the internal affairs of States and the use or the threat of the use of force against the territorial integrity or political independence of any State.[38]

Another aspect of the same counter-argument may be found in Matthew Happold's study:

> Once the Security Council starts imposing general and temporally undefined obligations on states, it is *usurping a role that states have reserved for*

[37] UN Doc. S/PV. 4950, 28. *op. cit.*
[38] UN Doc. S/PV. 4950, 30. *op. cit.*

> *themselves*. Moreover, given its composition and procedures, it is doing so in a way that *erodes the principle of sovereign equality*.[39]

Regarding one of the main arguments, namely the prohibition of the interference with the domestic jurisdiction of the states, it can be stated that Article 2(7) of the UN Charter expressly allows the organization and its organs to interfere with the *domain reservé* of its member States, by adopting binding resolutions for them.

The other argument, concerning the violation of the principle of sovereign equality of States, needs further examination. An important element of this principle may be formulated that the source of obligations and rights of States in the international plane shall be based upon their will and consent. Here again, this rule may have general application, however, there are certain exceptions on the level of individual States. To begin with, a State may be bound by *ius cogens* norms of international law by the fact that it became a member of the international community. In general, a State is also bound by customary international law, even against its will, except the very narrow case of 'persistent objection'.

In the specific case of decisions of international organization, this consent is implied within the accession to the constituent treaty of the organization. On the other hand, the fact that the Security Council as an organ with 15 members may adopt binding decisions for the whole organization is generally accepted among the member States as well as among international lawyers as a legitimate restriction of sovereign equality. Consequently, the question is not whether or not the Council may interfere with the domestic jurisdiction of its member States or whether it may adopt binding decisions for the whole membership under the general international law but whether or not the Council may adopt general legislative measures. The answer to this question may be affirmative if the UN Charter (expressly or implicitly) attributes to it legislative powers.

It is true that:

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[40]

[39] Happold: *op. cit.* 1373. 610.

[40] Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, *ICJ Reports,* 73 (1980) 89.

Nevertheless, there must be a governing principle among these obligations; based upon to the *lex specialis derogat legis generalis* principle. If the constituent treaty, namely the UN Charter attributes certain powers to the Organization which are not granted (or regulated) by general international law, the Organization shall have the power as long as it does not violate peremptory norms of international law.[41] However, as proven by the case of other international organizations (especially by the example of the European Community), attributing legislative powers to an international organization *per se* does not in any way violate *ius cogens*.

Conclusions

In the end, the essential question still remains: is the Security Council empowered to adopt legislative measures? The question is not in any way as simple as it seems at a first glance. It is also far more than a semantic question concerning the contents of the notion of 'legislation'; however, a different interpretation of the term may shorten many parts of the discussion. The underlying problem, namely the uncertainty concerning the parameters of a legitimate and generally accepted power, leaves an extremely wide margin of appreciation for the interpreters. The text of the UN Charter may be interpreted in many ways: from the aspect of State sovereignty and also from the aspect of the efficiency of the Organization. In my interpretation, it cannot be concluded that the provisions of the Charter exclude a possible legislative power of the Council. The Security Council has the power to adopt binding resolutions for the member States of the UN. Whether those shall refer to a specific situation or general "threats to the peace" may also form the basis of such acts, may also be disputed.

On the other hand, the Charter and the *travaux preparatoires* do not underpin a restrictive interpretation–this has been proven in the study. It is also of vital importance for a legitimate legislative function of the Council that member States accept and observe it, at least implicitly. Eventually it is the States that shall determine rules of international law–their consent is a prerequisite. This view does not necessarily impair with the existence of a legislative power of the Security Council because the consent of the member States may be found in their acceptance of the UN Charter and their views expressed during the adoption of the legislative acts in question. It is also up to the States to set up the limitations on the legislative powers of the Council. The sign of this

[41] This principle also follows from the law of treaties, as regulated by Article 53 of the 1969 Vienna Convention on the Law of Treaties.

tendency may be seen in their statements referring to existing gaps in international law.

Whether or not a legislative power would be beneficial for the international community, is, however, not a legal question and may only be proved by a longer term of exercised practice. Nevertheless, it cannot be denied that the elaboration or exploitation of a legislative power by the Security Council will definitely change the quality of measures within the maintenance of international peace and security.

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VANDA LAMM*

Japanese–Hungarian Seminar on "Comparative Aspects of Civil Litigation"

Friday, March 10, 2007
Jakobinus Hall, Hungarian Academy of Sciences

The co-operation between the Graduate School of Law of the Nagoya University and the Institute for Legal Studies of the Hungarian Academy of Sciences goes back to 2003. Since that time there was extended research co-operation mostly on experience of the respective transitions to the rule of law, on the one hand, and there were regularly held Japanese–Hungarian seminars either in Nagoya or in Budapest on a variety of timely legal issues, including also constitutionality and justice problems raised by those processes of transition, on the other. These seminars were contributed to and attended by not only Japanese and Hungarian researchers but experts coming from other countries in Asia and Europe as well. The professional interest in these seminars was enhanced so as to transform them into genuine nation-wide workshops in the hosting country.[1] On its turn, the output of the co-operation itself in two considerable volumes of proceedings published so far became similarly an achievement standing for itself.[2]

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[1] Friedery, R.: Transformation, Law Reform and Integration in Central- and Eastern Europe *(Symposium held on 17–18 October 2003 in the Institute for Legal Studies of the Hungarian Academy of Sciences). Acta Iuridica Hungarica*, 45 (2004) 159–169.

[2] Mamoru Sadakata (ed.): *Hungary's Legal Assistance Experiences in the Age of Globalization.* Nagoya, 2006. ii + 312 pp. with seventeen papers from Hungary and Mamoru Sadakata (ed.): *Legal and Political Aspects of the Contemporary World ed. Mamoru Sadakata.* Nagoya, 2007. vii + 240 pp. with seven Japanese and seven Hungarian papers.

In the spring of 2007 the Institute for Legal Studies had the honour to host an international seminar on "Comparative Aspects of Civil Litigation" in Budapest.

The Editors of *Acta Juridica Hungarica* are pleased to present the revised and shortened version of all the seven presentations made at the seminar.

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MASANORI KAWANO*

Arbitration as a Transnational Business Dispute Resolution

I. Introduction

In our globally expanding and closely integrating cross-borderline business activities legal disputes are one of their indispensable costs. They are inevitably of transnational nature, and should be resolved by an internationally fair and reliable system of dispute resolution. For business men they should be a costly performed and economically reasonable dispute resolution system.

Resolution by litigation before state courts has been, generally speaking, one of the traditional and typical resolution systems especially for domestic business disputes. Of course, litigation is always burdensome and requires sometimes severe expenses. But as to transnational business litigation, there are different kinds of difficulties. Generally, being in its nature, it shows some national bias based on the forum jurisdiction. Civil procedures and justice systems in every respective nation accompany some kinds of burden especially to the foreign party: They have to expect many difficulties due to the unfamiliar foreign proceedings and face foreseeable as well as unexpected expenses, which would not be necessary for their domestic litigation.[1] Sometimes they need lawyers for their own and foreign lawyers admitted in the jurisdiction for the advocates of the foreign litigation.

Obstacles of litigation in foreign courts should be avoided, as far as possible, for reasonable business activities. Risks and other potential difficulties with foreign litigation should be calculated in advance and minimized. By well established contractual relationships future disputes could be minimized. For avoiding such difficulties or future uncertainties, reasonable business men

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[1] For reducing such costs or obstacles of transnational civil procedure there are some trials to realize the harmonization of civil procedures in the respective nation. One ambitious experiment is a joint project of ALI and Unidroit, see *ALI/Unidroit, Principles of Transnational Civil Procedure*, Cambridge 2005.

should establish substantially clear and undoubted agreements. However, disputes cannot be avoided only by such substantial agreements. For taking precautions against such legal risks by litigation, they have to provide some schemes for avoiding litigation before state courts to resolve their future potential disputes. One of the well known methods for avoiding future litigation before national, especially foreign, courts has been to choose a dispute resolution by arbitration. Especially in transnational business transactions, arbitration is regarded as a favorite way for resolving disputes. Today, according to German literature, over 80 percent of transnational contracts include arbitration agreements.[2]

II. Successful March of International Arbitration?

The popularity of arbitration in transnational contractual relationships, especially in the Western business world, has been referred to some internationally common elements. Arbitration, particularly the transnational aspect, has been regarded as one of the well established and successful resolution systems. Following points could be pointed out as reasons for such success of international arbitration: One is the successful worldwide acceptance of the New York Convention of 1958 for recognition and enforcement of foreign arbitration awards. Today over 130 nations have ratified this Convention, and it is said that this Convention was one of the most successful multi-national conventions. But its real functions or effectiveness, especially efficiencies by enforcement of a foreign arbitration award, depend on the national system of enforcement, and are not proved. The second point is the UNCITRAL-Model Law of Arbitration of 1985. Many countries[3] have accepted fundamental ideas of the Model Law, and they have changed, totally or partly, their national law according to it. Approximation of national legislations of arbitration law has been realized by amendment or new legislation of national law of arbitration based on this Model Law. But such legislation was only one of the first steps for realizing a feasible system of international arbitration. National law of arbitration regulates mostly certain fundamental treatment of agreements of arbitration, appointment procedure of arbitrators, its procedure before arbitrators, arbitral awards and some procedure before state courts to agree its enforcement and the way to contest against arbitral awards. Law of arbitration is a frame-

[2] See Schwab, K.-H.–Walter, G.: *Schiedsgerichtsbarkeit*. 7. Aufl. München, 2005, 345.

[3] Hungary legislated according to this Model Law, as to historical background and political decision, see Kengyel, M.: Schiedsgerichtsbarkeit in Ungarn. *Zeitschrift für Zivilprozess International* (3) 1998. 378.

work for the actual performance of arbitration. It can be applied, if arbitration will be really performed in the jurisdiction. Functions of national law depend only on the choice, whether business men choose the forum as a place of arbitration. Substantial functions or achievements of arbitration depend on the real choice of the jurisdiction by parties as an arbitral place for potential disputes. The third element is successful activities of well established organizations or institutions for international arbitration. In the field of international arbitration there are a number of well established and well known institutions of international arbitration. Most of them have a long history of tradition and achievements. Arbitration could be performed as a form of ad hoc style, too. But the institutions play a more important role in the transnational business world. Between such institutions there exists competition. Most of them are proud and advertise their own merits. Even so, it is not easy to understand the real meaning of their activities for most normal business men when choosing one of them for their dispute resolution.

III. Some Considerations on Arbitration as a Private Dispute Resolution

1. Arbitration is a private dispute resolution system based mainly on the arbitration agreement between private parties. They can and will choose arbitration as a part of their business activities in advance, already on the occasion of their establishment of contractual relationships. One of the most typical results of an arbitration agreement is, as agreed in most jurisdictions, to avoid litigation before the state court. Some well considered reasons must be decisive for choosing it. In much literature some merits of arbitration have been pointed out. Here I will point out a few aspects.

Confidentiality must be one of the aspects. Disputes open to public between contractual parties must be strange for them and should be avoided.

Further for their business activities such disputes could not be profitable. Special knowledge of arbitrators should be considered. It is common that arbitrators should be chosen especially based on the aspect of the special nature of disputes. In our modern transaction professional and technical knowledge for understanding the real core issues of disputes and adequate ways for resolving their disputes are required. It is necessary for the parties to have information of the ability of candidates of their arbitrators.

2. As a reasonable business activity, cost performance of the dispute resolution is one of the most important issues in the business world. The decision whether the arbitration should be chosen as a device of a future dispute resolution should be considered from the view point of such business aspects. In case of

litigation before a state court, the court procedure should be decided and decisively depends on the forum legal system. Parties can choose the forum, but not the procedure itself. They cannot choose judges for their case. They can be specialized on the legal problems of the forum state, but mostly they do not have the necessary special knowledge on the specific matters of the case. On the contrary, if arbitration will been chosen, parties can choose a specialized person of the specific field as their arbitrator; their procedure can be tailored to the case or other requirements of them. They can choose the place of arbitration by which they can choose the arbitration law applied on the case, too. Language problems cannot be disregarded. They can be calculated not only from purely judicial aspects, but from business aspects, too.

3. For accelerating a more popular use of international arbitration, it is necessary to be informed widely about the real phases of transnational arbitration. Sometimes there can be seen some anxieties on arbitration because of its decisive nature to avoid other possibilities for resolving their disputes and no possibilities of appeal in case of litigation. Especially because of the confidentiality of arbitration real achievements of most international arbitration are not predictable. A lack of such information provides parties who are frequent or experienced users of the institute with a profitable position.

4. Establishing amiable institutes or organizations of arbitration should be the next step for encouraging arbitration in a country. Compared with some leading states, Japan had not been regarded as an encouraging country for arbitration. Japan accepted the German system of Civil Procedure and there were some provisions which were almost complete translations of the German Code. For over 130 years this had not been changed. In 2003 a new Code of Arbitration was promulgated and the next year it was enforced. It accepted generally the UNCITRAL Model Law and it is composed as a uniform law for domestic and international arbitration. Like in Germany, Japanese lawmakers wanted to establish an internationally attractive legal system of arbitration. For that purpose it was necessary as a first step to establish arbitration law with an internationally admissible and feasible system of arbitration. Arbitration is regarded as an important part of ADR which is encouraged in our recent total reform of the Judicial System.

As to Japanese international commercial arbitration, JCAA, the Japan Commercial Arbitration Association, is one of the main institutes. But the case number annually filed with the institute has been averagely 10, and remains at a low level. For a long time, we discussed the reasons of such inactive and unpopular international arbitration. Many aspects had been pointed out. One was attributed to our archaic law of arbitration at that time. It was changed by the new code of arbitration. But there can be observed no sign of improvement

of this situation. It must be based on a more profound reason: The lack or insufficiency of international lawyers with the ability of international arbitrators.

IV. Successful Function of International Arbitration

1. As already mentioned, litigation abroad brings unexpected risks and difficulties. Such risks should be surely endured by most big world business entities. But for normal business entities it could be hard to accept such difficulties. To create a feasible dispute resolution system for them, establishing adequate systems or institutions of arbitration must be one of the urgent tasks to realize in the globally expanding market society.

Establishing an attractive and cost performed system of international commercial arbitration should be profitable and encourage most business entities in our globally expanding business world. To accelerate attractiveness as place of international arbitration and to establish an attractive organization for international arbitration there is international competition as the next step of a harmonized legislation of arbitration law in many countries.

2. Attractiveness of arbitration should be based on and established by mainly a high ability of arbitrators. Differently qualified arbitrators are one of the most important prerequisite for establishing an arbitration organization. Well trained arbitrators with different nationalities and different special knowledge should be organized. For business men who want to use the organization as an institutional arbitration, it is one of the most important elements to find reliable arbitrators.

Arbitration based on the private agreements between parties. Neutralities from state interferences are one of the indispensable aspects of international arbitration. State courts should keep restricted position to the arbitration proceedings. In this respect there are some difficulties to regulate arbitration proceedings as a uniform system of domestic and international arbitration. Especially for international arbitration the restrictive position of state courts or other organizations must be respected. Autonomy of the business world for encouraging and establishing a feasible arbitration scheme and a sufficient number of qualified international lawyers is urgently required. In Japan we are now trying to change our legal system totally and we established a new education system of lawyers. But there is no way for supplying international lawyers. To realize an adequate dispute resolution system in our globally expanding market society arbitration is one of the reasonable ways, but there remain many problems to be resolved.

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MIKLÓS KENGYEL *

Recent Developments in Hungarian Civil Procedure

1. Introduction

The Code of Civil Procedure of 1911 was one of the greatest achievements of Hungarian codification in the 20th century. The value of this statement is not diminished by the fact that our procedure had *German* and *Austrian* roots. Sándor Plósz, the creator of this field of law drew on the German and Austrian codes with a very fortunate and steady hand. The first Code of Civil Procedure of the 20th century was in force from 1915 to 1952, and during this period it had to be modified only once, namely in the early 1930s when the wave of bankruptcies following the economic crisis necessitated the acceleration of civil actions.

The *second model* of our civil procedure in the 20th century, the Code of Civil Procedure of 1952 in its original form intended to imitate the *Soviet-Russian* Code of 1923. For this reason among others, the institution of "people's" assessors and the participation of public prosecutors were introduced, the obligatory representation by lawyers had been eliminated, the first instance procedures were unified, the review appeals were discontinued and a one-level legal remedy system had been developed with the possibility of protest on legal grounds.

The Code of Civil Procedure contained many "socialist" elements: The most important one was the change in the *principle of party control.* The law divided control over the scope and nature of the proceedings between the parties, the court, and the public prosecutor. As a result of this, the conventional right of disposal became illusory in practice because all the procedural acts of the parties felt under the control of the court and the public prosecutor.

Contrary to the principle of party control's socialist transcript, the *principle of adversary hearing had not been implemented in a completely socialist way* in Hungarian civil procedure. The socialist idea on civil procedure, in which it

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is the parties' duty to disclose all relevant facts and the power of the court to take the initiative ex officio in discovering the true facts of the case is mixed up with the spirit of the Code of Plósz. As a result of this, Hungarian civil procedure had been protected even in the 1950s from the application of the principle of judicial investigation.

The Hungarian Code of Civil Procedure of 1952 was characterised by the active role of the judiciary as initiator, which contained the formal conduct of proceedings and made the judge's duty to clarify the facts. As a result of the ex officio automatism characterising each phase of the process, the parties were left little freedom of disposition over the course of the proceedings. The summoning, the service of process, the deadline fixing, and trial dates took place ex officio; the party was allowed to request the extension of the deadline only. The preparation for the trial and the conduct of the trial, the most important element of the conduct of proceedings, also formed part of the tasks of the court.

The four decades of socialist civil procedure cannot be defined as a uniform period: In Hungary at the beginning of the 1970s, the situation was suitable for reducing the dominance of the judge and the public prosecutor. The third amendment to the Code on Civil Procedure (Act XXVI of 1972) restricted the possibility of the initiation of a court action or intervention by public prosecutors. It also took steps to increase the weight and responsibility of the parties in the legal action, for the sake of improving the efficiency of the procedure.

Subsequent modifications of the socialist Code of Civil Procedure could not repeat the success of the third amendment to the Code. Between 1973 and 1979 hardly any provisions of law were made concerning civil procedure. The reasons for the decade's last relevant modification were not procedural but organizational ones.

In the second half of the 1980s, one more unsuccessful attempt at codification was made. The most important goal of this was the further simplification and acceleration of procedures. The concept of 1988 did not want to change relationship between the court and the parties, and it did not plan to renew the content of the socialist principles of disposition and hearing. The last socialist concept silently passed away in the whirl of the political transformation.

2. Renewal of Hungarian Civil Procedure after the Democratic Transformation

The Hungarian Constitutional Court played a determining role in the re-establishment of rule of law. One of the most significant decisions of the Constitutional Court relating to civil procedure was *Dec. 9/1992 (I. 30) AB,*

in which the institution of protest on legal grounds were declared unconstitutional and the rules were annulled. It was laid down as a fact that a protest on legal grounds was contrary to the rule of law, to the institution of legal force, and to the parties' right of control over their disputes.

The first amendment after the democratic transformation had as one of its primary purposes to substitute the protest on legal grounds annulled by the Constitutional Court and rules that were outdated or contrary to international conventions. The first amendment after the democratic transformation–in spite of the preliminary expectations–did not re-establish the remedy at (the?) third instance, which was abolished in 1951. This caused disappointment among the judiciary and in legal literature.

In the mid 1990's, the judicial government took the first steps for a further modification. The direct cause of this act was the considerable protraction of civil actions which already queried the functionality of jurisdiction. The acceleration of the procedure became the most important intention of the legislature. The new modification was aimed to change relations between the court and the parties in some important questions.

One of the greatest achievements of the 1995 reform amendment was the reformulation of the principle of party control. After the collapse of socialism, the principle of party control (which had embodied the ideology of the system) also became meaningless since private property, market economy, and constitutionality all required respect for private autonomy. Five years had to pass after the democratic transformation for the genuine content of the principle of disposition to be re-established on the basis of the decisions of the Constitutional Court and later on the basis of the 1995 modification of the Code of Civil Procedure.

The 1995 amendment, in accordance with *Dec. 1/1994 (I. 7) AB,* has maintained the general entitlement of the prosecutor to commence actions in cases where the entitled parties are unable to protect their rights for any reason. According to the point of view of the Constitutional Court, this restriction on the constitutional right of autonomy is an unavoidable restriction and corresponds Art. 51(3) of the Constitution; according to which, protecting and ensuring the constitutional public order, rights, and legal interests of citizens (and their organizations) is also the task of the public prosecutor's office.

The 1995 amendment set the principle of adversary hearing on a new basis. According to the new rule, the court may order the taking of evidence ex officio only when the law allows it, whereupon the proving of the facts required to decide the action is solely the task of the parties. The modification of art. 164(2) drastically restricted the possibility of ordering evidence officially to the number of cases defined by the Act, by which it wanted to ensure the

absolute effectiveness of the adversary hearing. By this solution, the legislature did not return to the moderate regulation (the principle of mixed adversary hearing) applied by the Code of Civil Procedure of 1911, but to the model applied by liberal civil procedure in the 19th century. Apart from the fact that the pure principle of adversary hearing does not have historical roots in Central Europe, the 1995 amendment also proved to be inconsistent as it maintained the court's obligation to endeavour to find out the truth stated in art. 3(1).

3. The Influence of Hungarian Judicial Reform on the Code of Civil Procedure

The large judicial reform scheduled for the end of the 1990s, made it necessary to modify the Code of Civil Procedure. The most important provisions of Act LXXII of 1997 did not come into force immediately because of the delay in the setting-up of the regional courts of appeals. In spite of this, the 1997 amendment is considered to be significant regulation because, by the introduction of the idea of disputes involving a small amount (less than HUF 200 000), it simplified both appeals and reviews, it restricted the possibility of appeals in administrative proceedings, and re-regulated labour disputes (arts 349–359).

The reform of the judicial organization, which broke down in 1998, was given a fresh start by Act CX of 1999. This amendment practically finished the change of model started at the beginning of the 1990s, re-formulated the principles of civil proceedings, and the purpose of the action. Forty seven years after the Code of Civil Procedure came into force, the legislature gave up the aim of ensuring the decision of civil legal disputes on the basis of truth. At the same time it released the court from the obligation to endeavour to find out the truth in civil actions. The new objective that replaced the just resolution of legal disputes, in harmony with the requirement of a fair trial laid down by Art. 6 of the ECHR, wishes to guarantee the impartial decision of legal disputes. The guarantee of this is the fact that the court has to proceed in accordance with the re-formulated principles of civil procedure.

Among the significant innovations, it should be mentioned that the 1999 amendment fixed numerous deadlines binding on all courts. For example art. 125(1) prescribed that the court has to take steps to fix a date for the hearing not later than within 30 days after the statement of claim is received by the court, and according to art. 125(3) the date of hearing shall be fixed in such a way that it could be held in four months.

4. In search of the 'Lost Truth'

The 1999 amendment to the Code of Civil Procedure produced little reaction in legal literature even though the elimination of the concept of truth from arts. 1 and 3 of the Code was one of the most important modifications since the coming into force of the Code. This step of the legislature was not unexpected, however, since the 1995 amendment restricting the possibility of ordering evidence officially anticipated the change strengthening the role of proof. (The apathy of the judiciary may be explained by the frequent modifications, since the time of the democratic transformation, that did not concern civil procedure only.)

The former judge István Novák was the first one who came to the conclusion that our civil procedure will surely resist to the shock caused by the lack of truth.

Tamás Földesi defended the 'lost truth'. There is a close connection between truth and justice, which can be expressed in a simplified way by the fact that a just judgement can generally be based on true statements, proved facts, or facts at least verified with a high probability. Földesi suggested reinstating provisions concerning truth in the course of further modifications of civil procedure.

As for ourselves, we do not oppose the declarative re-appearance of the concept of truth in civil procedure, and so it is expected by the majority of the judiciary and by the public seeking justice. We share the view of the great Austrian jurist, *Franz Klein* that legal action without truth is a 'rattling mill running with no loads'. However, we consider it more important that a future new Code of Civil Procedure should define the objective of proof more specifically than the present one.

5. 'Dimming' of the Role of the Judge

Another substantial part of the change of model between 1995 und 2000 was the dimming of the role of the Judge.

The 1999 amendment to the Code of Civil Procedure put even more emphasis on the principle of disposition by the re-formulation of the fundamental principles of the Code, by the modification of the existing provisions, and by the establishment of new rules. The modified art. 3(1) lays down the exclusive right of the party interested in the dispute to institute legal proceedings, which right can only be restricted by law. Article 3(2) declares that the court, unless provision is made to the contrary, is bound by the petitions and declarations submitted by the parties, and extends the application of the principle of disposition to the parties' control over the whole proceeding. Thus, the Code

makes it clear now that the parties are the 'masters of the case', they determine the subject-matter of the proceedings and so the procedural scope of action of the court. At the same time, the court is bound to prevent any procedural action of the parties and their representatives which is contrary to the requirement of good faith in the exercise of rights (art. 8). As a consequence, the parties' right to disposition is not unlimited; it may only prevail within the framework of another principle: The exercise of rights in good faith.

Everybody agreed that the judge had to be relieved from unnecessary burdens, so the 'hyperactivity' of the socialist era had to be changed with a different role for judges. The modifications between 1995 and 1999 seemed to find this new role in the contemplative judge. In conformity with this, supplying facts in proceedings became solely the task of the parties and the modification did not allow the ordering of proof officially–contrary e.g. to the 1911 Code of Civil Procedure–not even for practical purposes, because it would restrict the right of the parties to self-determination.

It should be noted that the reduction of judicial power took place in the former socialist countries at a time when: In the common law legal system, the idea of judicial "case management" had evolved, which–by contrast–endeavoured to move judges out of their traditional passive roles (e.g. Civil Justice Act of 1990). This phenomenon may rightly be characterised as the convergence of procedural models from both directions. Development is aimed to balance judicial power and modern cooperation between the parties and the court.

Seeing this procedure, we can observe this third change of the model of our civil procedure within a century with some anxiety. In the mid 1950s, mechanical and uncritical acceptance of Soviet legal institutions replaced the German-Austrian orientation of values. Nowadays we are approaching a–partly-outdated–English-American model of civil procedure. Even besides the fulfilment of duties of legal harmonization, enough ground is left for the Code of Civil Procedure, which should be filled with legal institution based on Hungarian procedural traditions rather than with the development of a newer model of litigation. The judge's role in civil litigation does not have to be re-invented since it was defined precisely by Géza Magyary nearly a century ago: 'It must be up to the parties whether they want legal defence or not but it must not depend on them how the proceedings are conducted or how long they last'.

At the end of my presentation I would like to give a brief summary of the actual state of Hungarian Civil Procedure Law.

There had been no significant amendments since 1999. The attempt to reform the regulation of the review appeal of 2002 has failed. The judicial government issues, each year, new proposals which are regularly refused by the legal practice and literature. The economic crisis that Hungary is facing

now is not favourable for the reform either. Due to lack of funds, the recently adopted law on legal aid cannot be applied yet. The introduction of electronic proceedings are hindered by the insufficient equipment of the courts. We can only hope that after the reform of the Hungarian Civil Code, a new Civil Procedure Code will finally be on agenda.

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Some Special Features of Swedish Civil Procedure

Introduction

The current Swedish Code of Procedure, Rättegångsbalken,[1] was adopted in 1942 and came into force on 1 January 1948, following decades of investigation and preparation.[2] It replaced the corresponding part of the Swedish lawbook of 1734 with main changes inter alia in 1849, 1901 and 1915.

The then new Code was described, at least in Sweden, as being very modern for its time. And it is still in use, 60 years later, by and large with few structural changes.[3] It is applicable for criminal as well as civil procedure.

The court system

The court system in which this Swedish Code of Procedure is generally applied, consists in principle of two types of courts, the ordinary courts and the administrative courts. In addition, there are some special courts as the Patent Court and the Labour Court. There are no special juvenile courts or family courts, no small claims courts, no justices of the peace and no investigative judges. The Code is directly applicable only in the ordinary courts.

The ordinary courts deal with criminal cases and civil cases, family cases included, while the main bulk of the cases in the administrative courts are taxation cases.

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[1] *Svenk författnings-samling*, 1942:740.

[2] For a summary in Swedish regarding the preparatory work, see *Nytt Juridikt Arkiv*, II 1943.

[3] Partial changes and modifications have been made and are made, none significantly relevant, though, to this presentation.

There are three levels of courts in the ordinary as well as the administrative court system.[4] All ordinary court cases start in principle at the first level. Thus, there is no rule that civil cases regarding a huge sum of money nor a criminal case concerning a serious crime should start at the second level.

The courts at the third level, the Supreme Court, Högsta domstolen, and the Supreme Administrative Court, Regeringsrätten, are in principle only to establish precedents. When appealing from the second level, a party first has to get review permission, and review is in principle only permitted, and strictly so, if there is a matter of interesting principle involved and it is likely that the court will come in a position to rule on that principle, this ruling not being likely disturbed by changed testimonies or other matters of fact.

Criminal cases and civil cases concerning family matters are in principle judged by one or more professional judges together with lay judges at the first and second level, but only by professional judges at the third level. Other civil cases are always judged only by professional judges at all three levels of the judicial system.

The procedure

The procedure is strictly adversarial, not investigative. Thus, the case should be presented to the court by the two parties and the court has to judge on what is presented, nothing else. A prosecutor is in principle the plaintiff in a criminal case with the victim as a possible co-plaintiff.

The procedure is described as based on three main principles, three central pillars, „oralness", „immediateness" and „concentration". These principles are interlinked and somewhat overlapping each other. They imply that the case, whether a criminal or a civil one, should be presented orally during one time wise concentrated trial with immediate access for the court to all relevant material, and with the judgment delivered in close connection with the trial.

Previously, prior to 1948, it was allowed and common to present written party and witness statements, on which, inter alia, the court should base its judgement. Now, the judgement should be based on one, concentrated trial– what is then and there orally presented to the court.

[4] Sweden, with an area for instance somewhat 20% smaller than that of France and somewhat 20% larger than that of Japan and with a population of some 9 million inhabitants, has 53 ordinary and 23 administrave first instance courts and six ordinary and four administrative appellate courts.

These principles are moreover closely connected with the evidence rules. The prevailing rule is now the principle of free evaluation of the evidence.[5] There are no binding rules as prior to 1948, when for instance two witnesses in principle equalled full proof and one witness equalled half proof, the other half possibly being filled with circumstantial evidence of various kinds.

There are no exclusionary rules as in the USA. If, for instance, the police has acquired evidence in an unlawful way, then that evidence will not be excluded for that reason. The unlawfulness by the police will be dealt with separately as a matter of police error, not a matter in the proceedings in question.

There are no rules against hearsay as in anglo-sachsian legal tradition. The court should indeed try to get access to a witness in person, but would nevertheless accept hearsay as such, if the hearing of the witness in person is not reasonably possible. Naturally, the court has to take into account the hearsay nature, when assessing the value of such evidence. Likewise, children could per se be heard as a witness, the value of the testimony naturally having to be assessed with due regard to the child's maturity etc. It is another matter, that a child might not be heard out of respect to the best of the child and that a child could not be heard under oath.

The principle of concentration calls for a two-stage system at the first instance level. Due preparation is needed to hold a concentrated trial. Therefore, there is a preparatory phase of the trial and a main hearing phase–in criminal and civil cases alike, however rather different in form, when it comes to the preparatory phase.

In criminal cases, the preparatory phase takes place mainly outside the court under the leadership of the prosecutor together with the police and with possible influence of the defense.

In civil cases on the other hand, the preparation is undertaken in court under the neutral leadership of the responsible judge without the participation of any lay judges. It could be in writing, but normally there is one or more oral hearings. The aim is to clarify all factual and legal issues as well as available and needed evidence, making it possible to have a concentrated oral main hearing, soon followed by a judgement.[6]

This all does not mean that the Swedish system as now described functions altogether well. This goes especially for other civil cases than family cases. They may take a lot of time before a final outcome of the case is achieved, if handled according to the principal rules. Therefore, large commercial firms

[5] Chapt. 35 art. 1.
[6] Chapt. 42 art. 6 sect. 2.

often find it useful to insert into their contracts a provision that a dispute should be dealt with via arbitration and not via the ordinary court system. The primary reason is normally speed but business secrecy and the possibility to choose qualified and experienced judges could also be of importance.

Judicial mediation

The matter of speed to come to a final decision is important also to parties, where an arbitration clause is not applicable. Already the first instance preparation of a case could take a lot of time, and it might then be difficult to find a suitable main hearing time. The court, however, is seldom solely responsible for delays in these regards. The parties themselves and their lawyers might in various ways contribute to slow speed. And the appeal possibilities naturally contributes substantially to a final say in a case taking its time.

Consequently, an alternative way is widely used. The Swedish Code of Procedure envisages the possibility for the court in consultation with the parties to assign an outside mediator, medlare,[7] to try to achieve a friendly settlement in civil cases.[8] Whether successful or not, such a mediator is to be paid by the parties in due course. The possibility to assign such an outside mediator is, however, extremely seldom used. The alternative is instead the first instance judge mediating in his or her own cases.

This approach is most commonly used in Sweden. In fact, according to the Code, the judge is obliged to try to achieve a friendly settlement, if it appears appropriate considering the nature of the case and the situation in general.[9] Consequently, the judge will in most civil cases, at some or more points during the procedure, explore the possibilities to achieve such a friendly settlement. He or she will try to inspire and help the parties to agree. The exercise of his or her impartiality and experience will contribute to the opening or re-opening and fostering of a dialogue between the parties, and the judge will in many cases be successful in his or her efforts. In fact, the Swedish court system would probably collaps, had not quite a number of disputes at the first instance level been settled by the parties under the guidance of a mediating judge. The

[7] Chapt. 42, art. 17, sect. 2.

[8] Here and in the following, the term „civil cases" will only refer to other civil cases than family cases.

[9] Chapt. 42, art. 17, sect. 1.

advantages are substantial, not only to the court and the court system but also to the parties and to society at large.

Various techniques seem to be used by mediating judges, some perhaps less professionally commendable than others.

It seems to occur that the mediation process sometimes more or less come to resemble old-fashioned horse-trading. The judge might for instance start the preparatory phase by suggesting that the parties should simply split 50–50 or might come up with such a suggestion after a while, without a closer assessment of the legal and factual situation at hand. The method might work, either by the parties directly accepting the suggestion or by the suggestion initiating a dialogue leading to an agreement. Criticism against the method is often countered by the argument that no real objections could be made, if the parties do not object and they come to a speedy agreement.

Another method, which might work, is the judge's tipping the parties off at some stage of the proceedings concerning his or her opinion on the outcome of a judgement, giving the parties the possibility to base a settlement on this tip. One might question why a seemingly winning party would agree to a settlement in such a situation. However, a number of reasons are conceivable, not the least the avoiding of an appeal with its delays and its risks for another view on the case by the appellate court. A considerable and obvious risk with this method is the judge not being able to deal further with the case, should the parties not settle the case, based on his or her tip. Another obvious deficiency is the judge, when stating his or her opinion, naturally not being able to consider the case as a whole, witnesses not being heard etc, and the parties thereby not really being on the safe side concerning the actual outcome of a judgement.

A third method, fairly recently introduced in Sweden, allegedly inspired by the way cases are often handled in the USA, calls for the judge to ask a colleague to discuss the settlement possibility with the parties in a somewhat more informal way. This colleague might for instance talk with each party separately and thereby inter alia being able to explore and discuss the real settlement limits of each party without these limits becoming known to the other party. The method obviously calls for great skill on the side of such a mediator in order to keep the trust of both parties and not to be seen as being partial in any regard. A draw-back from a resource point of view is also the engagement of a second judge in the case.

A fourth method combines efforts to prepare the case for a main hearing with efforts to reach a settlement. As stated above, it is the duty of the judge during the preparatory phase to clarify the standpoint of the parties on all legal and factual issues in order for the case to be swiftly and correctly dealt with

during the main hearing.[10] By way of asking clarifying questions, the judge will make the parties aware of the various weaknesses of their respective position, whether regarding for instance the interpretation of a precedent or the evaluation of a witness. The weaknesses will then eventually „stick out as a sore thumb", to quote a most experienced and respected civil case judge of southern Sweden,[11] making each party inclined to seriously consider the advantages of „getting some instead of loosing all", to quote the same judge.

In all mediation, it is naturally useful for the judge to be prepared to highlight the applicable advantages of a settlement and the disadvantages of a continued court case. This is facilitated by the judge being aware of a case not being first and foremost an interesting legal problem but rather a conflict between the parties, typically solved by themselves, and often being better solved by the judge helping the parties to a settlement than by him or her providing a judgement, subject to appeal as well as possible enforcement problems.

It is also facilitated by the understanding that a court case is very often derived from carelessness on the side of each party. Both parties have often been at fault in one way or another. Since a judgement, due to the nature of the legal order, often results in one party winning and the other one loosing, one could reasonable state that, in a general perspective, a settlement is more fair in such situations.

Successful mediation is further facilitated by the judge's accepting the fact that very few, not to say almost no cases cannot be settled by the help of a skillful judge. This is for instance relevant even regarding legally quite clear cases, where a friendly settlement could often be in the interest also of the presumably winning side. This side might inter alia appreciate getting some money immediately as compared to more money much later or even no money at all in the end, the other party at that time being without any assets at all.

Here is not the place to enumerate all possible good arguments for a friendly settlement such as avoiding loss, continued business relations, more profitable time-use etc nor all specific techniques available to the mediating judge to help the parties to a settlement. It might not be out of place, though, to add some concluding remarks.

When mediating, timing is essential, i.e. not to start agreement talks until the situation is „ripe" and the parties have become disposed to consider a settlement. It is further useful, if the conditions of the settlement include that they should be fulfilled before the court dismisses the case, i e that for instance

[10] Chapt. 42 art. 6 sect. 2 (see above).

[11] Chief Judge Anders Arvidsson, Klippan.

an agreed amount of money is actually paid. It is also useful, if the conditions of the settlement are taken down in writing, preferrably in only a couple of clear sentences. And it is finally useful, if a settlement explicitly implies all loose ends between the parties being tied up and nothing left to further dispute. Such a settlement equals a binding contract, which will neither be successfully appealed or otherwise further contested in court nor in need of a confirming court decree.

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The Tendency of the Recent Reforms of the Japanese Code of Civil Procedure

1. Introduction

Twelve years ago the Japanese Code of Civil Procedure was thoroughly reformed. These modifications concerned in particular four sectors, namely the provisions concerning the procedure to organise the points at issue (preparation of the hearing), the gathering of evidence, the restriction of appeal and the small pecuniary claims procedure. Statistics show that these reforms have considerably accelerated proceedings in Japan (in 1994: 10.1 months; in 2003: 8.3 months; in 2004: 8.2 months).[1]

However, difficulties remain. Certain procedures like those on medical practitioners' liability, on cases concerning building disputes or on intellectual property are still very time-consuming. In these procedures especially the investigation of the facts of the case often takes a lot of time. Frequently a first instance procedure is only terminated after three or four years. The reason for this length of time is that the points at issue are normally difficult and complicated and that the judge, lacking of expertise, needs more time than would usually be necessary. The judge has the possibility to call for an expert's opinion by means of a clarifying order to enable him to understand the problems of fact. Nevertheless, this kind of an expert's opinion implies no little charge for the parties. This is why in Japan judges seldom use this option before taking evidence.

After the reform of the Japanese Code of Civil Procedure, the government, pressurised by the economy, has submitted a large reform of the judicial system. These propositions have been realised little by little since. They emphasise in particular the necessity of accelerating the procedures. For this purpose the law

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[1] Sato–Takeshita–Inoue: *Justiz-Reform.* Shihoseido Kaikaku, 2002. 42; Onose–Takechi: *Die reformierte Zivilprozessordnung.* 2003. Kaisei Minjisoshoho, 2003. 2004. 7.

concerning the promotion of procedure was adopted in 2004. According to its provisions, all aforementioned complicated procedures of first instance are to be decided within two years. For this, a reform of certain provisions of the Japanese Code of Civil Procedure was indispensable. Therefore the Japanese Code of Civil Procedure was again reformed also in 2003 and the amendment has come into effect since 1.1.2004. The main points that have been changed concerned the concentration of competence for intellectual property cases, the assistance of experts who are to complete the judge's knowledge when organising the technical points at issue and the introduction of a special instrument concerning the taking of evidence before filing the action. In the following, I would like to briefly present these modifications.

2. Concentration of competence in cases of intellectual property

A suit with respect to patent, utility model, right to utilize circuit arrangement (Integrated Circuits) or copyright on computer programs lies within the exclusive jurisdiction of the Tokyo District Court and the Osaka District Court [§ 6 (1) Japanese Code of Civil Procedure]. The competence of appeal cases is concentrated at the Tokyo High Court [§ 6 (2) JCCP]. This provision has been introduced by the amendment of 2003. Before, these courts had concurrent jurisdiction.

As these proceedings require expert knowledge in the scientific field, qualified judges with large practical experience are needed to allow a correct and speedy procedure.2 The district courts of Tokyo and Osaka are particularly suitable for these cases as many similar cases have been pending at these courts and therefore specialised sections in these courts already exist. Since the amendment of 2003 these sections have adopted the role of a patent court and the average period of investigation has been shortened considerably. Concerning the law of registered designs, trademarks and copyrights on other creations but computer programs these sections have a concurrent jurisdiction (§ 6a JCCP). Little after these specialised sections of the two district courts, in 2005 an independent specialised court for intellectual property has been established as an appeal court at the Tokyo High Court. Thus, a special judicial system for these cases has been developed. All of this shows the high priority which the Japanese government attributes to these affairs. The main reason for this strong interest in a well organised, efficient intellectual property law is the lack of

[2] Sato–Takeshita–Inoue: *op. cit.* 60ff, Onose–Takechi: *op. cit.* 62ff.

raw material in Japan wherefore intellectual property provides an important basis for economic activity in Japan.

3. The institution of an expert

The reform of the system of civil justice was intended to cope with the growth of disputes which demanded expertise. As a part of this reform, the amending law of 2003 had introduced provisions on the assistance of an expert during the procedure into the Japanese Code of Civil Procedure. It was intended to halve the investigation period of disputes with technical difficulties.[3]

As economy and society advance and grow more complicated, the comprehension of the facts of a case becomes more and more demanding and delays the procedure. Expertise is needed in this kind of lawsuits to understand the facts of a case completely. The assistance of an expert of the matter completes the judge's knowledge with further professional competence. Good examples for technically demanding procedures are the disputes on medical practitioners' liability, building disputes or processes concerning intellectual property. However, a common procedure like a sales contract may also raise difficult technical questions and turn into a challenging procedure, e.g. if a defect of a computer's software is concerned. In this kind of lawsuit it is very difficult to properly understand the parties' allegations without profound knowledge of the technical matter. A lengthy investigation period is often the consequence. For example, in disputes on medical practitioners' liability in 2003, the investigation period took an average 30.4 months. Compared to the average investigation period of common civil cases of 8.2 months, the investigation period of these medical practitioners' liability disputes is very long.

Therefore, the Reform Commission of the Japanese Code of Civil Procedure recommended instituting the assistance of an expert to amend the situation. His/her mission was to help the judges understand the allegations and evidence more easily and correctly. The technical procedure would be accelerated by an easier organisation of the points at issue and a better understanding of documents or testimony. The establishment of the technical expert was accompanied by discussions about a possible loss of transparency of the procedure as the parties–not knowing what the expert's suggestion had been–would lose the possibility to file an objection, and therefore also lose the guarantee of their right of a fair hearing. Despite these and further concerns the expert's role was established.

[3] Sato–Takeshita–Inoue: *op. cit.* 41.

If the judge wants to use this new instrument for the investigation of the facts of the case, he/she can summon one or several technical experts by court order to help him/her clarify the contents of the allegations or the documents of the procedure [§ 92a (1) JCCP]. On this, the judge must hear the parties. Moreover, the expert's statement must be made in a written or during the hearing in an oral form [§ 92a (1) JCCP]. Under the same rules, the judge may also apply the institution of the technical expert during the taking of evidence [§ 92a (2) JCCP]. The technical expert may directly ask questions during the hearing of witnesses, of the parties and of other experts. If the parties negotiate a court settlement, the judge can ask for the expert's assistance in order to hear his technical estimation of the matter [§ 92a (3) JCCP]. The parties' consent to this is mandatory. As court settlement is a mutual agreement, based upon the intention of the parties, their intention has to be respected throughout the negotiations for a court settlement. The technical expert's advice may be helpful to determine the subject matter of the court settlement.

The technical expert is nominated as a public servant by the Supreme Court. In order to guarantee an equal standard of the technical experts in the whole country, not every court, but only the Supreme Court is entitled to nominate the technical experts. As the expert plays a very important role for the parties, the provisions on the exclusion of or the objection to a member of the court apply to him/her [§ 92e (1) JCCP]. On demand of both parties, the court must reverse its order which appoints a certain expert (§ 92c JCCP).

4. The usability of investigators' statements

In the courts of Tokyo and Osaka, in-court specialists are employed as a kind of investigators, e.g. patent attorneys for procedures concerning intellectual property (§ 92g JCCP). Unlike the technical experts these are only in-court subsidiary organs. Considering the guarantee of the right of a fair hearing, the JCCP describes clearly their role in procedure. These investigators are only established for cases that concern intellectual property law. If the judge wants to require the presence of such an investigator, he/she does not have to ask for the parties' consent. It is a question of role assignment during the process. The court expects these investigators to provide general knowledge whereas the technical experts are to provide highly specialised skills. The court can decide at its own discretion how to include these persons in the process. It is not difficult to decide whether or not to include an investigator in the process. The court can already ask for his/her participation in the process if this seems of only little value. The investigator may directly ask questions during the hearing of

witnesses, of the parties and of other experts [§ 92g (2) JCCP] or give an opinion [§ 92g (4) JCCP]. He/she may also assist the negotiations for a court settlement because of his/her technical knowledge with further opinions [§ 92g (4) JCCP]. The involvement of the paralegals aims at an accelerated dispute resolution by party agreement. The provisions on the exclusion of or the objection to a member of the court apply also to the investigators, as their function requires impartiality and neutrality as well (§ 92h JCCP).

5. Improvement of the expert's opinion

Prior to the reform the question of the expert's conception was solved according to the provisions on hearing of witnesses, namely those on cross examinations. This frequently caused inconveniences for the experts as the party aggrieved by the expert's opinion often asked the expert inappropriate questions during the contents clarification. This occurred in particular in procedures on medical practitioners' liability. It therefore became difficult to find experts, because many competent experts refused to accept court assignments after their aggravating experiences through impolite questions at cross examinations. To improve this situation, an amendment of the provisions on the questioning of experts was absolutely essential. Since the amendment [§ 215 (2) JCCP] no cross examination is applied for the questioning of experts and judges pose their questions first. This means, it does not follow the provisions on hearing of witnesses anymore, but it is simple questioning (§ 215a JCCP). In this way inappropriate questions are expected to be avoided.

6. The gathering of evidence before lodgement of a complaint

If it is possible to gather evidence before the lodgement of a complaint, the plaintiff can often estimate whether he/she can win the process or not. It is probable that he/she might abstain from filing the claim if he/she believes that he/she will lose the process. This would also be advantageous for the adversary who otherwise would have to supply evidence. Notwithstanding the cases in which the plaintiff refrains from filing the action after the gathering of evidence, it is more probable that both parties will agree to a settlement if they know their chances of winning the process. Should the plaintiff really file the action, the organisation of the points at issue can be concluded early due to the prior gathering of evidence. This would accelerate the process further. Consequently, it is considered best to gather evidence before the lodgement of a complaint in

order to avoid unsuccessful claims and encourage a speedy procedure. However, the gathering of evidence before the lodgement of a complaint implicates certain problems that have to be resolved, such as how to oblige the adversary party to provide information without a claim to be entitled. Which sanction can be imposed if the adversary does not satisfy the request for information? Isn't there a risk of malpractice? Should the adversary who is not legally represented bear the negative consequences if he/she answers too widely or in an unfavourable way for his/her own position? These and many other questions are aroused by the gathering of evidence before the lodgement of a complaint.

The possibilities of malpractice were strongly discussed during the elaboration of the reform. The new provisions on the gathering of evidence before the lodgement of the complaint were formulated to avoid any malpractice. The amending law stipulates an application of the existing legal device of the parties' interrogatories (§ 163 JCCP, a kind of written interrogatories) already before the action is filed, although this usually requires the pendency of the complaint (§ 132a JCCP). The amendment adds a few provisions to avoid an abuse, e.g. a ban on investigation concerning secrets of the adversary's or third person's private life, if answering the question might imply social disadvantages for the adversary or the third person [§ 132a (1) No. 2 JCCP] or a ban on investigation concerning business secrets [§ 132a (1) No. 3 JCCP].

The second important point which has been discussed was of more theoretical nature: It concerns the legal basis for the duty to reply. Before the lodgement of a complaint there is usually no procedural relationship between the parties. Why should one party be authorized to demand information before the action is filed? The Japanese answer to this question is the following: Whoever wants to benefit from this instrument must first announce the future lawsuit in writing. This written announcement must contain the main points of the intended claim and describe the subject matter of the dispute. In this respect, the written announcement replaces the written complaint. Through it the adversary finds out what kind of lawsuit the announcing party plans to file. After the announcement the action must be filed within 4 months. This means that there is a delay of 4 months for the gathering of evidence after the announcement. The legislator seems to consider the announcement as the beginning of some kind of pendency. Further scientific debate will be necessary to decide whether this is true.

Apart from the investigations of the parties, the facts of the case can also be clarified by court orders like a request for transmission or for further investigation. Possible transmission objects are as follows: medical record of an injured, inspection transcript of a traffic accident, documents on securities or commodities transactions, etc; the results of these measures can be exploited as

documentary evidence. The examination of the actual condition by a bailiff can also be ordered; its results can be exploited [§ 132c (1) No. 1, 2, 4. JCCP]. The adversary is committed to give the requested information. However, having answered the request, he/she on his/her part can claim an investigation of the relevant fact.

Both parties are obliged to give information, but there is no penalty if they don't. The court can consider the parties behaviour as an indication while establishing the facts and appreciate a refusal as a negative aspect.

During the preparation of the reform, it was discussed whether mandatory representation was necessary for the application of these instruments considering the danger of malpractice or injustices. However, as legal representation is never obligatory in Japan, the reformers hesitated to introduce mandatory representation only for this stage of trial.

The expenses of this investigation period are not considered as costs of litigation.

7. Procedural plan

Every procedure has to follow a regular schedule (§ 147a JCCP). This bears in mind a clear perspective as to the time-schedule of the procedure which is of interest to the parties and the fact that all first instance procedures should be ended within two years. The court must even establish a formal procedural time-schedule if the dispute is very complicated and contains many points at issue (§ 147b JCCP), like a multi-party-litigation, underwriting business litigation and litigation on the claim on the allowability of the shortening of the compulsory portion etc.[4] Due to the complicated circumstances of the case, the investigation in this kind of dispute often takes longer than in other disputes. The court establishes this procedural time-schedule on its own responsibility, but it must negotiate with the parties.

The procedural schedule sets a deadline for the organisation of written arguments, for the completion of the taking of evidence, i.e. testimonial evidence, for the last hearing and for the rendering of the judgment. However, the concrete date and time are not yet set. The presiding judge of the panel may set a timetable for submissions regarding the parties' methods for prosecuting their claims and defences regarding specified matters (§ 156a JCCP). If a party does not comply with the procedural time-schedule, late submissions will be

[4] For more detailed examples see the report of the Tokyo district court, 500 days after the reform of the JCCP (4), Hanreijiho No. 1914. 4.

precluded (§ 157a JCCP). Considering the record as it stands, the conduct of the case by the parties and the further circumstances, the court may change the schedule if deemed necessary [§ 147c (4) JCCP]. The schedule for the investigation should be set depending on the concrete dispute. This might lead to a work overload for the lawyers, but one should not spare these efforts on behalf of the parties. The main ambition of the Japanese courts is to carry out a better investigation.[5]

8. Some effects of the reform

In the reformed parts mentioned above technical experts often have to be consulted especially in building disputes, disputes on medical practitioner's liability, disputes on intellectual property and general civil law suits.[6] As the provisions on expert evidence have been amended, expert opinions can now be obtained more frequently.[7] The procedural schedule leaves room for improvement. The cooperation of the parties is necessary when the court establishes the investigation schedule. The details of the cooperation between the parties and the court are still to be considered and elaborated with care. Regrettably the gathering of evidence before the lodgement of a complaint has not been used very often. It seems that the use of this institution is not yet common. The differences between this institution and the preservation of evidence are not sufficiently known either.[8] It will take some more time to make this institution known and to make use of it.

According to latest statistics, the following average duration of investigation could be observed:[9] disputes on medical practitioner's liability 27.1 months, building disputes (compensation) 25.6 months, disputes on intellectual property 14.0 months. The promotion of procedure is still required for some disputes.

9. Final remarks

The main target of the latest reforms is the acceleration of procedure. At the same time, these reforms intend also to guarantee and promote just decisions. Especially for the intellectual property law both have been claimed by the

[5] Report of the Tokyo district court (4), Hanreijiho No. 1914. 9.
[6] Report of the Tokyo district court (2), Hanreijiho No. 1911. 5.
[7] Report of the Tokyo district court (4), Hanreijiho No. 1914. 13.
[8] Report of the Tokyo district court (4), Hanreijiho No. 1914. 13.
[9] Supreme Court, Report on the confirmation of the promotion of procedure, 2005. 33.

economy for a long time. The new provisions are also a result of the Japanese economic policy. Time will tell whether these new provisions are effective and whether other states will accept the Japanese decisions and have confidence in the Japanese judicial system. In the end, it is the main function of the whole judicial system to serve economy and society. We believe therefore that the Japanese court system may not only be of interest for Japanese citizens, but also for foreigners.

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Setting Aside Hungarian Arbitral Awards Without Time Limit?

I. Introductory remarks

The Hungarian Code on Arbitration, regulating both national and international arbitration, Act Nr. LXXI of 1997 (hereinafter: HAA), is in the overwhelming majority of its provisions in conformity with the world's mainstream legislation on arbitration by implementing the Model Law on Arbitration created by UNICITRAL in 1985.

There is only a small, however very important couple of rules, in which the Hungarian lawmaker deviated from the Model Law.[1] This article deals with one of these rules, which happens to be of outstanding significance for the legal practice and in a broader sense for the Hungarian arbitration community and Hungary as place of arbitration: the time limit for instituting setting aside procedures set forth in sec. 55 (1) HAA. The provision in question reads as follows:

(1) The party, furthermore any person who is affected by the award, may file for action–within sixty days of the date of delivery of the award of the arbitration tribunal–at the court of law to have the award set aside if:

a) the party having concluded the arbitration agreement was lacking legal capacity or competence;

b) the arbitration agreement is not considered valid under the law to which the parties have subjected it, or in the absence of such indication, under Hungarian law;

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[1] For an exhaustive list of differences between HAA and Model Law see Varga, I. in: Liebscher, C.–Fremuth-Wolf, A. (eds.): *Commercial Arbitration in Central and Eastern Europe*. New York, 2006. 10 et seq.

c) the party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was unable to present his case due to other reasons;

d) the award was made in a legal dispute to which the clause for submission to arbitration did not apply or that was not covered by the provisions of the arbitration agreement; if the award contains decisions on matters beyond the scope of the arbitration agreement where the decisions on matters submitted to arbitration can be separated from those to which the clause for submission to arbitration did not apply, only that part of the award which contains decisions not submitted to arbitration may be set aside;

e) the composition of the arbitration tribunal or the arbitration procedure did not comply with the agreement of the parties, unless such agreement was in conflict with any provision of this Act from which the parties cannot derogate, or failing such agreement, was not in accordance with this Act.

(2) An action for setting aside the arbitral award may also be filed alleging that:

a) the subject-matter of the dispute is not capable of settlement by arbitration under Hungarian law; or

b) the award is in conflict with the rules of Hungarian public policy.

(3) Failing to keep the time limit specified in Subsection (1) entails the forfeiture of right. In the case of a supplementary award the time limit shall be reckoned from the delivery thereof.

Subsections (1) and (2) reflect therein the traditional distinction between the two groups of grounds for cancellation/setting aside of an award: absolute and relative ones. Although this distinction is not correctly reflected by the pertinent part of the HAA [sec. 55 (1)–(2).] This negligence of the Hungarian legislator can be traced back to the fact that the relevant HAA-provisions have been designed on the basis of an unsatisfactory Hungarian translation of Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (hereinafter referred to as the "New York Convention"), specifying the grounds for refusal of recognition and enforcement.[2] The legislator most probably used such a Hungarian translation

[2] See the ministerial explanatory note to Sections 54–57 of Arbitration Act:

"Az érvénytelenítésre lehetőséget adó okok megegyeznek a külföldi választottbírósági határozatok elismerésére és végrehajtására vonatkozó, 1958-ban megalkotott New York-i Egyezményben az elismerés és végrehajtás megtagadását lehetővé tevő okokkal. (Az Egyezménynek Magyarország is tagja.)"

„The grounds for setting aside are in accordance with the grounds for refusal of the recognition and enforcement stipulated in the Convention on the Recognition and

of the New York Convention, which–as opposed to the original English version–does not correctly express the distinction between the both sets of grounds for refusal.[3]

In theory, one of the differences between absolute (or rather objective) and relative (or rather subjective) grounds for cancellation of an award and for refusal of recognition and enforcement is whether the court the suit for cancellation has been filed with and accordingly the authority (in Hungary the court) competent to recognize the award shall take account of it ex officio or solely at the request of the plaintiff or of the judgment debtor. This distinction can be clearly read out of the New York Convention and also from various foreign laws regulating arbitration. Most importantly, German law, as the traditionally most influential foreign example for the Hungarian lawmaker, and specifically sec. 1059 of the German Code of Civil Procedure (Zivilprozessordnung, hereinafter referred to as the "ZPO") leaves no doubt that the relative grounds are only to be examined if the party substantiates and argues them, whereas both absolute grounds (lack of arbitrability of the subject matter and infringement of ordre public) have to be considered by the court even if no such party application has been made.

It is a well-known tradition in regulating commercial arbitration shared by all major legal systems that there is no ordinary remedy against an arbitral award. Once an arbitral tribunal has decided on the merits of the case brought to it, the award containing the meritorious decision becomes final and binding

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Enforcement of Foreign Arbitral Awards, done in New York, in 1958. (Hungary is also a member of the Convention.)"

[3] The Hungarian translation reads as follows:

55. § (1) A fél, továbbá az, akire az ítélet rendelkezést tartalmaz, a választottbíróság ítéletének részére történt kézbesítésétől számított hatvan napon belül keresettel az ítélet érvénytelenítését *kérheti* a bíróságtól, ha [...]

(2) A választottbírósági ítélet érvénytelenítése arra hivatkozással is *kérhető*, hogy [...]

The same in English:

55. § (1) The party, furthermore any person who is affected by the award, may file for action – within sixty days of the date of delivery of the award of the arbitration tribunal – at the court of law to have the award overturned if [...]

(2) An action for overturning the arbitration award *may also be filed* alleging that [...]

On the contrary the original version of UN Convention:

Article V

Recognition and enforcement of the award may be refused, *at the request of the party* against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that [...]

Recognition and enforcement of an arbitral award may also be refused *if the competent authority* in the country where recognition and enforcement is sought *finds* that [...].

against which only an extraordinary remedy with strict and exceptional requirements can be brought, i.e. a setting aside claim.

As opposed to award enforcement, setting aside claims can be instituted exclusively in the respective jurisdiction which served as place of arbitration. The respective national courts seized with setting aside claims apply naturally their procedural *lex fori* with respect to all aspects of the setting aside proceedings, i.e., among the others, to qualification and length of the time limit for instituting the procedure. Therefore, peculiarities, inconsequences or even uncertainty regarding the details of the regulation of the possibility and contents of setting aside can and, as it will be shown, do lead to serious problems, like in Hungarian practice. For instance, it needs no sophisticated explanation that once a jurisdiction seems to open the door for time-limitless setting aside actions, then this circumstance will certainly to a considerable extent discourage the actors of cross border commerce to designate that jurisdiction as place of arbitration.

Oddly enough, the named example poses an actual question in contemporary Hungarian civil procedural and arbitration law as show a series of setting aside proceedings which the author of this contribution had the chance to assist as party representative. In these unpublished decisions Hungarian courts repeatedly confirmed their view that the two so-called objective setting aside grounds, i.e. the lack of arbitrability and the violation of *ordre public (sec. 55(2) HAA)*, could be relied on as causes of action even after the lapse of the 60 days time limit stipulated by sec. 55(1) HAA.

Before showing that such an interpretation of the law is not only wholly mistaken but also outstandingly dangerous, it seems to be of some use to highlight the main types, attributes and consequences of time limits existing in Hungarian law.

II. Different kinds of time limits in Hungarian law

There are three aspects which serve as basics for the distinction of time limits in Hungarian law.

(1) A distinction is drawn between time limits of substantive nature (hereinafter: substantive time limits) and time limits of procedural nature (hereinafter: procedural time limits);

(2) Another differentiating feature relates to the consequences of failing to meet a time limit. Here one can distinguish between "forfeiture time limits" and the "lapsing or statute of limitations-like time limits";

(3) Finally a distinction can be drawn with a view to the criterion as to from when the time limit begins to run. In this respect a time limit is either an "objective" or a "subjective" one.

These distinctions are not only of theoretical nature. Their practical significance flows from the fact that each of them has different legal effects and attributes regulated in Hungarian civil substantive and/or procedural law.

Ad (1) Regarding the distinction between substantive and procedural time limits it is at the outset important to bear in mind that the difference between both types has nothing to do with the type of source of law that establishes them. A time limit established in a civil procedural law source, e.g. in the Code on Civil Procedure can evenly be a substantive time limit and vice versa, a time limit established by substantive law can be interpreted as a procedural time limit. In other words, the main differentiating factor is not the form, but the function.[4]

Substantive time limits govern basically still undisturbed legal relationships, i.e such legal affairs which have not yet reached the phase of an institutionalized law enforcement procedure, while procedural time limits govern the course of such procedures.

Since the institution of an action, i.e. typically the filing of a complaint with the competent court stands on the threshold leading from the named first phase to the second and at the same time linking both, it is a crucial question whether the time limit for starting a court action is of substantive or of procedural nature.

In Hungarian civil law there is no specific time limit established for institution of an action. A general provision is that statute-barred claims cannot be enforced in a judicial way. Nevertheless, there are some specific fields of law where a time limit for filing a claim is specially stipulated. One of these special time limits is the subject matter of this essay, namely the time limit for instituting a claim for setting aside of an arbitral award.

The time limit for filing a claim is[5] necessarily a substantive time limit, since the statement of claim is not inherent but an instrument for initiating a civil procedure in order to enforce a right. By the time the claim is filed, the dispute may have already arisen between the parties, the judicial procedure

[4] Cf. the Civil Law Directive Decision of the Hungarian Supreme Court No. 3/2004 and further for a recent very comprehensive overview *Kisfaludi*, A.: *Társasági jog* [Company Law]. Budapest, 2007. 226 et seq.

[5] The exeptions are discussed infra in connection with procedural deadlines.

starts, however, only with submission of the claim. From this it follows that, as it is explicitly stipulated in the Civil Law Directive Decision of the Hungarian Supreme Court No. 3/2004, the rule set forth in sec. 105(4) of the Act III of 1952 on the Code on Civil Procedure (hereinafter: CCP) is not applicable to the time limit for filing a claim, since it applies only to procedural time limits, which require the judicial procedure to have been instituted.[6]

The fact that not the above-cited provision of CCP but the ones stipulated in substantive law[7] are applicable to the time limit for filing an action causes that the instrument for enforcing a right of substantive nature shall arrive at the addressee, in the case of a statement of claim at the court, on the last day of the time limit at the latest (in fact, prior to close of office-hours of the court's registrar).

If the plaintiff fails to keep the substantive time limit for filing the claim, the court dismisses the claim according to sec. 130 (1) (h) CCP without deciding on the merits of the case.

Procedural time limits on the other hand exist logically only within the procedure, that is, once the procedure has been initiated. A procedural time limit means a period of time in the framework of the proceedings, which is set by law or by the court and within which an act shall, or may be performed. Failing to meet a procedural time limit causes that the act bound to the time limit cannot be carried out anymore with the proper legal effect.

The above cited eased requirement for the compliance with time limits set forth in sec. 105 CCP (registered mail on the last day sufficient) applies accordingly only for these procedural time limits.

Notwithstanding the basic principle that the time limit for filing a claim is of substantive nature, there are two exceptions.

In one of these exceptional cases, the procedural nature of the time limit for filing the claim can be justified by the specific characteristic that the claim initiates the civil proceedure, which is, however, only the second or third phase of the whole legal procedure itself. This special civil procedure is the judicial review of an administrative decision where the judicial procedure is in fact a kind of extraordinary remedy.

In the other exceptional case, namely in labor suits, the protection and preference of the employee as the weaker party of the employment relationship

[6] *"Consequences of failing to meet the time limit cannot be applied if the submission addressed to the court has been posted by registered mail on the last day of the time limit at the latest."*

[7] Law-Decree Nr. 11 of 1960 on the Entry into Force and Implementation of Civil Code, sec. 3 (1)–(3).

could be a possible reason for the deviating regulation. In these two types of civil procedure the exceptional procedural character of the claim time limit can be thus regarded as justified.

In case of the claim for setting aside an arbitral award, it is obvious that the time limit for filing the claim can only be of substantive nature, since the judicial procedure meaning the procedure of the state court, only begins with the submission of the claim. The time limit is furthermore declared by the HAA to be a forfeiture time limit, which is also an indication for its substantive nature. The consequences of this classification are the following: the statement of claim for setting aside an arbitral award has to arrive at the court on the last day of the time limit (till the close of office-hours), i.e. at the latest on the 60th day after the plaintiff of the setting aside suit received the award.

Ad (2) The distinction between forfeiture time limits and statute of limitations-like time limits only has meaning in the context of substantive time limits. Once a forfeiture time limit has been missed, not only the claim, that is, the possibility of enforcement of the right in judicial way, but also the right itself ceases to exist. For the reason that the above legal consequence is very rigid, the consistent case law follows the manner of interpretation that a time limit is deemed to be a forfeiture time limit only if this character is explicitly set out by the legislator. In case a statute of limitations-like time limit has been missed, it does not result in losing the right itself, in fact: it does not necessarily mean an obstacle for the trial, that is, for the decision on the merits of the claim, either. The circumstance that the claim is statute-barred has to be as a rule explicitly referred to by the counterparty. The lapse of a statute of limitations-like time limit only terminates the claim, i.e. the opportunity of enforcement of the right in a judicial way, but does not affect the existence of the right itself. In addition, if a time limit is not a forfeiture time limit, it is allowed to verify the failure.

Considering that the time limit for filing a setting aside claim qualifies as a substantive time limit, the categories in question can be applied. Sec. 55 (1)–(3) HAA establishes a 60 days time limit for filing the action, and declares it explicitly to be a forfeiture time limit. Consequently, the statement of claim shall be filed with the court till the close of office-hours of the court's registrar; otherwise the possibility to have the arbitral award set aside in a judicial way ceases to exist.

Ad (3) The last aspect of classification is the question whether the time limit begins to run when the legally relevant event occurs or when the party

concerned takes notice of it. In the first case the time limit is a so-called "objective" time limit, while the latter type is referred to in the case law as "subjective" time limit. In the case of an objective time limit, the time of taking notice of the legally relevant event, e.g. the failure to perform a procedural act or an obligation stipulated by substantive law, remains out of consideration.

The time limit for filing the claim for setting aside set forth in sec. 55(1) HAA is an objective time limit, since the time limit begins to run when the arbitral award is in fact or presumably[8] delivered to the party. The time of taking actual notice has no relevance.

III. The time limit for setting aside claims

As it has been mentioned in the introductory remarks of this essay, Hungarian court practice has led to some uncertainty in connection with the nature and duration of the time limit open for filing the complaint in setting aside actions. It seems that the courts tend to establish a kind of deadline dualism by differentiating as to whether the action is based on one of the subjective setting aside grounds or on one of the objective ones.

For this reason–and for the sake of simplicity the main question of this contribution can be formulated as follows: Does the HAA determine only one uniform time limit applicable for instituting setting aside claims based on any of the grounds listed in sec. 55(1)–(2), or–and this seems to be the prevailing interpretation–are there two different time limits, i.e. one explicitly set forth for the relative grounds (60 days), the other implicitly for the absolute grounds ("infinite")?

The legislator makes a distinction between the two groups of setting aside grounds, which, as a consequence of the codification technique used, takes shape in two different subsections. Unfortunately the pertinent 60 days time limit has been codified in the first subsection containing also the relative/subjective grounds, whereas the second separate subsection has been dedicated to the absolute/objective grounds. This shaping of the rule leaves admittedly some room for such interpretation that the 60 days time limit would apply only for the relative grounds with which it shares the subsection. On the other hand, subsection (2) can also be interpreted–at least for the purposes of the time limit–as a mere continuation of subsection (1).

The right interpretation of the named provision is the latter one. Each of the two groups of grounds is homogenous respectively in the sense, that the

[8] Cf. sec. 99 CCP for the delivery presumption.

relative grounds are destined for safeguarding the interests of the parties (and those who are affected by the award), especially the losing ones, who can plead these grounds in a short period of time in order to have the arbitral award set aside. Since these grounds are granted by the state in order to safeguard the basic interests of the parties, or at least those which are deemed to be basic by the legislator, their common feature is that they are exclusively open to be pleaded by the interested party.

The reasoning behind the relative grounds is that through them the interests of the parties are intended to be protected. This momentum can be also interpreted as a kind of paternalism over the arbitration, by not letting the dispute settlement (and its procedure) completely getting out of state control. After a certain period of time it can be deemed, that causes for pleading these grounds have not occurred, otherwise they would have been risen by the party, thus the legislator rules these to be forfeited and allows no verification as exoneration for running out of this time limit, nor lets these grounds possible to be pleaded in a later exequatur.

As an opposition to these–and this specialty of the absolute grounds is usually shown by the arbitration codes–the other group of grounds are not intended to safeguard the interests of the parties firstly, rather to protect the public order and public interests in a broader sense. International practice clearly shows, that the challenge of an arbitral award is only possible through a setting aside claim, in which the claimant is to cite the ground on which he relies as setting aside basis. But once the claim has been filed, the court is free, moreover it is his legal duty, to examine criteria set out in the two objective grounds also, i.e. whether the public order or the objective inarbitrability are infringed. Nevertheless the issue that these are to be examined by the court *ex officio*, once the claim has been filed, shapes a completely different question, and does not mean at all that these ground i.e. the absolute grounds would be free to be pleaded in a setting aside claim limitlessly.

By taking a closer look at the ministerial explanatory note to sections 54–57 of the HAA one can find an explicit reference to this time limit.[9] By reading the note carefully it becomes obvious that the text says nothing about the grounds, but without slightest touch on differentiation between the groups of grounds it explicitly speaks about *the* claim: "For instituting such a claim a time limit of 60 days is open...". Thus in my opinion the explanatory note

[9] For instituting such a claim a time limit of 60 days is open, which may be a short period of time, but in the frames of arbitration the disputes should be solved quickly, and the suspension of persistent uncertain situtations are to be avoided. Hence the time limit is forfeiting.

clearly shows that after the 60 days elapse, there is no opportunity (since the legislator does not want so, instead orders forfeiture as consequence of running out from the time limit) for any setting aside claim to be filed anymore, based on whichever ground. This note explicitly confirms the opinion that there is no difference among the grounds with regard to the time limit for instituting the claim, citing whichever ground.

All this means that although the grounds are different from the viewpoint of their main aim, the different safeguarded interests, their ability to be taken into account by the court *ex officio* or only on the basis of citation by the party, and the possibility of serving as a pleading in a later exequatur, there is at least one point where they are all to be treated equally: the time limit open for filing the setting aside claim enforcing them.

IV. Comparative law aspects

Finally, the overwhelming majority of procedural legal systems playing substantial role in international commercial arbitration and with a Model Law-based legislation can be cited in favor of our above outlined view.

The time-limit is exactly the same for relative and absolute grounds without any further differentiation in Germany,[10] which is of major importance due to the traditionally strong influence of German procedural law on Hungarian legislation and practice. In addition to the German example, an overview of a series of foreign legal systems having substantial weight in the international commercial arbitration community provide for a same solution, i.e. the time-limit is exactly the same for the relative and for the absolute grounds. Here only some examples of major importance shall be listed. The jurisdictions listed all play a significant role in international arbitration and their regulations provide like the German one for a uniform time limit: the Netherlands,[11] in Spain,[12] in the United Kingdom,[13] in Italy,[14] in France,[15] in Austria,[16] in Sweden[17] or in the USA.[18]

[10] § 1059 Zivilprozessordnung, establishing a general 3 months time limit.
[11] Art. 1065(7) of the Dutch Code of Civil Procedure.
[12] Art. 41(4) of the Spanish Arbitration Act.
[13] Sec. 70(3) of the English Arbitration Act.
[14] Art. 828 Codice di procedura civile.
[15] Art. 1486 Nouveau Code de procédure civile.
[16] Art. 611(4) Österreichische Zivilprozessordnung.
[17] Sec. 34 of the Swedish Arbitration Act.
[18] Sec. 12 of the Federal Arbitration Act and in conformity with it the state laws.

All of the listed countries can be regarded like the Hungarian HAA as UNCITRAL-harmonized systems. This constitutes in my view additional and satisfactory evidence that the Hungarian courts' interpretation of the time-limit is clearly mistaken. The right interpretation of the–admittedly uncertain and misleading–wording of the HAA in sec. 55(1) must thus be that the time-limit for the filing of the action does not differ along with the different grounds for setting aside.

There are on the other hand only a few jurisdictions where a problem comparable to that in Hungary seems to exist, i.e. where the legislator establishes different time limits for setting aside claims arising out of different challenges. So in Ireland, by the Arbitration (International Commercial) Act of 1998[19] the Model Law has been adopted. The Act explicitly rules that time limit specified in Art. 34(3) of Model Law shall not be applicable to setting aside claim on the ground of ordre public.

Apparently there is therefore no specific time limit for this kind of challenge in contemporary Irish law. It has to be noted that this legislation is harshly criticized in Ireland and furthermore it is planned to be replaced by a specific regulation establishing a time limit in the near future.[20] The weakness of this construction is shown by the fact that it is not reasoned in the explanatory memorandum of the Act at all, but the memorandum only repeats the texts of the act. Recently there is a new Bill drafted in which the time limit open for ordre public ground claim is planned to be fixed.[21]

The reasoning behind the interpretation (which follows from the explanatory note, the wording of the HAA, the formal logic and the international practice also) of the subject matter this way, that every different interpretation leads to a legal nonsense, namely, a remedy infringing legal certainty. Duly examining the–in our opinion–false interpretation, it clearly follows that only the first interpretation of Section 55 could and can be the real motion of the legislator.

As it is stated also in the *supra* quoted explanatory note, and also as it is well-known, one of the main advantages of arbitration is its quickness and the fact that arbitration is able to give a definite, professional answer to legal disputes, which is of course very important especially in case of business

[19] See full text at site http://www. irishstatutebook.ie/1998/en/act/pub/0014/.

[20] Cf. e.g. Leila *Anglade*–Challenge, recognition and enforcement of irish and international arbitral awards under the Irish 1997 Arbitration (International Commercial) Bill.

[21] See http://www.justice.ie/ga/JELR/Arbitraton%20Memo.PDF/Files/Arbitration%20Memo.PDF

issues. The main reason of ruling on a relative short period open for filing a setting aside claim is the requirements of promptness and avoidance of persistent uncertainties concerning the relationship or rights and duties of the parties and the future enforceability of the award.

Establishment of a timely limitless possibility for the setting aside procedure, which is the only way for challenging an arbitral award, would straightly mean a ruling opposite of this advantages of arbitration and to the aim of legislator. In case we would accept this interpretation, in the same time we would accept an interpretation that is in total divergence with the international practice. The consequence of such an interpretation would be that Hungarian arbitration would become very uncomfortable for parties who may solve their possible disputes through arbitration, since there would be no final deadline when the winning party would be safe about the final result of the award.

Nevertheless we should bear in mind that with our interpretation the opportunity of safeguarding the interests (at first place the state's but in some way also those of the losing party) is still open, since the absolute grounds, namely the infringement of the *ordre public* and the objective inarbitrability are still possible to be pleaded as grounds for refusal of execution in the exequatur, even after the time limit for the institution of the setting aside claim has elapsed and no such action has been brought.

On the contrary, a subjective ground, if not relied on in a timely instituted setting aside action, becomes excluded also in its capacity as ground for refusal of exequatur. Absolute grounds are absolute only in the meaning that they do not get lost as exequatur objections and thus they protect the ordre public of the respective enforcement jurisdictions without timely limitation.

This protection satisfies wholly the interest of public order. Nevertheless this protection does not apply through the infinite challengeabilityof the award, but in another phase of the dispute, in the exequatur, through refusing the execution of any award that infringes the interests protected by the absolute grounds.

V. Summary and conclusion

According to nowadays prevailing Hungarian court practice the 60 days deadline for filing a setting aside claim to be counted from the service of the award would not apply to the absolute grounds, i.e. both inarbitrability and ordre public infringement regulated in sec. 55(2) HAA.

The Hungarian regulation is certainly not entirely clear on this issue. Section 55(2) HAA can be interpreted as a mere addition to Section 55(1) containing

the named time limit, meaning that the absolute grounds listed in subsection (2) shall be raised under the same (timely) conditions as the relative ones in subsection (1).

There is, however, also another possible interpretation according to which subsection (2) contains a completely different group of setting aside grounds which shall be excepted from the scope of subsection (1), consequently also from the time limit laid down in subsection (1).

Taking a closer look at the ministerial explanatory note to sections 54–57 of the HAA one can find an explicit reference to this time limit. From this reference it follows beyond any doubt that–as has been shown–the lawmaker did not intend any differentiation, so that the time limit *generally* applies to *each* ground for setting aside. Hungarian doctrine is somewhat surprisingly uncertain on this question. The ministerial explanatory note justifies the relative shortness of the time limit by listing the requirements to the arbitration proceedings such as promptness and avoidance of persistent uncertainties concerning the relationship or rights and duties of the parties and the future enforceability of the award. Such a differentiation makes some sense in only one case, i.e. in the case of application for recognition and enforcement of a domestic award.

An absolute ground like infringement of the ordre public can be relied on as a ground for refusal of exequatur even after the time limit for the institution of the setting aside claim has elapsed and no such action has been brought.

On the contrary, a subjective ground, if not relied on in a timely instituted setting aside action, becomes excluded also in its capacity as ground for refusal of exequatur. Absolute grounds are absolute only in the meaning that they don't get lost as exequatur objections and thus they protect the ordre public of the respective enforcement jurisdictions without timely limitation. This protection satisfies wholly the interests of public order. It certainly does not render the objective grounds timely limitless causes of action. It can easily be recognized that the opposite would lead to unbearable consequences from the viewpoint of legal certainty.

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On the Scarcity of Civil Litigation in Japan: Two Different Approaches and More

1. Preface

Let me start with one episode. When I met Professor Honma in university bookshop, and asked to make a speech in Hungary on some topics related to the legal foundation of Japanese high economic growth (in 60's–70's), my first reply was "Oh well... the shortest answer should be 'nothing'".

What did I mean by that? The point is that Japan is known to be a society with very scarce occasions in which law works, in both criminal cases and civil litigations. For instance in the United Nations statistics,[1] the number of homicide per 100,000 population in Japan is only 0.5, while in the United States it is 4.6. A part of reason could be of the States and its violent society, as often be criticized. However, considering the fact that the same numbers in the United Kingdom, France, and Germany lays around 1.5,[2] Japan seems to be very safe society even in comparison to these countries. On civil disputes, Wollschläger shows that there are 1.6 cases in Japan per 1,000 populations per a year, while the number is around 20 in France and Germany, over 50 in the state of Arizona, U.S. and the United Kingdom,[3] From these data, we could say

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[1] United Nations Office on Drugs and Crime, The 7th U.N. Surveys on Crime Trends & the Operations of Criminal Justice Systems (1998–2000), available at http://www.unodc.org/unodc/en/data-and-analysis/Seventh-United-Nations-Survey-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html (visited on 18th Feb., 2008).

[2] The accurate numbers are 1.6, 1.2, and 1.8 for U.K., Germany and France, respectively.

[3] Wollschläger, Ch.: Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics. In: Baum, H. (ed.): *Japan: Economic Success and Legal System*, Landsberg, 1997.

that there are very scarce legal cases in Japan, and the court has not so much importance in Japanese society. The problem is, why this phenomenon exists.

Kawashima These: cultural approach

In 1960's, the main theory on this problem found its answer in cultural factors. For instance Professor Takeyoshi Kawashima[4] wrote in his famous book Japanese Sense of Law,[5] that the Japanese dislike to solve disputes by litigation. He said that in Japanese traditional sense of law, rights and duties were recognized as ambiguous beings, and the people hate to make it clear or definite, because it probably harms the harmony in community. He wrote, "Since there exists friendly or 'communal' relation, to 'make clear between black and white' destroys the foundation of this friendly 'communal' relation".[6] So in Japan "those who make civil litigations are branded as 'weird' or 'aggressive'. The attitude to avoid litigation is deeply fixed in our hearts".[7] For Kawashima, this feature shows the underdevelopment of Japanese society. In the developed countries, litigations are thought as "the struggle to rights", as Rudolf von Jhering said, not only just but also sacred means to protect their own rights. Because the Japanese still had very weak sense of rights, Kawashima thought, they did not want to fight by themselves. So, along with the development of Japan the Japanese will recognize their rights stronger, and make litigations more frequent. This prediction is often called "the Kawashima These".

"Kenka Ryou-Seibai Hou"

There is one clear example often referred in this topic to show that the Japanese dislike disputes at all; the idea of Kenka Ryou-Seibai [put same sanction on both sides in dispute]. The idea is originally emerged as the Kenka Ryou-Seibai Hou [The law of Kenka Ryou-Seibai], which originally means that the both party in dispute are to equally sanctioned with death penalty. The first clear case is thought to be in the law of a Daimyo [feudal lord] in Sengoku Jidai

[4] Takeyoshi Kawashima (1909–1992) was professor of civil law in the University of Tokyo. He is famous for introducing legal sociological research into Japan.

[5] Kawashima, T.: *Nihon-jin no Hou-ishiki* [Japanese sense of Law], Iwanami Shoten, 1967.

[6] *Ibid.* 140.

[7] *Ibid.* 142.

[the age of war].[8] The Imagawa Kana Mokuroku [Law of House Imagawa][9] article no. 8 provided "the persons to make violent disputes are both to be sentenced to death, without discussing right or wrong". This kind of rule became widespread in the laws of Sengoku feudal loads, and in the age of Tokugawa Shogunate (1603–1867) sometimes thought to be "Tenka no Taihou" [the grand rule of the country]. At least in the Genroku Akoh case in 1703 (Genroku 15),[10] in which the late subjects of House Asano of Akoh made vengeance to Kira Yoshinaka who was believed to committed dispute with Asano Naganori their late lord in the Edo Castle, they justified their revenge referring to this law. In the dispute only their lord Asano was sentenced to commit Seppuku [the forced suicide with honor] while no penalty was put on Kira.

Haley's Argument: systematic approach

Against Kawashima, Professor John O. Haley pointed out the systematic problem in Japanese legal sphere. He called the belief that the Japanese dislikes litigation was a "Myth".[11] He agreed with Kawashima, that the fact the Japanese introduced many arbitration systems before the 2nd World War has ended,[12] shows that there lies some hesitation to litigate. But he insists that the hesitation was of the governing elites, not of the ordinary Japanese. Haley wrote:

[8] Sengoku Jidai (c. 1467–c. 1573) is the age of warfare between two Shogunate, Ashikaga and Tokugawa. Along with the decline of power and authority of Ashikaga Shogunate, many Daimyo increased their independence from the Shogunate and governed their power realm by their own initiative.

[9] House Imagawa, a branch of Ashikaga Shogunate, was a powerful feudal lord governed Suruga and Toutoumi (around Shizuoka prefecture now). Imagawa Kana Mokuroku was the law issued by Imagawa Ujichika in 1526 (Daiei 6) independently from the Shogunate, to govern his realm. The law was consisted from 33 articles.

[10] Inside the parenthesis is the name and count of the year in Japanese traditional calendar. Since traditional calendar was in lunar system, the year Genroku 15 had some difference from 1703 A.D. in its range.

[11] Haley, J. O.: The Myth of the Reluctant Litigant. *Journal of Japanese Study*, 4, (1978) 359–390.

[12] E.g. the Land Lease and House Lease Conciliation Act in 1922, Farm Tenancy Conciliation Act of 1924, the Commercial Affairs Conciliation Act of 1926, the Labor Disputes Conciliation Act of 1926, the Monetary Claims Conciliation Temporary Act of 1932, the amendment of the Mining Act of 1939, The amendment of the Placer Mines Act of 1940, the Agricultural Land Adjustment Act of 1938, the Personal Status Conciliation Act of 1939, and the conciliation provisions of the Special Wartime Civil Affairs Act of 1942.

> Kawashima relies heavily on the enactment of these statutes in arguing that the Japanese have been loath to litigate. Yet there is nothing to suggest that they were the product of popular demand for an alternative to litigation more in keeping with Japanese sensitivities. Rather it seems more accurate to conclude that they reflected a conservative reaction to the rising tide of lawsuits in the 1920s and early 1030s and a concern on the part of the governing elite that litigation was destructive to a hierarchical social order based upon personal relationships.[13]

For him, the largest factor for the Japanese to hesitate to litigate was the scarcity of lawyers in Japan. There are about 22 thousand practicing attorneys in 2006, after much increase from 1990's, which makes the number of lawyers per population of Japan around 1/20 of the United States, and 1/4 even to the France. Haley thought that this "institutional incapacity"[14] is the main reason, and "The failure of Japan to provide more judges and lawyers has been clearly a matter of governmental policy".[15] So which is the more reasonable answer to the problem ... cultural, or systematic?

Recent Studies on the Actual Japanese Culture

First of all, I should point out that the Kawashima Thesis is proved to be almost false. The statistics of Wollschläger I have mentioned earlier is of 1990, i.e. after Japanese high economic growth (1955–1974) and no one would doubt that Japan is one of the highly developed countries in the world. There was much population movement from rural villages to urban areas in the process of the high economic growth, and thus mass-destruction of many customs or rules of agriculture-based communities. But still, the number of litigation has not increased.

Recent comparative study in legal sense also shows that there is not so much difference in that point between Japan and the United States.[16] According

[13] Haley: *op. cit.* 373.

[14] *Ibid.* 378.

[15] *Ibid.* 385.

[16] Hou-Ishiki Kokusai Hikaku Kenkyuu-kai [The Research Center for International Comparison of Legal Consciousness], "Keiyaku Ishiki no Kokusai Hikaku: 22-kakoku/chiiki Jittai Chousa kara [International Comparison of Contractual Consciousness: from the Survey in 22 Countries/Areas]", *Nagoya Daigaku Housei Ronshuu* [Nagoya University Journal of Law and Politics], 2003. 196.

the comparison of surveys in 22 countries/areas in Asia, Europe, Americas, Oceania, and Africa, "the countries/areas with relatively high attitude to comply contracts are Hong Kong, Israel, and Sweden, while relatively low are Taiwan and Brazil".[17] Professor Masanobu Kato, chair to the survey, concluded that in the attitude to comply contracts, both the United States and Japan are in very mediate level. "We cannot conclude that the difference in the attitude to comply contracts is determined by difference between the East and the West".[18]

From the comparison between the United States, China, and Japan as a part of the survey mentioned above, Professor Daniel H. Foote concluded that in all these three countries, people thought in general that the alternative conflict resolution methods are more favorable than making litigation. He wrote:

> There is no clear result which country likes litigation and which dislikes in these three countries. (...) There are few people who find the litigation fun all around the world, except a few attorneys. In Japan, U.S., China, or whatever countries in the world, most people will try to solve the problem without making litigations.[19]

How Japanese acted before Kenka Ryou-seibai Hou

Another point what I should emphasize is that recent historical research puts new light on the Kenka Ryou-Seibai Hou. Dr. Katsuyuki Shimizu, a historian who investigates the earlier feudal Japanese society, pointed out that the Japanese society in 15th century was, against the common image (and also our self-image), very violent and aggressive. Among many cases he has introduced in his book *The Emergence of the Kenka Ryou-Seibai Hou,*[20] the following two will show typical problem in that age.

One is the incident in 1432 (Eikyo 4), in which the monks of two very famous temples in Kyoto, i.e. Kinkaku-ji and Kitano Tenmanguu, crushed each other in front of Kinkaku and according to one document three monks were

[17] *Op. cit.* ("Introduction" by Kato, M.).

[18] *Ibid.*

[19] Foote, D. H.: *Saiban to Shakai: Shihou no "Joushiki" Saikou* [Litigation and Society: Rethinking the "Common Sense" in Judicialy]. Tokyo, 2006. 45.

[20] Shimizu, K.: *Kenka Ryou-Seibai Hou no Tanjou* [the Emergence of the Kenka Ryou-Seibai Hou]. Koudansha, 2006.

killed before the Shogun[21] himself tried to mediate. Surprisingly, the trigger to whole these trouble was that one monk of Kinkaku was laughed at by a boy accompanied by the Kitano Monks who visited Kinkaku for sightseeing.[22] Shimizu insists that the people in this period, whether he was Samurai or not, had very strong pride and was very sensitive to be abused.

Another problem was that under weak government at that era people tend to have many connections or lineages to make certain that he could have enough help at the time of trouble. For instance, in an incident of 1479 (Bunmei 11), a brewer in Kyoto killed his wife's paramour (the secret lover of his wife). It was widely admitted to kill him in that kind of affairs at that era, so there must not be any problem. But the trouble was, the paramour was a Samurai who subjected to the Samurai-Dokoro Tounin [Chief Inspector][23] Akamatsu Masanori, and the lord tries to assault the brewer for vengeance under the name of the investigation of disorderly conduct. Another trouble was that the brewer himself had subjected to House Itakura who had subjected to another senior statesman of the Shogunate, Shiba Yoshikado.[24] Not only the members of House Itakura, but of House Kakiya, Ohtagaki, and Enya, other families of senior statesmen who had no direct connection with the brewer but some kinship with House Itakura, gathered to protect the brewer from Akamatsu. Kyoto suddenly faced the danger of war, which could split the whole Shogunate into two, from a simple secret love affair of the brewer's wife.[25]

Shimizu pointed out that in the feudal society in which existed various authorities with autonomous power, e.g. the feudal lords, old temples, or the group of blind persons who believed to have mysterious power, to discuss which parties are right or wrong could not give sufficient answer to finish the conflict. Of course the Ashikaga Shogunate at that era tried to make a reasonable system of conflict resolution, e.g. mediation by a third-party personnel, sending delegation to show apology, or Honnin Seppuku Sei in which the first person

[21] Ashikaga Yoshinori [1394 (Ouei 1)–1441 (Kakitsu 1)], the 6th Shogun of Ashikaga Shogunate (1336–1573), reign from 1428 to 1441. He himself was assassinated by one feudal load later.

[22] Shimizu: *op. cit.* 12–15.

[23] Samurai-dokoro was one of three important organization of Ashikaga shogunate, which governed the military and police affairs. The chief of Samurai-dokoro ("Tounin" [Head]) was in rotation of four powerful houses including Akamatsu, the feudal lord reigned Harima (part of Hyogo prefecture now).

[24] House Shiba was a very powerful feudal lord, which reigned many provinces in north-western Japan. Shiba Yoshikado was Saki-no Kanrei [late Prime Minister] of the shogunate at that time.

[25] Shimizu: *op. cit.* 60–62.

who actually committed an attack was ordered to commit honorable suicide (Seppuku). None of them, however, could gain success until the emergence of the Kenka Ryou-Seibai Hou.

New view: Predictability Approach

In this stage I think we could reach another approach to the scarcity problem: the predictability. Professors J. Mark Ramseyer and Minoru Nakazato asserted that the Japanese are rational in avoiding litigations.[26] Because of some features in Japanese litigation process, e.g. the adjudications are made by professional judge instead of unpredictable jury, the court session takes much time and it is easier for judges to suggest reconciliation between that long process, Ramseyer and Nakazato insists that it is very easy to predict the outcome (the adjudication) for both parties. Since the litigation needs some costs, i.e. time and money, both parties are to avoid it if they could get the same outcome. They wrote, "Analysts need not refer to cultural norms to explain how Japanese settle disputes over such accidents, for they will find, in fact, the Japanese bargain to their immediate advantage 'in the shadow of the law'".[27]

The most important feature will be that in Japan the norms and standards on which the courts rely in deciding the judgment are open and widely known. Typically in the traffic accident cases, "judges use detailed, clear, and public formulae to calculate comparative negligence percentages and the victim's damages ... whether for death, disability, or simple injury",[28] and these formulae are published as a book and open to the public. In the survey over the compensations the victims' family got in traffic accidents with death results, "figures suggest that they recover, on average, about 80–110 percent of the amount that would earn if they sued and won against a fully insured defendant".[29] So they concluded that in Japan avoiding the litigation is a result from the rational choice of each potential litigant. According to them, "Litigation is scarce in Japan not because the system is bankrupt. It is scarce because the system works".[30]

[26] Ramseyer, J. M.–Nakazato, M.: The Rational Litigant: Settlement Amounts and Verdict Rates in Japan. *Journal of Legal Studies*, 18 (1989) 263.

[27] *Ibid.* 264.

[28] *Ibid.* 269–270.

[29] *Ibid.* 280.

[30] *Ibid.* 290.

The Desire of Whom?

But the trouble still remains, on what purpose established such highly predictable system? Professor Takao Tanase pointed out the problem against Haley, and asserted that if it had failed to satisfy what the people expect in legal system, these must be another reason for it to maintain its existence.[31] TANASE insists that if the governing elite try to oppress the number of litigation, they should give proper alternatives to litigation --- "Clearly, the elite is not omnipotent. If the elite is to be effective in leading a society, it cannot depart too radically from the aspirations of the people".[32] That is the case in Japan, he concluded.

In the case of traffic accident, (1) there are many free consultation service run by police, insurance companies, local governments and bar associations, (2) there is clear, unified, public standard to calculate the amount of compensation, and (3) there are alternative dispute resolution systems like conciliation of the court or the NGO like Koutsuu Jiko Hunsou Shori Sentaa [the Center for Conflict Resolution on Traffic Accidents], established in 1974. Since such processes absorb most of all conflicts, Tanase wrote, it became somewhat rare occasion for both parties to decide to bring the conflict to court. He called his theory as the management model.

If the differential weighting is so arranged as to make the disputants "find" judicial services less efficient and alternative services more satisfactory, then the state, without any coercion, can effectively induce the people to voluntarily use fewer services. (...) The people now believe that the system is created only to benefit them, not contrived by an ill-willed agant with a hidden agenda.[33]

Still there remains a problem: who are those elites? Haley insists that the governing elite dislike litigation because it will break the friendly, communal relationship on which their power relied. It could be an explanation why the Japanese government is very eager to keep the quality of bills and acts, and to maintain the unification of the whole legal system, through the strict audit process of the Cabinet Legislation Bureau. They tried to avoid litigations by making clear and highly predictable statutes. But what about judges? What are their incentives to avoid litigations? Wouldn't be the litigations their source of power?

[31] Tanase, T.: The Management of Disputes: Automobile Accident Compensation in Japan. *Law and Society Review*, 24 (1990) 651–692.

[32] *Ibid.* 656.

[33] *Ibid.* 656–657.

The Role of Courts: to avoid them to work?

Foote describes the curious situation concerning this matter.[34] It is the judges themselves that established the highly predictable rules and standards about traffic accident compensations from which everyone could avoid litigation. He introduces the fact that in corresponding to the rapid increase of traffic accident, and thus increase of lawsuit filed to the court in early 1960's, the Supreme Court of Japan decided to establish the special division to solve them, i.e. the 27th civil division in the Tokyo District Court in 1962. Just after its establishment the judges in the division started eagerly to make new, highly predictable system to solve the problem: they persuaded the prosecutors' office to offer police inspection report on the accidents, organized workshops to investigate the substantive and procedural law relating this topic, and made the standard formulae for the attorneys to file a lawsuit and for the judges to adjudicate. In fact it was those judges that made the whole "detailed, clear, and public formulae to calculate comparative negligence percentages and the victim's damages",[35] which Ramseyer and Nakazato introduces. It is also notable that not only judges but also public prosecutors (referred above) and attorneys were cooperative in the process. If they didn't agree with the judges to bring high predictability to the courts and thus decrease its role, it would be totally useless to making standard formulae of petitions.

So there came to be another problem. Not only bureaucrats, but judges, prosecutors, and attorneys were eager to suppress the number of litigation through establishing high predictability in the whole legal process. But it is certain that this is not totally for their profit, especially in the case of attorneys who could earn from making litigations. Who wants these features in Japan?

Yet Another New Approach: the interaction of culture and system

I suppose that there is only the people themselves are left. According to Tanase, there must be some reason if the system, which fails to satisfy the peoples' expectation, continued its existence. But what about the case if a system successfully satisfies what the people expect for the legal system at least to some extent? You may notice that the Kenka Ryou-Seibai Hou is also very predictable, especially with very law resource to investigate the cases: both parties are to be sentenced to death without discussing right or wrong.

[34] Foote: *op. cit.*

[35] Ramseyer–Nakazato: *op. cit.* 269–270.

Shimizu pointed out that the Kenka Ryou-Seibai Hou had established in the process of Ashikaga Shogunate to lose its political power, and its validity under Tokugawa Shogunate was limited only to wartime,[36] although the late subjects of House Asano insisted that the law was "the grand rule of the country".

Thus, in my opinion, it could understand as a compromising rule to stop conflicts to escalate with limited resources, at least from the viewpoint of the governing elites. We could notice that the last thing left in there was the claim for predictability and equality, i.e. very simple rule which could be called as "the balance sheet of blood", which is rumored to be still used in the underground world of Japanese mafia (Yakuza) to resolute the conflict.

They were the Japanese ordinary citizens who appraised on the vengeance of the late members of House Asano in the Genroku Akoh case. The case was later dramatized in the Kabuki "Chuushin-gura", the most famous and popular program in Japanese traditional play. Since the members' claim to gain balance of blood between two Houses conflicted with the Shogunate's policy to regain peace within the society after long wartime of the Sengoku Jidai, all the members were sentenced to death. The only sign of concession from the Shogunate was that they were permitted to commit Seppuku instead of were beheaded, which usually applied to murder from personal fight. Their corpses were buried in Sengaku-ji temple of Edo, the same place as their late lord, where still the incense to pray for their souls never cease. Of course those incense were dedicated by the ordinary man-on-the-streets through the Tokugawa Shogunate, the Japanese Empire after the Meiji restoration, and post-war liberal democracy.

If we could find the cultural character special to Japanese, in my view it could be very strong concern with equality, unity, and thus predictability, shown in the emerging process of the Kenka Ryou-Seibai Hou.

Conclusion

Let me summarize the point. Against Kawashima who thought that the scarcity of litigation was the direct expression of Japanese weak sense of rights, Haley pointed out that there could be some systematic problem behind the scene. Ramseyer and Nakazato, joined to Haley, asserted that under the existence of more effective alternative conflict resolution systems it is rather rational for the people to depend upon them. I would like to point out in addition, that it

[36] Shimizu: *op. cit.* 191.

should be better to start our inquiry from why the conflicts would occur. As Immanuel Kant suggests, if all the person could use his practical reason properly, everyone will come to know what is his due portion of goods, and thus there should be no conflict between persons.[37] I don't intend to say that the Japanese have such an ideal character, but it suggests also that if each of us know exactly what the law will provide, there would be no conflict, and there is rather strong law functioning in reality, than weak sense of law. Of course to what extent this hypothesis could explain the fact of the scarcity of litigation in Japan needs more detailed study, I would like to propose a little bit new framework to see the legal function in society, other than just a number of litigation brought into courts.

[37] Kant, I.: Metaphysik der Sitten, in: *Kant's gesammelte Schriften.* Berlin, 1907.

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ÁDÁM BOÓC *

A Brief Introduction to Hungarian Arbitration Law

I.

The antecedents of modern arbitration–similarly to several institutes of modern private law–can be found in Roman Law, where arbitration was considered as a way of private dispute resolution.[1] As a leading source in Roman law we can refer to D. 4, 8, which has the following title: *De receptis: qui arbitrium receperint ut sententiam dicant.* When analyzing the features of arbitration in Roman Law, special attention should be paid to the term of *compromissum*, which meant the settlement of the parties to submit themselves to the jurisdiction of an arbitrator, who was called *arbiter ex compromisso.*[2] The term of *compromissum* on the field of arbitration still plays a particular role in several jurisdictions in Latin America.[3]

Concerning the appointment of the arbitrator in Roman law, the most important source in the Digest is perhaps the following sentence: "*Arbiter ex compromisso sumptus cum ante diem, qui constitutus compromisso erat, sententiam dicere non potest.*"[4] This regulation means that the *arbiter ex compromisso* cannot judge the case before the parties reached a consensus regarding the appointment of the arbitrator. This rule highlights the importance

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[1] In this regard see especially: D. Roebuck–B. De Loynes de Fumichon: *Roman Arbitration*. Oxford, 2004.

[2] It should be born in mind that *arbiter* had another meaning in Roman Law, too. It also meant a judge who had special knowledge on a particular field, which was necessary to the appropriate judging of the case. See esp.: Földi A.–Hamza G.: *A római jog története és institúciói* (History and Institutes of Roman Law). Budapest, 2007[12]. 161.

[3] See in this regard: Boóc Á: A kereskedelmi választottbíráskodás egyes sajátosságai Dél-Amerikában (Some Particular Features of Commercial Arbitration in Latin-America). *Állam- és Jogtudomány*, 48 (2007) 289–332.

[4] See: Alf, D. 4, 8, 50.

of the consensual nature of arbitration, which is undoubtedly one of the most fundamental principles of modern arbitration, as well.

Regarding the early Hungarian Medieval Law we can state that the persons who acted as quasi-arbitrators can be considered more as mediators than real judges. We can refer to the II. Decretum of St. Stephen, according to which ten gold coins should be given to the arbitrators and mediators for fulfilling their duty.[5]

It is not until the 13th and 14th century in Hungary that arbitrators could be regarded–to some extent–as real judges who could reach an award based on the same proofs as the ordinary judges. Practically speaking, there are two circumstances which have to be highlighted: (a) concerning the procedure of the arbitrators and their award they had to prepare a report either to the ordinary judge or to the administration of the county; (b) in case they failed to do so the report could be enforced by an order from the King.

It is worth mentioning that this phenomenon can be detected in modern law as well. Namely, that there is an important connection between ordinary judges, judicial system, and arbitrators. The arbitrators have to make sure that the award is authentic. In case they fail to fulfill their duties there is always a state control.

Concerning the possible direct effect of the arbitration agreement we can refer to a very interesting point of the *Planum Tabulare*, which is a compilation of decisions of the Hungarian Superior Court (*Curia*) from the 18th century. In Decision 11 we can read the following: "*Si is invalidatoriam litem in foro tabulari contra compromittentes suscitet vel illam continuet, ac illi qui ad compromissum influxerunt, propter initu, compromissum institutum difficultent, tunc illud coram foro tabulari arreptum institutum condescendit, quia actor facto suo ab ordinaria juris via recedendo judicem sibi delegit, cuius iudicio stare debet.*"[6] According to this quotation if there is a valid arbitration agreement and one of the parties commences an ordinary judicial procedure, the respondent may raise an exception based on a jurisdictional issue (*genus actionis vulgo institutum*). The ordinary judge than will reject the claim, based on this procedural issue. As a consequence, we can state that this procedural step does not create *res judicata*.

Regarding possible legal remedies against the award of the arbitral panel we can mention *Decretum* of 1729 (*de causis von appellabilibus*), which states that no appeal can be submitted against the award of the arbitral panel.

[5] "*Decem (pensae) autem arbitris et mediatoribus condonentur.*" See: Fabinyi T.: *A választott bíráskodás* (The Arbitration). Budapest, 1926[2]. 23.

[6] See: Fabinyi: *op. cit.* 23 sqq.

As a very interesting point in the history of the Hungarian arbitration law, we can refer to the *Procedural Order of 1786 of Joseph the 2nd*. This order contained the regulation, according to which if there is an apparent cheat in the procedure there is a possibility to commence another–ordinary–lawsuit within 14 days after the receipt of the award.

It is also worthy mentioning Act No. LIV of 1868, which regulated that in the case one of the parties failed to appoint an arbitrator within the given time-limit, the ordinary judge would fulfill this task based upon the application of the other party.

The *Provisional Civil Procedure of 16. 09. 1852* contained a modern feature, which is even typical of the arbitration agreements in the 20th century. The Provisional Civil Procedure stated that the parties may submit their legal dispute under the jurisdiction of an arbitration panel if they were allowed to dispose of the legal dispute in this manner, and if they were allowed to reach an out-of-court agreement concerning the legal dispute.

As it is known in the early years of the 20th century, a code on Civil Procedure was promulgated in Hungary. It was the Act I of 1911 on Civil Procedure. The Title XVII of this Code contained regulations on arbitration. The following questions were covered by these provisions:

- Arbitration agreement;
- Appointment of Arbitrators;
- Liability of Arbitrators;
- Jurisdiction of the Arbitral Tribunal;
- Procedure of the Arbitral Tribunal (proofs, legal representation, etc.);
- Award of the Arbitral Tribunal;
- Challenge of the award of the Arbitral Tribunal.

Concerning the liability of the arbitrator we have to refer to a separate act, the Act VIII of 1871. This act ruled that if there was an official crime commited by the arbitrator, he would also lose the ability to become an arbitrator.

Regarding the challenge of the award, it should be highlighted that the award could be challenged–based on Section 784 of the Code on Civil Procedure of 1911–if there was an arbitrator on the panel who had been successfully challenged previously? or if the would-be challenging party could not reach a challenge without his own fault before the award of the arbitral tribunal. Unlike the modern arbitration act, there is no reference to public policy in the challenge in this Act.[7]

[7] See in that regard: Burián L.: Gondolatok a közrend szerepéről (Thoughts on the Role of Ordre Public). In: Kiss D.–Varga I. (ed.): *Magister artis boni et aequi. Studia in Honorem Németh János.* Budapest, 2003. 99–122.

The well-known political and economic changes in 1948 in Hungary had an impact on arbitration as well. Because of the new political era and economic structure, the commercial arbitration in traditional sense ceased to exist to a large extent, but unlike the law of the stock exchange, there was a so-called "survival" of commercial arbitration.

There was a sort of compulsory arbitration among the member states of the Council for Mutual Economic Assistance (CMEA). It was regulated by the *Moscow Convention* (*Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technological Co-operation*). This convention was promulgated in Hungary by Law-Decree No. 23 of 1973. The aim of this convention was that in commercial disputes among CMEA countries, the method of the dispute resolution was the compulsory arbitration based on this convention.[8]

In order to integrate Hungary into the international legal framework of international commercial arbitration it should be taken into account that Hungary has ratified the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10. June 1958.* It has been promulgated into the Hungarian law by Law-Decree No. 25 of 1962. Hungary has promulgated the Geneva Convention of 1961 by Law-Decree No. 8 of 1964.[9]

As it is known a new Code on Civil Procedure was promulgated in Hungary; this was the Act No. III of 1952. The original version of this Act did not contain any regulation on arbitration. In 1972 this Act was amended with Chapter 24 on Arbitration. Chapter 24 included only four sections, lacking many important rules due to political-economic reasons. The main problems of this regulation can be summed up as follows. On the one hand the scope of application was quite narrow: according to Section 360 (1) c) arbitration could be applied between economic organization, supposing there had been an authorization by act, law-decree or governmental-decree. On the other hand the possibility to challenge the award was only allowed in case of *ad hoc* arbitration. At that time there was only one arbitration institute in Hungary: The Arbitration Court attached to the Hungarian Economic Chamber, which is the legal predecessor of the Hungarian Commercial and Industrial Chamber.

[8] See: Szász I.: *A KGST Általános Szállítási Feltételek. Egységes törvény a nemzetközi kereskedelemre* (General Supplying Conditions of CMEA. Uniform Law on International Commerce). Budapest, 1974. 308–310.

[9] See in detail: Faragó L.: A szocialista országok választottbíráskodásának néhány alapelve (Some General Principles of the Arbitration of the Socialist Countries). *Jogtudományi Közlöny*, 21 (1966) 214–216.

The awards of this Court had been regarded as legally binding and thus enforceable.

Later on–approaching the economic and political changes of the '80s–there had been a change in the regulation which resulted in arbitration gaining a much broader application. As an example, we can mention Act VI of 1988 on economic associations. This act provided the possibility of submitting legal disputes, between the members of the economic associations and between the members and the company, to the jurisdiction of an arbitration court.

Regarding the legal framework of arbitration the next important step might be considered the modification of the Hungarian Civil Code (Act No. 4 of 1959) in 1993 with an effective date of 1st November, 1993. After this modification the Section 7 (2) of the Civil Code gave economic organizations the possibility to conclude arbitration clauses for legal debates. At that time, in order to create a valid arbitration clause both of the parties had to be economic organizations.

It should be kept in mind that after the promulgation of Arbitration Act this regulation was changed. It was, and still is today, sufficient if one of the parties is an economic organization and the subject matter of the legal dispute concerns its activity.

In that regard we cannot avoid mentioning a very important dogmatic question: Should this basic regulation be incorporated into the Civil Code? In Hungary, the codification of the new Civil Code is under progress. According to the Draft of the new Civil Code it is not necessary to have any regulation on arbitration (alternative dispute resolution) in a private law code. (As it is currently known; the new draft has not been adopted, yet.)[10]

II.

The present act on arbitration in Hungary is Act No. LXXI of 1994 on Arbitration. In spring 1994, the Government accepted the draft of the arbitration act. There were Parliamentary elections at that year and after the elections the new Government made some minor changes. Still, in 1994 the Arbitration Act was

[10] See in that regard: Boóc Á.: A kereskedelmi választottbíráskodás egyes kérdései (Some Questions of Commercial Arbitration). In: Balogh M. (ed.): *Diszciplínák határain innen és túl* (Within and Beyond the Badeis of Disciplines). Fiatal Kutatók Fóruma 2. – 2006. Budapest, 2007. 121[15].

presented to Parliament and they adopted the new Act on Arbitration. The Act was promulgated and it became effective on 13. 12. 1994.[11]

The new Act is based on UNCITRAL Model Law on International Commercial Arbitration, as adopted on 21 June, 1985. Unlike the Law of the Russian Federation on International Commercial Arbitration which has been in force since the 14th of August 1993, the Hungarian Act is not a verbatim translation of the Model Law.[12] It is an adaptation of the Model Law, which means that there are some minor diverging points in the Hungarian text.

The Act contains 65 sections, having the following structure:

- General Provisions;
- Composition of the Arbitral Tribunal;
- Jurisdiction of the Arbitral Tribunal;
- Procedure of the Arbitral Tribunal;
- International Arbitral Proceedings;
- Proceedings of the Court;
- Miscellaneous and Closing Provisions.

The Hungarian Arbitration Act follows the *monist* conception, which means that the Act also regulates the domestic and the international arbitration procedure.[13]

Some of the important features of the Hungarian Arbitration Act can be summed up as follows. Section 6 of the Act contains the possibility of *waiver*, which is based on the principle of prohibition of *venire contra factum proprium*. It means that if a party knows that there is a breach of the agreement of the parties or the regulation of the Arbitration Act, and in spite of that this party still keeps on participating in the procedure, it has to be considered as if the party had waived to seek any legal remedies in this issue.[14]

[11] For *travaux préparatoires* of this act see especially: Szász I.: A választottbíráskodásról és szabályozásáról (On Arbitration and on its Regulation). *Gazdaság és Jog*, 2–3 (1993) 8–11.

[12] See esp: Gellért Gy.: Új törvény a választottbíráskodásról (New Act on Arbitration). *Magyar Jog*, 45 (1995) 449–460; Horváth É.: A választottbíráskodásról szóló törvény általános rendelkezései a gyakorlat tükrében (The General Regulations of the Act on Arbitration with Special Emphasis on the Practice). *Jogtudományi Közlöny*, 50 (1995) 171–178.

[13] For practical application of the Hungarian Arbitration Act, see: Horváth É.: A választottbíráskodásról szóló törvény gyakorlati alkalmazása (Practical Application of the Act on Arbitration). *Jogtudományi Közlöny*, 54 (1999) 335–340.

[14] Section 6 of the Act states: "*A party who knows that any provision of this Act from which the parties may derogate or any requirement of the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to*

It should be highlighted that the number of the arbitrators must be odd in order to enable the panel to reach a decision. It is interesting to mention that under the Civil Procedure of 1911 the parties could appoint an even number of arbitrators.

It is important to refer to section 11, first sentence: "*The arbitrators are independent and impartial, they are not representatives of the parties.*" This regulation is very similar to the Model Law. It should be pointed out that the reference to the fact that the arbitrators are not representatives of the parties can be reasoned with some Anglo-Saxon, esp. American, traditions: there is a dissenting role of party-appointed arbitrator in the American arbitration tradition.

The Hungarian Act is also lacking the definition of independence and impartiality. In order to try to find some sort of interpretation of these terms we can refer to the *IBA Guidelines on Conflicts of Interest in International Arbitration* (Approved on 22 May, 2004 by the Council of the International Bar Association), and secondly to the relevant legal literature. [15]

It should be kept in mind that if the arbitral tribunal dismisses the application for challenge of one of the parties, then this party may seek legal remedy in a competent county court.

The Hungarian Act (section 24) contains the principle of *Kompetenz-Kompetenz*, which means that the Arbitral Tribunal may rule on its own jurisdiction.[16] We have to stress that if one of the parties appoints an arbitrator or participates in the appointment of an arbitrator, it does not exclude the party from providing an exception against the jurisdiction of the Arbitral Tribunal.

Chapter seven of the Act deals with international arbitration procedure. It is important to know that in international cases the competent arbitration court is always the Arbitration Court, attached to the Hungarian Chamber of Commerce and Industry. The reason for this regulation is that this arbitration court is a legal successor of the arbitration court attached to the Hungarian Economic Chamber, and therefore, this court has enough experience in this matter. This part of the Act should be interpreted in accordance with the provisions of the New York Convention as well.

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such non-compliance immediately or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object."

[15] See in detail: Boóc Á.: Megjegyzések a választottbírónak az eljárásból való kizárásáról (Remarks on the Challenge of Arbitrator). *Állam- és Jogtudomány*, 47 (2006) 445–467.

[16] See: Horváth É.–Kálmán Gy.: *A nemzetközi eljárások joga, különös tekintettel a választottbíráskodásra* (The Law of the International Procedures, with Special Emphasis on Arbitration). Budapest, 1999. 112–113.

The intervention of the state court into the arbitral process can be divided as follows:

- Appointment of the arbitrator if the party fails to appoint his arbitrator;
- Legal help to the arbitral tribunal in the question of proof or interim measure;
- Challenge of the Award;
- Recognition and Enforcement of the Award.

This part is also in accordance with the UNCITRAL Model Law. In Hungary, the time-limit for challenging the award is 60 days from the receipt of the award of the Arbitral Tribunal. It should be stressed that the challenge of the award is not a form of appeal. There is an award of the Hungarian Supreme Court, which confirms it (BH 1996.159), so the legal practice also supports this interpretation.

According to par. 55 (2) b) one can also challenge the award if the award breaches *public policy, ordre public.* There is a leading case of the Supreme Court of Hungary (BH.1997.489), which clarifies the notion and interpretation of *ordre public, public policy* in Hungary. According to the reasoning of the case the breach of the *ordre public* should mean the breach of a fundamental right granted by the Constitution, and even more, the term of *ordre public* should also protect the ethical, political ideas of the society. The reasoning provides a framework how to interpret the breach of the *ordre public.*

It is wonderful to see that the application of arbitration is getting more and more popular in Hungary.[17] It is also nice to experience that Hungarian and foreign investors seem to realize the advantages of this way of dispute resolution. It does not seem to be an overstatement that there is a trend in Hungary which makes arbitration an important way of dispute resolution, and also that arbitration is likely to become a real alternative to civil litigation in commercial issues.[18]

[17] This is also supported by the activity of the Hungarian arbitral institutions. In that regard, we would like to refer to Arbitration Court Attached to Hungarian Chamber of Commerce and Industry and the Arbitration Court Attached to the Money and Capital Market. Concerning Arbitration Court Attached to Hungarian Chamber of Commerce and Industry see: www.mkik.hu, while regarding Arbitration Court Attached to the Money and Capital Market, see: www.valasztottbirosag.hu .

[18] For actual questions of arbitration in Hungary with special emphasis on the practice see especially: Balog L.: A kereskedelmi választottbíráskodás aktuális kérdései (Some Actual Questions of Commercial Arbitration). *Gazdaság és Jog*, 15 (2007) 39–44.

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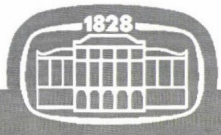

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RÉKA FRIEDERY*

The Role of the European Ombudsman in Dispute Solving

Abstract. The establishment of the Office of the European Ombudsman by the Maastricht Treaty was explicit in connection with the demonstration of the Union, as a complex of democratically functioning bodies. Democratically functioning is in necessary connection with transparency, openness and accountability. Transparency and openness are key requirement set as aims by the European Union in connection with the decision-making procedure of bodies and offices, and between the European bureaucracy and the European citizens.

In every member state of the European Union there are non-judicial and nonlitigious proceedings to settle the community and administrative disputes. The career of the institution of the ombudsman started in the 1700's and at present time one of the most important phase was the establishment of the institution at supranational level.

Keywords: Maastricht Treaty, transparency, bureaucratic, European citizens, right to complain, non-judicial, maladministration

1. Conceptual origin

The origin of the ombudsman can be found in the Old Norse, and the word umbuds man means representative. The first preserved use in Swedish is from 1552. It is used in other Scandinavian languages as well, examples are the Icelandic umbo, the Norwegian ombudsman, and the Danish ombudsmand. The ombudsman can be appointed by a government, by a parliament, by international organization, by firms but the ombudsman of a non-governmental organization works for its own members or for the public in general, and does not carry special powers or sanction abilities.

The expression of ombudsman originates from the Swedish usage, from the establishment of the parliamentary ombudsman in 1809. The word ombudsman and its specific menaing had been since adopted by other languages, and ombudsmen have been established by other governments and other organization

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too. The aim of this function is to protect the citizens' rights with an institution which is independent from the executive branch of the government's power.

The ombudsman is a government official who is charged with representing the interests of the public by investigating the complaints reported by individuals and addressing them to the responsible authority. The ombud always stands against the state bureaucracy in the case of violation of law (maladministration) as watching the requirements of the good administration, moreover he can criticize–either on functionalism or humanitarian base–the legally failing administration due to the lack of aim because of system sociological reason.[1]

The history of the institution's development is following. The Swedish Charles XII, fighting in the Great Northern War, when loosing the battle against the Russian Czar and his troops at Poltava in 1712, had to flee to Turkey and had not returned back to Sweden in over a decade.[2]

Because the state's administration had fallen into disarray, he wrote a letter to his government initiating the establishment of the office of His Majesty's Supreme Ombudsman. Some argue that the Swedish king was inspired by the practice of the Turkish Emperor's court. There he had learned about the *Diwan al-Mazalim*, the Board of Grievances. The holder of this office was entitled and obliged to check the complaints of the individuals against authorities.[3] In practice the *Muhtasib,* who was entrusted by the Sultan with a non-legal review protected those people who were victims of the officials' injustice, discrimination and unfairness. This system worked even before the structures of administration were introduced.[4]

In Sweden the role of the King's Ombudsman was to ensure that judges and public officials acted in accordance with the laws, proficiently discharged their tasks, and if not he could initiate legal proceedings because of dereliction of duty. This could be regarded as the origin of the Ombudsman institution. In 1719, with the Instrument of Government, a new name had been given to this

[1] Majtényi, L.: *Ombudsmann: Állampolgári jogok Biztosa* [Ombudsman. Parliamentary Commissioner for Civil Rights]. Budapest, 1992. 19.

[2] Sultan Ahmed III pointed out the Karolins' residence in the so-called Karlopolis, which was situated in Bess Arabia, on the riverside of Dnyeszter, between Vernice and Bender. Here had been made decisions regarding the Swedish empire, and the law proposals and nominations (into important offices) had been transported by a courier between Stockholm and Bender.

[3] The Diwan al-Mazalim, or Muhtasib is still existing in some Islamic state. In 1983 an ombudsman, a Wafaqi Mohtasib had been instituted in Pakistan.

[4] Machacek, R.: Law and Justice: Two Sides of the Same Coin, *Law and Politics,* 1 (2001) 571–580.

position, the so-called *Justitiekanslern*, the Chancellor of Justice. Although, he performed important tasks, it only acted on behalf of the royal government. In Sweden after the death of Charles XII, through the following decades there was more or less parliamentary rule, the so-called period of liberty.[5] In 1766, it was the first time that the parliament had elected the *Justitiekanslern*, but the Instrument of Government of 1776 made the appointment again to a royal prerogative.

The autocratic rule of Gustav III, that ended the half-century long parliamentary supremacy, prompted the Riksdag of the Estates (the assembly of the nobility, the clergy, the bourgeoisie and the peasants) to establish an ombudsman who is independent from the executive power. His son Gustav Adolf IV was deposed with the Instrument of Government in 1809, and divided the power between the king and the parliament. This Instrument of the Government had been adopted in 6th June in 1809 by the Riksdag of the Estates, which became repealed in 1974. This happened after the catastrophic outcome of the Finnish war, when Gustav Adolf had to resign and his place had been reserved by his uncle, Charles XIII. The one from 1809 had replaced the Instrument of Government of 1772, and could be regarded until the newest constitution as the second oldest constitution after the American one. Next to the King's Ombudsman, who had been appointed by the King, the parliamentary ombudsman had been instituted, who had been appointed by the Parliament, and acted on behalf of it.[6]

At this point we must revert to those allegations, which say that the ombudsman institution has Arab roots. As we have seen, in the Islamic legal tradition there is a high officeholder, who had handled the people's complaints lodged to the ruler, and the Swedish king created this institution in Sweden during his Turkish residence, based on the experience collected there. However, as Jacob Söderman[7] pointed out, this was not the establishment of the ombudsman's office as we know it today. In fact, in many royal courts in Europe, there were high officials dealing with complaint to the king, some of them as the *justitia mayor of Aragon* clearly inspired by the Islamic example,

[5] According to the laws passed in the Parliament in the years of 1720 and 1723, the cabinet-council assumed authority, which had been responsible towards the Estates, where the nobility was the most influential one.

[6] The first ombudsman of the Office's in the world was appointed in Sweden, on 1st March of 1810, in the person of Baron Lars Augustin Mannerheim.

[7] Jacob Söderman was the first ombudsman to be elected in the European Union. He had worked two periods long, and now the second European Ombudsman is Nikiforos Diamandouros.

others clearly set up just for practical reasons. The invention of the Swedish ombudsman idea came into force in a constitutional reform of 1809, when the Swedish legislative body, the *Ständerna* was given the right to elect an ombudsman of justice, after having disputed over that right with the king during almost the whole earlier century.[8] This new office had the model of that of the Chancellor of Justice. Like the latter, this was to be a prosecutor whose task was to supervise the application of the laws by the judges and civil servants. As in the words of the 1809 Instrument of Government, the Parliament was to appoint a man known for his knowledge of the law and exemplary probity as parliamentary ombudsman. In other words his duties were to focus on protection of the rights of citizen, for example he encouraged the uniform application of the law and indicated legislative obscurities. His work included to take the form of inspections and inquiries into complaints. The complaints played quite an insignificant role at the beginning, and during the first century of the existence of the office, the total number of complaints amounted to around 8000. The legislators introduced into the new constitution a system that would allow the Parliament some control over the executive power. The Standing Committee on the Constitution was therefore charged with the task of supervising the actions of ministers and ensuring the election of the special parliamentary ombudsman to monitor the compliance of the public authorities with the law. The reason for giving the power of appointment to the Parliament was to ensure the independence of the ombudsman's work from the king, the government and the administration.[9]

After this, the Parliament's Act of 1810 contained provisions concerning the auditors elected by the parliament to scrutinise the doings of the civil service, the bank of Sweden, and the National Debt Office. The regulations in Chapter 12 of the Constitution of 1974 later incorporated these three supervisory Riksdag[10] agencies (the parliamentary ombudsmen, the Standing Committee on the Constitution and the parliamentary auditors) into the current system of parliamentary government.

The Office of the Chancellor of Justice still exists, as the ombudsman of the government. The role of the parliamentary ombudsman, which was established in 1809, as we have mentioned earlier, have been preserved with the instrument of government of 1974. Against the public belief, the ombudsman

[8] Söderman, J.: *Is there a classic parliamentary Ombudsman.* Austrian Ombudsman Board, 20th Anniversary, Vienna, 4 June 1997.

[9] The European Ombudsman–Report for the year 1995, Office of the European Ombudsman, April 22, 1996.

[10] The name of the Swedish Parliament.

had been instituted by the political experience and not by the Swedish democratic government system, and this institution–gaining a new sense–ave spread all over the world.[11]

2. The spread of the ombudsman institution

The office started to spread to other states in the twentieth century. It started in 1915, when an independent military ombudsman was established in Sweden. Next was Finland in 1919, when it made provisions in the new constitution for the establishment of an ombudsman. With the introduction of a military ombudsman in 1952 by Norway, and a general ombudsman in 1953 by Denmark, Scandinavia confirmed its historical contribution towards the protection of citizens' rights.[12] The Scandinavian examples and experiences were continued with the controversial establishment of a military ombudsman in the Federal Republic of Germany in 1957.

The recognition of the office increased in the early 1960s, as different Commonwealth and other but mainly European states established such office. Examples for this are New Zealand in 1962, the United Kingdom in 1967, most Canadian provinces, starting from 1967, Israel in 1967, Tanzania in 1968, Puerto Rico in 1977, and Australia at the federal level in 1977 and at the state level between 1972 and 1979. By the middle of 1983 there were only twenty-one states with ombudsman offices at national level, and about six states at the provincial/state or regional level. By 2004 the number of the ombudsman institution had more than quintupled, including states with well-established democracies and states with younger democracies.[13]

In most states of the European Union,[14] the position of the general ombudsman is well known. The function of the general ombudsman was instituted in 1967 by the United Kingdom, in 1973 by France and later in the other Member States. Sweden, Denmark and the United Kingdom as well as Spain preferred the role of the parliamentary ombudsman, while in Germany we see the Petition Committee, and in France the *Médiateur de la Republique* enjoys consid-

[11] Kerekes, Zs.: Az ombudsman intézménye az Európai Unióban és Magyarországon [The institution of the ombudsman in the EU and Hungary]. *Politikatudományi Szemle*, 7 (1998) 138.

[12] Epaminondas, M.: The European Ombudsman. *Eipascope*, 11 (1994) 2.

[13] See International Ombudsman Institution http://www.law.ualberta.ca.

[14] Denmark, France, Spain, Ireland, the Netherlands, Austria, Portugal, Finland, Sweden, Great Britain.

erable reputation.[15] Ombudsmen function in Germany[16], in the Netherlands and in Portugal too, in the latter the ombudsman coexists with the Committee on Petitions of the Portuguese Parliament. In Belgium the situation is similar, the ombudsman of the Flemish Community and the ombudsman of the City of Antwerp functioning in parallel with the Committee on Petitions of the Parliament. In Luxembourg we can find the Committee on Petitions of the *Chambre des Députés*, and in Italy at regional and at local/municipal level there are ombudsmen too. In France and in the United Kingdom the complainant has to get the assent of a senator or of a Parliament's member, and in Spain an efficient net of regional ombudsmen was developed. In Austria, we can find an organ with three members who have constitutional authorization and independent power to control the administration.

Ombudsman-type offices can have different mandates; there can be various ways for their nomination or performance. The ombudsman is the institution of the parliament, and the parliament has the right to nominate them, except in Great-Britain where the monarch nominates on the recommendation of the Parliament. In France as the only real exception the President of the Republic has this right. Generally, in the European Union ombudsmen get the appointment for four-six years, and it can be renewed with the exception of France.

Common feature of the ombudsmen position is the obligation to supervise the proceeding and maladministration of public servants. Therefore, in general their independence is guaranteed by constitution, and they have immunity everywhere. The states for establishing their ombudsman offices can choose from different kind of models. They often refer to the Scandinavian model, but the Danish and the Norwegian offices are presenting a different model with different mandate. The Swedish and the Finnish ombudsman are established by constitutions and have broad mandate, which comprises not only the whole public administration, state and municipal, but also the supervision of the activities of the courts, meaning here the procedural and administrative sides of their work. The Swedish and Finnish so-called "classical ombudsman" has the power to prosecute or decide that a civil servant should or should not be prosecuted before a court of law, for criminal offences. The Danish one was established in 1953 and the judiciary does not belong to the mandate, concen-

[15] Epaminondas: *ibid.* 2.

[16] In Germany at federal level only specific ombudsmen–data security ombudsman and ombudsman for the protection of members of military bodies–are nominated.

trates especially on the maladministration in public administrative activities.[17] It has no power of prosecution but can initiate proceedings through a prosecutor. The most effective power of the Danish type is the right to publicly recommend the undoing of administrative malpractices and to argue for better solutions. However the broad investigation power and its right as well as the obligation to report its findings in annual or special report to the Parliament, makes it possible for the Members of Parliament to act on certain issues, for example by proposing law amendments.

The main difference between the Danish and the Swedish model is that the Swedish can be regarded as the expansion of a parliament, while in the Danish the legal protection of individuals is more emphatic. The Danish one was the model for the establishment of the European Ombudsman, and this model was mostly followed in the world, first in New Zealand in 1962, and than in other Commonwealth states.

3. The Office of the European Ombudsman

3.1. The establishment of the Office

In 1978, Sir Derek Walker-Smith, a British conservative Member of Parliament stated that the community law was increasingly regulating the lives of average European citizens. Although, he was contented with the safeguard of the civil and political rights by the European Convention on Human Rights, he recommended that appointing a Community Ombudsman could improve the protection of social and economical rights, would allow the investigation of injustice caused by maladministration, and would show the European Economic Community less inaccessible and impersonal. However, Walker-Smith did not suggest that the Community Ombudsman should represent an alternative to judicial review.[18] Taking into consideration the report of Derek Walker-Smith, the European Parliament adopted a resolution aimed at instituting a Community Parliamentary Commissioner for Administration in 1979.[19]

[17] Söderman, J.: The ombudsman concept and types of control of maladministration in Greece and Europe, Speech delivered at the University of Athens, 11 November, 1996. 2.

[18] Report drawn up on behalf of the Legal Affairs Committee on the appointment of a Community Ombudsman by the European Parliament, 6 April 1979 (PE 57.508/fin.). Rapporteur: Sir Derek Walker-Smith.

[19] OJ 1979 C 140/53.

In 1990 Philippe Gonzales wrote a letter addressed to the members of the European Council and he explained his idea to introduce provisions in connection with the European Citizenship into the Treaty on European Union. Following his letter, the Spanish delegation submitted a note on citizenship on 24 September, with the title "The Road to European Union", within the scope of the Intergovernmental Conference on Political Union. According to the Spanish note, the adoption of a catalogue on special rights of the citizens of the European Union should be accompanied with the establishment of special bodies for safeguarding. The Spanish Delegation proposed that European citizens should get greater protection of their rights within the framework of the Union by submitting petitions or complaints to a European Ombudsman whose function would be to protect and to help safeguard these rights. Moreover, for the European citizens the ombudsman could act through ombudsmen or their equivalents of the Member States. The proposal of the Spanish delegation was backed by Denmark, as here the institution of the ombudsman worked successfully. In the Memorandum of the Danish Government, which was issued on 4 October 1990, they stated that in order to strengthen the democratic basis of Community cooperation, an ombudsman system should be introduced under the aegis of the European Parliament. The Danish memorandum showed the changing European policy of Denmark, because the state was against the intergovernmental conference of the Single European Act in 1985, but the memorandum of 1990 was an obvious yes towards a closer economic and political integration.[20] In the autumn of 1990 the Spanish government submitted a new considered plea for the statement of rights, freedoms and obligations of citizens in the new Community, things which were believed belong implicit in the Single Market project.[21]

The institution itself was approved at political level by the meeting of the European Council in Rome. In December1990, the Head of State and Government of the Twelve stated that consideration should be given to the possible institution of a mechanism to defend citizens' rights as regards community matters.

[20] Biering, P.: The Danish Proposal to the Intergovernmental Conference on Political Union in: The European Ombudsman and the authors: *The European Ombudsman-Origins, Establishment, Evolution*. Luxembourg, 2005. 43.

[21] Church, C. H.–Phinnemore, D.: *The Penguin Guide to the European Treaties-From Rome to Maastricht, Amsterdam, Nice and beyond*. London, 2002. 228.

The Spanish Delegation on 21 February 1991 submitted a new and more detailed proposal on European Citizenship.[22] This envisaged European Citizenship as one of the three pillars of the European Union and the foundation of its democratic legitimacy.[23] The proposal had 10 Articles, where Article 1 to 8 were concerned with the substantive rights of European citizens, Article 9 was concerned with the structure for protecting these rights. According to the proposal, in each Member State a Mediator was to be appointed in order to support the citizens in the defence of their rights before the administrative authorities of the Union and its Member States and to call up these rights before judicial bodies. This should happen on the mediator's account or in support of the person concerned. Besides that, the mediators would also have the task of making available clear and complete information to the European citizens in relation to their rights and the means of enforcing them. At the same time, the Spanish Delegation pointed out in form of a footnote that consideration would also be given to two other possibilities: namely that the above mentioned function would be entrusted to the European Ombudsman, as an independent and responsible organ towards the European Parliament, and that the common action of the national ombudsmen and the European Ombudsman would be reinforced. When setting up the European Ombudsman, it had to be taken into account that the Committee on Petition of the European Parliament, the national ombudsmen and the Committees on Petition of national parliaments function in parallel.

The Luxembourg presidency issued the draft of the Treaty on European Union, the Treaty that established the European Ombudsman. The Treaty limited his jurisdiction because only the maladministration occurring during the activities of the Community institutions or bodies could have been examined, and has given the right to elect subordinated the office to the European Parliament.[24] The Maastricht Treaty on European Union has taken into effect in November 1993. The provisions concerning union citizenship can be find in Article 17–22 in the Treaty establishing the European Community, following the Amsterdam Treaty's through the new numbering. By virtue of Article 17 "(1) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be the citizen of the union. Citizenship of the Union shall complement and not replace national citizenship.(2) Citizens of

[22] Annex II, The Spanish Proposal for a European Ombudsman, Spanish Delegation Intergovernmental Conference on Political Union, European Citizenship (21 February 1991).

[23] Epaminondas: *ibid.* 3.

[24] This is on of the rare possibility where the European Parliament can take an independent decision.

the union shall enjoy the rights conferred by this treaty and shall be subject to the duties imposed thereby." Articles 18-21 introduce the various rights of European citizens. Article 21 provides for citizens to have the right to complain to the ombudsman, in accordance with Article 194 and 195 of the Treaty. After the establishment of the European Ombudsman, a report made in the frame of the European Parliament's Committee on Institutional Affairs said, that the ombudsman is intended to give people a mean to defend themselves against administrative abuses, without having to resort to costly legal action, or where legal action is not possible.[25] In his response the European Parliament emphasised that the ombudsman is intended to reinforce the European institutions, by providing an effective complaints procedure.[26]

The decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman duties[27] was adopted in 1994, regarding the Treaties establishing the European Communities, and in particular Article 195(4) of the Treaty establishing the European Community, Article 20d(4) of the Treaty establishing the European Coal and Steel Community and Article 107d(4) of the Treaty establishing the European Atomic Energy Community. According to the Statute, the authorization of the Union's ombudsman is nearly the same as the national ombudsman's. It must be mentioned, that the Treaty of Amsterdam resulted two changes in relation to the office. Firstly, a new paragraph was added to Article 21, according to which every citizen had the right to write to community institution on his own language and get a response on the same language, so this concerned the Ombudsman office too. Secondly, originally the mandate of the European Ombudsman was limited to the European institutions and bodies, and with the Amsterdam Treaty's third pillar (the Police and Judicial Cooperation in Criminal Matters) this was widened to other bodies.

3.2. The procedure of the European Ombudsman

A complaint can be referred to the Ombudsman by any citizen of a Member State, or by a person who is living in a Member State, directly or through a Member of the European Parliament. Furthermore, businesses, associations or other bodies with a registered office in the Union can also complain. There are

[25] Report A3-0298/92.

[26] Resolution A3-0298/92.

[27] It was adopted by the Parliament on 9 March 1994 (OJ L 113, 4.5.1994, 15), and was amended by its decision of 14 March 2002 deleting Articles 12 and 16 (OJ L 92, 9.4.2002, 13).

no special requirements with reference to lodge a complaint, but it is necessary to know the identity of the complainant and the accused. It is not necessary for the individual to show any specific interest to lodge a complaint. There is no express *locus standi* restriction in the Treaty or in the Statute of the ombudsman and the tradition is that the right to complain is an *actio popularis* especially in the classical ombudsman version.[28] Article 195 (1) of the Treaty establishing the European Community and the Statue lists other conditions regarding the complaints. Pursuant to Article 195 (1), he cannot make an inquiry when in the complaint "the alleged facts are or have been the subject of legal proceedings". From this formulation it is evident, that in such cases the complainant has no discretional possibility whether to turn with the complaint to the court or to the ombudsman. According to Article 1 (3) "The ombudsman may not intervene in cases before the courts or question the soundness of the court's ruling".[29]

The complaint's subject cannot be related to work relationship between a community institution or body and their officials or other servants. However, when the person concerned has exhausted all possibilities for the submission of internal administrative request and complaints, and the time limits for the authorities' replies have expired, he can turn to the ombudsman. The complaint shall be submitted within two years of the date on which the facts on which it is based came to the attention of the complainant. Moreover, it necessary that before this the complainant has contacted the institution or body concerned and preceded the appropriate administrative approaches.

The complaints can be divided into five groups. The first include the disputes about tenders and contracts. This includes all kind of procurement contracts, as well as contract under which the Commission provides grants or subsidies. The second group concerns the Commission's role as the "Guardian of the Treaty", which means enforcing the European law against a Member State that fails to

[28] Söderman, J.: *The citizen, the administration and community law*. General Report, FIDE Congress, 1998. 33.

[29] In cases where "When the ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point shall be filed definitively." Article 2 (7) of the Decision of the European Parliament on the regulation and general conditions governing the performance of the ombudsman's duties. Adopted by the Parliament on 9 March 1994 (OJ L 113, 4.5.1994, 15), and amended by its decision of 14 March 2002 deleting Articles 12 and 16 (OJ L 92, 9.4.2002, 13).

comply with the law.[30] Here complaints concern the subject of confidentiality and the long time of procedure. The third group involves complaints about personnel matters, recruitment procedure and complaint from existing staff. The fourth category concerns lack of openness especially refusal of access to documents. The fifth category finally covers complaints falling within the generic notion of maladministration.[31] It must be mentioned, that neither the Treaty, nor the Statute defines the term "maladministration". Clearly, there is maladministration if a community institution or body fails to act in accordance with the Treaties and with the Community acts that are binding upon it or if it fails to observe the rules and principles of law established by the Court of Justice and the Court of First Instance.[32] Furthermore maladministration includes administrative irregularities, administrative omissions, abuse of power, negligence, unlawful procedures, unfairness, malfunction or incompetence, discrimination, avoidable delay and lack or refusal of information. The European Parliament in connection with the ombudsman's annual report of 1995, asked the ombudsman to precise more the term of maladministration. Following this the ombudsman wrote a letter to the national ombudsmen, for information on whether in their states' administrative law there is something about maladministration or about the code of good administrative behaviour. After this he gave the following definition in his annual report of 1997: "Maladministration occurs when a public body fails to act in accordance with the rule or principle which is binding upon it."[33] After this the European Parliament has considered, that the definition together with the further explanation provided in the annual report gives a clear picture.[34] Following the proposal on

[30] By virtue of Article 226: "If the Commission considers that a member State has failed to fulfil an obligation under this treaty it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observation. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice."

[31] Diamandouros, N.: *The Role of the European Ombudsman.* British and Irish Ombudsman Association Conference, 2005. 2.

[32] The European Ombudsman–Report for the year 1995, Strasbourg, Office of the European Ombudsman, April 22, 1996. So the European Ombudsman must take into consideration Article 6 of the Treaty on European Union.

[33] The European Ombudsman-Annual Report for 1997, Strasbourg, 1998.

[34] Söderman, J.: *What is a good administration?* The European Ombudsman's Code of Good Administrative Behaviour, International Seminar "The Ombudsmen and European Union Law", Bucharest, 21–24 April, 2001. 1.

behalf of the Committee on Petitions the Parliament adopted a resolution welcoming this definition.[35]

The Office gets many complaints, which cannot be the subject of any inquiry, because they concern the function of the national, regional or local public service of the Member States. The Treaty and the Statute declares unequivocally, that the ombudsman has no authority to take steps in such cases, or in the procedure of international organizations.[36] This implies to the case when the authority concerned is liable for the enforcement of community law or community policy. The ombudsman can act strictly in relation to complaints concerning the work of community institutions and bodies, which institutions are listed in Chapter 5 of the Treaty establishing the European Community, and the bodies created by the Treaties and the community legislation. Among the institutions two exceptions can be found: the Court of Justice and the Court of First Instance, where maladministration originating from the area of their judicial power cannot be the subject of inquiry. Also he cannot intervene in cases before the courts or question the soundness of the court's rulings. When the ombudsman has no authority to act, he can give advice to the complainant where to turn, and when it is possible he hands the complaint over to the body concerned.[37]

3.3. Possibilities of the ombudsman during the inquiries

Similar to the national structure, the European Ombudsman has wide investigative power, but cannot annul administrative decisions. The ombudsman informs the institution or body concerned about the received complaints, and notifies as soon as possible the person lodging the complaint from the steps he has taken. Besides the complaints received, the European Ombudsman can *motu proprio* conduct inquires, which gives him an advantage contrary to the courts. Therefore, he does not need any particular complaint to open an inquiry, and he uses this possibility when analysing different complaints it may conclude,

[35] A4-0258/98 (OJ 1998 C 292/168).

[36] Within the framework of the aforementioned Treaties and the conditions laid down therein, the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role, and make recommendations with a view to putting an end to it. No action by any other authority or person may be the subject of a complaint to the Ombudsman. Article 2 (1) of the Statute.

[37] For example the regulation from the power of the French *Médiateur* has a special provision which gives authorize the *Médiateur* to take over complaints from the European Ombudsman. In this case the filter role of the French Parliament is not working. Numerous national, regional or local ombudsman can take over complaints, without any special provision.

that they refer to a general problem. It must be mentioned that he uses this possibility in cases where maladministration is to be observed, but the complainant has no *locus standi,* because he is not a citizen of the Union, or he does not live in the Union. If he decides to conduct an inquiry, he carries out every examination, which he considers justified to clarify the suspected maladministration and informs the community institution or body concerned. That shows the great value of his discretionary power. The importance of the cooperation can be seen that the institution or body concerned has the possibility to forward any useful comment arising during the inquiry to the ombudsman.

At community level the institutions and bodies are obliged– at the ombudsman's request–to give him any requested information or documents in relation to the case. Cases for exception are when there are duly substantiated on grounds for secrecy, without prejudice to the duty of the ombudsman's professional secrecy. The Member States has to make available any information at the demand of the ombudsman that he considers to be necessary. Exception is when such information is covered by rules or decrees on secrecy, or by provisions hindering its being communicated. Those documents, which are classed as secret by law, or regulation, can be accessible only with a prior agreement. Other documents originating from a Member State can be accessible only after having informed the Member States concerned. The Office (the ombudsman and his staff) are required not to reveal information or documents which they obtain in the course of inquires. The ombudsman has more tools that he can use where he finds that there is an instance of maladministration. But before turning to these tools, he must find a solution with the body to eliminate the instance of maladministration, and which also will satisfy the complainant. This obligation prevails throughout the whole course of the proceedings.

The Office is also trying to promote that the institutions or bodies in question look for an agreement directly with the complainant, and as the experience demonstrate it is quite successful. If a settlement cannot be achieved, the ombudsman submits a proposal to the administration–where it is adequate–for a friendly solution.[38] The proposal is often accepted by the institution or body although there is less room for this, because the institutions or bodies settle many cases directly, which clearly demonstrates their readiness to cooperate. We can conclude that 70% of the complaints are lodged against the European Commission, which is understandable in the light of its position as the main European organ that has direct relations with European citizens and inhabitants. When a friendly solution cannot be achieved, there are other means at the ombudsman's disposal. The ombudsman makes critical remark where is no sensible way to redress the

[38] This is the *la mediation* in the French ombudsman system.

situation. The idea behind this critical remark is to state an established instance of maladministration and seek to avoid a repetition in the future.[39]

There are cases where the ombudsman comes to the conclusion that there was no apparent maladministration. However, it would be desirable that the administration improves its behaviour in the future, and in such cases, at the end of the case he submits his suggestion to the administration.

When there is an instance of maladministration that can still be treated, the ombudsman informs the administrative institution or body, and makes proposals. The latter are called draft recommendations. The ombudsman is entitled to publicly submit a special report to the European Parliament, and asks to use its political power to undo the instance of maladministration when the institution or body concerned does not accept the draft recommendation within three months, or does not find an adequate way of undoing the maladministration. According to Article 195 (1) of the "Treaty establishing the European Community" and Article 3 (8) of the "Statute of the European Ombudsman", the ombudsman publishes annual reports in relation to his work. In the frame of the annual reports he has the opportunity to make more general comments, and can give positive guidance in connection with the good administration.

3.4. The main areas of the ombudsman's activity

The proceeding of the Office of the European Ombudsman, as an independent and impartial institution, has the following key areas:

- safeguarding fundamental rights;
- ensuring an open and accountable administration;
- improving the service the institution provide;
- guaranteeing respect for the rule of law;
- and protecting staff rights in the institutions.

The Charter of Fundamental Rights has been adopted on the European Parliament summit in Nice, and later the European Parliament, the European Committee, and the European Council published it in a common Statement. According to the Charter, with the formulation of the rights in 50 Articles, the European Union intended to strengthen its commitments toward the human rights, and outlined its general human rights policy. This was a significant step even when the Charter is not legally binding, and gives only a guideline for the

[39] Söderman, J.: *The effectiveness of the Ombudsman in the oversight of the administrative conduct of government.* 7th International Ombudsman Institute Conference, South Africa, 30 October 3–November, 2000. 2.

legislation and the application.[40] The ombudsman promotes the respect of the Charter on the area of fundamental rights. The Charter includes the right to good administration[41] and to determine this exactly, the ombudsman designed the Code of good administrative behaviour. In the Code he formulates what citizen can expect from the European administration, and gives a guideline to the public servants for their proceeding.[42] Those officials, who follow the Code, can be certain of avoiding the case of maladministration.

The duty of the European institutions is to protect and to promote the principal of transparency. As the Treaty formulates, decisions are taken as openly as possible.[43] One determining motive of the realization of transparency and openness is to ensure a broader possibility of people's access to documents. The ombudsman made inquires in connection with the access to documents, and as a result nearly all of the European institutes and bodies adopted and published the rules of access to documents.

Citizens have the right to expect an appropriate functioning of administration. The work of the ombudsman contributed in a great extent to the improvement of services offered, as for example by the use of language where citizen can write on their own language to the institutions or bodies of the European Union, and can expect an answer on the same language, or by the decisions taken by officials citizens can ask for their justifications. Rule of law belongs to the principle of the Union, and during his work the ombudsman called the European Commission's attention to the infringement of the community law, and in this way he contributed to the respect of the *acquis communitaire*. The ombudsman made inquires in cases where the community officials lodged complaints against their employer. The complaints encompassed a wide area, for example he proceeded in cases of unfair dismissal, or social security coverage, and he successfully solved many disputes.

[40] Rácz, A.: Az Európai Unió alkotmányos berendezkedése [The constitutional system of the European Union]. *Állam- és Jogtudomány*, 45 (2004) 244.

[41] Article 41 of the Charter of Fundamental Rights of the European Union.

[42] The idea of a Code was first proposed by Roy Perry, Member of the European Parliament in 1998. The European Ombudsman drafted the text, following an own-initiative inquiry and presented it to the European Parliament as a special report. The Parliament' resolution on the Code is based on the Ombudsman's proposal, with some changes introduced by Mr. Perry as rapporteur for the Committee on Petition of the European Parliament.

[43] "This Treaty marks a new stage in the process of creating an even closer union among peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen." Article 1 of the Treaty on European Union.

3.5. The Committee on Petition and the Ombudsman

The Maastricht Treaty raised the right to complain to the European Ombudsman at community level and parallel to this the right to petition. The latter competence was mentioned in the Treaty establishing the European Coal and Steel Community (Chapter of the Rules of Assembly), and from 1981 in the Statute of the European Parliament. Following this it was created formally in the Maastricht Treaty, as a European citizen's right. A significant difference between the two non-judicial forums is that with petition that relates to a proceeding at community level the citizens can turn with every case to the European Parliament. Instead of this, the ombudsman concentrates expressly onto the work of Community institutions and bodies–exception is the work of the Court of Justice and the Court of First Instance in their jurisdiction. Therefore, the ombudsman has no possibility to supervise the authorities of the Member States, but the right to petition touch upon this too. Example for the cooperative relation between the two institutions is that the Committee on Petition hands over the complaints to the ombudsman when the petition concerns only the maladministration of the offices of community institutions and bodies. The handling over of such complaints must have the assent of the complainant. In the case the complaints in the ombudsman's office can be regarded as petition, thus can be given to the European Parliament. The filing of complaints of the Committee of Petition concerns the application of community law of the Member States' offices and in these cases the Committee sends the petition to the European Committee to get an opinion, where the latter registers it usually under Article 169.

Conclusion

Citizens of Member States of the European Union can realize since the establishment of the European Ombudsman Office, that the Union does not intend to be seen as the set of bureaucratic institutions. The Union believes that it is important for European citizens to have the opportunity to turn to a body with their likely or presumed offence in connection with the European institutions' work. It is also important, that the citizens already have certain experience of the working potential of this body at national level, which strengthens the trust towards this kind of office on the area of the European Union. The success of the national ombudsmen offices predicted the guarantee of serving as an effective mean in relation to the legal functioning of the extremely expanded European administrative procedures. Working together with national ombuds-

men in an even closer way can improve the service provided by the institution. Regarding the future of the Union, in the Draft Constitution of the European Union the European Ombudsman has been mentioned under two titles in Part 1: under Title II of fundamental rights and citizenship, where the rights in reference to European citizenship are listed,[44] and under Title VI on the democratic life of the Union, where it stresses that the ombudsman shall be elected and not chosen by the European Parliament.[45] According to these, the ombudsman constitutes the link between the Union's commitments to human and fundamental rights and its democratic commitments and aspirations.[46]

Moreover, because the establishment of the institution can be connected to the idea of the European citizenship, it represents a new form of unity for the Union. The Office can play a role in the demonstration of the benefits of the European citizenship towards the citizens of the Member States, in the intensification of the relation between Europeans and the Union, and in the insistence on Europeanism. Furthermore, in this relation it can be expected giving a realistic picture from the role of the institute in the realization of the idea of the "Union's citizens", as this would play a role in "holding together and keeping" together in the integrating Europe. The European institutes concerned with citizen's complaint refused only in small instances the recommendation of the ombudsman. This shows its increasing importance, wherebythe institute occupies its proper place in the system of the European Union. However there is still where to develop, there is the task to inform an even wider circle of citizens, and to enhance the citizen-friendly administration.

[44] By virtue of Article I-10 (d): "The right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language."

[45] By virtue of Article I-49: "The European Ombudsman elected by the European Parliament shall receive, examine and report on complaints about maladministration in the activities of the Union institutions, bodies, offices, or agencies, under the conditions laid down in the Constitution. The European Ombudsman shall be completely independent in the performance of his or her duties."

[46] Diamandouros, N.: *The European Ombudsman and the European Constitution.* Speech given on the 34th Session of Asser Colloquium on European Law on 'The EU Constitution: Best way Forward?' The Hague, 15 October 2004. 5.

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The Underpinning of the Protection of Fundamental Rights Provided by the Hungarian Constitution: Article 8 Paragraph (1)**

Abstract. The study analyses the protection of fundamental rights in Hungary. Article 8 paragraph (1) of the Hungarian Constitution is the basis of the protection of fundamental rights. The paper shows how Art. 8 paragraph (1) elvolved and explains how the Constitutional Court formed its content during the almost two decades after the transition. The content of the rule is explained by way of an item-by-item analysis of the terms of this paragraph. The analysis shows that the fact that the protection of fundamental rights is a primary obligation is not merely a declaration, but a regulative principle of constitutional democracy.

Keywords: constitutional law, fundamental rights, protection of rights

Introduction

This paper purports to review the system of the protection of rights provided by the Hungarian Constitution, with the aim of taking into account historical and theoretical considerations, as well as the practice of the Constitutional Court (hereinafter: CC), with special regard to the role of Article 8 paragraph (1) in constitutional protection. Article 8 states: (1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State. (2) In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the essential contents of fundamental rights. (3) repealed (4) During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54–56, Article 57 paragraphs (2)–(4), Article 60, Articles 66–69 and Article 70/E.

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What lends special importance to the issue is the fact that, pressed by the need to interpret specific constitutional decrees, theoreticians and practitioners of the field seldom have the opportunity to stop to meditate the all-important text, through which the constituents have set the framework for further decisions. The item-by-item analysis of the terms of this paragraph gives an overview of the constitutional foundations of the Hungarian system of fundamental rights protection.

1. The history of the provision

The preamble to Act I of 1946, which declared Hungary's new form of government, contained the first attempt at defining human rights standards in a way in which Article 8 of the Constitution does.[1] It stated that it is the Hungarian Republic that guarantees the natural and inalienable rights of all its citizens. The rights themselves appeared in the form of a list of examples. It also contained a clause of universal equality stipulating that rights apply equally to everyone. This provision also guaranteed that no citizen may be deprived of his or her rights without due legal procedure. The so-called "minor constitution" did not, however, take full effect. History, however, hindered his statute, also known as "the minor constitution," from taking full effect. The period between 1946 and 1949, with the liquidation of political parties, with unfair elections that were forced on the population etc. obliterated the democratic initiatives. Act XX of 1949, the present Constitution of Hungary, did not provide for the protection of human rights. Constitutional orders related to human rights first appeared, as a declaration, in the Constitution with the constitutional reform of 1972. This, however, did not result in any significant improvement in the field

[1] "The republic ensures for its citizens the natural and inalienable rights of mankind, for the Hungarian nation the regulated cooperation and the peaceful living.

The natural and inalienable rights of citizens: personal freedom, right to life without oppression, fear and deprivation, freedom of expression of thoughts and opinion, free exercise of religion, right to assembly, right to ownership, right to personal security, right to work and human standards of living, right to education and right to participation in the control of the life of the state and the municipalities.

No citizen may be deprived from these rights without due procedure, and the Hungarian State ensures these rights to each citizens without discrimination, within the confines of the democratic state order, equally and uniformly."

Cf. Sólyom, L.: Az Alkotmány emberi jogi generálklauzulájához vezető út [The road to the general human rights clause of the Constitution]. *Iustum, aequum, salutare* 1 (2005) 28–49, especially 28.

of fundamental rights protection, since the party-state did not attend to human rights any more than in the preceding years. Noteworthy change only arrived with the democratic revolution of 1989. It was then that the legal system for the protection of fundamental rights was established, and not merely as a declaration, but as an actual safeguard, with institutional foundations, guaranteed by the state, for every individual to exercise his or her rights, as regulated by the provisions of the Constitution.[2]

On 26. April 1972 the following rule was incorporated into the text of the Constitution:

Article 54 (1) The Peoples Republic of Hungary respects human rights. (2) In the Peoples Republic of Hungary citizens' rights shall be exercised in accordance with the interests of the socialist society; the exercise of rights is inseparable from the fulfilment of citizens' duties. (3) In the Peoples Republic of Hungary regulations pertaining to fundamental rights and duties of citizens are determined by laws.

The amendment restates the same rights that were once described as the rights of the workers[3] as the rights of all citizens.[4] It also states, generally, that the People's Republic of Hungary respects human rights. This version, in many respects, already conforms to the standards of the protection of rights in democratic countries, but the lack of will to implement, and the shortage of institutional background made it impossible for these regulations to take full effect. Moreover, the declarations themselves were part and parcel of the socialist system of the Kádár-era: exercising rights was inseparable from the fulfilment of obligations, and rights could only be exercised in harmony with the interests of the "socialist society." Which means that rights were conditional: they were rights exclusively for those who complied with their duties.

In the original, 1949 text of the Constitution, the general rules can be found, importantly, under the heading of "rights and obligations of the citizens," whereas the 1972 amendment of the constitution already talks about the fundamental rights and obligations of the citizens. It even uses the phrase 'human rights'. The change in terminology did not, however, imply a veritable

[2] On the history of human and citizens' rights in Hungary see: Sári, J.: *Alapjogok. Alkotmánytan II.* [Fundamental Rights, Constitutional Law II.]. Budapest, 2006. 25–27.

[3] Some claim that "workers" here implies a broader category than that of "citizens." Cf. Sólyom: Az Alkotmány emberi jogi generálklauzulájához vezető út. *op. cit.* 40.

[4] According to the official explanation, the original distinction lost its function, since with the hegemony of socialist methods of production, the annihilation of oppressive social classes was complete.

attempt, on the part of the leaders of the country, at enforcing human rights.[5] The Constitution remained one of those declarations that were never seriously meant to be implemented. The claim that rights can only be exercised as long as they are in harmony with the interests of socialist society amounted to a general restriction of rights.

Through the democratic transformation of 1989, when the need to respect and protect human rights was accentuated, the legislator created the legal foundations for the protection of human rights in Hungary. The paragraph of Act XXXI of 1989, which provided for the fundamental rights in general, was placed at the beginning of the normative text.

Article 8 (1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection of these rights is a primary obligation of the State. (2) Regulations pertaining to fundamental rights and duties are determined by acts of constitutional force. (3) The exercise of fundamental rights may only be restricted by acts of constitutional force, if such restriction is necessary for the security of the state, public policy, public security, public health, public order or the protection of the fundamental rights or liberties of others. (4) During a state of national crisis, state of emergency or state of danger, the exercise of fundamental rights may be suspended or restricted, with the exception of the fundamental rights specified in Articles 54–56, Article 57 paragraphs (2)–(4), Article 60, Articles 66–69 and Article 70/E.

According to the ministerial explanation to the law, it emerged, while the amendment was in preparation, as a possibility that the acceptance of human rights as fundamental values might be expressed through structural changes to the Constitution (following the German example, the first part of the Constitution might have been devoted to the fundamental rights), but finally they decided that the urge of democratic transformation does not leave time for the restructuring.[6] The problem that stems from the provisory nature of the

[5] Cf. Takács, I.: Az emberi jogok garanciái [The guarantees of human rights]. In: Katonáné Soltész, M. (ed.): *Emberi jogok hazánkban* [Human rights in Hungary]. Budapest, 1988. 51.

[6] Cf. Bozóki, A. (et. al.): *A rendszerváltás forgatókönyve alkotmányos forradalom* [The script of the democratic transformation. Constitutional revolution]. Budapest, 2000. vol. 7; Farkas, G.: *A magyar köztársaság alkotmányi szintű alapjogi és alapjogvédelmi rendszerének születése* [The birth of the Hungarian system of fundamental rights and their protection in the Republic of Hungary]. Pécs, 2006; Kulcsár, K.: *Koncepció az Alkotmány felülvizsgálatáról* [Proposal for the supervision of the Constitution]. Budapest, 1991; Kilényi G. (ed.): Egy alkotmányelőkészítés dokumentumai. Kísérlet Magyarország új alkotmányának megalkotására [The preparatory documents of the Constitution. An attempt at creating the new Constitution of Hungary]. Budapest, 1991; Sükösd, F.: Az emberi és

Constitution is that Article 8 is not regulated together with other fundamental rights, which are regulated in chapter XII. The constituent declared, among the general provisions, that the Republic of Hungary recognises the inviolable and inalienable human rights; it is a primary duty of the state to respect and protect them. The role of the regulation in the protection of fundamental rights is, nevertheless, clear: the CC has provided the bases for its interpretation by defining the way in which the regulation should affect the protection of fundamental rights.

An important constitutional safeguard of the fundamental rights and obligations is that the relevant rules could only be modified by the unanimous vote of the two-third of the MPs; in so-called acts of constitutional force.[7] The legislator purposed, in harmony with international treaties, to ensure that the fundamental rights be limited according to a very strict protocol. The amendment to the constitution specified the fundamental rights that could not be limited even under extraordinary circumstances.

The rule, however, which stipulated that fundamental rights be regulated only through laws of constitutional force, made governing difficult, since the Antall administration (the first democratically elected government after the transformation), did not possess a two–third majority in parliament. This state of affairs stemmed basically from decision 4/1990 (III. 4) of the CC, which made it a constitutional expectation that all rules related to fundamental rights and obligations be only defined by laws of constitutional force. When political consensus did arise, the further criteria of limitation could easily be satisfied, since the introduction of notions such as "public morals," "public order" etc. left, in principle, ample opportunities for the limitation of fundamental rights. The task of the CC under such conditions would largely have been restricted to examining whether qualified two–thirds majority is necessary for the given decision. Some early decisions of the CC indeed show such a tendency. The CC did not undertake the interpretation of the notions listed in the Constitution. Nevertheless, it did state, for instance, that the modification of family law has–on the basis of the articles of the Constitution pertaining to marriage and the protection of the family–to take the form of a law of constitutional force [CC decision 4/1990. (III. 4), CCD 1990. 28.]. The first "interest-tax" law decision had to be regulated through a law of constitutional force due to the general and proportionate sharing of taxation [CC decision 5/1990 (IV. 9),

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állampolgári jogok, valamint az alapvető kötelességek [Human and citizens' rights, and the fundamental duties]. In: Kilényi, G. (ed.): *Alkotmányjogi füzetek* 2. Budapest, 1989.

[7] Article 10 paragraph (3) of Act XXXI of 1989, on the amendment to the Constitution.

CCD 1990. 32, 35].[8] The political difficulties resulted in an amendment to the Constitution which annulled the category of a law of constitutional force; the Constitution, thenceforth, only prescribes that the two–third majority of the MPs present (not all of them, that is) have to pronounce a uniform opinion, and even that only in cases, which are seen as politically sensitive.[9]

After the first democratic elections, the need to modify the text of the Constitution that came into power with Act XXXI of 1989 was swift to emerge.[10] Article 8 of the Constitution was also affected by the introduction–in accordance with German practice–of the concept of "the essential content of fundamental rights" (*Wesensgehalt*) to replace earlier rules of limitation. This meant that the limitation of fundamental rights, which the law made possible, should not affect the essential content of the given fundamental right. This step did not, however, invalidate the earlier rule, since the list of reasons of the limitation of rights does not specify the extent to which the limitation is constitutional. Unlike the earlier version, the new normative text does not indicate when it is possible to limit fundamental rights; it only specifies the maximum of the limitation. This is probably the reason why it was so difficult to get the notion of "the essential content of fundamental rights" accepted in Parliament.[11]

Article 8 of the Constitution was put into effect by Act XL of 1990 on the amendment of the Constitution. There are, thus, vital differences between the current normative text and its 1989 precedent. The relaxation of the formal criteria related to the regulation of fundamental rights undeniably makes governing more effective. It is important to accentuate, nonetheless, that the change in the content of constitutionality was more significant than that,[12] and the most important element of that change is the incorporation of the idea of

[8] Balogh, Zs. et al.: *Az Alkotmány magyarázata* [The explanation of the Constitution]. Budapest, 2003.

[9] For the details see: Sólyom: Az Alkotmány emberi jogi generálklauzulájához vezető út. *op. cit.* 48. Even with regard to the limitation of fundamental rights, it was agreed that they would return to the concept of limitation defined by the Roundtable discussions, which was significantly different from the one later accepted by the Parliament.

[10] Concerning the amendments to and the new concept of the Constitution, see: Kukorelli, I.: *Alkotmánytan I.* [Constitutional law I.]. Budapest, 2007. 70–73.

[11] See the official minutes of the 18. June 1990 session of the Parliament, and Balogh et al.: *op. cit.* 206–210; also Halmai, G.–Tóth, G. A.: *Emberi jogok* [Human rights]. Budapest, 2003. 125.

[12] Tóth, G. A.: Az eljárási alkotmányosság tartalma [The content of procedural constitutionality]. *Fundamentum* 3 (2004) 5–33.

"essential content" into Article 8 paragraph (2), and the annulment of the list of reasons for limitation.[13]

2. Institutional protection of fundamental rights

Article 8 paragraph (1) is the foundation of the protection of fundamental rights. The most essential element of the paragraph is that the Republic of Hungary recognises the fundamental human rights: the Constitution declares, thus, that these rights exist independent of the Constitution. More than merely recognising these rights, the State respects them, and places them under its active protection, qualitatively transforming them thereby, through guarantees of the State. This legal concept is in harmony with international and European human rights standards.[14] Right hereby means that the State is specifically obliged to justify any departure from guaranteeing these entitlements.[15]

Fundamental rights can, therefore, be defined as that group of rights, which the national constitutions and international treaties recognise as such, and which thus form part of statutory law.[16] The safeguarding of fundamental rights consists, in the case of written constitutions, of two phases: the fundamental rights have to be incorporated into the text of the Constitution, and an effective institutional framework has to be provided for. Modern constitutions, therefore, do not merely declare the fundamental rights, but ensure the means of their protection.[17] The Hungarian Constitution includes fundamental rights, more specifically basic rights and constitutional rights, obligations, constitutional values and objectives. Article 8 paragraph (1) of the Constitution contains the general rules related to fundamental rights and obligations. This provision is the underpinning of the protection of fundamental rights in Hungary, since all further legal definitions have to be seen in unity with the contents of this paragraph. This rule led to the interpretation of the Constitution by the CC, which is basic-right-centred and protective of fundamental rights in outlook.

[13] Sólyom: Az Alkotmány emberi jogi generálklauzulájához vezető út. *op. cit.* 44.

[14] Klein, E.: Az alapjogok meghatározása az alkotmányban [The definition of fundamental rights in the Constitution]. In: Ádám A. (ed.): *Alkotmányfejlődés és jogállami gyakorlat* [The development of the Constitution and constitutional practice]. Budapest, 1994. 67.

[15] Dworkin, R.: *Taking Rights Seriously.* London, 1984. 191. Quoted by András Sajó. Sajó, A.: Az „emberi jogok" jogi haszontalanságairól és lehetetlenségeiről [Of the legal uselessness and impossibility of "human rights"]. *Világosság* 31 (1990) 578.

[16] Cf. Halmai–Tóth: *Emberi jogok. op. cit.* 28–29.

[17] Pikler, K: *A burzsoá alkotmánybíráskodás* [Bourgeois constitutional practice]. Budapest, 1965. 212–213.

Fundamental rights are enforceable, and although originally one could only demand enforcement *vis-à-vis* the State, by now there is an increasing demand to render fundamental rights enforceable in certain horizontal legal relationships pertaining to private law.[18] Fundamental rights do not usually mean boundless rights, or liberties. The majority of rights can be limited, with the criteria of limitation fixed by the text of the constitution or/and the principles that have been propounded in the legal practice of the constitutional court. The content of human rights, protected by the State, can only be understood by examining fundamental rights, as codified in the constitution, together with the possibilities for their limitation.

One of the cardinal points as well as novelty of the system of human rights protection that arose in the years following World War II, and which Hungary adopted in the course of the democratic transformation, was that rights became gradually enforceable. Let us look at the origins of this development. Already in 1803 the Constitutional Court of the United States declared that regular courts do not have to apply unconstitutional laws.[19] In Europe, however, in accordance with the Kelsen-model, constitutional courts, as distinct from regular courts, only emerged in 1920, and in most countries, only after 1945.[20] Specifically and primarily human rights protection, enforceable by the court, and jointly European, only came into being in 1950, with the establishment of the European Court and Committee of Human Rights. In Hungary the first body to protect the constitution was set up on 2. January 1990. Although from 1984 there had been a Committee on Constitutionality surveying the constitutionality of legal regulations and legal directives, which was elected by the Parliament, and had the power to suspend the execution of unconstitutional provisions; it did not, however, amount to a real constitutional control over legal regulations, since the political aims of the party-state had paramount influence. The right to suspend execution did not extend to legal regulations codified by the Parliament or the Presidential Council of the Peoples' Republic; neither did it affect the principles of the Supreme Court or its theoretical decisions. The body made decisions in a limited number of cases, and its decisions were not legally binding.[21]

[18] See Sajó, A–Uitz, R.: *The constitution in private relations*. Maastricht, 2006.

[19] Marbury v. Madison, 5 U.S. 137.

[20] The first famous constitutional court was established in Austria, the operation of which was suspended between 1934–1945.

[21] Bihari, M.: *Alkotmányos rendszerváltás* [Constitutional transformation]. Mindentudás Egyeteme, VI. szemeszter, 13. előadás [University of Omniscience VI. lecture 13.], 2005. április 25. http://origo.hu/attached/20050430bihari0.rtf

The interpretation of Article 8 of the Constitution was elaborated in the first years of the CC,[22] and has remained essentially unchanged since then.[23] This is largely due to the model of western democracies and international treaties that the body could build on in its defence of the constitution. With the end of the socialist era the new democracies could take advantage of the legitimate practice of constitutional courts in other countries, as well as of the interpretative traditions of specific regulations in the courts of Western-Europe and the United States. The CC relied primarily on the accumulated experience of the German BVerfGE, because it found the arguments of this court the most satisfactory in interpreting the text of the Constitution. Although there are a number of unexpected parallels between the decisions of the German and the Hungarian Constitutional Court, and their respective justifications, there is no reason to impute this to direct copying of the foreign practice. The CC usually tried to adapt the lessons it learned from other courts to the Hungarian situation and to the traditions of the history of constitutionality in Hungary. Its intention was to create a coherent system, which, by clarifying the content of the normative text, creates a firm background for the protection of fundamental rights.

The CC relied on international traditions of human rights jurisdiction in establishing the national framework for the protection of fundamental rights. Human rights norms worldwide and in the EU, together with the precedents in the practice of the courts define the minimal standards that every member has to comply with in the field of the national protection of human rights. The work of the Hungarian CC is most heavily effected, besides the German (and in some cases American) example, by the ECHR; this tendency can be seen in the chapters of this commentary covering the fundamental rights.[24]

[22] There were a number of sceptics among the experts, who did not give much credit to the CC's development of fundamental rights. Béla Pokol believed, for instance, that fundamental rights are dynamites that are bound to cause harm eventually. "Activism, therefore, is harmful–not only to the legal system and to parliamentary democracy–but to the institution of constitutional jurisdiction itself." Pokol, B.: *Pénz és politika* [Money and politics]. Budapest, 1993. 115.

[23] László Sólyom claimed already in 1997 that the CC has established the framework of interpretation, and has made the fundamental decisions. Sólyom Lászlóval Tóth Gábor Attila beszélget [Discussion between László Sólyom and Gábor Attila Tóth]. In: Halmai, G. (ed.): *A Megtalált Alkotmány? A magyar alapjogi bíráskodás első kilenc éve* [Constitution found? The first nine years of constitutional jurisdiction in Hungary]. Budapest, 2000. 390.

[24] The situation is similar in most countries that are experiencing or have recently experienced the democratic transformation. Cf. *The protection of fundamental rights by the constitutional court.* Strasbourg, 1996.

The CC consequently defines itself and its responsibilities regarding the protection of fundamental rights:

„The Constitutional Court shall continue to state in its decisions the origins of the Constitution and the rights contained therein. These decisions shall form a coherent system, which–as an "invisible constitution"–serves as the standard of constitutionality, in a regime where the constitution is often amended due to daily political interests.

This could help to prevent contradiction with the probable new constitution or future constitutions. The Constitutional Court is free in this as long as it remains within the boundaries of constitutionality." [23/1990 (X. 31) 99.[25]]

2.1 "Fundamental Human Rights"

The beginnings of modern constitutionality are marked by British acts and declarations regarding fundamental rights–the *Petition of Rights* (1628), the *Habeas Corpus Act* (1679) and the *Bill of Rights* (1689)–, together with the *Declaration of Rights* issued by the Philadelphian Congress in 1774, and the American *Declaration of Independence* (1776).[26] These declarations reformulated basic principles as human rights, without, however, endowing them with the enforceability which characterises legal norms; these were, nevertheless, to form the bases of modern catalogues of fundamental rights, and the very concept of fundamental rights.[27] *The Declaration of the Rights of Man and of*

[25] Some experts warn that the CC, in enforcing the invisible constitution, often transgresses its constitutionally prescribed domain, and endows certain fundamental rights with content that can hardy be justified on the basis of the text of the Constitution. Sajó, A.: A „láthatatlan alkotmány" apróbetűi: A magyar Alkotmánybíróság első ezerkétszáz napja [Deciphering the "invisible constitution:" the first 1200 days of the Hungarian Constitutional Court]. *Állam- és Jogtudomány* 35 (1993) 51. Béla Pokol also saw the CC as diverging from the text of the Constitution. According to him the breach set in with decision 8/1990, where the CC founded its case on the general practice of modern constitutional jurisdiction, even though the German example was followed by none of the traditional democracies. Pokol, B.: A törvényhozás alkotmányossága [The constitutionality of legislation]. *Világosság* 34 (1993) 42–43.

[26] Ádám, A.: Az alapjogokra vonatkozó alkotmányi rendelkezések továbbfejlesztésének lehetőségei [Possible directions in the further development of the constitutional provisions on fundamnetal rights]. In: Ádám: *Alkotmányfejlődés és jogállami gyakorlat. op. cit.* 9; and Péteri, Z.: Az emberi jogok a történelemben [The history of human rights]. In: Katonáné Soltész: *Emberi jogok hazánkban. op. cit.* 21.

[27] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are insti-

the Citizen approved on 28. August 1789 by the National Assembly of France, treated in its 17 articles of "the natural, unalienable, and sacred rights of man." This document was issued "in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all."[28] By the 20th century all constitutional democracies provide for the protection of fundamental rights.

Article 8 of the Constitution recognises the fundamental human rights. It claims, thus, that there are certain fundamental rights[29] that every human being, from the moment it is born, merely by virtue of being human is entitled to.[30] According to the classical formulation: "Human dignity? This expression is meaningless if it does not reflect that based on natural law all men has the right to be respected, to be the subject of rights, to have rights. These are the rights that men are entitled to because they are men."[31]

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tuted among Men" United States Declaration of Independence. The legal positivists believe, on the contrary, that "right is the child of law", and is not derived from natural laws. Bentham, J.: *Anarchical Fallacies.* Edinburgh, 501. Quoted in Sajó, A.: *Az önkorlátozó hatalom* [The self-limitation of power]. Budapest, 1995. 325.

[28] Ádám: *Alkotmányfejlődés és jogállami gyakorlat. op. cit.* 10.

[29] The Constitution thus aligns itself with the theory of Ronald Dworkin. He argues that the moral rights transformed in a constitution into fundamental rights, which flow from the idea of human dignity and equality, are superior. Consequently, no government can refuse them to anyone. Dworkin, R.: *Taking rights seriously.* Cambridge, Massachusetts, 1977. xi; See also: Halmai–Tóth: *Emberi jogok. op. cit.* 51. This right is furter strengthened by the fact that the Constitution makes the protection of the fundamnetal rights into a primary obligation of the state.

[30] Of the origins and development of human rights in the twentieth century, see e.g.: Takács, P: Emberi jogok [Human rights]. In: Szabó, M. (ed.): *Jogbölcseleti előadások* [Lectures on the philosophy of right]. Miskolc, 1998.

[31] Maritain, J.: *The rights of man.* London, 1944. 37. quoted in Sajó: *Az önkorlátozó hatalom. op. cit.* 324. This is sharply opposed by the positivist concept of rights, according to which it is the state which gives rights to people, and in certain cases, to citizens. András Bagyova proposed that both theories are well-founded, and can even be harmonised. It is exactly this harmony that ensures the proper functioning of the state in the sphere of the fundamental rights. Human rights, consequently, can truly be seen as existing a priori, and due to human beings by the sheer virtue of being human. It is up to the state to decide the methods of enforcing the individual human rights. The Hungarian state undertook to respect and protect fundamental human rights. The category of fundamental rights is, however a legal category, the content of which it is the task of the state to determine. Bragyova, A.: *Az új alkotmány egy koncepciója* [A concept of the new constitution]. Budapest, 2005. 58.

Both theoretical considerations[32] and international legal practice justify such an interpretation of fundamental rights.[33] Judge László Sólyom, the first President of the Hungarian CC, formed at the end of the 20th century, believes that, limited in its activity by the text of the Constitution, the CC did not subscribe to any major theoretical trend in establishing its practice of the protection of fundamental rights, itself described as value-centred and elaborated in connection with the individual rights. The CC avoided basing the argument purely on natural and international law, or to objective values.[34] Article 7 paragraph (1) of the Constitution declares that Hungarian law conforms to the country's obligations resulting from international treaties; this does not, however, imply that it is international law that makes the protection of fundamental rights legitimate according to Hungarian understanding.

[32] Sólyom argues that the CC, instead of the system of values represented by the constitution, has elaborated legal concepts. Instead of ideologies or natural rights principles, it has adopted a limited form of constitutional positivism. "Legal security matters more than justice, which is always partial and subjective." [CC decision 11/1992. (II. 5), CCD 1992. 77, 82]. In a given historical context–in Sólyom's appraisal–"a neutral and objective standard has the power to create stability." Sólyom, L.: Az emberi jogok az Alkotmánybíróság újabb gyakorlatában [Human rights in the recent practice of the Constitutional Court]. *Világosság* 34 (1993) 16.

[33] Bragyova, A.: Alapozhatók-e az emberi jogok a nemzetközi jogra? Avagy pótolhatja-e a nemzetközi jog a természetjogot? [Is international law the proper foundation of human rights? Can international law replace natural law?] *Állam- és Jogtudomány* 32 (1990) 94.

[34] "The prime objective of the CC was to develop the Constitution into a coherent system, which requires a basic principle that ensures the coherence. It can be debated whether this is a moral principle. The CC has never stated that the supreme law presupposes a system of moral values. We wanted to avoid the German example, which–especially up until the mid-60s–usually referred to the system of values embodied by the constitution and its foundations in natural rights. There was no way to justify this on the basis of the Constitution, either in its history or in its present state. We have continually emphasised that the Constitution, especially since the 1990 modification, which extirpated all ideological references, is a neutral legal text. It is perfectly clear, nonetheless, that human rights are the legal equivalents of moral categories. The CC has elaborated the 'moral content' and 'moral reading' (in Dworkin's words) of the fundamental rights individually, according to the nature of the given fundamental right. There was no need, therefore, to refer to such abstractions as a 'constitutional system of values'. Moreover, this amounted to an instrumentalisation of moral ideas." Sólyom Lászlóval Tóth Gábor Attila beszélget. *op. cit.* 383. See further: Sólyom, L.: Alkotmányértelmezés az új alkotmánybíróságok gyakorlatában [The interpretation of the constitution in the practice of the new constitutional courts], *Fundamentum* 2 (2002) 25.

Usually, regulations related to fundamental rights in the Constitution can be described as general, as far as the wording of the contents and limitations of individual rights are concerned, and more specific, whenever the text of international treaties is adopted. The treatment of, civil, political, economic, cultural and social rights is homogeneous. Certain fundamental rights are placed as principles and national objectives among the general provisions of the Constitution. It is the concept of human rights, not that of the rights of the citizens that is accepted as a basic principle. The legal regulation of a number of basic rights is dependent on two–thirds majority; and it is also declared that no essential contents can be limited. The Constitution creates a wide range of institutions for the safeguarding of human rights.[35]

Terminological distinctions of fundamental rights are problematic, since both the texts of the CC rulings and the relevant legal literature present a number of diverse definitions and distinctions: there is simply no consensus or generally accepted practice in this respect.[36] For the purposes of this commentary, based on the text of the Constitution, the following terminology has been applied. Chapter XII of the Constitution, entitled "Fundamental Rights and Obligations" provides for the fundamental rights and obligations, but there are other parts of the Constitution that also discuss fundamental rights (e.g. the right to private property).[37] The CC applies the following categories: basic rights (e.g. the right to human dignity) and other constitutional rights (e.g. the freedom of contract), obligations (e.g. contribution to rates and taxes). The category of fundamental rights includes constitutional objectives (e.g. public peace and order) and values

[35] Kardos, G.: Az új alkotmány emberi jogi fejezete [The human rights chapter of the new constitution], in: Ádám, A. (ed.): *Alapjogok és alkotmányozás* [Fundamental rights and the making of the constitution]. Budapest, 1996. 20.

[36] An influential university textbook describes "fundamental rights" and "basic rights" as synonyms, and "constitutional rights" often turn up as further synonyms, but this usage is mistaken, since "every right, including civil rights, can be described as constitutional, which is based on the constitution, hence, those as well, which are not the constitutional versions of human rights (e.g. the rights of MPs)." Halmai–Tóth: *Emberi jogok. op. cit.* 29.

[37] The Hungarian Constitution uses the expression "fundamental rights," where the European Convention on Human Rights speaks about human rights and liberties. This does not mean that the catalogues of rights coincide, this only underlines that certain rights set out in treaties have been included in the Hungarian Constitution as fundamental rights. Bárd, K.–Bán, T.: Az Emberi Jogok Európai Egyezménye és a magyar jog [The European convention on human rights and Hungarian law]. *Acta Humana* 6–7 (1992) 9.

(e.g. the protection of the country, the creation of proportionate taxing).[38] Article 8 of the Constitution is the foundation of all these "rights".[39]

The CC, thus, differentiates between the categories of constitutionality, and established distinct status, function and level of protection for each of the "fundamental rights" enumerated in the Constitution. Constitutional rights are less protected and can more easily be limited. It is the rights declared basic rights by the CC that enjoy stronger protection *vis-à-vis* state power.[40] These rights include the basic liberties as well. The liberties of the individual are also legal in nature, since the demand can arise that the state protect the right of the

[38] Géza Kilényi uses a more detailed system including: principles, fundamental values, declarations, rules related to power, fundamental rights, guarantees of fundamental rights, other normatives included in the constitution. Kilényi, G.: Az Alkotmány egyes (alapelvi, alapjogi) rendelkezéseinek jogi jellege [The legal qualities of certain provisions of the Constitution, in the filed of principles and fundamental rights]. *Társadalmi Szemle* 11 (1995) 40. Concerning the other legal sources of fundamental rights see: Rácz, A.: Alapvető jogok és jogforrások [Fundamnetal rights and legistations]. In: Petrétei, J. (ed.): *Emlékkönyv Ádám Antal egyetemi tanár születésének 70. évfordulójára* [Studies presented to professor Antal Ádám on his 70th birthday]. Budapest–Pécs, 2000. 181. Nóra Chronowski claims that the CC uses three categories: „there are fundamental rights, constitutional fundamental rights and constitutional rights. Fundamental civil rights usually demand no conditions to be fulfilled, the law pertains widely, it guarantees all possibilities for action, can be asserted in courts, can only be limited in accordance with Article 8 paragraph (2), and is to be tried by the general test (the right to free speech, freedom of conscience, personal liberty, the right to chose profession). Fundamental constitutional rights permit action only if a number of objective criteria are satisfied, they cannot be directly asserted in courts, but civil rights do flow from them. They are usually limited in accordance with Article 8 paragraph (2), but extra-legal issues may be taken into consideration as well (e.g. state economy), the test of public interest can be used (work, profession, the right to services, the right to rest etc.). Constitutional rights are recognised and protected by the Constitution, but they are neither fundamental, nor civil rights. They are merely related to fundamental rights; often the two presuppose each-other. They can be limited through the use of the accessory test (e.g. the right to enter contracts)." Chronowski, N.: *Integrálódó alkotmányjog* [The integration of constitutional law]. Budapest–Pécs, 2005. 209.

[39] Cf. Halmai–Tóth: *Emberi jogok. op. cit.* 28–29.

[40] It was in German constitutional legislation that the concept of fundamental rights first emerged to denote the most important human and citizens rights. The constitution of the German Empire (*Paulskirchen-Verfassung*) was the first to provide for fundamental rights. The constitution of 11. August 1919, the so-called Weimar Constitution examined, in its second part, "the fundamental rights and obligations of the Germans." The first chapter of the constitution declared on 23. May 1949, which was intended to be provisory, is entitled "Fundamental rights." Ádám, A.: *Alkotmányi értékek és alkotmánybíráskodás* [Constitutional values, constitutional jurisdiction]. Budapest, 1998. 45–46.

individual to enjoy this freedom, according to constitutional standards. Liberty, then, appears as an enforceable right. A liberty becoming a basic right turns it into much more than a liberty, or a nationally accepted freedom to act: in the case of a basic right, the state is obliged to actively create the possibility for exercising that liberty.[41]

Constitutional objectives and values are used almost synonymously in CC parlance, and at times even the notion of constitutional principle emerges with a similar meaning attached to it.[42] Objectives usually appear as abstract constitutional values. Such divergent qualities are placed here as legal security, public peace or the principle of the separation of powers [CC decision 58/1994 (XI. 01), CC decision 30/1992 (V. 26)].[43] Constitutional objectives influence the limitation of fundamental rights and the constitutional surveillance of limitations. If the CC finds that the objective of the regulation indicated by the legislator can be seen as a constitutional objective, then the necessary and proportionate limitation can take place, in order to attain the objective. There is no such catalogue of the constitutional objectives as that of the rights. This is why it takes special precaution to establish the method apt for the assessment of the objectives.

Constitutional values appear in comparison as a more specifically defined category in CC practice. The CC, in treating the constitutional values as distinct from the constitutional objectives, associates the notion of value with the objective side of basic rights and obligations. The defence of the nation or the proportionate sharing of taxation, for instance, appear on the institutional side as a constitutional value in CC rulings. CC ruling 47/2007, which interpreted the right of the President of the Republic to award decorations, declares that the Constitution is a system of values in itself, and it is the responsibility of the State to safeguard its enforcement. Fundamental rights are, in this sense, values as well, which have to be protected.[44] All this means that fundamental

[41] Sajó: *Az önkorlátozó hatalom. op. cit.* 348.

[42] Géza Kilényi finds that in specific cases the nature of the norms is unclear. The term "constitutional principle" carries different meanings in different contexts. The distinction between principles and values is ad hoc as well [CC decision 11/1992 (III. 5.)]. Kilényi: Az Alkotmány egyes (alapelvi, alapjogi) rendelkezéseinek... *op. cit.* 41.

[43] In the case of each second and third generational right, fundamental rights should be distinguished from constitutional objectives, the definitions of the purposes of the state. Halmai, G.: Az alkotmány mint norma [The constitution as norm]. In: Erdei, Á. (ed.): *Második magyar jogászgyűlés* [The second lawyers' convention]. Budapest, 1994. 168.

[44] Antal Ádám, for instance, is of the opinion that "fundamental rights guarantee the basic intellectual, moral, political interests of humans, citizens and societies, together with the protection of their life and health, their social services and material possibilities, and

rights *qua* values can serve as reasons for the limitation of fundamental rights according to the test regarding the limitation of fundamental rights introduced by the CC.

CC decision 47/2007 (VII. 3) orders that „Some values, which serve as a basis for honours are values listed in the Constitution or values derived from them. The major standard for the worthiness is the constitutional value order of the Republic of Hungary. The constitutional value order consists of the values listed in or derived from the Constitution."

It is important to mention, nonetheless, that the system of values discussed in this decision is not a fiction that precedes the decisions, but a constantly evolving system that finds its origins in the individual rulings of the CC, in which the position of the given values is a function of the way in which constitutional crises are resolved. The temporary condition of the system of values can be reconstructed only after the decisions; it is not an a priori existent. This ruling, moreover, also suggests that the CC does not necessarily distinguish between the values encoded in the Constitution, and the abstract objectives that are merely derived from it.

The fundamental rights encoded in the Constitution are summarily called the fundamental rights catalogue. The fundamental rights catalogue is necessary in order that the legislator may not make an arbitrary decision according to its temporary needs concerning the range and content of fundamental rights regulations.[45] In the Hungarian Constitution, however, it is very difficult to define the fundamental rights catalogue, since the abstract nature[46] of Article 8 paragraph (2) of the constitution and certain fundamental rights regulations led to the CC introducing new rights on the basis of already existing constitutional rules.[47]

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thus, unquestionably are among the fundamental values." Ádám, A.: Az alkotmányi értékek fejlődési irányairól [The development of constitutional values]. *Jura* 1 (2002) 11.

[45] Sajó: *Az önkorlátozó hatalom. op. cit.* 336; 319–362.

[46] The text of the Constitution is nevertheless more detailed than that of certain civil and political rights, since it relies on the UN treaty on civil and political rights. Third generational rights turn up mostly as values, in the case of which it is unclear who the legal entity is and who the obligee, what the right is and what the obligation connected to it.

[47] The CC does not regard the fundamental rights catalogue as a closed system. So much so, that through its jurisdiction it has established new constitutional rights. The process is partially directed at the enrichment of certain rights. An example of this was the CC's pronouncing that from general personal rights the right to the free development of personality and the personal integrity can be deduced [CC decision 74/1992 (XII. 28), CC decision 4/1993 (II. 12)]. The CC has also created independent fundamental rights, e.g. in deducing the right to a private sphere from general personality rights [CC decision

Everyday parlance regarding right is multifarious, the concept of fundamental rights, however, has a very special meaning in the Constitution.[48] "Rights in the sense of civil, subjective rights due to every individual are basic categories of human intercourse and social thinking, since our rights define or may define our social liberties, our possibilities for action; which, in turn are guaranteed ultimately by the legal system–and thus the state–, which has the power to create and defend these possibilities."[49] The separation of the clusters of the fundamental rights catalogue, the interpretation of their legal character, as regards both their original content and their limitation, is a challenge that faces legal practice. This is due to the fact that in the case of fundamental rights regulations, in defining their content and the possibilities of their limitation, legal considerations are inseparable from moral, political and other concerns.[50]

In socialist state-law there was barely an example of even mentioning fundamental rights without fundamental obligations.[51] Rights could be exercised as long as obligations were fulfilled.[52] This, however, changed with the 1989 amendment to the Constitution: rights have become independent of obligations.

20/1990 (X. 4)]. The CC has also decided that even if the right to a healthy environment were not present in the Constitution, it could be deduced from the right to live [CC decision 28/1994 (V. 20)]. The right to work, moreover, follows from the right to human dignity [CC decision 21/1994. (IV. 16)]. Géza Kilényi is of the opinion that with this the CC has transgressed its jurisdiction, since, by this logic, it would suffice to name just a handful of rights in the Constitution and let the CC deduce the rest from those. Kilényi: *Az Alkotmány egyes (alapelvi, alapjogi) rendelkezéseinek... op. cit.* 44–45.

[48] Pokol, B.: Az alapjogok és az „alapjogi" bíráskodás [Fundamental rights and fundamental rights jurisdiction]. *Társadalmi Szemle* 5 (1991) 56.

[49] Bragyova: Alapozhatók-e az emberi jogok a nemzetközi jogra? *op. cit.* 94.

[50] "In the fundamental rights cluster of the Constitution [...] the interpretation of the text is impossible without first answering the question: what is the best political interpretation of this political morality." Kis, J.: A semlegesség megközelítései [Approaches to neutrality]. *Politikatudományi Szemle* 1 (1994) 158.

[51] Sári, J.: Jogok és kötelességek [Rights and obligations]. In: Katonáné Soltész: *Emberi jogok hazánkban. op. cit.* 378–385. For a general overview of socialist rights and obligations see: Halász, J.–Kovács, I.–Szabó I. (eds.): *Az állampolgárok alapjogai és kötelességei* [The fundamental rights and obligations of the citizens]. Budapest, 1965.

[52] Conjoining rights and obligations is alien to British, American or German law, although there are examples of it in the French constitution. The ultimate source, however, was Marx's dictum: "no rights without duties, no duties without rights." Quoted in Sári: Jogok és kötelességek. *op. cit.* 383.

The dogmatic revolution is unchanged by the fact that rights and obligations are still treated side by side in the Constitution.[53]

As human beings and as citizens we all have several obligations that we have to fulfil in the interests of social coexistence.[54] Only few of these, however, are among those fundamental obligations that are listed in Article 8 of the Constitution.[55] The Constitution establishes four basic obligations: the obligation to defend the country (Article 70/H.), the obligation to contribute to public revenues on the basis of income and wealth (Article 70/I.), the obligation to ensure the education of young children (Article 70/J.), and the obligation to abide by the laws [Article 77 paragraph (2)]. Out of these, the obligation to defend the country is defined as an obligation of the citizen, while abiding by the other rules are human obligations.

Article 8 paragraph (2) of the Constitution guarantees that rules regarding fundamental obligations are codified as laws. The Constitution further declares that it is possible to place members of the society under constitutional obligations through laws. There are certain constitutional rights, values and objectives, for the attainment of which the legislator is endowed with the right to declare new obligations, and to use the state's powers to enforce these obligations. Since the fulfilment of one's constitutional duties always coincides with the limitation of one or other of the fundamental rights, criteria of limitation refer to the regulation of obligations as well.

2.1.1 The subject of fundamental rights, or the interpretation of the word "human"

Article 8 of the Constitution uses the word "human" in defining the holder of fundamental rights. The subject of fundamental rights, historically and primarily, is truly humankind. This implies an abstract level of entitlement, since there are certain fundamental rights that are restricted to citizens or other specific groups.[56]

[53] There is no such expression in the German constitution, which in many ways is markedly similar to this part of the Hungarian constitution.

[54] The European Convention on Human Rights states that "the individual has obligations with respect to the society, which is the only possible milieu for the full and free development of a personality" (article 29).

[55] Petrétei J. (szerk.): *Magyar alkotmányjog III.* [Hungarian constitutional law III.] Budapest–Pécs, 2006. 608.

[56] Antal Ádám argues that constitutional values oblige everyone: every citizen, the organs of legislation and execution, all natural and legal persons, and all human communities must comply with them. Ádám, A.: A jogrendszer alkotmányosodása és erkölcsösödése [Rendering the legal system constitutional and moral]. *Jogtudományi Közlöny* 10 (1998)

In a number of cases the Constitution claims that "everyone" has the right to something [e.g. Article 55 paragraph (1)], or that no one can be denied their rights [e.g. Article 54 paragraph (2)].[57] There are certain provisions that concern citizens [e.g. Article 69 paragraph (2); Article 70/F]. There are also rights that refer to those who live within the Hungarian Republic (Article 70/D). There are further some rights to which everyone who works in the country is entitled [Article 70/B paragraph (2)–(3)]. Others are for everyone within the borders of the Republic of Hungary.[58]

The original version of the 1949 Constitution held that rights are granted by the State, therefore it is the State who decides about who it confers them on.[59] Already before the political transformation, however, there have been voices arguing that the State merely recognises already existing rights, and thus it is the individual who enjoys priority, and not the state. Following this logic, though, every human being should be entitled to these rights, and the rights should refer exclusively to human beings.

The CC has extended human rights to legal entities as well. The different arguments led to different fundamental rights with different contents in the case of legal entities, which have no inviolable essences, by virtue of which they would be entitled to rights independent of state recognition. This is what distinguishes between them and human beings as far as human rights are concerned. László Sólyom argued, at an early date, in his parallel statement on CC decision 23/1990 (X. 31.), which annulled capital punishment in Hungary, that „the right to human dignity embodies two functions. On the one hand it expresses that there is an absolute boundary and the power of the state or other

352. The CC, however, as we have seen, does not grant such a broad range of meanings to the concept of value.

[57] The concepts of "legal entity" and "legal capacity" have to be sharply distinguished. According to Article 56 of the constitution every human being has legal capacity. See: Sári, J.: Jogképesség az alkotmányjogban, az alapjogi jogképesség [Legal capacity in constitutional law, fundamental right legal capacity]. In: Bragyova, A. (ed.): *Ünnepi tanulmányok Holló András 60. születésnapjára* [Studies presented to András Holló on his 60th birthday]. Miskolc, 2003. 378.

[58] There are certain rights, then, which the constitution defines as human rights, but can only be exercised when they become laws (the right to work or the right to found a party). In others, it is described as a civil right, but foreigners may exercise it as well (the right to social security, the right to culture), and there are citizens' rights that not every citizen has a right to exercise (the right to vote, the protection of diplomats), since these rights are limited already by the text of the constitution. See: Petrétei: *Magyar alkotmányjog III. op. cit.* 24.

[59] The origins of this idea can be found e.g. in: Hobbes's *Leviathan*, Locke's *Treatise on Government* and Rousseau's *Social Contract.*

people may not go beyond this. This is the core of autonomy or self-deterrence. This is reflected by the concept also followed by the CC, stating that the right to human dignity is the origin of other liberties which constantly guarantees autonomy against (state) regulation. This concept of the right to human dignity differentiates men from legal persons, which can be fully regulated and has no untouchable essence" (CCD 1990. 88, 103).

The CC afterwards reaffirmed in its decision number 34/1994 (VI. 24) [summarising the conclusions of CC decision 21/1990 (X. 4), (CCD 1990, 77), CC decision 7/1991 (II. 28) (CCD 1991, 25) and CC decision 28/1991 (VI. 3) (CCD 1991, 114)] that fundamental rights–for different reasons–usually refer to legal entities as well.[60] What makes the status of legal entities special is that they are created in order to serve the interests of natural persons.[61] Even though modern law recognises the concept of even the criminal responsibility of legal entities, they are still qualitatively different from human beings (in civil law terminology: natural persons) as far as the applicability of fundamental rights go. The practice of the CC follows the German GG, where it has even been written into the normative text [GG Article 19 paragraph (3)]. According to this idea, it is the State, which safeguards the recognition and protection of those fundamental rights that legal entities are entitled to. This does not, however, imply that legal entities should have original rights; it simply means that the State constitutes a law.

The CC distinguishes between two types of legal entities: that are legal entities according to public and according to private law.[62] The existence of public law legal entities is heavily problematic.[63] It means, in effect, a legal entity with even more limited fundamental rights than the private law legal entity.[64] The CC declared that State organs have no fundamental rights *vis-à-vis* the State [50/1998. (CC decision XI. 27), CCD 1998, 387, 402]. German constitutional dogmatics has elaborated and recognised the ability of legal entities forming part of the State or exercising powers endowed by the State to

[60] The Constitutional Court examined in this decision how far the provisions on the protection of data about natural persons can be applied to data about legal entities [34/1994 (VI. 24) *Constitutional Court Decision* 1994, 177, 183].

[61] The example already describes public bodies and institutions as public law persons. This is elaborated in the part meaning of the "Republic of Hungary." Cf. Stern, K.: *Das Staatsrecht der Bundesrepublik Deutschland*, München, 1988 vol. III/1. 1112. Quoted in Petrétei et al.: *Magyar alkotmányjog III. op. cit.* 27.

[62] A legal entity is public law legal entity, according to the classic, functional definition, if with its ceasing to be, it would be the duty of the state to take over its function.

[63] Martin Pagenkopf in: Sachs, M. (Hrsg.): *Grundgesetz*. München, 4. Aufl. 2007, 104.

[64] Sári, J.: *Alapjogok. Alkotmánytan II. op. cit.* 378.

be entitled to procedural rights;[65] in their relationships pertaining to private law other fundamental rights may also be due to them.[66] The fundamental rights of public law legal entities have been elaborated to the greatest detail in the case of the rights of local governments, which, however, form a special group, since they have rights, but they are also obliged to respect and serve basic rights. This is due to the fact that the government–according to the Constitution and the laws–has duties, which it fulfils as part of the state. CC practice regarding legal capacity is not coherent, though [CC decision 4/1993 (II. 12), CCD 1993, 48, 69; CC decision 37/1994 (VI. 24), CCD 1994, 238, 244; CC decision 56/1996 (XII. 12), CCD 1996, 204, 207]. What is clear, though, is that local governments can be the subjects of fundamental rights. In the case of governmental fundamental rights, we have the right of self-government to which all voters are entitled (by the general test of fundamental rights protection) and the rights of the governments, which are best seen as jurisdictional authorities [CC decision 4/1993 (II. 19), CCD 1993. 48, 69]. In the latter case the CC does not apply the general test of necessity and proportionality; rather it examines whether the regulation that was the object of the complaint would effectively hinder the work of the government.[67]

The Constitution places public bodies into a similar position to the local governments. Economic, labour and professional unions are historically connected to the right of congregation,[68] but today, in certain cases, they are endowed with executive power.[69] They are entitled to the fundamental rights of legal entities, but they also exercise executive power in cases when they, like the State, are responsible for the respect for fundamental rights.

2.1.2 The inviolability and inalienability of basic rights

This phrase (inviolability and inalienability) is a remnant of Act I of 1946, and a term also from international treaties. Those who negotiated at the Round

[65] In certain cases, even to the content of rights, e.g. in the case of the radio or TV, the liberty of the media; or, with the universities, the freedom of science. Klein 73, and also 67 on the German context.

[66] Stern, K.: *Das Staatsrecht der Bundesrepublik Deutschland.* Band III/1. Allgemeine Lehren der Grundrechte. München, 1988. 1061–1066. quoted in Petrétei et all.: *Magyar alkotmányjog III. op. cit.* 27.

[67] Sári: *Alapjogok. Alkotmánytan II. op. cit.* 389.

[68] *Ibid.* 53.

[69] Public bodies have tasks related to their members or the activities of their members. E.g. The Hungarian Academy of Sciences, economic or professional chambers. Cf. *Ibid.* 390.

Table on the eve on the democratic transformation returned to this document in order to make up for the shortages in respecting human rights.[70]

In the great declaration of the French Revolution (*Déclaration de droit de l'homme et du citoyen*) the inalienability of rights simply meant that human beings cannot renounce their rights.[71] Historically and politically both concepts have had mostly declarative values, they nevertheless have a basic significance as far as positive law is concerned. The notions of inalienability and inviolability have their roots in the philosophy of human rights; their positive meaning in constitutional law indicates the type of force human rights have. These notions imply that neither the constituent nor the legislator have power over the fundamental rights. The two concepts are not synonymous. Inalienability does not imply inviolability: inalienability is a lesser form of protection, as regards grievances, than inviolability. The latter meaning that the right can not only not be withdrawn, but it cannot be violated either.

The two adjectives, however, appear as one in the hermeneutic practice of the CC; they are applied without distinctions, and they add nothing to the criteria of limiting rights set out in Article 8 paragraph (2), they are seen rather as their explanation and their foundation. One way of interpreting their role is by seeing the provision regarding essential content in Article 8 paragraph (2) as flowing from the provision for inviolability and inalienability in Article 8 paragraph (1).[72] Fundamental rights, in this interpretation, are limitable, as long as the limitation does not withdraw their essential content; rights, thus, are inalienable, and cannot be withdrawn altogether.

The other way of reading the adjectives in Article 8 paragraph (1) suggests that the human rights defined in this paragraph do not refer, immediately, to the limited right, but to the human right recognized by the Constitution (as inviolable and inalienable) in its originality and fullness. Article 8 paragraph (2) of the Constitution, then narrows the content of Article 8 paragraph (1). The disparity between Article 8 paragraph (1) and (2) can be resolved by separating the recognition of the full (inviolable and inalienable) human rights

[70] Sólyom: Az Alkotmány emberi jogi generálklauzulájához vezető út. *op. cit.* 43. He believes that this wording is reminiscent of the European Convention on Human Rights (inherent rights) as well, and clearly points to the roots in natural rights. Article 8 coincides with the wording of the GG as well, although there is no proof that it would have been a direct influence.

[71] Sajó: *Az önkorlátozó hatalom. op. cit.* 338. fn.

[72] Bragyova, A.: Vannak-e megváltoztathatatlan normák az alkotmányban? [Are there unchangeable norms in the Constitution?] In: Bragyova (ed.): *Ünnepi Tanulmányok Holló András... op. cit.* 82–84.

from the thesis according to which human rights are usually limited, when they become full rights, codified by the State.

The seeming disparity between Article 8 paragraphs (1) and (2) of the Constitution (the problem that human rights are, on the one hand, inviolable and inalienable, and on the other subject to limitations, with the exception of the essential content) can be resolved. Whichever above interpretation is accepted, the criteria of the inviolability and inalienability of human rights has, apart from its declarative value, positive legal content.

Article 8 paragraph (1) of the Constitution contains the expressions "The Republic of Hungary," and "the State," both of which are used in a loose sense in CC practice. All bodies endowed with executive power are parts of the State, and are consequently obliged by constitutional law to recognise and protect the fundamental rights.

German legal literature suggests that executive bodies can only interfere with interests protected by basic rights, if they are legal authorised to do so. This applies both to (governmental) decisions following legal regulations, and norm-creation by public authorities. The Constitution's orders that protect basic rights can only have direct implications for the work of the executive bodies, if the formal-legal authorisation leaves space for action, in which they have to comply independently with the requirements related to the limitation of fundamental rights.[73]

The commentary to the German constitution suggests that the same norms apply at the courts and in the executive. In limiting fundamental rights they have to respect–as part of the general requirements–the guarantee of essential contents. The legal principles elaborated in the process of law-development, irrespective of the treatment of the fundamental-rights-limiting "judge's right," are restricted in the same way as procedural rights-creation is, thus, the guarantee of essential contents applies in the same way too.[74] The utmost limits of fundamental rights limitation accordingly refer indirectly to judicature as well, since all laws infringing on essential content are classified as unconstitutional. Disregarding the effects of the breach of the constitution on the judicature, the really significant possibility is that through the interpretation of the constitution the court should avoid altering the essential contents of a fundamental right. The same applies to the obligation of the protection of institutions through the constitution.[75]

[73] Pagenkopf 733.
[74] *Ibid.* para 37. 733–734.
[75] *Ibid.* para 38. 734.

All considered, the CC has unambiguously declared that it is not merely the State, abstractly considered, that is obliged to respect the basic rights, but all its organs, and every member of the executive have to comply with the constitutional obligations regarding basic rights.[76] The CC claims that it is through these organs that the State fulfils its constitutional duties.

„The democratic functioning of the state includes through the activities of the state and its organs that it fulfils its constitutional obligation to respect and protect fundamental rights. Besides the protection of rights, the obligation of the state is to establish and maintain the functioning of the certain institutions so that they can guarantee fundamental rights irrespective of the claim of the individuals. The breach of the fundamental rights, therefore, cannot be separated from the functioning of the institution." [36/1992 (VI. 10) CC decision, CCD 1992. 210, 215, 216.]

Primarily it is the task of the legislature, naturally, to actively safeguard the fundamental rights, as the basic rules regarding fundamental rights have to be fixed as laws. Respecting and actively protecting these laws is the part of all organs of the executive.

The strictest liberal concept of the state claims that the state has no other obligation regarding fundamental rights as that of abstaining; what matters is that the organs of the state should in no way infringe upon fundamental rights. More recent constitutional thinking holds, on the contrary, that the state has to actively protect fundamental rights. The institutional concept of fundamental rights, a third option, insists that the protection of fundamental rights has to be present in all areas of the legal system.[77] This last theory sees an all-encompassing institutional framework as the guarantee of the protection of individual fundamental rights. Article 8 paragraph (1) of the Hungarian Constitution declares the obligation to respect and safeguard fundamental rights. CC practice shows, moreover, that the state is objectively obliged, on the basis of

[76] Article 8 paragraph (2) of the Constitution states, unlike its German counterpart, that the requirement of preserving the essential content only refers to fundamental rights regulations set out as laws. Grammatically considered, this suggests, in opposition to the complex interpretation above, that the Constitution restricts, *ab ovo*, the protection of fundamental rights to the activity of the legislative. Béla Pokol believes that the wording of the Constitution is ambiguous here: there is no guideline to what the limitation of fundamental rights refers to, which causes legal uncertainties. Pokol: *Pénz és politika. op. cit.* 115–117.

[77] In almost 90% of the cases the CC decides on the basis of fundamental rights regulations, and only in approximately 10% of the cases does it decide about questions related to the structure of the state. Ádám: *Alkotmányfejlődés és jogállami gyakorlat. op. cit.* 5.

the same paragraph, to protect the institutions, which realises the protection, not subjective, but institutional, of these rights.

The most important fact about Article 8 paragraph (1) of the Constitution is that the state recognises the fundamental human rights. This is where the normative text establishes that these laws exist independently of the state, but are hereby also confirmed by the state. CC practice–analysed above–has not decided whether this recognition is merely a declaration, or whether any specific conclusions flow from it, as regards the obligations of the state. The recognition does refer, nonetheless, to the origins of the fundamental rights, and does thus provide for the possibilities of their limitation by the state. The fact that the state recognises the fundamental rights implies that the system of fundamental rights can in no way be annulled by the state. (See the explication of the expression "inviolable and inalienable" above.)

Not even through a constitutional procedure can the bases of the system of fundamental rights be withdrawn. Although the procedures of the amendment of the constitution are provided for in the Constitution itself [Article 24 paragraph (2)], the 1990s saw major debates regarding the nature of constitutional amendments (summarised as CC decision 1260/B/1997, CCD 1998, 816, 819–826). The majority of the CC claim that the law regarding amendments to the Constitution is special insofar as the CC has no right to examine its content; it can only declare about its (un)constitutionality. The CC decided that the Constitution contains no provision that would make any other provision unchangeable or incapable of losing its effect. (CC decision 39/1996 (IX. 25), CCD 1996, 134, 138).[78] This ruling of the CC notwithstanding, the interpretation–that appeared as a dissenting opinion then–, which sees the first clause of Article 8 paragraph (1) of the Constitution as unchangeable in content is still more convincing.[79] Recognition by the state means that in the relationship between the state and the individual it is always the latter that has priority. The inviolable and inalienable fundamental human rights have to be recognised under whatever circumstances; the amendment that would leave an individual defenceless from the state is unconstitutional.

The essence of these debates can be summarised as follows. Article 77 paragraph (3) of the German GG, which was used as an example in the wording of the Constitution, and which regulates amendments to the constitution, states that in the field of fundamental rights GG Article 1, related to human dignity and the protection of human rights cannot be altered, even through an amend-

[78] Of this debate, see: Bragyova: Vannak-e megváltoztathatatlan normák az alkotmányban? *op. cit.* 65–67.

[79] Cf.: *Ibid.* 77.

ment to the constitution. The German Constitution, in other words, declares that the human right to dignity, an essential element in human rights protection, can under no circumstances be violated. The Hungarian Constitution does not contain this safeguarding passage, and therefore, technically, one could conjecture that every provision can be altered, limited or annulled through an amendment to the Constitution. Even without any explicit constitutional provision, however, what follows from CC practice and its stance regarding essential contents is that the right to life and human dignity cannot be withdrawn; not even through an amendment to the constitution. The recognition of human rights, therefore, results in rendering the essential content of fundamental rights (itself deducible from Article 8 paragraph (1) of the Constitution) in their totality unalterable even to constitutional power.

3. From classic restraint to active protection

The second point made in Article 8 paragraph (1) of the Constitution regarding obligations is that the state respects fundamental human rights. Originally and historically, in the constitutional concepts of fundamental rights, this signifies that content, which was the first to appear, namely that the state and the executive organs (placed under obligation by the fundamental rights) must not, either actively or through their passive behaviour, limit fundamental rights. One of the reasons why constitutions and the organs for the protection of fundamental rights came into being was that it needed to be ensured that the Parliament and the other organs endowed with the power of the state do not abuse their prerogatives.[80]

Respect, guaranteed by the state, also means non-interference. Non-interference, in this case implies that the state does not, for its own interests, influence interpersonal relationships, and does not regulate individual behaviour. This does not mean that the state should protect the individual from being limited in his or her rights by another individual: this only means that the state does not limit anyone's rights through interfering with relationships between private persons or legal entities.

[80] In the early phase of modern constitutionality it was held that human rights do not create concrete right for the citizens, it is only a mere promise that these aspects will be taken into account when the laws relating to citizens are enacted. Waldron, J.: *Rights and Majorities: Rousseau Revisited in Majorities and Minorities.* New York, 1990. 52. Quoted in Sajó: *Az önkorlátozó hatalom. op. cit.* 334.

3.1 Active "protection" of fundamental rights: subjective protection of rights and the state's obligation to protect institutions

CC has deduced from Article 8 paragraph (1) of the Constitution that apart from the classic constitutional content, the obligation of restraint, the state has active obligations as well in the fields of fundamental rights protection.[81] This obligation to protect has two parts: (1) to actively guarantee the prevalence of civil rights, and (2) to establish and protect the fundamental right as a legal institution that manifests the prevalence of constitutional values. This second obligation has two parts as well: (1) the creation of the institutional framework for the rights, and (2) making the prevalence of fundamental rights systematic and harmonious.

An important difference between the two aspects of fundamental rights is that the subjective side–whether it demands restraint or action–entails that the individual has a legal claim on the state, whereas the objective side, which ensures the prevalence of values, does not mean that the individual could, in specific cases, demand that the state fulfil its obligation of institutional protection.

State activity is necessary in order that the fundamental rights prevail. This means that civil rights are realised only if the state creates and maintains an institutional framework: first, in terms of the creation of normative provisions on equal position in life, and second, the system of organs, which these provisions bring into being.[82]

In German dogmatics, regarded as exemplary by the CC, basic rights create not merely civil rights, but (using terminology introduced by Carl Schmitt) the objective protection of–as institution-protection (*Institutionsgarantie*)–private

[81] "The question about the roots of the obligation of the state to protect institutions finds its answer in the constitutional concept of the state, and also in the extent to which the functioning of the society and presupposes the services of the state. In the early XIXth century, the formation of the market-economy demanded the restriction of the state with its powers to confer or withhold monopolies. Constitutions that were born in these times clearly object to the state's and especially the executive's, recently overcome, interference with economic and private affairs. The Supreme Court of the US originally held that the state has no duty of active protection; though it has altered this view since then. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195–196 (1989) (...) Easter-European countries no longer wanted to eliminate the central role of the state; there would have been nothing, on the short term, to replace state services, anyway. The protective 'services' of the state usually survived in the form of constitutional expectations." Sajó: *Az önkorlátozó hatalom. op. cit.* 349–350.

[82] Cf. Farkas, Z.: Az intézmény fogalma, fedezete és formalitása [The concept, the background and the formality of the institution]. *Miskolci Jogi Szemle* 2 (2007) 33.

law and–as institutional protection (*institutionelle Garantie*)–public law institutions, hence removing these from under the free, unlimited provision of the legislator. The constitutional protection of marriage, family, property and inheritance are good examples. It has to be decided case-by-case whether certain provisions related to fundamental rights provide objective institutional protection.[83] According to Carl Schmitt the state protects certain institutions (both in public and in private law) through constitutional regulation. The aim of the regulation is to make it impossible for these institutions to be annulled by simple laws. Schmitt underlined that institutional protection is not the same as the basic civil rights. These guarantees are structured differently. Basic rights presuppose an individual, whose sphere of liberties is, in principle, unbounded. There is no such presupposition in the case of institutions.[84]

A good example for the CC's understanding of the active obligation of the state can be found in CC decision 64/1991 (XII. 17), which provided for the constitutionality of abortions. This was the first occasion on which the CC stated that the state's obligation to respect and protect fundamental rights means, apart from refraining to violate them, that it is obliged to provide for the conditions in which they can prevail. This implies a complex obligation, manifested above all by duties of legislation.

Institutional protection often appears in the decisions on its own. The CC stated in the ruling on abortion as well that if the embryo is not seen as a human being, then objective, institutional right to live is contrasted with the autonomy of the mother. In the case of the right to a healthy environment, the CC pronounced, likewise, that the fundamental right's institution protecting side is guaranteed, but is not a basis for subjective basic rights. If, in a given case, it is only the state's duty to protect rights that is weighed, then a unique standard is applied, which is given in the text of the specific basic rights. More often, however, what is emphasised is the state's duty to create minimal protection for the legal institution, so that the existence of the institution is never imperilled.[85]

"The constitutional requisite (standard) of institutional protection is not necessity and proportionality, but it serves the constitutional tasks of the institution." [52/1997 (X. 14) CC Decision, CCD 1997, 333, 344.]

[83] Pieroth, B–Bernhard, Sch.: *Staatsrecht II. Grundrechte*, 19. Aufl., Heideberg, 2003. 19.

[84] Schmitt, C.: *Verfassungslehre*, 9. Aufl. Berlin, 2003. 170–174.

[85] Sólyom, L: *Az alkotmánybíráskodás kezdetei Magyarországon* [The beginnings of constitutional jurisdiction in Hungary]. Budapest, 2001. 422.

The CC believes, in accordance with the German concept of institutional guarantee,[86] that just because a private civil right is not imperilled, that does not mean that fundamental right as an institution is not in danger.[87] The following decisions demonstrate the developing sophistication of this thought. The objective obligation of the state to protect the institutions is usually elaborated without specific reference to Article 8 of the Constitution; it is described, rather, as the content of the given fundamental right. The obligation flows, however, from Article 8 paragraph (1) in the case of all basic rights. In the early decisions of the CC, reference is often made to Article 8 (the source of fundamental rights and the protection of institutions), [CC decision 33/1992 (V. 28), CCD 1992. 188, 190], later on, however, it has increasingly disappeared, and the CC decisions have lived a life of their own.

An early version of the concept of the protection of institutions can be found in CC decision 15/1991 (IV. 13), which states that it follows from the obligation of the state to protect fundamental rights that the risk to personal rights has to be kept to the minimum [CCD 1991. 40, 52]. The obligation of the state to protect the institutions flows, hence, from its obligation to protect fundamental rights. This does not only mean that the state has to refrain from infringing on those rights, but it has to provide for the conditions in which they can prevail. The state has to create the institutional (objective) guarantee of the subjective rights. According to the CC, the guarantee of the prevalence of subjective fundamental rights is the objective obligation to protect the institutions. The CC first declared that in its decision 64/1991 (XII. 10), (CCD 1991. 297, 302–303), and then reaffirmed it in the explanation to the second decision on abortion 48/1998 (XI. 23), (CCD 1998. 333, 340).[88]

[86] "The existence of institutional guarantees is a relatively recent phenomenon only with regard to constitutional rights–the constitution itself, in its totality, is an institutional guarantee with respect to the state–, but there it has a very significant role to play, since many constitutional rights are essentially institutional guarantees (among other things), such as the right to property or the constitutional protection of the family or marriage. It is indifferent, here, whether or not the constitution *explicitly* calls them so." Bragyova: Vannak-e megváltoztathatatlan normák az alkotmányban? *op. cit.* 69. Emphasis in the original.

[87] In the case of expropriation, for instance, even if the specific decisions fulfil the criteria set out in the constitution, and violate no fundamental right, such decisions may reach a point where they begin to endanger a legal institution, in this case, the right to property. Holló, A.: *Az alkotmányvédelem kialakulása Magyarországon* [The development of the protection of the constitution in Hungary]. Miskolc, 1997. 167.

[88] Balogh, Zs–Holló, A.: *Az értelmezett Alkotmány* [Constitution interpreted]. Budapest, 2005. 207.

It was in connection with the freedom of speech that the CC further elaborated its stance on the objective protection of institutions. The argument is special, but the general concept clearly shines through. The CC stated that

"In addition to the right of the individual to the freedom of expression, Article 61 of the Constitution imposes the duty on the State to secure the conditions for the creation and maintenance of a democratic public opinion. The objective, institutional aspect of the right to the freedom of expression relates not only to the freedom of the press, freedom of education and so on, but also to that aspect of the system of institutions which places the freedom of expression, as a general value, among the other protected values. For this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the person's subjective right to the freedom of expression, the formation of public opinion, and its free development–being indispensable values for a democracy–are also considered." [30/1992 (V. 26) CC Decision, CCD 1992. 167, 171–172.]

The state is obliged, therefore, to harmonise subjective, personal rights, and to protect situations in life in their own complexity. The state is obliged to uphold and manage the whole constitutional order. Only the state can so arrange the laws regulating individual behaviour, that all the legal and institutional conditions of the safeguarding of basic rights are fulfilled, while, at the same time the regulations are in harmony with all the fundamental rights, without the state losing its ability to accomplish all its constitutional tasks. In doing so, the state has to resolve conflicts of interest and harmonise various legal practices. The subjective, personal side of certain fundamental rights is not necessarily correlated with its objective content. The objective protection may extend beyond the subjective right that every citizen enjoys. [CC decision 64/1991 (XII. 17) CCD 1991. 296, 302.]

It is a peculiar phenomenon in Hungarian CC practice that the state's obligation to protect the institutions is conjoined with the protection of values. Nevertheless, as was seen in the explication of the concept of value, there is no such pre-defined system of values as in the German BVerfGE: the objective side of the fundamental rights that connected with the protection of institutions is often identified by the CC with the concept of constitutional value, which the state is obliged to implement. The objective side of specific fundamental rights is, in short, the constitutional value, which cannot be enforced as a subjective (claim) right, but which it is the task of the state to guarantee. There are no constitutional values as separate from the Constitution itself: the objective and subjective sides of the fundamental rights together–as separate

rights and as a unified system–can be called constitutional value, or, alternatively a dynamic system of values.[89]

German constitutional law made a great impact on CC practice in this respect. The BVerfGE strictly separates the subjective and objective elements of fundamental rights. BVerfGE practice shows that the definite, objective system of values, which is manifested by the fundamental rights, and which must prevail in the complete legal system, results in an obligation on the part of the state not only to recognise fundamental human rights in individual cases, but to guarantee their prevalence in general as well. Every single measure of the state–be it legislative or executive–has to respect human rights. The objective side of fundamental rights is not only connected to private rights, it also protects the institutions of constitutionality. The state, for instance, is not only obliged to respect the right to marriage, it also has to protect the institution of marriage. Institution-protection extends, among other things, to property, to the press, to scientific institutions, and to the churches as well. According to the German concept, then, fundamental rights have a double role to play. 1) To protect, as private fundamental rights, certain exceptionally imperilled areas of human liberty. 2) To oblige, as objective principles, the state to generally and institutionally ensure that the conditions of the prevalence of these rights are fulfilled, even in the absence of individual legal grievances.[90] This understanding had a formative influence on Hungarian CC practice as well.

Summary

Article 8 paragraph (1) makes the protection of fundamental rights a primary obligation. This is not merely a declaration: this rule is the regulative principle of constitutional democracy. This obligation is manifested, for instance, in the CC's elaboration of the specific rules for the limitation of fundamental rights–the coherent system of the protection of fundamental rights–, and in the Constitution's providing, in Article 8 paragraph (4), the standards of declaring a state of emergency. In both cases the respecting and protection of fundamental rights is the dominant factor. The primacy of the obligation means that all other considerations–public interests related to the organisation of the state–are only valid if they do not hinder the state in fulfilling its primary obligation. The protection of fundamental rights being a primary obligation of the state

[89] Constitutional Court decision 47/2007 (VII. 3), *Constitutional Court Decision* July 2007.

[90] Halmai–Tóth: *op. cit.* 103–104.

means, therefore, that fundamental rights are seen as the basic values of the legal system, while constitutional considerations concerning the efficacy of the organs of the state are only secondary.[91]

The CC constantly reaffirms that the state has to establish the conditions suitable for the protection of fundamental rights in such a way as to comply with Article 8 paragraph (1) of the Constitution. This is what makes the adaptation to international standards possible, as well as the creation and preservation of the constitutional state, set out in Article 2 paragraph (1). The CC deduced from the provision on constitutionality that the state has to create the most suitable conditions for the prevalence of the fundamental rights [CC decision 34/1992 (VI. 1), CCD 1992, 192, 201]. This being the primary obligation of the state, the CC's criteria for the limitation of fundamental rights have to conform to the constitutional norms. Further restriction of the limitation of fundamental rights, based on the interpretation of the text of the Constitution, has become necessary, in order that the primacy of fundamental rights remain unaltered. It was in the light of Article 8 paragraph (1) that paragraph (2) had to be interpreted, which excluded seeing the possibility of limiting fundamental rights (until their essential content remains unharmed) as legitimating their unbounded limitation; that would be in conflict with the primary obligation of the state to protect fundamental rights. This is why the CC interpreted the regulation on the limiting of fundamental rights in such a way as to enable the state to limit fundamental rights, only on condition that there is no other way to protect or enforce other fundamental rights, liberties, or constitutional values.

[91] Pokol, B.: Az alapjogok és az „alapjogi" bíráskodás [Fundamental rights and fundamental rights jurisdiction]. *Társadalmi Szemle* 5 (1991) 56–57.

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Recent Trends in Extraterritorial Jurisdiction – The Sarbanes-Oxley Act and its Implications on Sovereignty

Abstract. This paper endeavors to analyze the current U.S. practice on the field of extraterritorial application of corporate governance law. As it is widely known, sovereignty is one of basic tenets of public international law, and its relevance is considerably debated in our age. Therefore, the main question of the paper is whether this qualitatively new U.S. practice on the field of extraterritoriality can contribute any insight for the better comprehension of the transformation of sovereignty. So, it will basically compare the lessons stemming from the adoption of the Sarbanes-Oxley Act to the classical concept of sovereignty.

In its first part the paper briefly introduces the reader into the basic notions of extraterritorial jurisdiction. In doing so, it analyzes some theoretical problems, the former U.S. antitrust law practice and the European approach. The second part of the paper deals with the Sarbanes-Oxley Act as an emblematic and very actual example of corporate governance law having extraterritorial reach. This part discusses the major provisions of the act in detail as well as examines the different arguments justifying or criticizing it. In the last part the paper tries to reflect the results of the earlier inquires to different dimensions of sovereignty. Through three different prisms–Legislatio, Legitimatio and Subordinatio–the paper compares each aspect of sovereignty to the lessons flowing from the case of the Sarbanes-Oxley Act in order to get relevant insights concerning the transformation of sovereignty.

In conclusion, the paper argues that the classical 19th century approach of sovereignty is outdated because of the transformation of the global economic and political context. But, sovereignty, as a legal basis and legitimizing factor is still in play if the question is the protection of fundamental national interests. As it exactly happened in the case of the Sarbanes-Oxley Act which intends to protect a pillar–the confidence in corporate governance–of the basic structure of U.S. free market system.

Keywords: public international law, extraterritorial jurisdiction, Sarbanes-Oxley Act, sovereignty

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"But it does suggest that current fashionable suggestions
that State sovereignty is a thing of the past
are to be understood with some cautions and perhaps some qualification"
Sir Robert Jennings

I. Jurisdiction and extraterritoriality–A general introduction

1. Jurisdiction, from theoretical perspectives

Law, since it is a human product, is necessary dependent upon time and circumstances. Its spatial, temporal and material boundaries are designated by the legislator itself and the practice of the community of states in the form of international customary law. The legislator can define the material, territorial, personal and temporal scope of a given legal rule, while international customary law regulates the collision of different states' legal spheres. Thus, the limits of a state's competences stem from both its own decision and the practice of the international community of states.

1.1. The concept of jurisdiction

The birth of the doctrine of jurisdiction is a necessary corollary of both the formation of the modern international political system and the emergence of modern state.[1] The premise of states' sovereign equality, as a basic principle of the Westphalian system of international relations rendered necessary the elaboration of such rules of international law which are able to regulate the relationship among the colliding competences of states. If no state can subordinate other states to its will, since they are equal in a legal sense, international law regulating interstate relations needs such rules which can solve the conflicts in case of collision of legal rules of different states. Therefore, the emergence of the doctrine of jurisdiction was inevitable during the first centuries of legal modernity.

In the view of F. A. Mann, who elaborated a comprehensive theory of international jurisdiction, the concept of jurisdiction in international law consists of five constitutive elements. First of all, it is related to activities of a state, however it has nothing to do with the internal competences of state

[1] Cf. Weber, M.: Államszociológiai töredék [A Fragment of the Sociology of the State]. In: Takács P. (ed.): *Államelmélet* [State Theory]. Budapest, 2003. 48–70.

organs based on municipal law.[2] Secondly, jurisdiction is about a state's right to exercise certain of its powers.[3] Thirdly, a state's right to exercise jurisdiction is exclusively determined by public international law.[4] So, states cannot unilaterally determine the scope of their jurisdiction, it is delimited by public international law. Fourthly, jurisdiction is focused on states' right of regulation.[5] Lastly, jurisdiction in international law has only relevance in those cases which are about matters not exclusively of domestic concern.[6] He concludes that jurisdiction "is concerned with what has been described as one of the fundamental functions of public international law, viz. the function of regulating and delimiting respective competences of States."[7]

It is common ground in doctrine that jurisdiction comprised of the aforementioned five constituting components has three different aspects. One can use the expression of jurisdiction to elaborate on the opportunities of states how to perform acts in the territory of other states (executive jurisdiction), to explain the competences of courts to deal with cases in which a foreign factor is present (judicial jurisdiction), and to analyze the power of states to make binding laws to cases involving foreign elements (legislative jurisdiction).[8]

1.2. The origins of the doctrine of jurisdiction, territoriality

As a consequence of the predominance of the concept of sovereignty in the structure of modern international law a territorial approach of jurisdiction emerged during modernity. This territorial approach was in perfect conformity with the needs of modern international law which regarded the world as a community of sovereign states. All these sovereign states formed complete units of legal systems regulating legal relationships over their territory, as Bodin described it in his fundamental work.[9]

[2] Mann, F. A.: The Doctrine of Jurisdiction in International Law. *Recueil des Cours*, 1964, I. 9.

[3] *Ibid.* 9.

[4] *Ibid.* 10.

[5] *Ibid.* 13.

[6] *Ibid.* 15.

[7] *Ibid.*

[8] Shaw, M. N.: *International Law*. Cambridge, 2003. 576–578.; Akehurst, M.: Jurisdiction in International Law. *British Yearbook of International Law* 43 (1972–73) 177; Lowe, V.: Jurisdiction. In: Evans, M. (ed.): *International Law*. Oxford, 2003. 329.

[9] Cf. Bodin, J.: *Les six livres de la république*. Paris, 1526.

U. Huber in his work published in 1684[10] laid down the foundations of the territorial theory of jurisdiction. In his axioms he announced that laws of sovereign authorities have only force within the boundaries of its state, and the exercise of sovereign authority should not prejudice that kind of power of other states.[11] These axioms gradually became the guiding principles of the territorial conception of jurisdiction. Joseph Story only reformulated them in a more modern wording when he affirmed that "every nation possesses an exclusive sovereignty and jurisdiction within its own territory" and "no State can, by its laws, directly affect or bind property out of its own territory or bind persons not residents there" except so far as regards its own citizens.[12] Story's general maxims were universally accepted in the community of international lawyers prior to World War I. Therefore, they dominated the *doctori communis opinio* about the scope of jurisdiction.[13]

However, the transformation of the structure of world economy, precisely both the strengthening of economic interdependence and the growing role of multinational enterprises, has been starting to progressively challenge this approach following the end of World War II. Due to the far-reaching consequences of the alteration of the world economic context the leading states of the world economy made severe attempts to regulate more-and-more that economic conduct which took place outside of their territories, but nevertheless affected their domestic market.

1.3. Beyond the territorial principle and legislative jurisdiction

This profoundly, or dramatically, altered economic environment induced the rethinking of the whole concept of jurisdiction which was born in a considerably different socio-economic context. Territoriality did not seem to be able to offer adequate answers for the novel problems of the post World War II era anymore. It became clear for the scholars' community that this traditional concept should be exceeded. It was also obvious that the whole paradigm needed rethinking, not only some parts of the territorial approach.

[10] The title of this work: *De conflictu legum diversarum in diversis imperiis.*

[11] Mann: *op. cit.* 26.

[12] Mann: *op. cit.* 28.

[13] However, in the Lotus-case, in 1927, the PCIJ argued that territoriality is not an absolute principle of international law and it does not coincide with territorial sovereignty. [PCIJ, Lotus case, No. 9. (France/Turkey), judgment of 7 September 1927, *Permanent Court International Justice Report. Series A.* Nr. 10, 20.] With this, the case-law opened the theoretical possibility to accept other approaches than strict territoriality.

Mann suggested that international law concerning legislative jurisdiction should liberate itself from the chains of the traditional territorial approach and the time came for the elaboration of a qualitatively new approach.[14] Therefore, he proposed a change of point of view at the beginning of the 60's. He suggested that international lawyers should not ask anymore whether certain facts can be subject to the legislation of a state, but whether the relevant facts of a case belong to a given jurisdiction.[15] Therefore, in his view, problems of jurisdiction should be approached from the direction of the legislation, so from the aspect of a given state, rather than from the direction of the nature of the facts.

According to this approach, when deciding on jurisdiction, it must firstly be decided whether a given jurisdiction has a 'close connection' with the relevant facts of the case. The assessment of these facts from the aspect of territorial maxims may be of marginal importance. Hence, to claim jurisdiction over a given 'behavior' a close connection with the facts of the case is needed, not a territorial one. This close connection must demonstrate a genuine link, in other words a sufficiently strong interest in the case at hand.[16] If a state's relation to a certain constellation of facts is "so close, so substantial, so direct, so weighty"[17] then a state can legitimately, that is, in harmony with international law, claim the right of legislation in that respect.

In sum, Mann argues that mere political, social, economic or commercial interests cannot in themselves establish this close enough connection, since any declaration of jurisdiction should be in harmony with basic principles, such as non-interference, reciprocity, of international law. One may say that Mann proposed to reformulate the theory of jurisdiction on the basis of interest instead of the traditional territorial approach which looked to be quite old-fashioned within the conditions of an emerging global economy.

1.4. The 'primary effects' approach

As a further step in the inner development of the doctrine of jurisdiction Michael Akehurst suggested some additional refinement with regard to the effects doctrine forged out by the case law. In his view it implies certain obscurity from a theoretical point of view. As a main problem, Akehurst pointed out that the broad interpretation of this approach can easily refer to absolutely coincidental facts, remote and slight effects. And, asserting jurisdiction on this

[14] Mann: *op. cit.* 43.
[15] *Ibid.* 44–45.
[16] *Ibid.* 46.
[17] *Ibid.* 49.

basis would have an unfavorable effect on trade relations. It is easy to accept that almost all transnational economic activities can have a certain effect on markets around the globe.

He proposed that the best way to avoid the implications related to a too broad interpretation, such as for instance too many states claiming jurisdiction in a given case, is to limit jurisdiction to that state where the primary effects of the business conduct occurred. In the determination of the primary or secondary nature of the 'effects' two factors should be taken into account.[18] Firstly, are the effects more direct in a state than in other states? Secondly, are the effects occurring in a given state more substantial than in other states? On the basis of this 'primary effects test' it will be possible to differentiate among primary effects which may call for state intervention via its legislation and judiciary, and other effects which are too slight and remote to trigger the same mechanisms. In conclusion, as argued by Akehurst, this approach makes the exercise of jurisdiction possible by those states which have a legitimate interest in the given case.[19] So, by this development, Mann's 'close connection' requirement is realized since this theory links the 'effects doctrine' with the legitimate interest of states. This approach helps to sufficiently sharpen the focus of the 'effects theory', so that it creates a reasonable framework for asserting jurisdiction over business practices occurring outside the territorial jurisdiction of a state.

2. Globalized world economy and competition law

The main goal of competition or antitrust law is to help the neutralization of those effects which can likely arise from an imperfect competition. Distortion of competition can have such outcomes which are unfavorable from the point of view of society. Monopolies cause welfare losses by maintaining prices above the optimal and blocking market entry for new innovative actors. Unfair or restrictive commercial practices also disturb the functioning of the market by depriving the consumer of information necessary to make optimal and well-founded choices, that is, they cause informational asymmetries. Therefore market power and market actors are to be necessarily regulated in order to improve the work of the market. A smooth run of the market can increase the aggregated social welfare as followers of Adam Smith believe and teach it.[20]

[18] Akehurst: *op. cit.* 198.

[19] *Ibid.* 201.

[20] Cf. Van Cayseele, P. and Van den Bergh, R.: Antitrust Law. In: Bouckaert, E.–Geest, G.: *Encyclopedia of Law and Economics.* http://encyclo.findlaw.com/5300book.pdf

The birth of competition law at the end of 19th century was thus an answer to regulate those circumstances which disturb the real functioning of the market.[21] Of course, these early acts mainly intended to regulate the national market, that is, the domestic market of a given country. The structural features of the world economy prior to World War I and in the interwar period did not render it necessary to take into account foreign acts and facts to that degree as it is unavoidable today.

However, today's world economy is characterized by new features which separate it from the earlier stages. According to a historical approach, following the age of mainly land and agriculture based pre-industrial capitalism and the industrial, machine and finance based second phase of capitalism–in which the Sherman Act was born in 1890–a qualitatively new economic phenomenon has come forth in the last decades of the 20th century.

This new form of capitalism is now mainly knowledge-based and has a global dimension in contrast to the limited spatial diffusion of the earlier stages. The distinctiveness of this new economic world order is based on five qualitatively new features. Firstly, cross-border transactions are deeper and more interconnected than they have ever been. Secondly, resources, goods and services are spatially more mobile than they have ever been. Thirdly, multinational enterprises play a more significant role in the creation and distribution of wealth than they have ever done before. Fourthly, the financial and real volatility has increased in a considerable degree due to the dramatically increased interdependence. And lastly, the advent of digital environment and electronic commerce has completely changed the character of cross-border transactions by making them much faster and easier.[22]

Therefore interdependence,[23] which has transactional, spatial and informational dimensions in economic sense,[24] is a keyword to understand that

[21] The first anti-trust acts were the following: the Sherman Act of 1890 (US), the Law against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) of 1909 (Germany), the Clayton Act of 1914 (US), and the Combines Investigation Act of 1923 (Canada).

[22] Dunning, J. H.: *Global Capitalism at Bay*. London, 2001. 13.

[23] A guiding indicator of economic globalization in the sense of interdependence is the trade-to-GDP ratio (in other terms the "trade openness ratio"). Between 1992 and 2005 this indicator increased by 13 percentage points for the whole OECD. For the details see http://titania.sourceoecd.org/pdf//fact2007pdf//03-01-01.pdf. And Cf. Woods, N.: The Political Economy of Globalization. In: Woods, N. (ed.): *The Political Economy of Globalization*. London, 2000. 1–3.

[24] For a detailed and broader discussion of interdependence in international law see: Wouters, J.: Perspectives for International Law in the Twenty-First Century: Chaos or World Legal Order. *Ethical Perspectives* 7 (2000) 17–23.

economic context in which the problems of extraterritoriality in antitrust cases have arisen in the last decades.

3. Extraterritoriality in antitrust cases; general introduction

The very first problems of extraterritoriality in antitrust cases have already appeared in the first decade of the 20th century and they continuously crystallized during the whole century. So, anti-trust extraterritoriality has a history of more than ninety years. The experiences of this period may help to formulate some general premises supporting the particular research of the new trends in the second part.

3.1. The genesis of the U.S. practice

Thus, in accordance with the classical doctrine of public international law, legislative jurisdiction regarding restrictive business practices is subject to those limitations which stem from territoriality.[25] However, within the conditions of a highly interrelated world economy characterized by several dimensions of interdependence it is more-and-more difficult to localize such business practices which extend beyond a certain scale.[26] Generally, business transactions beyond and over national boundaries can be realized in a form of complicated patterns of conduct implying a longer time period and a transnational, even global spatial area.[27] So, these practices necessary have a transnational character due to the very nature of their economic context, and this transnational nature encodes some problems of extraterritoriality from the point of view of legislator.

*3.1.1. The prior-*Alcoa *period, the first antecedents*

U.S. antitrust law is fundamentally based on two legislative acts; on the Sherman Act of 1894 and Clayton Act of 1914. While the Sherman Act in its first paragraph declared that all anticompetitive business illegal,[28] so to say it

[25] For an analysis of alternative legal bases for the application of antitrust law see: Basedow, J.: International Antitrust: From Extraterritorial Application to Harmonization. *Louisiana Law Review* 61 (1999–2000) 1039–1042.

[26] On the question of localization see Mann: *op. cit.* 36–37.

[27] *Ibid.*

[28] Sherman Act 1§ "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nation, is declared to be illegal." Stranger, A.: Analyzing U.S. Antitrust Jurisdiction over foreign parties after *Empagran S.A. v. F. Hoffman-LaRoche, Ltd. Brigham Young University Law Review*, 2003. 1456.

indicated the general U.S. antitrust attitude, the Clayton Act established a detailed procedural framework for antitrust affairs.[29] Additionally, the legislator announced that their provisions equally apply for domestic and foreign business practices by explicitly addressing activities among foreign nations.[30]

Nevertheless, from the birth of the Sherman Act to the first decade of the 20th century, U.S. courts did not think of applying the Sherman Act for business practices occurring outside U.S. territory.[31] Justice Oliver Wendell Holmes, as a judge of the U.S. Supreme Court, in his opinion in the *American Banana v. United Fruit Co.*[32] pointed out that the lawfulness of an act causing damage in the U.S. "must be determined wholly by the law of the country where the act is done".[33]

However, this practice based on a restrictive interpretation of the Sherman Act radically changed by the judgment in the case of *United States v. Am. Tobacco Co.*[34] in 1911. The court held that an agreement between a U.S. and a British tobacco syndicate is under the scope of U.S. antitrust law notwithstanding that the agreement was concluded under British jurisdiction.[35] Moreover, Chief Justice White argued that a specific "rule of reason" imposes U.S. antitrust law to foreign cartels if they significantly threaten U.S. commerce.[36] With this judgment the case-law[37] confirmed the legislator's intent concerning the extraterritorial scope of the Sherman Act.

[29] The Clayton Act concerning the enforcement of antitrust law provided that the U.S. government can bring both civil and criminal suits in case of an illegal, anti-competitive conduct. Moreover, it mandated private parties to bring suits, and provided treble damages for successful complaints. *Ibid.* 1457.

[30] *Ibid.* 1458.

[31] The U.S. Supreme clearly declared in *Rose v. Himely* [8 U.S. (Cranch) 241 (1806)] that, on the basis of conflict-of-laws rules, U.S. legislation is basically territorial, and beyond its borders it can only affect its subjects and citizens. Moreover, in 1812, it forged out a presumption that federal law applies only within the U.S. Norton, J. J.: Extraterritorial Jurisdiction of U.S. Antitrust and Security Laws. *The International & Comparative Law Quarterly* 28 (1979) 577.

[32] 213 U.S. 347 (1909).

[33] Mehra, S. K.: Extraterritorial Antitrust Enforcement and the Myth of International Consensus. *Duke Journal of Comparative & International Law*, 1999. 204,; Falencki, C. A.: Sarbanes-Oxley: Ignoring the Presumption Against Extraterritorialty. *The George Washington International Law Review* 35 (2004) 1219.

[34] 221 U.S. 106 (1911).

[35] Stranger: *op. cit.* 1458, footnote 24.

[36] *Ibid.* Footnote 25.

[37] Other cases disregarding the principle of territoriality in antitrust matters: *Strassheim v. Daily* [221 U.S. 280 (1911)], *U.S. v. Pacific & Arctic Co.* [228 U.S. 87 (1913)], and *U.S.*

3.1.2. The "effects doctrine" and the Alcoa *judgment*

As we have seen in the prior World War II period, the U.S. courts, following some hesitation, consequently applied U.S. antitrust law to anticompetitive foreign business practices affecting the domestic market. However, it should also be recognized that they did so on the basis of occasional considerations, so they did not forge out a coherent doctrine for the justification of their practice.

The so-called "effects doctrine" was born in the famous *Alcoa* decision of the Second Circuit. Since it was able to offer a solid conceptual framework for antitrust litigation having extraterritorial dimensions, it could swiftly replace the earlier fragmented practice. In 1945 in the *US v. Aluminium Company of America and others*[38] (the *Alcoa* case) the court had to decide on such economic effects which resulted from business practices of foreigners outside of the USA. In the given case an agreement among foreign aluminium producing companies affected aluminium imports to the United States.[39] The Court argued that "It is a settled law [...] that any State may impose liabilities [...] for conduct outside its borders that has consequences within its borders."[40] Furthermore, the Court also asserted that the intention to produce effects on the territory of United States is sufficient to invoke the jurisdiction of the US. And, if this intention is proved, the burden of proof will automatically shift to the defendant to prove that his acts have no such effects.[41]

The details of the effects doctrine were elaborated by Judge Learned Hand's opinion in this case. According to him four conditions must be fulfilled to assert US laws over those conducts which occurred outside the territory of US. First of all, a close connection between the conduct and its effect is necessary. Secondly, this effect must be substantial, so it cannot have marginal relevance concerning the given market segment. Thirdly, the effects must be "direct and foreseeable"; a mere coincidence of facts is not enough to assert jurisdiction. Fourthly, the application of this doctrine should be "consistent with generally recognized principles of justice".[42]

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v. Sisal [274 U.S. 268 (1927)]. Common in these cases that the Court chose quite diverse legal bases for the justification of its extraterritorial jurisdiction, for example: producing detrimental effects, the realization of the conspiracy happened partially in the U.S., or the intention of the parties. Norton: *op. cit.* 577–579.

[38] 148 F. 2d 416 (2nd Cir. 1945).

[39] Akehurst: *op. cit.* 193.

[40] Quoted by Akehurst, *ibid.*

[41] *Ibid.* 194.

[42] De Kieffer, D. E.: Effects on US Trade. In: Lacey, J. R. (ed.): *Act of State and Extraterritorial Reach: Problems of Law and Policy.* New Orleans, 1982. 63.

3.1.3. Post-Alcoa developments: the Timberlane *decision and the FTAIA*

Following the *Alcoa*-judgment the 'effects theory' was applied in many US antitrust cases.[43] In 1976 the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*[44] substantially improved this approach by amending the traditional effects test with the element of comity.[45] In the view of the Ninth Circuit the "effects test" simply failed to take into account other states' legitimate interests. A so-called "jurisdictional rule of reason"[46] should be applied in addition to the effects analysis in order to decide whether a U.S. Court has jurisdiction over a certain business activity. This "jurisdictional rule of reason" is composed of several factors which should be assessed to assert jurisdiction. Chief amongst these factors are: (i) the degree of conflict with foreign law or policy, (ii) the extent to which enforcement by either state can be expected to comply, (iii) the extent to which there is an explicit purpose to harm or affect American commerce, and (iv) the relative importance of the given conduct within the U.S. as compared with conduct abroad.[47] So, by adding the element of comity to the "effects test" the Ninth Circuit considerably blunted its edge and therefore it contributed to the consolidation of the quite upheaval international atmosphere.[48]

The Free Trade and Antitrust Improvement Act of 1982 (FTAIA) could also be regarded as a qualitatively new development in the story of "effects test". This procedural statute amending the Sherman Act attempted to unify those divergent "effects tests" which were elaborated in the judgments of different courts.[49] The FTAIA requires the Sherman Act to apply to all conduct related to imports, and it can also be applied in those cases where there is a direct, substantial and reasonably foreseeable effect on U.S. commerce or U.S. exports and this effect "gives rise to a claim under the Sherman Act".[50]

[43] The US courts referred to this doctrine in *US v. Timken Roller Bearing Co.* [83 F. Supp. 284 (1951)], *US v. General Electric Co.* [82 F. Supp. 753 (1953)], *US. v. The Watchmakers of Switzerland Information Centre* [Trade Cases 77, 414. (1963)] and *Hazeltine Research, Inc. v. Zenith Radio Corp.* [239 F. Supp 51, 78 (1969)]. Cf. Akehurst: *op. cit.* 194.

[44] 549 F. 2d 597 (9th Cir. 1976)

[45] About the concept of comity and its role in antitrust litigation see Mehra: *op. cit.* 203–211.

[46] *Ibid.* 205.

[47] Quoted by Mehra, *ibid.*

[48] For critics of this approach on the basis that assessing the interests of states is not part of the judicial function see: Durack, P.: Australia: Conflicts and Comity. In: *Act of State and Extraterritorial Reach... op. cit.* 48–49.

[49] Cf. Stranger: *op. cit.* 1459–1460.

[50] *Ibid.* 1461.

However, the FTAIA was not as successful as initially hoped by the legislator. Because of the ambiguous expression of "gives rise to a claim" divergent interpretations began to develop around the question who precisely can have standing before a U.S. court in an antitrust case. In case if the plaintiff is a U.S. company no problems arise since it can raise the claim without difficulties.[51] Conversely, if the given case is about damages occurring outside the U.S. market, which may affect the U.S. market, as a result of non-U.S. companies' act, the interpretation of the "gives rise to a claim" clause is more problematic. U.S. courts tried to solve this question in three different and divergent ways. The Fifth Circuit held in *Den Norske Stats Oljeselskap As v. HerreMac Vof*[52] case that this clause only allows for plaintiffs who are injured in connection with the effect, so it interpreted it very narrowly.[53] The Second Circuit in *Kruman v. Christie's International*[54] chose a different approach by declaring that on the basis of this clause it is possible to grant jurisdiction if the plaintiff can show evidence of a hypothetical claim under U.S. laws.[55] Finally, the D.C. Circuit also created its own interpretation. As it was elaborated in *Empagran S.A. v. Hoffman-LaRoche, Ltd*[56] foreign plaintiffs can have standing if they bring a suit alongside those U.S. plaintiffs who had suffered damages in the U.S.[57]

3.2. The European approach

The European Union and the EU member states, on a political and a legislative level, produced quite a hostile reaction regarding the extraterritorial reach of U.S. antitrust law. The United Kingdom, as for instance, adopted the U.K. Protection Trading Interests Act in 1980 in order to outweigh the negative consequences flowing from the U.S. practice. Moreover, in the 90's the EU in many press releases questioned the legality of the extraterritorial application of the Helms-Burton[58] and D'Amato[59] acts and other laws[60] which established

[51] *Ibid.* 1464.

[52] 241 F. 3d 420 (5th Cir. 2001).

[53] For details see: Stranger: *op. cit.* 1465–1466.

[54] 284 F. 3d 384 (2nd Cir. 2002).

[55] For details see: Stranger: *op. cit.* 1466–1468.

[56] 315 F. 3d 338 (D.C. Cir. 2003).

[57] Stranger: *op. cit.* 1470.

[58] Cuban Liberty and Democratic Solidarity Act of 1996.; for a detailed discussion of the act from the point of view of the entertprises see: Wallace, C. D.: *The Multinational Enterprise and Legal Control.* The Hague–London–New York, 2002. 613–625.

[59] Iran and Lybia Sanctions Act of 1996.

unilateral sanctions against the so-called "rouge" states between 1993 and 1996. Obviously these acts considerably affected other nations' trade and commerce by unilaterally blocking commerce and business participation in the sanctioned countries. The result of long-lasting negotiations was a Transatlantic Cooperation Agreement in 1998. Thereby the U.S. government provided a waiver under these acts for the European Union in exchange for suspending the WTO proceedings against these acts initiated by the European Communities.[61]

From the earlier it may seem that the EU and its member states have been quite reluctant towards the extraterritorial application of laws, and they have approached this problem from the direction of solid territoriality. However, the analysis of some ECJ and Commission decisions may suggest a slightly shaded conclusion. During the 60's and 70's the Commission and the Court of Justice have already applied the effects doctrine to claim jurisdiction over certain business conducts. In cases related to distributorship agreements, *Martens and Streat v. Bendix* (1964) and *Béguelin Import Co. v. S.A.G.L. Import Export* (1971)[62] or market-access agreements, *Grossfillex v. Fillistorff* (1964), the European Commission or the ECJ partially applied "effects doctrine".[63]

It is also very intriguing that the Advocate Generals in *Imperial Chem. Indus. v. Commission*[64] and *Ahlström v. Commission*[65] explicitly referred to the "effects test" by using the same criteria–substantial, direct and foreseeable–as used in the U.S.[66] But, the ECJ by applying different legal constructions avoided the explicit application of the "effect test" in order to establish its jurisdiction. Finally, in 1999 in *Gencor v. Commission*[67] the ECJ declared that it has jurisdiction if the conduct, in this case a merger, can have an immediate and substantial effect on the EC market. In this case the ECJ acknowledged that the application of the "effects test" is not contrary to international law.[68] Thus, while on a political level the countries of the EU and the EU in itself has

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[60] Between 1993 and 1996 61 laws and other administrative actions were adopted, which authorized unilateral economic sanctions against 35 countries. For a detailed list see: Layton, A.–Parry, A. M.: Extraterritorial Jurisdiction: European Responses. *Huston Journal of International Law*, 30 (2004) 315; footnote 22.

[61] For a detailed discussion of the whole process see *ibid.* 315–318.

[62] Case C-22/71 *Béguelin Import v G.L. Import Export* (Rec. 1971, 949).

[63] Akehurst: *op. cit.* 197.

[64] Case C-48/69 *Imperial Chem. Indus. v Commission* [1972] *European Court Reports*, 619.

[65] Case C-89/85 *Ahlström v Commission* [1988] *European Court Reports*, 5193.

[66] Layton–Parry: *op. cit.* 318–320.

[67] Case T-102/96 *Gencor Ltd. v Commission* [1999] *European Court Reports*, II-753.

[68] Layton–Parry: *op. cit.* 322.

a quite conservative standpoint concerning the extraterritorial application of U.S. laws, the practice of the ECJ seems to be quite similar to the U.S. practice.

II. Recent developments on the field of corporate governance law

1. Changing scope: from behavior of market actors to their governance techniques

Following the earlier brief theoretical-historical overview the paper wishes to turn to recent tendencies. As a starting point of this analysis it might be worthwhile recognizing a qualitatively new trend underlying the development of extraterritorial jurisdiction issues. As we have seen in the first part, from the 50's to the 80's the problems of extraterritoriality mostly flowed from such conducts of economic actors which may affect the domestic market. However, following the adoption of Sarbanes-Oxley Act in 2003[69] the focus of questions concerning extraterritoriality suddenly shifted to the area of corporate governance. So, while in the first four decades of the history of extraterritorial jurisdiction problems were mainly arising from the conduct of economic actors, their restrictive practices which may affect the domestic market, nowadays the main problem of legislation having extraterritorial reach is how these economic operators direct their businesses. So, the whole problem of extraterritoriality got a relatively new layer in the last years besides the 'traditional' issue of transnational restrictive economic practices.[70]

[69] For the full text of the act see http://www.sec.gov/about/laws/soa2002.pdf

[70] Although commentators agree that U.S. securities laws, in principle, cannot be extraterritorially applied there are some very limited exceptions under this rule. In. *Schoenbaum v. Firstbrook* (403 f. 2d 200 (2nd Cir. 1967) and in *Leasco Data Processing Equipment Corp. v. Maxwell* (468 F. 2d 1326 (2nd Cir. 1972) the Second Circuit found that sec. 10 (b) (an anti-fraud provision) of the Securities Exchange Act of 1934 can be extraterritorially applied. And, the court developed a specific conflict-of-laws rule for the extraterritorial application of this section of the act in *Bersch v. Drexel Firestone* (549 F. 2d 614 (9th Cir. 1976). For details see Norton, J. J.: *op. cit.* 584–587 and 590–591. Additionally, the judgment in *Consolidated Goldfields plc. V. Minorco S.A.* (871 F. 2d 252 (1989) also raised the certain questions about the extraterritoriality of U.S. securities laws. Cf. F. A. Mann: The Extremism of American Extraterritorial Jurisdiction. *The International and Comparative Law Quarterly* 39 (1990) 410–412. Furthermore, this development has also some antecedents in certain provisions of the Foreign Corrupt Practices Act of 1977. This act covered conduct of (i) U.S. companies' subsidiaries abroad as well as (ii) foreign

2. *The Sarbanes-Oxley Act and its extraterritorial implications*

The Sarbanes-Oxley Act enacted on July 30, 2002 has opened a new chapter in the history of extraterritoriality. According to U.S. commentators it should be regarded as the most comprehensive corporate reform legislation since the reforms that had been introduced under the presidency of Franklin Delano Roosevelt.[71] Both the Securities Act of 1932 and the Securities Exchange Act of 1934 mainly intended to give concrete answers to the financial crisis of 1929 from the aspect of corporate and securities affairs. Commentators also agree that the decisive impetus behind the provisions of the Sarbanes-Oxley Act were the corporate scandals between 2001 and 2002 coined by such companies' names as Enron, World Com Inc., Adelphia Communications Co. and so on.[72] Thus, the Sarbanes-Oxley Act must be regarded as a clear governmental answer to certain failures and shortcomings of the U.S. corporate system and one of its major aims is to restore and preserve investors' confidence in the securities market.[73]

It is more than a commonplace that the U.S. securities market is one of the world's most important marketplaces.[74] Foreign companies are traditionally actors on these capital markets, therefore extraterritorial problems were implied from the very first moment of the birth of the act.

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companies registered under the Exchange Act. De Kieffer: *op. cit.* 61–62. But corporate governance issues from the aspect of extraterritoriality were impressively and comprehensively raised by the Sarbanes-Oxley Act.

[71] Lunt, M. G.: The Extraterritorial Effects of the Sarbanes-Oxley Act 2002. *Journal of Business Law*, 2006. 250. President Bush regarded it as "the most far-reaching reforms of American business practices" Thompson, J.: The Paradoxical Nature of the Sarbanes-Oxley Act as it Relates to the Practitioner Representing a Multinational Corporation. *Journal of Transnational Law and Policy* 16 (2006) 266.

[72] Lunt: *op. cit.* 249.; On the background and the legislative history of the Sarbanes-Oxley Act see Falencki: *op. cit.* 1212–1214.

[73] In the words of William Donaldson, former president of the Securities and Exchange Commission. Quoted by Stoltenberg, C.–Lacey, K. A.–George, B. C.–Cuthbert, M.: A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the U.S. and European Union. *The American Journal of Comparative Law* 53 (2005) 462.; Or, in the words of Congress, as it was formulated in the act's preamble, the aim of the act is "To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."

[74] Most of the major transnational companies are registered companies on the U.S. securities exchanges. Cf.: http://www.sec.gov/divisions/corpfin/internatl/foreignsummary 2006.pdf

2.1. Nexus to extraterritoriality

Concerning the extraterritorial scope of the Sarbanes-Oxley Act, its definition of "issuer" has a predominant importance. In its 2 § (a) (1) the act defines "issuer" as

> "an issuer (as defined in section 3 of the Securities Exchange Act of 1934), the securities of which are registered under section 12 of that Act, or that is required to file reports under section 15 (d), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933, and that is has not withdrawn."[75]

Thus, the decisive factor from the personal scope of the act is either the fact that a company's securities are registered according to the Securities Exchange Act or the company is required to send reports to the Securities and Exchange Commission (SEC). Therefore, all non-U.S. companies registered on the US. securities exchanges and reporting with the SEC are under the scope of the act.[76] So, all companies whose securities are traded in the U.S. must comply with the provisions of the Sarbanes-Oxley Act. Therefore, it is clear that the act has an extraterritorial scope from the point of view of those multinational enterprises that are registered on U.S. securities exchanges.

2.2. The major provisions of the act

The Sarbanes-Oxley Act introduced numerous new provisions concerning the traditional corporate governance structure of U.S. companies. These provisions specifically aimed to strengthen the transparency of the companies' affairs so they are answers to a specific problem of the U.S. corporate governance model. However, they may be in conflict with foreign corporate governance laws due to the explicit extraterritorial nature of the act arising from its definition of "issuer". Thus it is inevitable to get to know them better, in order to understand the vehement foreign, mostly European, reactions.

The act introduced reform in the following areas of corporate governance.[77] Firstly, it instituted certain reforms regarding the pre-Enron corporate struc-

[75] Quoted by Falencki: *op. cit.* 1222.

[76] On December 31, 2006 1145 foreign companies were registered. Cf.: http://www.sec.gov/divisions/corpfin/internatl/foreignsummary2006.pdf

[77] On the basis of M. D. Vancea's categorization, however by restructuring it and amending it with new elements Cf. Vancea, M. D.: Exporting U.S. Corporate Governance Standards through the Sarbanes-Oxley Act: Unilateralism or Cooperation. *Duke Law Journal* 53 (2003) 838–839.

tures of U.S. companies by (i) establishing the so-called audit committee, as a compulsory requirement for all companies under its scope;[78] (ii) expanding certain disclosure requirements for principal executive officers;[79] (iii) introducing new certification requirements for CEOs and CFOs;[80] (iv) prohibiting loans to executives of a company[81] and (v) establishing an efficient "whistleblower protection" system for employees providing information about the financial situation of a company.[82] Secondly, it made serious efforts in order to (vi) considerably enhance the independence of auditors by dramatically decreasing the potential personal and business relationship between audit firms and their audit clients.[83] Thirdly, from the aspect of administrative regulation it (vii)

[78] Section 301 of the act obliges all publicly registered companies to establish an audit committee which is directly responsible for the appointment, compensation and oversight of the work of the auditor, a public accounting firm registered by the new regulatory entity (PCAOB), employed by the issuer. This committee is composed of independent members and members of the board of directors. The other main part of this committee's work is to treat any complaints on accounting, internal controls and auditing matters. Lunt: *op. cit.* 252.

[79] Section 409 obliges each issuer to disclose to the public any relevant information regarding the financial situation of the company as rapidly as possible. Furthermore, according to section 401 every report containing financial statements, mainly the periodic reports, should reflect all "material correcting adjustments to [...] financial statements" which have been identified by an external audit firm. Lunt: *op. cit.* 254–255.

[80] Section 302 requires that both the principal executive and financial officer must certify in the quarterly and annual reports that they give a fair presentation of the financial situation, so to say the statements contained in the report are accurate and complete. Additionally, as required by section 906, these periodic reports submitted to the SEC have to include a certification prepared by the CEOs and CFOs that the given report fully complies with the relevant sections of the Securities Exchange Act. Lunt: *op. cit.* 251.

[81] Section 402 prohibits any credits in the form of personal loans to executive officers. Lunt: *op. cit.* 251.

[82] Section 806 forbids to discharge, suspend, threaten, harass or even discriminate against an employee because of the fact that this employee lawfully provided information or assisted in an investigation. If the employee can reasonably believe that a conduct constitutes a violation of any securities law he cannot be sanctioned due to her/his assistance to the public authorities. Lunt: *op. cit.* 255–256.

[83] Section 206 forbids audit firms to perform for a company any audit service if any of the companies' principal executive officers has been employed by the given audit firm and participated in any capacity in the audit of that company in the one year period preceding the actual audit process. Additionally, Section 201 explicitly prohibits auditors to provide eight specified non-audit services for the audit clients. Furthermore, section 203 requires that audit partners should rotate every five years. O'Neill, T.–Cardi, B.–Chabit, S.: Conflicts between French Law and Practice of the U.S. Sarbanes-Oxley Act of 2002. *International Business Lawyer*, April 2003, 62–63.

strengthened the sanctions, both civil and criminal, for violations of securities law[84] and (viii) significantly broadened the prescriptive competences of the SEC over companies by delegating a general implementing power to it[85] and (ix) established a new administrative body, the Public Company Accounting Oversight Board (PCAOB) to register audit companies and set forth compulsory standards for the audit profession.[86]

2.3. Arguments for justification and critics

Obviously, the Sarbanes-Oxley Act has been a central topic of political, business and scholarly disputes since Congress passed it. In these debates one can distinguish an armada of arguments concerning the values and the disadvantages of the act. In the next part this paper shall try to summarize the most important lines of argumentation in order to indicate the worldwide reception of the act.

[84] If the principal officers falsely certify a report, or any report contains false statements, they have to face serious fines and/or prison sentences. In case of a "knowingly" false certification the penalty may be a fine up to $1 million and/or prison sentence of up to 10 years. If it was committed "willfully" the penalties imposed are much more serious, a fine up to $5 million and/or prison sentence of up to 20 years. Moreover, the act creates a new crime for the destruction, alteration or falsification of records in federal investigations and the destruction of corporate audit records in its section 802. *Ibid.*; Vancea: *op. cit.* 839. Footnote 32.

[85] The act by its section 3 (a) gives a general mandate to the SEC to "promulgate such rules and regulations as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act." Until July 30, 2003 the SEC adopted 13 sets of rules in various areas, such as for example improving the independence of outsider auditors, requiring companies to disclose whether they have a code of ethics for the principal officers, or governing standards of conduct for attorneys practicing before the SEC. Section 1103 permits SEC to temporally freeze certain payments made to those who violated securities law, and due to section 1105 the SEC has an authority to prohibit persons from serving as principal officers or directors. For the details see http://www.sec.gov/news/press/2003-89a.htm; http://www.sec.gov/news/press/2003-89a.htm

[86] In order to enhance the transparency of the work of audit companies Section 101 created a new administrative body, the Public Company Accounting Oversight Board. One of the main areas of the work of this body is to register audit firms, because after the adoption of the act only publicly registered audit firms can provide audit services. Besides this authorization function it has the competence to adopt standards, as for instance auditing, quality control and ethics which should be respected by all registered companies. Moreover, this organ has a certain supervisory function because it can conduct inspections as well as investigations and disciplinary proceedings regarding public accounting firms, and it can even impose appropriate sanctions. Lunt: *op. cit.* 254.

2.3.1. Arguments of justification

The main justification behind the Sarbanes-Oxley Act is the intention to defend the American capital markets and, in a broader sense, to protect the whole American free enterprise system. On the one hand President George W. Bush argued that this act provides "new tools" for the U.S. administration.[87] And, these "new tools" make the American authorities able to defend the American free enterprise system against corruption and crime, even in an "aggressive" way.[88] On the other hand, Senator Paul Sarbanes emphasized that the act is an essential piece of legislation in order to protect the investors' confidence in the U.S. corporate structures. Senator Sarbanes pointed out that the trust "in corporate executives and their financial reports" as well as the independence of accountants should be regarded as the main aims of the act.[89] Consequently, the act is justified in the eye of the U.S. government by the aim of protecting the American system of capitalism through the defense of trust and confidence in the U.S. corporate structures. This governmental intent to restore the confidence can effectively contribute to the smooth functioning of U.S. capital markets, which can also be considered to be of vital importance to U.S. style capitalism.

Another argument for the justification of the act, on a scholarly level, is that it can potentially establish "global best practices",[90] so to say it can foster the existing convergence of corporate models.[91] Many experts state that the convergence of corporate governance models can lead to a substantial decrease of transaction costs of issuers and to an increased comparability of companies. Furthermore, it can also facilitate the opportunities of global firms to enter foreign public markets, and trade there with their shares.[92] In conclusion, the convergence of corporate governance models based on worldwide recognized "global best practices" can reduce the transaction costs of the functioning of enterprises. And this reduction of transaction costs can increase the efficiency of world economy which may lead to a better performance of world markets.

[87] President George W. Bush's speech at the time of signing Sarbanes-Oxley, July 30, 2002. Quoted by Thompson: *op. cit.* 266.

[88] *Ibid.*

[89] Falencki: *op. cit.* 1214.

[90] Cohen, A.–Winter, M.: The Debate Sarbanes-Oxley. *Accountancy Age*, Sept 4, 2002. http://www.accountancyage.com/accountancyage/comment/2038648/debate-sarbanes-oxley

[91] Vancea: *op. cit.* 867–870.

[92] Cf. *Ibid.* 868. Footnote 169. At this point the author quotes the researches of John C. Coffee.

2.3.2. "Insider" and foreign criticisms

The Sarbanes-Oxley Act has been under very severe criticism since its enactment in July 2002. Regarding these critics, one interesting, probably unusual point is that the act was criticized by U.S. issuers as well as foreign actors.

Smaller U.S. firms were quite vocal concerning the negative effects of the act on their businesses. Several advisory organizations came up with such conclusions that the burden created by the provisions of the act is quite significant for small companies being publicly listed. They also anticipated that for these small companies it is even advantageous to go private, that is to de-list from the stock exchanges, because they can avoid a considerable increase of their costs in this way. As for instance, a survey realized in 2004 found that for smaller companies, that is firms with annual revenues less than $1 billion, the price to remain listed increased by 130 percent compared to the costs of the last pre-Sarbanes-Oxley year.[93]

Besides this increasing of compliance costs small firms can be threatened by a silent change in the attitude of audit firms invoked by the act. Due to the severity of the new rules regarding the auditors, audit companies, mostly the Big Four, may drop their clients considered to be too risky to work with them. Because of the fact that a Big Four audit is regarded by the business community as symbol of prosperity, losing this relation can send a bad message to possible investors. Furthermore, the increase in audit fees due to the act's audit provisions may also imply disadvantageous consequences for the smaller companies.[94]

The universal foreign criticism has basically been focused on the charge of illegitimate extraterritoriality of the act.[95] Generally, the international community complained that the U.S. intended to act as a global regulator on the field of corporate governance practices, thus it did not respect, or even infringed the sovereignty of other countries to rule these activities.[96] Consequently, the act appeared to conflict with classical principles of public international law on jurisdiction. Additionally, international business community raised a very clear-cut point regarding the act's disadvantageous implications. In the view of foreign firms it has a very strong anti-competitive aspect vis-à-vis foreign companies.[97] They argued that the cost of compliance for foreign companies is

[93] Stoltenberg–Lacey–George–Cuthbert: *op. cit.* 469. Footnote 72: first and second sections.

[94] *Ibid.* Footnote: 72 third section.

[95] Cf. Vagts, D. F.: Extraterritoriality and Corporate Governance Law. *The American Journal of International Law* 97 (2003) 293.

[96] Falencki: *op. cit.* 1218.

[97] *Ibid.*

much higher,[98] errors, and therefore criminal penalties are much more likely, and some exceptions of the act favor U.S. companies.[99] Additionally, the United Kingdom, Germany and Japan asserted that Congress failed to respect the principles of comity, which obliges the U.S. to adjust to those foreign regulations which are equivalent to the provisions of the act.[100]

The European Commission, either as a body or through its high officials, also indicated quite serious concerns about the act. In a communication of 2003 the EU Commission raised the problem of "outreach effects" on European companies as well as auditors and asserted that these can cause "a series of problems".[101] Moreover, Alexander Schaub, Director General of DG Internal Market in his speech in the framework of an ECB Symposium criticized the act owing to the lack of consultation and the rather fast and hasty process in which it was enacted.[102]

Moreover, certain European companies explicitly declared that they have very serious doubts whether it is worthwhile to maintain their listing in New York. The increased costs of compliance to the new requirements may outweigh the benefits of being listed on the New York Stock Exchange.[103] Moreover, almost two thirds of European CEOs said during a survey in 2003 that they are more reluctant concerning the access to U.S. capital markets then they have been prior to the Sarbanes-Oxley Act. These European CEOs argued that the over-regulation created by the act could be the biggest threat to the business.[104] As an illustration of this wide-spread attitude among European

[98] Lunt: *op. cit.* 264. About compliance costs in details see: Thompson: *op. cit.* 265. Footnote 1. Concerning S&P 500 companies the average costs of auditing fees in 2001 (the last prior-Sarbanes-Oxley year) was $2.934.000, following the adoption of the act in 2002 it increased to an average of $4.048.000.

[99] Section 402 generally prohibits all loans to executives, but it provides certain exceptions for U.S. banks, on the basis that they are insured by a federal entity, the Federal Deposit Insurance Corporation. Falencki: *op. cit.* 1218.

[100] *Ibid.* 1211; for a detailed analysis of conflicting rules see Falencki: *op. cit.* 1225–1229.

[101] Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the EU–A Plan to Move Forward, COM (2003) 284, 2004 OJ (C 80) 12–16, quoted by Stoltenberg–Lacey–George–Cuthbert: *op. cit.* 468.

[102] Speech by Alexander Schaub, Director General of DG Internal Markets to the ECB Symposium, Money v. Ethics, Nov 29, 2002, quoted *ibid.*

[103] *Ibid.* 470.

[104] Schlesinger, L.: Sarbanes-Oxley scares off European CEOs. *Accountancy Age,* 24 Jan. 2003. http://www.accountancyage.com/accountancyage/news/2031960/sarbanes-oxley-scares-european-ceos

CEOs, Wendelin Wiedeking, Porches's CEO argued, when his company withdrew its plans for listing on the NYSE, that the certification requirement for CEOs and CFOs makes no sense, because German company law establishes a collective responsibility for the management board.[105]

2.3.3. Scholarly problems

The other part of criticism was raised by scholars and experts. A major part of this wave of criticism focused on the issue that the act is, in reality, an unambiguous exportation of U.S. corporate governance models. Some scholars even asserted that since the Sarbanes-Oxley Act was adopted without any foreign consultation, in a unilateral way,[106] it can be a kind of American economic imperialism.[107] Thus, from the aspect of international business environment including multinational companies as well as major powers of world trade, the act may indicate the intent of the U.S. to export its corporate governance model without taking into account other interests and divergent models.

From a more detailed perspective it can also be argued that the Sarbanes-Oxley is not in conformity with those requirements which can justify its extraterritorial scope. According to an academic position neither the subject-matter test nor the effects test can justify the extraterritoriality of the act.[108] Due to the fact that that the act does not use any geographical terms and that the act's legislative history suggests that the act is mainly concerned with domestic problems, the Congress' intent to regulate extraterritorial affairs cannot be presumed.[109] Additionally, since the act also tries to regulate that kind of conduct which cannot have substantial harmful effects on U.S. investors, because these conducts have already been effectively regulated by foreign legal systems, the act goes beyond those considerations which may justify extraterritoriality under the effects test.[110] Additionally, it should also be taken into account that from the perspective of a comity analysis, even in the narrow sense of cases of true conflicts between U.S. and foreign laws, as accepted in the *Hartford Fire*[111] judgment, the legitimate extraterritoriality of the act is highly questionable.[112]

[105] Lunt: *op. cit.* 264.

[106] Stoltenberg–Lacey–George–Cuthbert: *op. cit.* 457; Vancea: *op. cit.* 874; Lunt: *op. cit.* 266.

[107] Falencki: *op. cit.* 1224.

[108] Vancea: *op. cit.* 849–860.

[109] *Ibid.* 853–854.

[110] *Ibid.* 858.

[111] 509 U.S. 764 (1993).

[112] Vancea: *op. cit.* 861.

Case-studies based on the post-Sarbanes-Oxley experiences revealed the fact that certain provisions of the act conflict with some structural elements of U.S. or foreign legal systems. Section 307, for instance, requires an attorney representing an issuer to report any evidence of a material violation of securities law to the chief legal officer or to higher forums, as the Audit Committee or the Board of Directors. This provision obviously conflicts with the American Bar Association's model rules of professional conduct which require the attorney not to disclose any information without her/his client's permission. The narrow exceptions provided by these model rules, preventing the client from committing a criminal act which likely result in imminent death or substantial bodily harm, can obviously not be applied to this case.[113]

Some whistleblower protection provisions can also be in conflict with national legal systems. In order to get all relevant information related to the work of the whole company; companies should establish anonymous tip-lines through which an employee can inform the management of the company without giving any personal information.[114] However, these tip-lines are not in conformity with the data-protection rules applied in the EU. In France in the case of McDonalds the French Data Protection Authority found that McDonalds by introducing an anonymous tip line failed to comply with the French Data Protection provision, hence it did not authorize this tip-line system.[115] A German Court also established that a similar tip-line created by the Wal-Mart Group is contrary to the provisions of the German Works Constitution Act.[116]

2.4. General Assessment

The most general and most important effect of the Sarbanes-Oxley Act is the significantly stronger U.S. governmental position in the supervision of financial markets and their operations.[117] The act established a new administrative body, the Public Company Accounting Oversight Board, and broadened the competences of SEC by mandating it with the implementation of the act. So, one can easily recognize a shift in the attitude of the U.S. legislator. By this act the legislator abandoned the former regulation model based on the self-

[113] Thompson: *op. cit.* 268.
[114] *Ibid.* 269–270.
[115] *Ibid.* 271–274.
[116] *Ibid.* 274–277.
[117] Ehrat, F. R.: Sarbanes-Oxley–a View from Outside. *International Business Lawyer*, April 2003. 77.

regulation mechanisms established and managed by market-participants, and proceeded to a novel model in which state supervision has the preeminent role.[118] It may also indicate that the U.S. legislator recognized the relevance of the enhanced governmental regulation of financial markets in order to tame those turbulences which might be caused by the market actors' conduct.

Taking into account the importance of U.S. capital markets on the world scene it seems to be quite likely that the act shall have a certain benchmark effect.[119] Foreign legislators may regard the Sarbanes-Oxley Act as a reference point or a model having certain provisions which might be worthwhile to take into consideration during the drafting of new corporate governance standards. For instance, during the discussion of 8th Company Law Directive on statutory audit Commissioner McCreevy suggested very similar points on the further development of EC law in this area.[120] *Inter alia* he emphasized that the directive should clarify the duties of auditors, their independence and their ethics. Moreover he argued for a "robust public oversight of the audit profession".[121]

The recent version of this directive being in force obliges public-interest entities to establish an audit committee which should primarily monitor the financial reporting process and the effectiveness of the company internal audit and risk management system.[122] It is not too difficult to identify the same underlying philosophy behind the above-cited article of the EC directive and the relevant paragraphs of Sarbanes Oxley Act on audit committees. Both the U.S. and the EC legislator attempts to strengthen the independence of audit mechanisms by establishing a new committee within the traditional corporate structures in order to minimize the risks arising from the possible interlocking of companies and audit firms.

In conclusion, the Sarbanes-Oxley Act does not only profoundly changed the regulative framework of U.S. financial markets by setting forth new standards for publicly listed companies, but revealed a new tendency of U.S. legislation which proceeds to an increased governmental intervention in former self-regulatory areas. Additionally, the act can also illustrate another change in the U.S. legislator's approach concerning extraterritoriality; instead of the

[118] *Ibid.*

[119] *Ibid.*

[120] Naturally, the effects of Parmalat collapse in 2003 should also taken into account as a significant motivation to adopt an ammended version of the former directives on audit controls. Cf. Stoltenberg–Lacey–George–Cuthberg: *op. cit.* 478–481.

[121] *Ibid.* 482.

[122] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006, Art 41.

former international practice focusing on the search for cooperative solutions to extraterritorial problems, the U.S. legislator privileges the unilateral solution nowadays.

III. Sovereignty in the mirror of the recent extraterritorial developments

1. Introductory remarks

Sovereignty is one of the most important basic antinomies in the understanding of modern international law. Its precise meaning, boundaries and relevance has been broadly debated in our age, however these very intense scholarly disputes indicate its inestimable importance within the structure of international law.[123] Extensive debates on sovereignty, from the most different perspectives, are quite frequent, but a theory of international law without sovereignty, at least as an antithesis, is nearly unimaginable. Hence, it is a rational solution to compare the earlier findings with certain dimensions of sovereignty, since it may facilitate to better understand both our findings and sovereignty in itself.[124]

In the next part the paper will reflect the earlier findings to the concept of sovereignty by using three different prisms. Each prism–*Legislatio*, *Legitimatio* and *Subordinatio*–will highlight a peculiar feature of sovereignty to compare this feature to recent extraterritorial developments. This method may make possible to better comprehend the effects of Sarbanes-Oxley Act on the general concept of sovereignty and formulate some conclusions.

2. Legislatio–*sovereignty as legislation*

Those international lawyers who rely on the heritage of Jean Bodin agree that legislation is the most crucial aspects of sovereignty.[125] By the 'invention' of sovereignty Bodin created the modern state's most relevant conceptual basis.

[123] Cf. Jennings, Sir R.: Sovereignty and International Law. In: Kreijen, G. (ed.): *State, Sovereignty and International Governance*. Oxford, 2002. 27.

[124] Due to the differences in the interpretation of this concept, this paper does not endeavor to work out a comprehensive definition. In the following analysis it will only apply certain dimensions of sovereignty, which should be a part of it, however they should not be every part.

[125] Cf. Jennings: *op. cit.* 30–31. Sir Jennings here argues that these years' tragic situations related to 'failed states' in Asia and Africa are obvious symptoms of the decline of state sovereignty.

If the modern state is sovereign all governmental functions, so to say the corollaries of statehood like legislation, execution and judiciary, are easily explainable coherently from the point of view of public law. Since every state competence emanates from a final axiom, from the *suprema potestas*. And one particularly relevant dimensions of sovereignty is legislation, as Bodin formulated it: an essential manifestation of sovereignty is the power to make the law.[126] Or, in a more modern wording: a state's sovereign right to regulate[127] those conducts which are under its jurisdiction, if certain requirements regarding the basis for it are met.

The Sarbanes-Oxley Act is a sovereign legislative act in an age when most scholars talk about the disappearance or the erosion of traditional sovereignty presuming a governmental center of decision-making.[128] They argue mostly following these three patterns. First, in our world classical state sovereignty is diminishing since the interlocked nature of world economy and its economic self-regulation regimes make it meaningless.[129] Hence state sovereignty is a possible source of binding norms, but neither the only one, nor a privileged one. Secondly, besides the classic governmental level alternative, that is from sub-national units to supra-national or global processes, decision-making centers have been emerging since the end of Cold War.[130] Therefore, more and more parts of decisions are made on a level, or in a process which is not the traditional governmental one. And thirdly, due to the considerable improvement of regulatory elements in international law, such as for instance human rights enforcement mechanisms, international law erodes governments' sovereignty

[126] "Primum ac praecipium caput majestatis [...] legem universis ac singulis civibus dare posse" quoted by *Ibid.* 27.

[127] A. W. Lowe argues that economic sovereignty, as a theoretical concept, may help in deciding jurisdictional conflicts by summarizing those points–a central core of economic rights–which can justify the extraterritorial reach of a given act. Cf. Lowe, A. W.: The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution. *The International and Comparative Law Quarterly* 34 (1985) 744–746.

[128] For a comprehensive overview from the point of view of international relations see: Jennings: *op. cit.* 33–35.

[129] Cf. Teubner, G.: Global Bukowina: Legal Pluralism in the World Society. In: Teubner, G. (ed.): *Global Law Without a State*. Aldershot-Brookfield USA-Singapore-Sydney, 1997. 4–7.

[130] Cf. Brühl, T.–Rittberger, V.: From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of Twenty-first Century. In: Rittberger, V. (ed.): *Global Governance and the United Nations System*. Tokyo, 2002. 1–6.

to comprehensively regulate domestic affairs.[131] That being said, governments should incorporate norms having an international or supranational law origin into their legal systems without possessing any discretion for their implementation.

Notwithstanding this, the Sarbanes-Oxley Act suggests a slightly differentiated conclusion about the imaginable future of sovereignty. Through classical lenses this act is the best example of a traditional sovereign legislative act. When Congress passed the act, it made a serious effort to change the whole framework of such a regulatory area–law of securities and corporate governance–which has a strategic importance from the perspective of the whole U.S. economy in the age of globalization. Thus, this 'draconian' change in the law of securities is in the very national interest of the U.S. In doing so, the legislator was quite reluctant to take into account the legitimate interests of other states or those of the international community, in one word comity concerns. So, the act had been passed in a unilateral way, which was shocking as a new state practice regarding the cooperative solution of extraterritorial issues seemed to be gradually emerging at the end of the 90's.[132] But, the U.S. legislator simply disregarded this former practice and enacted the act without any serious doubts in its legality concerning all international law aspects. Furthermore, the SEC, being responsible for its implementation, has also been very reluctant to consider foreign complaints, although it provided some extension of compliance deadlines, it did not permit any exemptions from the scope of the act for foreign companies.[133]

In conclusion, the example of the Sarbanes-Oxley Act unambiguously shows that notwithstanding all those considerations and achievements which may suggest the rethinking of the classic theories of public international law largely

[131] Cf. Weiler, J. H. H.: The Geology of International Law–Governance, Democracy and Legitimacy. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004) 559.

[132] All examples of this emerging practice in antitrust cases–Agreement relating to Mutual Co-operation regarding Restrictive Business Practices of 1976 (USA-Germany), Agreement relating to Co-operation on Antitrust Matters of 1982 (USA-Australia), the final outcome of the Boeing and McDonnell Douglas merger, and the Transatlantic Partnership on Political Cooperation and Understanding with Respect to Disciplines for Strengthening of Investment Protection in 1998 about the effects of the Helms-Burton and D'Amato Acts between the United States and the European Union–showed that the parties concerned can find cooperative solutions.

[133] This is contrary to the former SEC practice, which exempted foreign companies from certain obligations flowing from the securities acts. For a more detailed discussion see Falencki: *op. cit.* 1229–1231. and Lunt: *op. cit.* 250.

based on sovereignty, sovereignty as a right to legislation is still in force and can be a powerful tool in the hands of governments. And, governments by using this tool can seriously disturb the recent structure of international law by creating such a situation which is obviously contrary to the universally recognized principles of international law. However, this attitude is such a reality which renders the adjustment of both international and national policies necessary.

3. Legitimatio–*sovereignty as a value-basis in the construction of international law*

From the second half of the 19th century to the first decade of the 20th century, transactionalism was the dominant assumption in the theory of international law. This approach was mostly based on such interlinking concepts as sovereign equality, consent and *pacta sunt servanda.*[134] It also meant that the basic legitimating source of the whole international order based on an international law mostly comprised of bilateral treaties was the sovereign will of actors. So, behind the whole system of international law stood the states' sovereign will as a fundamental cornerstone of the entire world order. Therefore, from this perspective, Sovereignty, that is to say sovereign equality, could be regarded as the preeminent legitimating source of international law.

However, following the end of World War I and owing to the hard lessons stemming from it the value structure of the international system has begun to gradually change. First of all, Stability as a value has appeared. It primarily meant that the maintenance of the stability of the international system with the help of a multilateral framework should be considered as a value of humankind. This conviction was reflected among the objectives of the League of Nations in an embryonic form,[135] and considerably elaborated in the UN Charter.[136] Then, Human Rights have also become a legitimating factor of international law as they were concretized in the UN human rights system, from a solemn declaration through covenants to implementing and follow-up mechanisms.[137] Moreover, international Rule-of-Law, meaning the slow formation of increasingly

[134] Cf. Weiler: *op. cit.* 555.

[135] Preamble, Art 8 first para, Art 10, Art 11. The Covenant of the League of Nations.

[136] Art 1. UN Charter.

[137] de Wet, E.: The International Constitutional Order. *International and Comparative Law Quarterly* 55 (2006) 58.

refined and complex international dispute settlements systems,[138] also got quite an important place within the values of the international community.

Thus, the value-basis of international law is much richer and broader today than it was at the turn of the 20th century, when Sovereignty had a predominant place in this construction. Therefore, legitimization of international law emanates from these values which can even permit the restriction of Sovereignty in order to favor other values.

The legislative attitude behind the Sarbanes-Oxley Act is exclusively based on the sovereignty of Congress. Within certain constitutional limits[139] Congress can regulate anything, even conducts occurring outside the territory of the U.S., and it is only legitimated by Sovereignty. It is not too difficult to recognize that this approach has clearly originated from that century when Sovereignty, and the national interest implied within it, was the predominant legitimating factor in international law. So, as the example of the Sarbanes-Oxley Act shows it, this classic attitude did not at all disappear under the influence of the new values, it can again-and-again appear if a certain constellation of facts invokes it.

What could be the major factors being able to trigger this attitude? On the basis of lessons arising from the Sarbanes-Oxley Act one of them is clearly identifiable. If basic or vital interests of a state are at stake, it is quite likely that the given government will answer by bringing out the mask of Sovereignty. And, if this state has enough power,[140] in military, economic and diplomatic sense, to disregard or neglect the reactions of the international community, such an answer will be even more likely.

4. Subordinatio–*sovereignty with the eyes of subjects*

[138] For a comprehensive overview of the web of international, regional and specialized tribunals as well as international administrative tribunals and international arbitral tribunals see: Burgenthal, T.: Proliferation of International Courts and Tribunals: Is it Good or Bad. *Leiden Journal of International Law* 14 (2001) 267–271.

[139] Concerning extraterritoriality the Congress is limited by the so-called "subject-matter" test which comprised of two mutually interlinked assumptions. The first one is the "Charming Betsy presumption" implying that legislative acts cannot to be enacted in violation of international law. The second one, the Foley Bros. presumption, asserts that an act of Congress, unless a contrary intent appears, can be applied within U.S. territorial jurisdiction. The intent of Congress, if it is not an explicit one, can be revealed from the given act's legislative history and the related administrative decisions. This doctrine was revitalized by the *Aramco* judgment in 1991. Cf. Vancea: *op. cit.* 849–852.

[140] Cf. Rynagaert, C.: The Limits of Substantive International Economic Law: In Support of Reasonable Extraterritorial Jurisdiction. *KULeuven Institute for International Law Working Papers*, No. 99, Aug. 2006. at http://law.kuleuven.be/iir/nl/wp/WP/WP99e.pdf, 2. 4th para. and 5. 3rd para.

From a different angle, sovereignty necessarily implies the fact of subordination to the *suprema potestas*. All subjects under the scope of the sovereign must obey to its acts so long as the conditions for a legitimate practice of sovereign powers are satisfied. In modern international law this conviction is reflected in the very refined doctrine of jurisdiction as well as in the detailed rules of conflicts-of-laws. Thus, doctrine of jurisdiction and conflict-of-laws rules orientate that fundamental preparatory process in international law whereby a person is subjected to a given legal system which emanates from the will of a sovereign. Therefore, these areas of law, which may have a marginal significance compared to the weight of substantive provisions, have a vital importance regarding the element of *subordinatio* in international law. So, state practice concerning the extraterritorial reach of a sovereign act can have fundamental importance from the point of view of potential subjects.

In accordance with the provisions of the act every issuer is under the scope of the Sarbanes-Oxley Act if its securities are registered on the U.S. financial markets or it has to report regularly to the SEC. In order to get a slightly more precise picture on the relevance of this section it is worthwhile comparing the list of top 200 transnational companies with the list of registered companies on the U.S. securities exchanges.[141] In 1999, so during the pre-Sarbanes-Oxley period, from the top 30 transnational companies 21 companies were foreign in accordance with their place of incorporation and the remaining 9 were incorporated in the USA. From the foreign multinational companies only 7 companies were not registered under the SEC (4 Japanese and 3 German multinationals). This fact means that the most powerful players of world economy attach a substantial importance, due to a number of reasons as for instance access to nearly unlimited sources of capital or indicating the prosperity by being registered on such prestigious marketplaces, to the fact of being registered on U.S. capital markets. So, a considerable majority of top global multinational companies[142] is an actor on the U.S. securities markets, that is to say they have to act under the scope of U.S. securities law even if they are de facto foreign companies. Nevertheless, until the birth of the Sarbanes-Oxley Act the SEC

[141] Cf. S. Anderson and J. Cavanagh: Top 200–The Rise of Corporate Global Power. at http://www.ips-dc.org/downloads/Top_200.pdf 10. Table 3. Top 200 (1999); and International Registered and Reporting Companies, Alphabethical Listing (2000) at http://www.sec.gov/divisions/corpfin/internatl/alpha2000.htm

[142] About multinational or transnational companies in general see: Wallace: *op. cit.* 9–13 and 60–70.

provided them some exception from those obligations which must be completely fulfilled by domestic companies.

With the passing of the Sarbanes-Oxley Act Congress in fact tried to fully subject all registered companies to its jurisdiction notwithstanding their place of origin or registration. So, the U.S. Sovereign sent a clear message to the major actors of the global economy: if they want to have access to the U.S. capital market they have to fully comply with the requirements of the act, even if this extraterritorial reach is contrary to international law and the former international practice, or the compliance costs are too high. Foreign multinationals can only stay on the domestic capital markets if they accept these new rules emanating from the will of sovereign. In any other case, due to whatever legitimate reason of non-compliance, transnational companies must leave the U.S. securities exchanges because exemption from the scope of the act is impossible.

In conclusion, if transnational companies would like to participate in the exploitation of U.S. capital sources, they have to subject their full corporate governance system to the new rules created by the Sovereign. So, Congress offered them a stay or leave solution via neglecting the classical mechanisms to deal with the problem of *subordinatio* developed by scholars and state practice in the last century. This attitude revealed again, in a very bluntly way, the element of *subordinatio* in sovereignty which was successfully disguised and tamed by the doctrine of jurisdiction and international private law.

5. Final comments

The comparison of the Sarbanes-Oxley Act to these three profoundly interlocked dimensions of sovereignty–*Legislatio*, *Legitimatio* and *Subordinatio*–can lead us toward a slightly non-conventional conclusion. First of all, it should be recognized that the whole concept of sovereignty is under transformation. The concept of sovereignty is changing since states are more-and-more willing to give up or confer certain competences to international organizations. Moreover, the international, perhaps it is better-to-say global context of international law has also considerably changed, and this transformation also eroded some original aspects of sovereignty mostly in an economic sense.

However, as the case of the Sarbanes-Oxley Act unambiguously shows, this does not at all mean that sovereignty is completely disappearing, rather that its function has been transforming to a certain degree. Nowadays, in accordance with the emblematic example of the Sarbanes-Oxley Act, legislative sovereignty–legitimated by the sovereign interest and the goal of subjecting certain actors to the sovereign regulative competences in order to protect vital

national interests–might be conceived of as an *ultima ratio*, a last legal basis which can be very efficiently invoked.

In conclusion, it is quite plausible to say that the classical 19th century approach of sovereignty is outdated, but sovereignty is still in play if the question is the protection of fundamental national interests. One may formulate this conclusion from a different angle, too: under the layers of global interdependence, multilateralism, regionalism and international regulatory processes–that is to say under the surface of those factors of which our age's international environment is comprised–we can get to see Sovereignty if a certain constellation of facts invoke its re-appearance. And, it has exactly happened in the case of the Sarbanes-Oxley Act.

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Consumer Protection in Sales Transactions in Hungary**

Abstract. Sales transactions are the basic and most frequent transaction consumers conclude in their everyday lives. Therefore, it is very important to know what rights consumers have, and which procedures and remedies are available when their rights are infringed. The paper aims to give a comprehensive overview of consumer protection issues arising out of the sales contract in Hungary, from the advertising activity, via the contract itself, and until the enforcement of consumer's rights. Attention will be given even to consumer education and information, as important tools for making smart purchase choices. Since a wide range of issues will be covered the paper aims to give a structured summary of consumer's rights, remedies, institutions, enforcing mechanisms, procedures and educational and information tools and methods. The approach of the paper is original as the protection of consumers is analyzed from both civil and criminal law point of views. Besides focusing onto consumer protection in Hungary in general, the paper will present some unique practical data from a smaller territorial unit, the city of Szeged.

Keywords: consumer protection, sales contract, civil and criminal law, Hungary, Szeged

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All views expressed in the paper are personal and mistakes and omissions are those of the author.

I. Introduction

The paper aims to determine how consumers are protected in Hungary when concluding, the basic and most frequent transaction in their everyday life, the sales transaction. In other words it explores what rights consumers have according to the law in force, and which procedures and remedies are available when their rights are infringed. In exploring consumer's rights and remedies a complex approach is taken, and the protection of consumers is analyzed from both civil and criminal law point of views.

The paper deals with consumer sales transactions. However, as sales contract in the Hungarian Civil Code is defined as a contract for the sale of *goods*, the features of the sale of goods contract will be considered, together with mentioning some special ways of sale like distance contracts and doorstep selling, but some contracts that otherwise could be considered as sales contracts and some selling arrangements like time-share agreements and package holidays will stay outside the scope of this paper.

The paper aims to give a comprehensive overview of consumer protection issues arising out of the sales contract in Hungary, from the advertising activity, via the contract itself, and until the enforcement of consumer's rights. Attention will be given even to consumer education and information, as important tools for making smart purchase choices. However, since a wide range of issues will be covered, there is no place for an indebt analysis. Therefore, the paper aims to give a structured summary of consumer's rights, remedies, institutions, enforcing mechanisms, procedures, educational and information tools and methods, pointing onto some compelling problems but leaving room for further research and discussion.

Since the research (that this paper is based on) has been conducted in Szeged, the capital of Csongrád County, the city with county rights (megyei jogú város)[1] and its own university, the paper will, when dealing with the application of the law in practice, present unique, location specific data related to consumer protection in Szeged.

After the introduction the paper will give a short overview of the crucial definitions (consumer, sales contract) and present the legislation in force (civil and criminal law). Thereafter it turns to the enforcement of the law, to its mechanisms and procedures, also briefly showing the institutional framework of consumer protection in Hungary. The last part spreads some light on consumer education and information. The paper is concluded with a short assessment of

[1] The local authorities have extended powers but are not independent territorial units.

the main research findings and some remarks on the future of consumer protection in Hungary.

II. Definitions

Before turning to the legislation in force and its enforcement, it is necessary to determine how the crucial terms, the consumer and the sales contract are defined according to the Hungarian law.

1. Who is a consumer?

Interestingly, the Hungarian law knows a couple of definitions, they are given by the CLV Act of 1997 on Consumer Protection[2] (hereinafter: CPA), the Act IV. of 1959 on the Civil Code of the Republic of Hungary[3] (hereinafter: CC), the Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition (hereinafter: PUTPUC) and the Act LVIII of 1997 on Business Advertising Activity (hereinafter: BAA).[4]

The most detailed definition of a consumer is given by § 2 (a) CPA, according to which a consumer is *"a person who purchases, buys, orders, receives, or uses goods for non-business or non-professional purposes, or for whom a service is rendered, furthermore who is the addressee of information or an offer related to goods or services"*.

The CPA talks about consumers as *person*s, which leads to a conclusion that both natural persons and business organizations (with or without legal personality) can be considered as consumers,[5] whereby the main criteria for delimiting consumers from non-consumers is the aim of the purchase. A consumer is a person, who buys, orders or receives goods for a *non-business, non-professional purposes.*

The CPA addresses consumers as persons who *buys, orders, receives or uses* goods. Therefore, the notion of a consumer is wider than the buyer, and tenants, lessees, even receivers of a gift and family members of a purchaser

[2] Comments and analysis of the definition of consumers can be found in Fazekas, J.: *Fogyasztóvédelmi jog* [Consumer Protection Law]. Miskolc, 2003. 62–67.

[3] The definition of a consumer has been implemented into the CC with 1997 amendments.

[4] Act LVIII of 1997 on Business Advertising Activity.

[5] See also court decisions *Bírósági Határozatok (BH)* 2000, 554 and *BH* 2006, 343.

can be considered consumers.[6] It also extended the notion of a consumer from realized transactions to those situations when there is not contract yet, but the rights of a consumer had been infringed due to some information or offer to conclude a contract (e.g. in the advertisement).[7]

The CC defines a consumer as "*any person who is a party to a contract concluded for reasons other than economic or professional activities*". This, definition, though much more simple than in the CPA, encompasses (explicitly or implicitly) almost all elements than the CPA, but limits consumers to persons who are party to a contract, and consumer transactions to realized transactions.

The PUTPUC in § 8 (1) determines consumers as *customers, buyers and users* that thereby define consumers in a much wider manner. A consumer can be anyone who is a customer, a buyer or a user, a natural person or a business organization even when buying goods in the course of its business or professional activities.

§ 2 (g) of the BAA defines consumers as "*all private individuals, legal entities and economic associations without legal entity towards whom or to which advertising is directed*". Therefore, a consumer is anyone to whom the advertisement is directed, regardless of a purpose (professional or non-professional) in connection which the advertisement is received. Moreover, it is not necessary to actually receive the information but is sufficient if the advertisement is published and a person, a consumer falls within the critical category of a group of persons towards whom the information is directed.

In addition to these definitions, Ministerial Decrees, that implement EU directives into the Hungarian legal system, often overtook the definitions given by the directives. Taking into account that directives mostly delimit consumers to natural persons, the confusion is even greater.

Having more definitions and different definitions within one legal system is not the best solution. Problems arose when in an instant case the legislation itself does not give any guidance as to who is a consumer. In like situations, the best solution is to determine under which legal branch the problem falls and apply the corresponding definition, and in case of a doubt use the definition of the CPA.[8]

[6] Fazekas: *Fogyasztóvédelmi jog* (2003). *op. cit.* 63.
[7] *Ibid.* 66.
[8] *Ibid.* 67–68.

2. What is a sales contract?

The essence of sales contact is determined by the CC. However, it does not give a definition as to what constitutes a sales contract, but rather determines the mutual obligations of buyer and seller. Namely, the seller is obliged to hand over the goods and to pass the title on goods onto the buyer, while the buyer is obliged to take the goods and to pay their purchase price [§ 365 (1) CC]. Further on, the CC also defines the consumer contract. A consumer contract is any contract concluded by a consumer and a person acting within the scope of its economic or professional activities [§ 685 (e) CC].

It can be concluded, that in a *consumer sales contact the business organization, a person acting within the scope of its trade or business is obliged to hand over the goods and to pass title on them, while the consumer (natural person or business organization) is obliged to take possession of the goods and to pay for their price.*

III. Civil and Criminal Law Protection of Consumers in Hungary

The civil and criminal law protection of consumers is considered from a practical point of view, starting from a pre-contractual phase (advertising), from the initial "contact" of the consumer with the goods, throughout the content of the contract and the rights and remedies of a consumer in case of non-confirming performance by the seller. The liability of the seller will also be considered for injuries caused by a defective product, and for crimes and offences. However, the civil and criminal law protection of consumers in Hungary will be presented as a brief overview of consumer protection regulations pointing onto the main features of the Hungarian law and legal system without detailed analysis and scientific elaborations.

1. The pre-contractual phase: Advertising and labeling

Advertising is the major activity of the companies that influences (and induces) consumer in making their purchase choices. Basic rules on advertising can be found in the BAA, whereas additional provisions are laid down in the PUTPUC and sanctions in the Criminal Code.

Business advertising is any *"communication facilitating the sale or use in any other way of products, services....; the popularization of the name, designation or activity of an enterprise; or the familiarization of goods or identification of goods"* [§ 2 (h) BAA].

The most important notions regarding advertising are that, of course, the advertisement should contain true information, the advertised goods and the advertiser should be clearly identified, and ultimately the sales contract should be performed according to the advertisement or label. Covert and misleading advertising (§ 6 & 7 BAA) is expressly forbidden, comparative advertising is allowed under certain conditions (§ 7A BAA).

In case of a breach of law, a business organization is liable for an offence or a crime. The *Act LXIX. of 1999 on (minor) offences* (hereinafter: MOA) incorporates only one offence involving advertising relating to pornographic advertisements and the advertising of sexual services [§ 145 (1) MOA].

Misleading consumers is a crime, called: *Deception of Consumers. "Any person who, in respect of any essential feature of a product, publicly states false facts, or true facts in a deceptive way, or provides deceptive information on any essential feature of the product for the purpose of rendering it more desirable, is guilty of a misdemeanor punishable by imprisonment for up to two years, community service work, or a fine"* (§ 296/A CRC).

Therefore, the information has to be stated to the general public, it has to be deceptive (false information or a true information that becomes deceptive in the context) and the advertiser has to be aware of the true features of the advertised goods and of the fact that the information published is potentially deceptive. However, in order to have a crime, the publication of the information is sufficient, and practically none consumer has to be decided.[9]

Besides advertising, another important factor that influences purchase choices and often contains crucial information are labels. Even though labeling requirements strongly relate to information of consumers, due to its close links with advertising and the structure of the paper itself, the rules on labeling will be discussed at this point. The CPA deals considerably with rules relating to labeling, whereby the most important provisions are those on the exact content of labels and the language requirements, or that labels should be only or also in Hungarian language (§ 9 & 10 CPA). If goods are accompanied with the Users or Instructions Manuals, it should be also written in Hungarian language (§ 11 CPA). Besides general rules contained in the CPA, there are other legislative acts that regulate a more narrow market of goods[10] or only certain aspects of

[9] For a more detailed analysis see Tóth M.: *Gazdasági bűnözés és bűncselekmények* [Economic Criminal and Crimes]. Budapest, 2000. 178–184. This is the only crime in the CRC that has no monetary limits, or in other words, the same circumstances cannot lead to an offence in case the harm done to consumers was not substantial. See 186 above.

[10] Like the Ministerial Decree on shoe labeling 4/1998 (I. 16).

labeling.[11] Regarding price indications, prices of goods should be indicated twofold. They should contain the sale price and the unit price (§ 14 CPA). In case any doubt occurs regarding the content of the labels, the CPA declares: the burden of proof is on the distributor (seller) (§ 16 CPA).

A business organization that violates rules on labeling harms competition and is liable for a crime: *False Marketing of Goods. "Any person who produces a product with distinctive appearance, packaging, labeling or name, from which a competitor or his product having distinctive features can be recognized, and who does so without the consent of such competitor, or who acquires such product for the purpose of placing it on the market, is guilty of a felony punishable by imprisonment for up to three years"* (§ 296 CRC).

If a sufficient amount of production material (e.g. raw material, labels) has been acquired for marketing purposes, but the actual marketing did not take place, the person will be liable for preparatory actions of the crime.[12] If until the discovery only an unsubstantial amount of goods has been placed on the market, a business organization will not be liable for a crime but rather for an offence.[13] An offence will be committed also when a person publicly states a false statement (on the label) to the general public, but the amount of goods placed on the market (carrying false statement) is not substantial.[14]

False Marketing of Goods is a crime, because it is designed to safeguard the interests of both consumers and competitors. Therefore, if a business organization labels its products with a confusingly similar label with its competitor, it will be liable for the above criminal act even if the goods are otherwise of a perfect quality.[15]

2. *The content of the sales contract*

Regarding the content of the consumer sales contract the most important provisions are those related to unfair contract terms. Consumers often have no choice but to sign a pre-printed form contract that contain a number of pre-formulated terms by the business organization. Consumers thereby have no

[11] Like the Government Decree on providing uniform codes for the goods 145/1991 (XI. 22).

[12] Horváth, T. at all: *A magyar büntetőjog különös része* [The Special Part of the Hungarian Criminal Law]. Budapest, 1999. 632.

[13] Court decision: *BH* 1996. 404; In case of an offence the fine of up to HUF 100.000 is playable, according to § 71 of the Government Decree on some offences 218/1999 (XII. 28).

[14] Court decision: *BH*, 1999. 103.

[15] Court decision: *BH*, 1998. 552.

choice but to take or leave the contract, and are not in a position to negotiate its terms (contracts of adhesion). General provisions regarding unfair contract terms can be found in the CC.

The CC firstly defines standard contract terms,[16] emphasizing their non-negotiated character;[17] regardless whether they are integrated into a written contract or provided in a separate document [§ 209/A (3) CC]. It also contains a set of rules on the incorporation of standard contract terms into the contract; however these rules relate to all contracts (consumer and business) and are of less relevance to consumer contracts.[18] Rules of the CC that are consumer focused relate to contract interpretation and unfair contract terms.

Regarding contract interpretation, the CC incorporates the contra proferentem rule according to which if the term is not clear it will be interpreted in favor of the consumer [§ 207 (2) CC].

A standard contract term that has not been individually negotiated is regarded unfair in consumer contracts if, contrary to the requirements of good faith and honesty it causes a significant and unjustified imbalance in the parties' rights and obligations arising under the contract [§ 209 (1) CC]. The unfairness of a contractual term is assessed, taking into account the nature of the contract and all the circumstances that existed at the time of contract conclusion [§ 209 (2) CC]. The CC also states which terms will not be regarded as unfair, these are: terms relating to the definition of the subject matter of the contract, the price of the goods and terms defined by legal regulations [§ 209 (4 & 5) CC].

Unfair contract terms will be declared null and void. Nullity can be invoked by the injured party, provided the injured party is a consumer [§ 209/A CC] or by an organization that represents consumer interests [§ 209/B CC].[19]

[16] Calling them "standard contractual conditions". See § 205/A (1) CC.

[17] If doubt arises whether the term has been individually negotiated, the burden of proof is on the party who claims it was negotiated. See § 205/A (2) CC.

[18] For example it provides that contract terms which have not been individually negotiated will become part of a contract only if they have been previously made available and if the other party accepted the terms explicitly or via conduct that implies acceptance [§ 20 5/B (1) CC]. Moreover, the party that indents to use its standard clauses has an obligation to explicitly inform the other party of any standard term that differs substantially from usual contractual conditions [§ 20 5/B (2) CC].

[19] The organization that represents consumer interests (like the NACPH) can ask the court to grant an injunction against an unfair term in standard contracts (or general conditions of business that is part of the standard contract) of a business organization, provided it is unfair, regardless whether the term has been actually used. Following such judgment the user of the unfair term or condition shall satisfy any claim the consumers may have against him.

Provisions of the CC are further specified with the *18/1999 (II.5) Government Decree on unfair terms in consumer contracts*[20] that relates to both standard terms in consumer contracts and to unfair terms in individual contracts conclude by consumers.[21] The Decree lists contract terms that will be regarded as unfair (§ 1 of the Decree) differentiating between those that will be regarded unfair in any event, and those that will be regarded unfair until the opposite is proven (§ 2 of the Decree).

3. *Performance of the contract*

The seller is obliged to deliver (or hand over) goods that are of a quality and quantity specified in the sales contract. Regarding characteristics of goods, according to the CC, goods should be as goods of the same type under like circumstances, or goods that a consumer can reasonably expect taking into account any public statement on the specific characteristic of goods made in advertising or on labeling. Accordingly, goods should fit for any particular purpose which the consumer made known to the seller at the time of contract conclusion (§ 277 CC).

If the delivered goods does not confirm to the contract the seller is liable for lack of conformity (implied warranty) [§ 315 (1 & 3) CC].[22] Conformity is estimated at the time of delivery of goods, however, any lack of conformity that becomes apparent within six months after delivery is presumed to have existed at the time of delivery unless this presumption is incompatible with the nature of the goods or the nature of the lack of conformity [§ 305/A (2) CC]. But the seller will not be liable for the lack of conformity, if the consumer was or could reasonably have been aware of the defect at the time of contract conclusion [§ 305/A (1) CC].

In the case of non-conformity firstly, the consumer can choose between repair and replacement, or if repair and replacement is not possible it can ask for a price reduction or rescind the contract. However, rescission in possible only if the lack of conformity is substantial (§ 306 CC).

[20] 18/1999 (II. 5) Government Decree on unfair terms in consumer contracts.

[21] Kertész, Á.–Wallacher, L.: The Ministerial Decree 18/1999 (II. 5) on Unfair Contract Clauses in Consumer Contracts and Related Rules in the Civil Code. In: *Szerződési jog–fogyasztóvédelem* [Contract Law–Consumer Protection]. Budapest, 2000. 77.

[22] It has to be noted that all provisions regarding consumer rights arising out of non-conforming goods in the CC are of a mandatory character. Therefore, any agreement to the contrary will be regarded as null and void.

Any repair or replacement should be completed within a reasonable time and without any significant inconvenience to the consumer. If the seller is unable or unwilling to comply with the above requirements, the consumer is entitled to repair the goods itself and reimburse the expenses incurred from the seller (§ 306 CC).

The consumer has to notify the seller on the lack of conformity within the shortest possible time, or within two months after it has noticed the lack of conformity. The consumer is liable for any damages resulting from late notification (§ 307 CC).

According to the general rule, the consumer is entitled to invoke its warranty rights in the limitation period of six months upon delivery of the goods (unless a different period is prescribed by a special regulation) or within two-years after delivery. This period, however may be shorter (but not less than one year) in case of second-hand goods, if the parties reach an agreement to that effect. The limitation period is suspended for the period when the goods are being repaired and the consumer cannot use them (§ 308 CC).[23]

However, even though the limitation period for consumer contracts is extended (from six months to two years), the burden of proof shifts. Namely, within six months of warranty, the burden of proof is on the seller, and after six months it shifts to the consumer, when the consumer has to prove the goods have been defective at the time of delivery. This is of course very difficult in practice, taking into account that not many consumers are in hold of the necessary technical or other relevant information.

Besides warranty rights, consumers are entitled to damages resulting from the lack of conformity (§ 310 CC). Costs incurred in bringing goods into conformity with the warranty, particularly the costs of postage, labor and material are on the seller. When the goods are replaced or the contract is rescinded, the consumer will not be liable to compensate for the loss in value resulting from proper use of the goods (§ 309 CC).

The other particularity of the defective performance is guarantee rights. The CC states that where a guarantee is provided under the contract or the law, the guarantor will be released from liability during the guarantee period if he is able to prove that the cause of the defect occurred after performance. The liability of the seller is determined in accordance with the conditions laid down in the guarantee statement of the contract, the applicable regulation, or the relevant advertising [§ 248 (1 & 2) CC].

[23] The limitation period is suspended until the consumer waits for the expert report, having been discovered the defect on the goods (court decision: *Bírósági Döntések Tára*, 2004. 1057).

Therefore, the difference between the guarantee and warranty is that the guarantee can also be contractual. However, the particularity of the Hungarian legal system is that a mandatory guarantee can be provided by the law. This is done by the *Government Decree on obligatory guarantee for certain durable consumer products*.[24] Namely, the seller is obliged to undertake a guarantee, meaning that within a minimum of one year starting from the delivery of goods it will repair or replace the defective products. The rules therein relate only to durable consumer goods, like household appliances, transportation means. The guarantee claim is enforceable by the presentation of the warranty certificate, provided by the seller at delivery. Unlike warranty, in case of a guarantee, the burden of poof is on the seller.

Consumer rights are the same in both warranty and guarantee claims. However, the procedure of their enforcement is regulated in separate acts,[25] and if at the initiation of claim six months passed after delivery the burden of poof is different in case for warranty and guarantee claims. As in many cases both the rules on mandatory warrantee and mandatory guarantee are applicable there is a legal uncertainty as to which rules are applicable in the instant case.[26]

In case of non-confirming delivery, the consumer will invoke its warranty or guarantee rights and ask the seller to remedy the fault. However, the seller is also criminally liable for Marketing of Poor Quality Products, False Display of Quality, and Defrauding Consumers.

a) Marketing of Poor Quality Products[27]

A person who sells or places on the market poor quality products as if they were good quality is guilty of a felony punishable by imprisonment for up to three years. However, if a person acts out of negligence, it will be liable for a misdemeanor with imprisonment of up to one year, community service or fine. The same punishment goes to a person who only engages in preparations for the sale or placement on the market of poor quality products. On the other hand, a person who violates the rules applicable for determining the quality[28] and the qualification of a product, and thereby makes possible for such product

[24] 151/2003 Government Decree on obligatory guarantee for certain durable consumer products.

[25] 49/2003 Ministerial Decree on handling guarantee and warranty claims within consumer contracts.

[26] Fazekas, J.: *Fogyasztóvédelmi jog* (Consumer Protection Law). Budapest, 2007. 133.

[27] See § 292–294 CRC.

[28] Rules that make possible quality estimation are laid down e.g. in 2/1981 (I. 23). Ministerial Decree on Certain Aspects of Quality Protection.

to be sold, or to a bad quality product to be placed at the market, is guilty of a felony punishable by imprisonment for up to three years.

The product that is subject to mandatory national standards is considered to be of poor quality if it fails to meet the lowest quality requirements defined in the standard.[29] When the product is not subject to a standard a product is of a poor quality when it cannot be used for its designated purpose, or its use has been diminished considerably.

The 218/1999 Gov. Decree on offences establishes the offence variation of the above crime, which will occur when the value of goods that have been sold or placed on the market are not exceeding the amount of HUF 50,000 (§ 75 of the Decree). In this case a person will be punished with a fine and the goods will be confiscated. When the product in question is foodstuff the Decree does not sets any limit as to the value of the goods, hence in any case a person will be liable for an offence (§ 84 of the Decree).

b) False Display of Quality

According to § 295 of the CRC, any person, who certifies false data related to substantial amount or monetary value of goods, regarding their quality in a document attesting quality, is guilty of a felony punishable by imprisonment for up to three years. A person who only acted in negligence will be punished for a misdemeanor by imprisonment for up to one year, community service or fine.

This crime therefore relates to forgery of documents that testify the quality of goods.[30] The most important element in this crime is the substantial amount or monetary value of goods regarding which the false data is presented. This condition is satisfied provided the value is more than two million but less than fifty million HUF [§ 318/A (c) CRC].

A person who fails to present the quality of the goods or fails to give necessary information to consumers is responsible for an offence.[31]

c) Defrauding Consumers

According to the crime Defrauding Consumers (§ 328 CRC) any person who, in the process of supply of goods directly to consumers, engages in an activity for defrauding consumers by false measurement or calculation or by degrading

[29] National standards of products can be found in the Act XXVIII. of 1995 on national standardization.

[30] It can be considered a special way of a document forgery. Tóth: *Gazdasági bűnözés és bűncselekmények. op. cit.* 161.

[31] § 74 of the Decree on offences.

the quality of goods is guilty of a misdemeanor punishable by imprisonment for up to one year, community service or fine provided such act did not result in a criminal act of a greater gravity. If a person engages in defrauding the consumers in a form of business activity is guilty of a felony punishable by imprisonment for up to three years.

In order to have a crime a person has to be engaged in defrauding consumers as a continuing activity. The number of activities and consumers that are defrauded is not relevant, a consumer has only have to be defrauded on more than one occasion.[32] In case of only one intentional act, the act will be qualified as an offence.[33]

4. Product liability issues

Product liability is regulated with the *Act X of 1993 on Product Liability* (hereinafter: PLA).[34] Regarding damages, material or non-material damages due to death, injury or any impairment of health [§ 4 (a) PLA] caused by a defective product [§ 2 (1) PLA],[35] the PLA determines the liability of the manufacturer. The distributor (seller) of the defective product is liable for damages only in case the manufacturer cannot be identified, or until the distributor does not reveal to the name of the manufacturer (§ 4 PLA). In case products are imported the liability lies on the importer. However, the importer can later reclaim the amount paid for compensation from the manufacturer [§ 3 (2) PLA]. This exemption is understandable, as in case of an imported product the manufacturer is a foreign business organization, and cross border law suits are extremely expensive and troublesome for consumers.

Since the liability of a seller and the importer is basically an exception from the main rule, and between the manufacturer and the buyer of a final product there is no contract concluded, the deeper elaboration on product liability issues will stay outside the scope of the paper, since it primarily deals with contractual liability and is not invited to settle issues of tortuous liability.

[32] Horváth at al.: *A magyar büntetőjog különös része. op. cit.* 754.

[33] § 78 of the Decree on offences.

[34] Act X of 1993 on Product Liability.

[35] A product is defective if it fails to provide a level of safety generally expected, with special regard to the purpose of the product and the way in which it can be reasonably expected to be used, the information provided in connection with the product, the date of the sale of the product, and the current state of scientific and technological achievements.

5. *Some contemporary ways of sale*

As a consequence of a modern commerce apart from the traditional sales contract some special ways of sale developed, from which distance contracts and door-to-door sales will be mentioned at this point.

a) Distance sales contacts

Distance contracts in Hungary are regulated by *Government Decree on distance contracts*[36] that practically regulates all kinds of distant sales contracts concluded between absents via TV, telephone, catalogues, e-mail, etc. It guarantees the "classical" rights of consumers in respect of distance contracts, namely the right for sufficient information (orally and in writing) and the right of withdrawal from the contract without any reasons. Withdrawal can be done within eight working days[37] from the time of the contract conclusion.

b) Door-to-door sales

Doorstep selling is regulated in Hungary with *Government Decree on contracts concluded away from business premises and on certain conditions of doing business away from business premises.*[38]

When contracts are concluded during a visit by a trader to the consumer's home or its place of work, provided the visit did not take place at the express request of the consumer, the consumer can withdraw from such contract without giving any explanation within eight working days from the time of contract conclusion or delivery of goods.[39] The seller (trader) is obliged to inform, at the time of contract conclusion, the consumer on how and to whom he should communicate the withdrawal. In case of withdrawal the consumer has no obligation to reimburse the seller for the decrease in the value of goods that occurred due to their regular usege.

[36] 17/1999 (II. 5) This Decree implemented (except Art. 8) the Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.

[37] According to the principle of minimum harmonization, the Government Decree givers one day longer time to consumers to change their minds in respect of the concluded sales contract than the EC Directive.

[38] 370/2004 (XII. 26) Government Decree on contracts concluded away from business premises and on certain conditions of doing business away from business premises that implemented the Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

[39] Here, the deadline for withdrawal is even more extended than stated in the directive that requires a cancellation period of 7 days, whereas the Decree stipulates 8 working days.

IV. The Institutional Framework of Consumer Protection in Hungary

Before turning to the mechanisms of enforcement of consumer rights, it is necessary to give a brief overview of the institutional framework of consumer protection in Hungary as these institutions are empowered to enforce or to assist in enforcing consumer's rights.

1. Central government: the Ministries

On the level of the central government the issue of consumer protection is in the hands of ministries. The main responsible ministry is the *Ministry of Social Affairs and Labor* (Szociális és Munkaügyi Minisztérium) that has a separate *Consumer Protection Department*. The operation of the *Advisory Committee for Consumer Protection* (Fogyasztóvédelmi Tanácsadó Testület)[40] stands also within the competence of the Ministry. The *Ministry of Economy and Transport* (Gazdasági és Közlekedési Minisztérium) is responsible for EU and national legislation in the field of product specific directives, business advertising activity and commercial regulation. The *Ministry of Justice and Law Enforcement* (Igazságügyi és Rendészeti Minisztérium) bears the overall responsibility for the coordination of the transposition of the EU legislation and its integration into the national legal system. It is responsible for the regulation of consumers' economic interests in the field of contract law, competition law or procedural law.

2. Public Agencies

Among the public agencies the *National Consumer Protection Authority* plays a crucial role in defending consumer's interests and shaping the consumer protection policy, whereas the *Hungarian Competition Authority* has some importance in the filed of consumer protection, especially regarding business advertising activity.

[40] The council is taking part in shaping the consumer policy, it advises the Ministry, follows the enforcement of consumer protection legislation, etc. See more at http://www.szmm.gov.hu/main.php?folderID=1139&articleID=32444&ctag=articlelist&iid=1.

a) National Consumer Protection Authority

The *National Consumer Protection Authority* (Nemzeti Fogyasztóvédelmi Hatóság) has been established in 2007[41] (hereinafter: NCPA) by the transformation of its legal predecessors the *General Inspectorate for Consumer Protection* (Fogyasztóvédelmi Főfelügyelőség). It is a central administration body with independent scope of duties and authority under the managerial and financial control of the government responsible for consumer policy. The NCPA has its central administration and seven regional establishments as well as their representations throughout Hungary. For the paper the Dél-alföldi Regional Authority of the NCPA (NFH Dél-alföldi regionális felügyelősége) seated in Szeged with representations in Kecskemét and Békéscsaba are important. The competence of central and regional bodies is split so that the regional authorities act/decide in the first instance and the central bodes in the second. The NCPA is responsible for monitoring the enforcement of the consumer protection legislation, and takes part in shaping consumer policy in Hungary. It is a principle body for market surveillance and quality control, and often represents the first instance in deciding offences against consumer interests.[42]

b) Hungarian Competition Authority

The *Hungarian Competition Authority* (Gazdasági Versenyhivatal) is responsible for the implementation of Directive 84/450/EEC as amended by Directive 97/55/EC (misleading and comparative advertisement).

c) The Local Government

Though the CPA delegates certain competences to local governments (§ 44 CPA), however their role in Szeged is still marginal.

d) National Consumer Organizations

A great number of NGO's deals with protection of consumers in Hungary, from which the most powerful is the *National Association for Consumer Protection* (hereinafter: NACPH) (Országos Fogyasztóvédelmi Egyesület).[43]

[41] In Accordance with the Action Plan for Consumer Protection Policy in the period of 2007–2013, the institutional system of consumer protection in Hungary has been renewed with the NCPA. It was established with the Government Decree on National Consumer Protection Authority 225/2007 (VIII. 31) and the Government Decree on the amendments of some government decrees in compliance with the establishment of the National Consumer Protection Authority 226/2007 (VIII. 31).

[42] www.nfh.hu

[43] www.ofe.hu

being the only NGO defending consumer's interests that covers the entire country and all consumer issues. The paper focuses on the activities of the NACPH in Szeged (hereinafter: NACPH Szeged). The NACPH Szeged has a separate legal personality and as consumer protection in Hungary is organized on regional bases, it is further a member of a wider regional association with NACPH's in Békéscsaba and Kecskemét.[44]

Besides the NACPH there are other consumer associations that tend to protect a wide range of consumer interest, but are much less significant for the shaping of consumer protection policy in Hungary.[45]

Individual consumer organizations are gathered in further, wider associations, from which the most significant is the *National Federation of Associations for Consumer Protection in Hungary* (Fogyasztóvédelmi Egyesületek Országos Szövetsége).[46]

V. The Enforcement of Consumer Rights

Consumers can enforce their rights guaranteed by the law in courts or rather by taking advantage of alternative dispute resolution mechanisms.[47]

1. Courts

In Hungary there is no special court procedure for the resolution of consumer-disputes. Although a simplified procedure, order to pay procedure (fizetési meghagyásos eljárás) exists that allows the settlement of simple complaints in a faster way, it has no special consumer oriented features. In accordance with the Civil Procedure Act (hereinafter: CPRA)[48] this procedure can be applied when the amount of claim is for the payment of a sum of money and will be applied in any event when this amount does not exceeds HUF 200,000 (§ 313 CPRA). However, the order to pay procedure was rarely if ever applied for

[44] Regional Consumer Protection Association of Délalföld.

[45] E.g. the Hungarian Association of Consumer Protectors and Association of Conscious Consumers.

[46] www.feosz.hu

[47] See for more on out-of-court and in-court mechanisms of settling consumer disputes in the National Report of Hungary within the project titled: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings, prepared by The Study Centre for Consumer Law–Centre for European Economic Law Katholieke Universiteit Leuven, Belgium.

[48] Act III of 1952 on Civil Procedure.

consumer redress in Szeged, and not because of the monetary limit of the claim but due to particularities of consumer disputes. Most disputes arising out of the consumer-business sales contract relate to defective goods, whereby a consumer is in first instance entitled (and in the same time obliged) to ask for repair or replacement of goods, and only if these remedies are not available the consumer can ask for the reduction in purchase price or rescission of the contract. Since, the order to pay procedure is applied for payment of a sum of money or handing over a movable property [§ 313 (1) CPRA] the order to pay procedure in consumer disputes is applicable only in case of rescission of the contract, when the consumer is entitled to claim back the paid purchase price. However, since rescission of the contract is only a subsidiary remedy of a consumer (after repair or replacement) the application of this special procedure comes rarely in consumer disputes. Therefore, the main problem is not in monetary limit of HUF 200,000 but rather in the fact that the order to pay procedure is applicable only for monetary payments, whereas the same remedy is only subsidiary for consumers.[49]

Besides the order to pay procedure there is another simplified procedure that is perhaps more suitable for consumer disputes called: *preliminary proof or preliminary proving procedure* (előzetes bizonyítás). Before submitting the claim or during the civil procedure when warranty issues are disputed [§ 207 (c) CPRA], the interested party may ask the court to grant an expert witness hearing, during which both parties are entitled to ask questions from the judicial expert. Appeal is possible only against the court's negative (rejecting) decision on granting the procedure [§ 209 (2) CPRA]. This procedure is sensible when goods of a substantial value have been purchased, and also when the burden of proof is on the consumer, since the costs of the procedure itself have to be covered initially by the consumer, as this procedure helps the consumer to proof the goods have been defective at the time of delivery. After the expert report is ready, the procedure ends, and the consumer can decide, whether it will based on the expert report, commence a regular civil procedure and sue the seller, or provided the report is favorable for the consumer, to settle the dispute with the seller out of court.[50]

Despite the fact that even the regular court procedure usually lasts (if there are no complications) approximately one year, not many consumer cases appear in courts of Szeged. Consumers, most probably, unwilling to accept the

[49] Dudás, E.: pers. conv., 6 Dec. 2007.
[50] *Ibid.*

expenses and inconveniences coming with the process itself, sue the seller only if the value of goods is substantial (e.g. a purchase of a car).[51]

Collective action for damages or collective redress (közérdekű kereset) is foreign to the Hungarian legal system, similarly to other Continental- European legal systems. However, according to the CPA the consumer protection authority, organizations representing consumer interests or the public prosecutor may file a claim against any party causing substantial harm to a wide range of consumers by illegal activities. The claim can be filed even if the identity of injured consumers cannot be established (§ 39 CPA). This possibility was, however, not yet exercised in Szeged.[52]

2. *Alternative Dispute Resolution (ADR)*

In Hungarian legal system there is only one out-of-court procedure, which has specifically been designed for the resolution of consumer-business disputes. There are other out-of court procedures that have a more general scope of application (arbitration, mediation), however, these procedures are less suitable for the resolution of consumer disputes that usually involve small claims and a wide range of types of disputes.

a) Arbitration

The *Act LXXI of 1994 on arbitration*[53] (hereinafter: AA) regulates the arbitration procedure (választott bíróság). Parties may settle their dispute in an arbitration procedure if at least one of the parties engages professionally in economic activities and the dispute is connected to that professional activity, moreover the parties are in command of the subject matter of the lawsuit and they have agreed on arbitration (§ 3 AA). Therefore, arbitration can be used for solving consumer disputes. However, consumer disputes involve generally small claims and contracts are concluded in most cases orally while the arbitration agreement has to be in writing [§ 5 (3) AA].

b) Mediation

Mediation in Hungary is regulated by *Act LV of 2002 on Mediation.*[54] (hereinafter: MA). Mediation (közvetítés), as a special alternative dispute settlement method can be used by natural or legal persons to settle their disputes in

[51] *Ibid.*
[52] Varga, J.: pers. conv., Nov. 20. 2007.
[53] Act LXXI of 1994 on arbitration.
[54] Act LV of 2002 on Mediation.

connection with personal and property rights, provided the parties are not bound by statutory provision [§ 1 (1) MA]. Therefore, in principle, consumer disputes can be resolved by mediation. However, mediation has a number of disadvantages for consumers. The process results only in an agreement (settlement) that is basically a new contract and can be subject of further procedures. Additionally, until the very end the parties can withdraw (change their minds) from mediation (§ 35 MA). Further, parties' choice in choosing a mediator is limited to the Register of Mediators which is maintained by the Hungarian Ministry of Justice.[55] Lastly, the mediator is entitled for remuneration, and the reimbursement of expenses (§ 27 MA). Therefore, while mediation could be a fast and simple way to resolve consumer disputes, it neither offers lasting and optimal outcomes nor is it a cheap solution for consumers.[56]

It has to be noted, that neither mediation nor arbitration is applied as a dispute resolution method of consumer disputes in Szeged.[57]

c) Consumer Arbitration Boards

Dispute resolution by the Consumer Arbitration Boards (Békéltető testület) (hereinafter: CAB) is the only ADR method in the Hungarian legal system that is specifically designed for solving consumer disputes. The CAB has been introduced and is regulated by the CPA.[58]

The CAB are independent bodies that operate at the regional chambers of commerce. There are a total of 20 arbitration boards in Hungary, of which one is in the capital and each one of the remaining 19 is in different County. One CAB is situated at the Chamber of Commerce and Industry of Csongrád County in Szeged. The CAB's are comprised of the representatives of consumer associations (in Szeged only the NACPH has designated members) and the representatives of the Chamber of Commerce and Industry of Csongrád County, thereby the interests of both consumers and businesses are represented.[59] Instant cases are decided in tripartite panels (hereinafter: Panel) whereby two arbitrators are from the NACPH and one from the Commercial Chamber. The competence of the CAB extends to all kinds of consumer disputes.[60]

[55] § 5–12 of the MA.

[56] National Report of Hungary... *op. cit.* 47. fn.

[57] Varga, J.: pers. conv., Nov. 20.

[58] See § 18–39 of the CPA.

[59] According to § 18 (5) CPA the local government can also has its representatives in the CAB, however, this right is not exercised in Szeged.

[60] Especially regarding disputes the quality and safety of goods and services, the application of product liability regulations and the conclusion and performance of contracts (§ 19 CPA).

The CAB is established for the purpose of attempting to reach an agreement (settle a dispute) between a consumer and a business organization in a quick, efficient, simple [§ 18 (1) CPA] and free of charge ways.[61]

A prerequisite for commencing a proceeding is that the consumer has attempted to settle the case directly with the business organization (§ 27 CPA). The consumer has to record its complaint in the Consumer Complaint Book (jegyzőkönyv) in writing, at premises of the business organization. One copy stays with the business organization and one with the consumer. If the business organization is unwilling to remedy the consumer's complaint the consumer can commence the CAB procedure, by a written petition to the chairman of the CAB.[62] The Chairman shall review the complaint within three working days, and provided the CAB has jurisdiction, it will schedule the hearing date within thirty days of the commencement of the proceedings [§ 29 (2 & 3) CPA]. The Chairman shall notify the parties regarding the date of the hearing deliver them a copy of the petition and the list of CAB members, requesting the parties to make their choice of a panelist. If the parties flail to appoint a member the Chairman will do so ex officio [§ 29 (4) CPA]. In the notice, the business organization affected by the complaint shall be ordered to file a written statement (response) within 5 days with regard to the legitimacy of the complaint, the circumstances of the case, and acceptance of the decision of the Panel as obligatory (submission). The business organization will be warned that, should it fail to file a statement regarding the merits of the case, the Panel will pass its resolution based on the information at its disposal [§ 29 (5) CPA].

The procedure at hand is lead by the Chairman, during which the Chairman attempt to negotiate an agreement between the parties [§ 30 (1) CPA]. Proceedings are public; however either party may request the exclusion of the public [§ 30 (3) CPA]. If one of the parties fails to appear at the hearing in spite of having been properly notified or fails to present its evidence, the Panel shall continue the proceedings and shall pass its resolution on the basis of the information in its possession [§ 31 (2) CPA]. Unless the Panel terminates the proceeding [§ 31 (4) CPA] it will conclude the procedure within 60 days of its commencement [§ 31 (6) CPA] and bring a decision (a resolution) with simple majority votes [§ 31 (5) CPA].

[61] The procedure is free of charge from 2004. Before, consumers needed to pay HUF 1000 at the initiation of the procedure. See Fekete, O.: A fogyasztóvédelem aktuális kérdései [Contemporary Questions of Consumer Protection]. *Magyar Közigazgatás,* 55 (2005) 608.

[62] On the exact content of the petition, see § 28 (3) *CPA.*

The resolution can be a recommendation (the business organization stated upon commencement of the proceeding that it will not avail itself to the decision of the Panel), or obligatory (the business organization declared it will accept the decision of the Panel as obligatory, upon commencement of the proceeding (submission) or upon announcement of the resolution (§ 32 CPA).

Obligations from the resolution have to be fulfilled within 15 days from the day of its announcement (adoption) [§ 33 (3) CPA]. The resolution of the council is not subject to an appeal [§ 34 (2) CPA] and it is passed without prejudice to the consumers right to have his claim enforced in a regular court proceeding [§ 34 (1) CPA].

Within 15 days from receiving the resolution, any party may have the resolution annulled by the competent court,[63] however, only on grounds laid down by the CPA [§ 34 (3) CPA].

In case the business organization (the seller) does not comply with an obligatory resolution, the consumer protection authority or the commercial chambers in question will be entitled to publish the decision [§ 36 (2) CPA] or the Panel, the consumer or the organization initiating the proceedings may request the court to have a writ of execution attached to the CAB resolution [§ 36 (3) CPA].

The CAB can make its own rules of procedure within the available legal framework (§ 37 CPA). However, in Szeged this step has not yet been done.

In practice, when a consumer is not satisfied with the goods purchased and cannot settle the dispute with the seller, it will firstly turn to the Complaint Office. The Complaint Office in Szeged is operated by the NACPH. Complains can be submitted in person, via telephone or online. Most of the times, the consumers are advised how and where to complain, but the complaint offices do not participate in settling the complaint in any way. The Complaint Office receives approximately 18–20 complaints/day or 1600/1800 per year.[64] They relate (in percentages): to foodstuff (9%); clothing (32% from this shoes 29%); guarantee, warranty (37%); public utility services (19%) and other (3%).[65] Most of the complaints are settled, after getting the advice from the complaint office, between the consumer and the seller.

All complaints arrive to the Complaint Office, and the activists thereby decide which cases will fall under the competence of the NCPA. The NCPA is

[63] The annulment procedure of the resolution is not an administrative procedure (court decisions: *EBH* 2005. 1284; *BH* 2005. 411; *Közigazgatási–gazdasági döntvénytár,* 2006. 67).

[64] Varga, J.: pers. conv., Nov. 20, 2007.

[65] *Ibid.*

competent to take actions when besides infringing the rights of an individual consumer the business organization also committed and offence. Approximately 10% of all complaints are forwarded in the lack of competence to the NCPA and around the same (10%) passes to the next level, to the CAB.[66]

After receiving the complaint the NACPH activist will check whether all the conditions are fulfilled, and direct the consumer to file a petition for the commencement of an CAB proceeding. At the hearing parties, due to the small amount of claims, participate by themselves (without lawyers). Since disputes usually involve bad or insufficient quality products, parties are asked to provide proof regarding the quality by showing an expert report.[67] Both parties can submit their own reports, but since the aim of the proceeding is to reach an agreement between the parties, none of the parties is legally bound to accept the expert report.

In practice business organizations many times would not come to the hearing, and though a resolution can be brought in their absence, they are not obliged to act by it. Only in about 25–30% business organizations accepts the decision (resolution) of the CAB as an obligatory.[68] Therefore, the success of the CAB depends mainly on the good will of a business organization, whether in course of protection of its reputation it will be willing to co-operate and settle the dispute with the consumer.

The other deficiency of the CAB procedure is the fact that the free of charge character of the procedure looses its weight, as consumers usually incur non-refundable expenses in order to take part in the proceeding.[69]

VI. Education and Information of Consumers

A right for information and education are amongst the basic rights of consumers.

In the era of new information technologies and increasingly sophisticated strategies for promoting products and services the need for consumer education is indispensable. This need become even more significant after Hungary became an EU Member State and part of the European single market. The aim of consumer education it to raise the awareness or to help individual

[66] *Ibid.*

[67] Quality checks are done by independent organizations.

[68] Varga, J.: pers. conv., Oct. 16, 2007.

[69] The most expensive is the expert report on quality of the product, which expense in most cases is not refunded to the consumer, and which is sometimes a more substantial amount than the value of the goods (dispute) in question.

consumers to understand and apply their rights and thereby take full advantage of market opportunities.[70] Nowadays education of consumers is more important than legal over-regulation, as it teaches consumers how to use effectively their rights and the available information when making purchase choices.[71]

Section 17 of the CLV Act is devoted to Consumer Education, according to which the education of consumers should be primarily done in schools [§ 17 (1) CPA] during primary and secondary education. As education is primarily a State responsibility [§ 17 (2) CPA] consumer protection education is included into the National Basic Curriculum (Nemzeti Alaptanterv).[72] However, in practice in the fulfillment of its task the State cooperation with the NCPA and consumer organizations [§ 17 (5) CPA]. Accordingly, organizing consumer protection education is one of the tasks consumer organizations should strive at [§ 45 (1) (h) CPA].

In Szeged, the NACPH has a significant role in providing education for young consumers. It visits 15–20 primary and high schools, 2–3 times a year. Their campaign is named: "Gaining necessary knowledge for becoming aware consumers".[73]

Besides, the NACPH also organizes an accredited 30 hour specialization course in consumer protection for school teachers and professors.

The NACPH is involved in other interesting activities in the filed of consumer education. It organizes a consumer protection competition for pupils and announced a drawing competition for children between 8 and 13, with the topic: "Shopping in hypermarkets".[74] Since consumer education became one of the explicit goals of education in Hungary only in 2007,[75] the NACPH in the future expects an increase in its activities in providing education for consumers.[76]

[70] See http://ec.europa.eu/consumers/cons_info/index_en.htm (Last visited: October 15, 2008).

[71] Fazekas: *Fogyasztóvédelmi jog* (2007). *op. cit.* 71.

[72] 243/2003 (XII. 17). Gov. Decree on the issuance, introduction and application of the National Basic Curriculum as amended in 2007.

[73] Varga, J.: pers. conv., Oct. 16, 2007.

[74] OFE Hírlevél (NACPH Newsletter), 2007. No. 53. 8. www.ofe.hu

[75] Consumer education became one of the goals of Hungarian education only in 2007, with the amendments of 243/2003 (XII. 17) Gov. Decree. In the section on pupils economic education the National Basic Curriculum states: "The school education system plays a principle role in developing aware consumers from the pupils, whereby they will be able to asses the risks, benefits and costs of their choices".

[76] OFE Hírlevél, *op. cit.*

Informing consumers is just as important as their education. However, it suppose consumers are already aware of their rights and thereby need to be equipped with sufficient information to make smart purchase choices. Consumer information should fulfill two criteria. It should be complex or complete, include the pros and cons of a product or service, and it should be plural or multilevel, namely provided not just one sided from the other contracting party (seller) in the course of contract conclusion but gained from governmental and non-governmental organs and agencies.[77]

The CPA is considerably devoted to Consumer Information; primarily focusing on labeling requirements. On the other hand, the CPA establishes a duty of consumer organizations to operate consulting offices for providing information to consumers and aiding in the enforcement of consumer rights [§ 45 (1) (g) CPA] and to inform the consumers by the making public their experiences [§ 45 (1) (i) CPA].

The NACPH Szeged is operates a consulting office, or a Consumer Complaint Office where the activists are available to consumers for all kinds of advices and questions of the consumers. However, the majority of cases relates to consumer claims, whereby the consumers are advised on how to enforce their rights.

The NACPH Szeged is active in informing the consumers in their County and in Szeged. Approximately once a month its activists are guests in Telin TV in a program called: "Szótér". They are also appear regularly in radio programs at Rádió 7, Rádió 88 and Radió MR6 Szeged.

Regarding printed media, a couple of is devoted exclusively to consumer, namely the "Kosár Magazin",[78] the "Fogyasztóvédelem" magazine[79] and the "Kontroll" newspaper.[80] However, even though these media cover a wide range of topics, they are not well known, or not solicited among consumers, which fact diminishes their practical importance. However, the "Délmagyar", the regions most wide spread daily newspaper regularly publishes news related to consumer protection.

A significant step has been taken by NACPH, when in October 2007 it launched a one year EU funded consumer information project, called: "In the

[77] Fazekas: *Fogyasztóvédelmi jog* (2003). *op. cit.* 72.

[78] The magazine of the NACPH and is published monthly. See www.kosarmagazin.hu

[79] Published four times a year by the NCPA. See http://www.nfh.hu/portal/hasznos/szaklap

[80] Published monthly by NCPA. See www.origo-haz.hu/akontrol

EU consumers have rights. Get to know yours" that already showed its positive results.[81]

Though consumer education is viewed as educating pupils in primary and high schools, today the internet become just as an important education tool. Besides providing information on consumers' rights and remedies, ways to enforce there rights, a great deal of useful information can be found therein for everyday purchase choices.[82]

VII. Conclusion

Hungary underwent a great deal of legislative changes from the time of regime change and signing the Europe Agreement in 1991. The harmonization process with acquis communaitaire has been mainly finished by April 2004 that required a total of almost 50 peaces of new or amended legislation![83] However, changes are still ongoing, towards more solid consumer rights and their more effective protection. In this light the institutional framework has been reformed just recently, and the former General Inspectorate for Consumer Protection was transformed into the National Consumer Protection Authority in September 2007.

Since the paper aimed to offer location specific data, focusing primarily at consumer protection in Szeged, it presented unique data related to the city and to Csongrád County. However, the same fact also made limits to the paper, as some possibilities that are given by the law, more accurately by the CPA have not yet been taken advantage in Szeged, thereby some issues practically stayed outside the scope of the paper. This relates for example to the possibility that organizations providing representation of consumer interests (like the NACPH) may file a claim against any party causing substantial harm to a wide range of consumers by illegal activities, and to the role of local government is in the filed of consumer protection that is still marginal in Szeged. Since the paper

[81] For example: for some time there is already a possibility to file an online consumer complaint, but till the beginning of a campaign none arrived to the NACPH Szeged. After the initiation of the campaign within 1 or 2 weeks around 10 claims have been filed online!

[82] Information and education of consumers via the internet is very impressive in Hungary. Web pages dealing with consumer issues vary from official presentations of the ministries, throughout web sites of different consumer organizations until consumer forums.

[83] Fazekas, J.–Sós, G.: A fogyasztóvédelmi jogharmonizáció 10 éve – II. Rész (10 Years of Consumer Law Harmonization – Part II). *Külgazdaság*, 48 (2004) 77.

focused on Szeged, it did not explore further whether these possibilities have been used in other parts of Hungary, perhaps in the capital, Budapest.

Due to being an EU Member State consumer protection is influenced by EU legislation. However, having more and different definitions of a consumer is not a sensible solution and causes confusion and legal uncertainty in practice. Moreover, according to all definitions of Hungarian legislative acts, consumers can be both natural persons and business organizations, which is not in compliance with EU directives that delimit consumers to natural persons.

Even though the protection of consumers, without a doubt, is on a high level, there are still some lacks in the legal system that is waiting to be remedied. Regarding substantial provisions, the confusion related to guarantee and warranty rights of consumers should be abolished. Regarding procedural rights, it would be sensible to introduce class actions, collective redress for consumers. Consumers, usually due to small claims and no prior legal knowledge, are deterred from enforcing their rights in regular court proceedings. Class actions would free consumers from all inconveniences of the court procedure and their rights would still be effectively protected. Today, Hungarian consumers mostly turn to the CAB seeking justice. However, as it was shown, in practice even favorable decisions of the CAB do not guarantee protection, as they are not obligatory for business organization. That leads to a conclusion, that the enforcement of the consumer's right depend on the will of the seller. In most Western European countries, business organizations are aware that nothing can harm them more than a bad reputation, however, it seems Hungarian business people seldom visited their neighbors, as in practice only a small percentage of resolutions is complied with.

In the filed of criminal law, though certain behaviors of business organizations are recognized as criminal acts, it still cannot be said that there is a Consumer Protection Criminal Law in Hungary. There is a need to look for a substantial connection between consumer protection and criminal law[84] that has not yet been done, neither in theory nor in practice.

The education of consumers should be continued, and perhaps intensified, as until now much less attention has been devoted to education and information of consumers from making legislative changes in the light of harmonization process. Major improvements are expected in the future, as consumer education become part of the National Basic Curriculum only in 2007. The information

[84] Karsai, K.: Gondolatok a büntetőjogi fogyasztóvédelemről [Thoughts on Criminal Law Protection of Consumers]. *Acta Juridica et Politica*, Szeged, Tomus LXIX. 2007. 1–48.

of consumers is also expected to improve in the future after the EU financed information project.

The future of consumer protection in Hungary is the future of consumer protection in EU that is defined by the EU Commission's document: "EU Consumer Policy Strategy in the period of 2007–2013".[85] The aim is to empower EU consumers, which will have real choices, accurate information, market transparency, effective protection and solid rights. It remains to be seen how Hungary will live up to these challenges.

[85] http://europa.eu/scadplus/leg/en/lvb/l32054.htm

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Judicial Black-box and the Rule of Law in the Context of European Unification and Globalisation

I. Basic Issues in the Understanding of Law

1. For an ontological reconstruction, the significance of *juristische Weltanschauung* as one of the original components of the law's very existence (besides objectified embodiments) is definitely shown by the fact that institutionalised social existence, whatever it be, cannot but withstand those kinds of simplification inspired by the *Newton*ian outlook of the universe (reducing reality to casual intertwinement of causal series originated by things and powers directed at them), in terms of which we may and have to differentiate the 'construction' itself (as given from the outset) from its 'being made to function' as a complementation exteriorly and posteriorly added to the former by an individual purposeful or random act; albeit when we are considering social dynamics with social institutions at work, we are tempted to take simplifyingly the two above components as some bifactoral mechanics that has been organised into one single functional system. As opposed to the physical world, however, in the specifically social world exclusively kinds of phenomena (features and aspects) suitable to be reconstrued from their actual movement as their genuine subsistence can be thought as prevailing as having the specific quality of 'social existence'.[1]

Consequently, the ontological status of the way the jurist approaches to law in a manner sanctioned by the approved canon of the profession–describing the kinds of intellectual operations he/she usually performs by referencing to the law and the actual ways in which real life situations are judged by justices in law (as if all it were a simple deduction from the law valid at the time)–is hardly more or else than what is called *professional deontology*. And this is

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[1] Cf. Varga, Cs.: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1996.

just not simply a case of false ideology (as usually treated by *Marx*isms) but a specific procedure of (virtual? real? in any case: actual) reality construction, controlled by the required mental referencing as a mediator wedged in-between.[2] As if the same background idea asserted in the professional conceptualisation of norms would also be repeated here as applied to the overall functioning of the normative world. For in the same way as neither the norm is descriptive–therefore necessarily true/false–a 'reflection' (the fact notwithstanding that its lingual expression suggests as if it were exactly some description of ontological relations),[3] nor this reality construction is effectuated–„caused", or made to have no alternatives at all in practical decision making–by the norm (the fact notwithstanding that the normative understanding of norms pictures and officially justifies it as such).[4]

2. The duality of 'law in books' and 'law in action' (which *Roscoe Pound* formulated originally as a pioneering category of legal sociology after he had realised that positivation itself cannot automatically be equated to textual effects referenced to in implementation) has turned into a genuine paradox when it has also been revealed that differing normative orders, heterogeneous to one another to an extent to be almost incommensurable by their textures compared, can nevertheless exert quite a commensurable impact as measured by the social effect to which, however, they may lead in societies at by and large comparable civilisational levels.[5]

Accordingly, one may raise the issue whether or not there may be a hidden (and hitherto unrecognised) "magic" (perhaps exerting influence on/through

[2] Cf. Varga, Cs.: *The Place of Law in Lukács' World Concept.* Budapest, 1981. It is to be noted that 'mediation' [*Vermittlung*] itself is a key term of *Georg Lukács'* posthumous *Zur Ontologie des gesellschaftlichen Seins.* For a background, see Varga, Cs.: *Marxian Legal Theory.* Aldershot, Hong Kong, Singapore, Sydney, 1993.

[3] Cf. Varga, Cs.: A magatartási szabály és az objektív igazság kérdése [Rule of behaviour and the issue of objective truth] [1964], in his *Útkeresés* Kísérletek – kéziratban [*Searching for a path* Unpublished essays], Budapest, 2001, 4–18.

[4] Cf., in summation of a decade's research previously published in huge a many parts, Varga, Cs.: *Theory of the Judicial Process* The Establishment of Facts [1992], Budapest, 1995. Later on, a similar conclusion was reached from the phenomenologisation of Critical Legal Studies by Conklin, W. A.: *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering. Aldershot, 1998, preceded, as a case study, by his Human Rights, Language and Law: A Survey of Semiotics and Phenomenology. *Ottawa Law Review* 27 (1995–1996) 129–173.

[5] Zweigert, K.: Solutions identiques par des voies différentes (Quelques observations en matières de droit comparé). *Revue internationale de Droit comparé* 18 (1966) 5–18.

other–cultural?–paths) similarity (or some mechanism of effects resulting in comparable ends) among such linguistically differently expressed and culturally differently contextualised rules aiming at behavioural regulation and control, or the norm(s) posited by them can only qualify as a decisive factor of decision-making by their mere appearance and backing normative ideology solely, while in fact other (further) circumstances do play the role of determination in (parts or the over-weighty part of) the actual process.[6]

3. The answer is to be searched for in the actual functioning of the 'judicial mind' taken as a *'black-box'* (symbol for a self-regulating cybernetic entity), in case of which, its internal laws remaining unknown, we can only try at re-constructing the regularities at work in it through the analysis of its actual data processing, by comparing what are their in-puts to what are their respective out-puts.

First of all, the judicial mind aims at resolving (by settling) the conflicts of prevailing interests (involving the axiological conflicts behind them) brought before court fora, through asserting that alternative of resolution (settlement) which it considers the most defendable of (while balancing amongst) all the feasible (or presented) variations–by fulfilling, inasmuch as available at an optimum level, the 'system of fulfilment' [*Verfüllungssystem*] canonised in the given legal regime–, all this being operated by the law's particular *technicality* which, in each and every case in principle, makes it possible with equal logical chance (that is, in a way not any longer limitable or controllable by logic) to select those procedures from the stock of available (by the way, even logically mutually counter running) techniques,[7] with the help of which one may argue for the given norm either covering or non-covering (and therefore either to be applied or disapplied to) the case at hand, and respectively, by the help of which–in the name of our common respect for the law–either strict or equitable judicial adjudication can be reached almost at please, when also the strictness of the wording of the law is loosened in cases when a programme "to make the law liveable" is appealed for.

[6] Cf. Varga, Cs.: Theory and Practice in Law: On the Magical Role of Legal Technique. *Acta Juridica Hungarica* 47 (2006) 351–372 and <http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>.

[7] For the foundational outlines, cf. Varga, Cs.–Szájer, J.: Legal Technique. In: Mock, E.–Varga, Cs. (eds.): *Rechtskultur – Denkkultur.* Ergebnisse des ungarisch-österreichischen Symposiums der Internationale Vereinigung für Rechts- und Sozialphilosophie 1987. Stuttgart, 1989, 136–147.

Accordingly, behind the stage appearance and ideology of mere norm application there is always a human being at standing work, with own valuation and further full human(e)ly personal *facultas*es mobilised when the determination is taken to (and how to) decide. For the hermeneutic definition of the very understanding of norms as a kind of cultural predisposition [*Vorverständnis*] will from the beginning have a selective effect on the judicial ascertainment of both those facts that shall constitute the given case (*Tatbestand*, taken as the legally exclusively relevant set of facts to be judged) and the norm to be applied thereto (including its actual meaning reflected to, by validated in, the given case). On the one hand and always posteriorly, the *logic of justification* cannot do but infer the decision from the given normative set by positing that there is an available cluster of norms from which the case-specific and case-conform selection has been made and, on its turn, the selected norm will have already defined what fact(s) can be taken as relevant for the actual norm application. On the other hand, however, from the point of view of the *logic of problem-solving* (that is, the genuine logic at work in the actual process), any consideration of either facts or norms can at all be marshalled in simultaneous mutuality of both sides as complementarily reflected upon and through (as tested by) one another.

This is why for an ontological reconstruction of the judicial process, the judicial operation with both legal provisions and so called facts can only be termed as *manipulation*. On its behalf and as the temporary end product of judicial reality construction, this manipulation will produce so-called case-law, on the one hand, and law-case, on the other. The former represents law as actualised to a concrete life situation, while the latter stands for the legal reconstruction of real life facts that will then be adjudicated in law. It is to be seen that the exclusive reason and the genuine roots of both sides lies in their having been mutually reflected–the fact notwithstanding that the official court statement is to build on the hypothesis (taken as an ideological claim) of their being independently posited and then related to one another.

4. In sum, the law can not simply be reduced to rule components alone.[8] What is more, similarities and dissimilarities amongst legal arrangements can not even be reduced to rule contextures termed as *mentalités juridiques* either (using a notion applied until now exclusively to the self-conflicting contemporary

[8] Cf. Varga, Cs.: Is Law A System of Enactments? In: Peczenik, A.–Lindahl, L.–Roermund, B.: *Theory of Legal Science*. Dordrecht–Boston–Lancaster, 1984, 176.

European legal set-up, composed of Civil Law and Common Law regimes[9]).[10] The realisation of differing legal mentalities lurking behind in the background is part of a larger problem indeed that can only be revealed, I believe, by future inquiries into what I propose to call *'Comparative Judicial Mind'* within the larger domain of future analyses on the field what I do mean by 'Comparative Legal Cultures'.[11]

Unfolding what is inherently working within the judicial 'black-box' promises an answer to the query raised in the former paragraphs, namely, whether or not the law as the total sum of enactments is either one of the (probably determinative) relatively autonomous components of the complex legal network aiming at the regulation and effective control of behaviours or, simply, one of the (probably determinative) signals of cultural expectations formulated in many ways in the complex social patterning network taken in the largest sense, a total sum that can neither stand for nor substitute to the total complex of social patterning (which is to enclose into one framework both cultural determination and the entire process of getting determined in interaction).

Concludingly, the comparative analysis of the judicial 'black-box' is faced with a double task: on the one hand–as motivated by pure theoretical interest–, it recourses to historical *"legal mapping"*, that is, to draw the available taxonomy of all the variety of past and present legal experiences of *theatrum legale mundi* in representation of the whole arena of our historical and cultural diversity,[12] and on the other hand–for the sake of assuring mutual cognition on behalf of all concerned and out of purely practical interest–, it is to promote *interaction* amongst differing civilisational superstructures, with approaches, conceptual sets and institutions, human sensitivities and professional skills included, for widening their horizons in a continued learning process.

[9] For the expression, and its unfolding as a key term, cf. Legrand, P.: *Le droit comparé*. Paris, 1999, 127, and his *Fragments on Law-as-Culture*. Deventer, 1999.

[10] For their internal variety and richness with a partly heterogeneous historico-cultural potential, cf. Gessner, V.–Hoeland, A.–Varga, Cs. (eds.): *European Legal Cultures*. Aldershot–Brookfield USA–Singapore–Sydney, 1996.

[11] Cf. Varga, Cs.: Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline. *Acta Juridica Hungarica* 48 (2007) 95–113 and <http://akademiai.om.hu/content/gk485p7w8q5652x3/fulltext.pdf>.

[12] Cf. Varga, Cs.: Introduction to Varga, Cs. (ed.): *Comparative Legal Cultures*. Aldershot–Hong Kong–Singapore–Sydney–New York, 1992, and, more developed, his *Theatrum legale mundi* avagy a jogrendszerek osztályozása [On the Classification of Legal Systems]. In: Szilágyi, H. I.–Paksy, M. (eds.): *Ius unum, lex multiplex*. Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy). Budapest, 2005, 219–242 and 243–244.

5. Up to the point reached here, our developments have been grounded on the widely held assumption of classical legal positivism as the approach to law traditionalised in the western civilisation.[13] However, our inquiry must diversify into further paths of research and extended cores of problematisation, taking also into account the materialisation of the law's own (so called) *post modern conditions* under which the new *juristische Weltanschauung* itself will declare (or simply tolerate the hard empirical facts of) the *re/dis-solution of legal positivism* (taken narrow-mindedly as rule-positivism) in a legal regime that asserts itself as thoroughly (α) constitutionalised while also (β) multiculturally (γ) poly-centered under conditions when (δ) even its eventual codification cannot aim at more than just foreseeing patterns to be considered (δ/1) at the level of principles (δ/2) as the suggestion of the temporarily best solutions (that may be changed the next time), which (δ/3) openly calls for continuous judicial unfolding and further development (refinement and adaptation); or, summarily expressed, (ε) the final re/dis-solution of classical legal positivism in what adepts now call 'legal socio-positivism' [*socio-positivisme juridique*].[14] Well, the ERC advanced research proposed has also to involve the foresight in what way and how such a new setting (with further ongoing moves also considered) will have a detouring accumulated impact on the tasks judicial law-actualisation is going to face in actual court processes.

A further complementary issue and topic of problematisation is set by the renewing international arena as well. This is dedicated partly to those forms that the above re/dis-solution may have on the field of *international law* proper[15] and partly to forms that the structural arrangement and internal

[13] As mirrored by the development of the idea of law-codification and the adventure of its variegated uses and attempts at implementation, cf. Varga, Cs.: *Codification as a Socio-historical Phenomenon*. Budapest, 1991.

[14] Cf. Varga, Cs.: What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of "The Judicial Establishment of Facts". In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–Wyduckel, D. (eds.): *Theorie des Rechts und der Gesellschaft*. Festschrift für Werner Krawietz zum 70. Geburtstag. Berlin, 2003, 657–676 as well as his Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada), *Acta Juridica Hungarica* 44 (2003) 21–44 and <http://www.akademiai.com/content/x39m7w437134167l/fulltext.pdf>.

[15] According to Koskenniemi, M.: The Politics of International Law. *European Journal of International Law* 1 (1990) 4–32, „Social theorists have documented a recent modern turn in national societies away from the *Rechtsstaat* into a society in which social conflict is increasingly met with flexible, contextually determined standards and compromises. The turn away from general principles and formal rules into contextually determined equity may reflect a similar turn in the development of international legal thought and practice.

organisation of *international humanitarian law* will probably establish when it is about to reach its relative completion. For, as known, its novel structuration is based growingly on the call for a mode of thinking asserting definite (well-circumscribed) value-preferences in military/civil strategic/tactic planning and execution, rather than on traditional schemes of mere issuing rules of behaviour, a regulatory model historically practiced hitherto in law. Well, the query focuses here on what repercussions this new method of patterning may and probably will have as regards to the development of domestic laws and the diversification of the latter's instruments.

6. It can be taken for granted that so long as it is not cleared adequately and to the sufficient depth what law in social existence truly is (that is, what indeed makes it suitable to exert normative effects in the realms of both the Ought/*Sollen* and the Is/*Sein* as well),[16] certainly we shall not be in a position to control its conscious planning and shaping, that is, its overall destiny. Until it we cannot help entertaining ourselves in *re* of law if not in a merely symbolical sense and with a sheerly metaphorical force, i.e., in the exclusive manner of signalling something as referring to it at the most.[17] When in everyday professional

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There is every reason to take this turn seriously–though this may mean that lawyers have to re-think their professional self-image. For issues of contextual justice cannot be solved by the application of ready-made rules or principles. Their solution requires venturing into fields such as politics, social and economic casuistry which were formally delimited beyond the point at which legal argument was supposed to stop in order to remain »legal«. To be sure, we shall remain uncertain. Resolutions based on political acceptability cannot be made with the kind of certainty post-Enlightenment lawyers once hoped to attain. And yet, it is only by their remaining so which will prevent their use as apologies for tyranny."

[16] In the context of Georg Lukács *Zur Ontologie des gesellschaftlichen Seins* (Prolegomena, MS in Lukács Archives M/153, p. 253), it is of a criterial importance that "social being" as such can only emerge once the phenomenon in question starts actually exerting specific effects [e.g., „Das Sein besteht aus unendlichen Wechselbeziehungen prozessierender Komplexe"].

[17] As already demonstrated by the author–*Lectures on the Paradigms... op. cit.*, passim–, in addition to the ways in which the law shall be treated and applied (as something ready-made), also–as a prior issue–the ways by which the law can be produced (e.g., which procedure can result in a law made, fed from what and attaining what degree of completion) are getting conventionalised by the ideology of the legal profession. For we could take it as previously given from our inquiries into the methodology of the formation of legal notions–Varga, Cs.: Quelques questions méthodologiques de la formation des concepts en sciences juridiques in *Archives de Philosophie du Droit* 16 (1973) 205–241–and into the law's anthropological foundations–Varga, Cs.: Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures in *Law in East and West.* Tokyo,

routine we act as jurists, usually we identify what we mean by the law through its eventually objectified phenomenal forms, that is, through the latter's procedurally due formal enactment, its textual wording, as carrier of what we qualify by legal validity;[18] although when we act as jurisprudents we are aware of the underlying fact that this is but a simplifyingly abbreviated expression, and no criteria set by actually canonised states of an ideology (upheld temporarily by the legal profession) is entitled to substitute to scientific description and definition. This is why the subject and main vocation of our present interest in the recent research topic is to circumscribe, as exactly as possible, those necessarily fragmentarily objectified items (composing parts) of the law (necessarily withstanding, of course, definitions pointing beyond the limitingly relativising terms of "in this or that sense" and "more or less", because the law stuff, lingually expressed, is the same for law enacted, law enforced, law doctrinally treated in so called *Rechtsdogmatik*, as well as for law as the scientific object of study), together with those entire social, institutional, and intellectually represented environments of law that, on the final analysis and at any given time, will in their totality create and make up as well as form and shape the law.

7. In want of a deepened answer to the above, it is by far not unambiguous what we exactly desire for when, for instance, we announce our strive for the *harmonisation of laws within the European Union* (unifying them by common codification, among others),[19] or when, responding to the challenges made

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1988, 265–285 and his 'Law', or 'More or Less Legal?' *Acta Juridica Hungarica* 34 (1992) 139–146–that independently of the self-definition and self-provision of the law, there is a constant battle for both its everyday uses and tendential definition ongoing among at least three of its feasible components in mutual rivalry: positing as law / enforcing as law / popular practicing as law. Accordingly, instead of 'law' in general, we can only speak about law with further specification implied, that is, as circumscribing it in and against a multifactoral continuous move. Or, on final analysis, the question of '*what* the law is' is changed by the sole issue in which sense the law is properly and actually meant; whether anything meant is meant so either more or less; and if it is meant so at all, then in which phase of either developing to become, or ceasing to have been, a law.

[18] Cf. Varga, Cs.: Validity. *Acta Juridica Hungarica* 41 (2000) 155–166 and <http://springer.om.hu/content/mk0r8mu315574066/fulltext.pdf>.

[19] Cf. Varga, Cs.: La Codification à l'aube du troisième millénaire in: Cohen-Jonathan, G.–Gaudemet, Y.–Hertzog, R.–Wachsmann, P.–Waline, J. (eds.): *Mélanges Paul Amselek.* Bruxelles, 2004, 779–800 and his Codification at the Threshold of the Third Millennium. *Acta Juridica Hungarica* 47 (2006) 89–117 and <http://www.akademiai.com/content/cv561915051t7k36q/fulltext.pdf>, as well as Az Európai Unió közös joga: Jogharmonizálás és

explicit by the globalisation process ongoing in our days, we declare our longing for a substantiated respect for 'the rule of law' and 'legality', both in the further shaping of international law and especially within the decision making processes of international organisations (such as the United Nations).[20] For nowadays more than dreams are at stake on this global terrain. Firm determination is almost reached for that upon the model offered domestically by constitutional courts, some legal/juristic filtering agent should and shall indeed be built in at/around the peaks of such big international organisations (amongst which mostly the United Nations Organisation Security Council is specified by the literature), with a clear intent to control and possibly also efficaciously sanction the conformity of the course they are actually taking with the ideal of what is now called *'the international rule of law'*, even if it is by far not thoroughly and reassuringly clarified what is meant exactly thereby and how it can be measured within a multi-partnership complex network operated by various sides and under ever-changing conditions.

II. Questions to be Raised by Legal Arrangements Individually

8. All these developments precondition to clarify the (simultaneously conditioning and conditional) basic issue in what law does indeed subsist.

The overall query for identifying what on final analysis law consists of and what it is building constantly from can only be detected from its actual operation, that is, from the moves by which it is operated and made to function, otherwise speaking, from its practical working (including the ways by which it recurrently reconventionalises its standing or innovative routine), or, in sum, from the analysis of intellectual/mental operations actually effected on/by (while appeals and/or references are getting made to) the law. For reaching adequate

jogkodifikáció [The common law of the European Union: Harmonisation and codification]. *Iustum Aequum Salutare* 4 (2008) 131–150 and 283.

[20] Cf., e.g., Bryde, B.-O.: Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts. *Der Staat* 42 (2003) 1, 61 et seq. and, for the background, Goldstein, J. et al. (ed.): *Legalization and World Politics.* Cambridge, Ma., 2001, and Pildes, R. H.: Conflicts between American and European Views of Law: The Dark Side of Legalism. *Virginia Journal of International Law* 44 (2002), 145 et seq. For an overview, see also by the author 'Jogi kultúránk – európai és globális távlatban' [Our legal culture from a European and global perspective] in: Paksy, M. (ed.): *Európai jog és jogfilozófia.* Tanulmányok az európai integráció ötvenedik évfordulójának ünnepére [European law and philosophy of law: Papers dedicated to the half-of-the-century of European integration]. Budapest, 2008, 13–42, particularly para. 5: "The rule of law", 25 et seq.

knowledge, we have to reconstruct exactly what it is that on final account gets referred to as the law, and indeed, what is the relationship reconstruable through such analyses between its aspect (property, feature, etc.) referred to as 'the law' and the practical conclusion inferred (stated, motivated, and justified mostly by justices) as 'the conclusion of the law'.

9. Triple sorts of questions can be formulated here as queries to be addressed to all legal traditions and arrangements that can at all be included in such an inquiry: whether or not (1) their law is *exhaustively embodied* by their given textual *corpus*es, or those texts, destined only to offer from what to learn the law, are mere signals as exemplifications from the law, or references to realise how rich the potential hidden in the entire stuff of the law is, or not more ambitious then serving as memo-props or didactic help on desirable or mostly followed practices in the name of the law; whether or not (2) in the medium carrying or lingually manifesting it, the law is also *conceptualised*, that is, its words used are at the same time defined as systemic and taxonomic locuses of a notional network built at varying (adequate) levels of generality with the claim of exhaustive completeness, or all these are, in want of better, linguistically exhibited for the exclusive sake of making communication possible at all on law, with kinds of mere naming that only characterise, instead of any classification performed within some relatively closed and internally arranged taxonomy; and lastly, whether or not (3) in the intellectual operational series targeting that the mutual reflection of the law and the facts constituting the case of it will be achieved in the case at hand, the claim is formulated and enforced for the legal decision being derived from the law as *a logical conclusion* of it (parallel to the requirement for its categorically formal and exhaustive posterior justification excluding any alternative to the decision reached), or logic can only and will in fact remain in the background all through, playing, if at all, some merely controlling function at the most.[21]

[21] For some basic hints, cf. Varga, Cs.: Jogdogmatika, avagy jus, jurisprudentia és társai – tudományelméleti nézőpontból [Rechtsdogmatik, or jus and jurisprudentia in the perspective of the theory of science] and 'Jog', 'jogtudomány', 'tudomány' – lét- és ismeretelméleti nézőpontból (Viszontválasz) [Law, science of law, and science, in an ontological and epistemological perspective] and A dogmatika természetét illető kutatások lehetséges hozadéka (Hozzászólás) [The possible fruits of inquiries into the nature of dogmatics]. In: Szabó, M. (ed.): Jogdogmatika és jogelmélet. A Miskolci Egyetem és a Miskolci Akadémiai Bizottság által 2006. november 10-én és 11-én rendezett konferencia anyaga [Legal dogmatics and legal theory: Conference proceedings]. Miskolc, 2007, 11–26, 68–80 and 245–251, as well as his Law and its Doctrinal Study (On Legal Dogmatics). *Acta*

10. This inquiry can be assured by investigating applied *legal techniques* in quadruple directions that may have developed in each and every legal system to a locally sufficient degree, that is, techniques which, on the one hand, (a) have to guarantee the need of any given law and order to remain stable and preserved in its identity through the continued flow of challenges it is faced to answer in the meantime all along, (b–c) have to produce instrumentalities available as suitable for that change, adaptation, or mere refinement as needed at any time can be effectuated, and which, on the other hand, (d) can close down the mutual reflection of rules and facts by/upon one another in a way excluding any doubt–mostly by the mere fact (or authority) of the decision taken or the self-comforting cover of its alleged logical certainty.

In accordance with the above, (a) the first of the directions relating to applied legal technicalities moves (by oscillating) between the (frequently simultaneous) opposites of *conservatio/novatio*, with the recourse to which partial renewal may of course be achieved by interpretation but in most of the cases only fragmentarily at a given time, as emphatically counterbalanced by the simultaneous conservation of all the other terrains and domains of regulation for a while; (b) the second of the directions (sometimes in parallel to the former) moves (by oscillating) between what is considered *ius strictum / ius aequum* in the given moment of the ever-developing overall regulatory arrangement, which move (somewhat modelling the former) may venture either to loosen the original (or derivative) strictness of the regulation in question (mostly in its practical legal consequence) or, vice versa, to fix the original (or derivative) equity available in the actual regulation, in each case preserving the prevailing state of strictness/equity of all the other fields; (c) a two-way option almost depending on free choice as an evergreen instrumental *trouvaille* of legal technicality can also be realised by the continuing tension between moves targeting *generalisatio/exceptio*, in case of which conservation/novation and/or strictness/loosening are/is either generalised or made to become an exception (whilst we have to be aware of the fact that, logically from the outset, any change as compared to the original state makes it an exception). Finally, (d) for that the law's abstract normative expectations can be related–projected, then ascribed–to actual facts by performing a formal synthesis[22] unifying the

Juridica Hungarica 49 (2008) 253–274 and <http://akademiai.om.hu/content/g352w44h21258427/fulltext.pdf>.

[22] This is what a Hungarian classic of legal sociology once termed as *synopsis* for his processual theorising. Cf. Varga, Cs. (ed.): Horváth, B.: *The Bases of Law / A jog alapjai* [1948]. Budapest, 2006. Cf. also Jakab, A.: Neukantianismus in der ungarischen Rechts-

heterogeneities of Ought and Is in the court's *dictum* normatively judging upon sheer facts, an artificially formalised gesture is also required (reminding of the otherwise a-natural effects of, say, *mancipatio* in Roman law, activated–as an institutional act with normative effects–by an easily memorisable formal human gesture as the *sine qua non* complementation eventually performing it in law), by means of which in order to officially ascertain equalisibility (reflectability and ascribibility, or correspondence or similarity) between the two sides, depending on the logical transcription of their connection established, either logified subsumption [*subsumptio*] or discretionally decided subordination [*subordinatio*] will finally be declared by mobilising all the available and freely disposable legal techniques for its demonstration [*justificatio / motivatio*].

(It is to be noted that the classical stock of legal technicalities have to be expanded so as to include, for instance,[23] techniques of argumentation by basic principles and of the constitutionalisation of issues, as well as the recourse to filling gaps in the law or the case-specific determination of the meaning of so-called flexible or uncertain terms in law.)

III. The Circle of Legal Arrangements to be Included in the Investigation

11. The investigation revolving around the judicial 'black-box' is to concentrate (1) on *Civil Law and Common Law* arrangements, decisive for foreseeing the prospects of their *future dis/con-vergence* what is at stake when we aim at the eventual unification of laws within the European Union, by surveying also, on the one hand, (1/a) their antecedents, involving the kinds of legal reasoning characteristic of the ancient Greeks and Romans (differentiated amongst themselves according to relevant periods) and, on the other, (1/b) their historical formation within/into own so called families or groups–separately in the (1/b/α) Latin and Germanic, as well as the (1/b/β) Nordic stuffs–, enlarged up to include (1/c) their mixed/mixing branching(s) off in the world (exemplified primarily by Scotland, Québec, Louisiana, and the State of Israel) as well. This has to be complemented by the other part of the diversity of world civilisations, namely, by (2) what can be learned about the resolution/settlement of legal conflicts in autochthonous societies, as probably our common civilisational root culture (with the data of contemporary legal anthropological researches and tribal materials included), as well as, nearing the specifically European

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theorie in der ersten Hälfte des XX. Jahrhunderts. *Archiv für Rechts- und Sozialphilosophie* 94 (2008) 264–272.

[23] Cf. with para. 5 above.

roots, (3) the classical Jewish and Arabic traditions, contrasted–for signalling the availably practiced variety of patterns–with at least (4) the Asian tradition exemplified by the Korean, Chinese and Japanese procedures and lastly, as annexed by–in function of the availability of data and monographic treatments–, for instance, (5) the Persian, Indian, or other tradition(s).

IV. Purpose and Impact of Investigations

12. The research hypothesis itself is addressing important challenges at the frontiers of the field addressed by its being grounded on assumptions going substantially beyond the current mainstream state of the art. Its underlying approach to law through the reinterpreted duality of "law in books" and "law in action" between which the judicial 'black-box' (calling for unfolding in the present project) can only erect a bridge by opening up quite new horizons, once it is also recognised that the very fact of (alongside the manner in which) exerting social influence constitutes–serving as the basis for–the ontological existence of law. Thereby features of law in practice perceived mostly as either contingently added moments or mere accidents of false consciousness (and therefore treated, if at all, epistemologically) are elevated into the unified domain of the law's very ontology. In parallel with the distinction of the logic of problem solving from the one of formal justification, the very notion of legal technique and its usual assessment as mere accompaniment in instrumental complementation is changed to an unconventionally novel one, with a creative or arbitrative potential able to marshal the process up to its outcome.[24] By launching a research to be carried on 'the comparative judicial mind', the concept of "legal mentalities" itself (quite *à la mode* now and excellently useful in prophesising on the con-/dis-verging prospects of Civil Law and Common Law in the European Union) is transubstantiated into a transdisciplinary notion that can only be described by a long series of multidisciplinary investigations.

Such features of law as its exhaustive embodiment in textures, conceptualisation perfected, or thorough logification, have never been systematically surveyed through historico-comparative inquiries. Moreover, neither themselves indeed nor their varieties in various legal-cultural settings have been notionalised as

[24] Cf. Varga, Cs.: *Theory of the Judicial Process* The Establishment of Facts. Budapest, 1995 and his What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of "The Judicial Establishment of Facts". In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–Wyduckel, D. (Hrsg.): *Theorie des Rechts und der Gesellschaft.* Festschrift für Werner Krawietz zum 70. Geburtstag. Berlin, 2003, 657–676.

yet. What I call post modern challenges of and by the law[25] is well cultivated in literature but without having been generalised as parts (or the over-weighty superior part) in any overall *Juristische Methodenlehre* (or juristic methodology). And almost the same holds for international law, for neither humanitarian methodology nor post positivism's challenge to international regulation has ever been subjected to legal philosophical reflection, generalisation and application up to now.

European endeavours at unifying/codifying/harmonising member states' laws are mostly politically expressed and sectorally advanced in *travaux forepréparatoires* rather than envisaged in all their possible actual implementations, including their feasible legal-philosophical dimensions. As a matter of due course, 'Rule of Law' and 'international rule of law' have only simply been mostly used as key words without whatever theoretical-methodological scrutiny done to the depth, what the present paper proposes to achieve. Accordingly, the conceptualisation itself it is bound to conclude by has to be unconventionally novel.

Or, the impact will be (1) a more differentiatedly complex notion of law in which both the classical positivist and the post positivist stands are transcended by a concept based upon something operated rather than merely positivated; (2) a *theatrum legale mundi* with a thorough historico-comparative overview of the kinds of judicial mind actively working in all its representative varieties, past and present; and (3) a legal-philosophical substantiation of (3a) what can at all be meant (3aα) by the "rule of law" and "international rule of law" and also (3aβ) by unification, codification and harmonisation of laws, especially in a European Union context; as well as (3b) what impact so called post modern conditions of law expressed by the constitutionalisation of issues and the argumentation by principles may have on the future of judicial adjudication in view of the self-strengthening re-/dis-solution of classical rule-positivism; (3cα) what impact the specific methodology of international humanitarian law may have on other fields of law, including the issue of (3cβ) what impact post modern novelties and humanitarian specificities may have on the understanding and individual identifiability of what is meant exactly by the "rule of law" and "international rule of law".[26]

[25] Para. 5 above.

[26] A proposal prepared under–and within the finances of–the Hungarian Scientific Research Fund (*OTKA*) project K62382.

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TEKLA PAPP*

The Timesharing Contract in Hungary and in Europe

1. Regulation of timesharing contracts

The European Parliament and Council adopted Directive 94/47/EC (on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of right-to-use immovable properties on a timeshare basis) on 26 October 1994 for the following reasons:

- From the aspect of timesharing contracts, the differences between the national legal systems may restrain the management of the internal market and deform competition;
- Consumers shall be protected at a high level (the right to information, providing for the right for rescission, requirement of written information, prohibition of paying deposit/advance);
- Minimum obligations shall be prescribed for marketers, and the performance thereof shall be provided;
- The minimum elements of timesharing contracts shall be determined (see: appendix of directive);
- Common provisions referring to the language of timesharing contracts are needed.

The directive's aim is not to provide for complete regulation regarding timesharing contracts. Its scope extends to the legal harmonization of the following aspects:

- information being the fundamental element of the contract,
- communication of information (time, mode),
- the consumer's due rescission.[1]

In the member states of the European Union, during the codification of the timesharing contract, either consumer protection became conspicuous (see: Scandinavian countries, Benelux states, United Kingdom, Germany, Austria),

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[1] Papp, T.: *Atypical contracts.* Szeged, 2007. 77.

or market commerce and the aspects of the law of taxatation were taken into consideration (see: Greece, Portugal, Spain, France).[2] A common feature of the member states' regulations is that the realization of the objectives of Directive 94/47/EC was the primary task thereof. The member states adopted the conceptual determinations almost in the same way (see: Point 2.). The member states' implementations are identical to the directive in connection with the minimum content element (consumer data, criterion of right-to-use, payment liability of the consumer), formal requirements (simple documents) of time-sharing contracts, and the determination of the written information that shall be given to the consumer [in connection with the marketer, the right-to-use, real estate, consideration to be paid by the consumer, information of the consumer's due rescission and the final clause (the written information shall be regarded as the part of the contract)]. Sharper differences appear in the subject matter of qualifying of timesharing contracts and in the time-period of the socalled 'cooling off period' (the consumer's 'calming down period': after contracting the right for rescission, with strict legal title, is due to the consumer). With regards to the letter:

- 10 day rescission (counting from the date of the contract and giving a copy to the consumer) is determined by Dutch, Finnish, Irish, Greek, Italian, Portuguese, French, Danish, Swedish and Spanish law,
- Austrian, German and English regulations give 14 days to the consumer to exercise the right of rescission,
- the Belgian and Hungarian codes give 15 days to the consumer to exercise the right of rescission.[3]

The Hungarian Government decree (20/1999 (II. 9) Government decree on contracts for purchasing the right-of-use of real estate on a timeshare basis) and the Directive harmonize with regard to the aspect of subject-determination, formal requirements of concluding, content elements (referring to the information being inherent to the contract), the consumer's right to rescission, prohibition of advance/deposit, applicable law. Considering the definition of timesharing contracts, the Hungarian implementing law is more detailed: it is extended to recreational use as well, and it does not determine minimum time for a repeated, definite period (the Directive does not allow establishing a right-to-use lasting less than a week).[4]

[2] http://www.timesharingproblems.org/Timesharing_GB/index.html

[3] http://europa.eu.int/youreurope/nav/hu/citizens/factsheets/at/consumerprotection/timeshares/de.html

[4] Papp: *op. cit.* 77.

The up-to-dateness of this theme is indicated by the modification of the Directive 94/47/EC. The Commission had drafted a proposal (COM (2007) 303; about the consumer protection of the timeshare and long expiration holidayproduct regarding their specific aspects, as their resale and barter) as a reform of the Timeshare Directive leading to increased consumer protection on 7th June 2007. This proposal is a reaction of the Commission for development of timeshare-market, so it contains the following new elements:

- the extension of the effects of the directive to the movable timeshare, for example boathouse, cruiser and mobile house;
- the changing of the periods:
  - the minimum period of the timeshare won't be 1 week, it can also be shorter,
  - the shortest period of the timesharing contract will be 1 year,
  - the cooling-off period will be at least 14 days;
- the effect of the directive will be extended to the timeshare-broker, who gives advice and acts in connection with the resale and acquisition of the timeshare;
- the consumer may join the timeshare-barterpool;
- the obligation of the information chunks;
- the prohibition of the paying during the cooling-off period will also be applied for the third person;
- the contracts subordinated to the timesharing contract (for example contract for the club-membership) become void by the termination of the timesharing contract.

The Draft Common Frame of Reference and the Consumer Acquis Principles are targeted the full harmonisation of the consumer protection law, but there is a danger of inconsistencies with the reference to the changing of the Timeshare Directive. The concepts of the proposal (for example consumer, businessman, resale, contract for barter) are not sufficiently linked to the current review of the Consumer Acquis.[5]

2. Conceptual analysis of timesharing contracts

Agreement for purchasing the right-of-use of real estate on a timeshare basis is a contract under which the consumer directly or indirectly acquires the right

[5] Busch, C.: Der Vorschlag der EU-Kommission für eine Reform der Timeshare-Richtlinie – ein richtiger Schritt auf dem Weg zur Überarbeitung der Verbraucheracquis? *Zeitschrift für Gemeinschaftsprivatrecht/European Community Private Law Review*, 1/2008. 13–17.

for a repeated, definite period for the use of recreation or housing of one or more properties for at least a three-years period from the marketer, in return for consideration. Within the frame of the contract, the consumer acquires the right to use something of a definite purpose (recreation and housing) for a 3-year period. (This period may be longer, but it must be definite.) This includes one or more buildings (e.g. hotel) and rooms, and supplementary accessories (e.g. swimming pool, sauna, tennis or golf court). The term is a predetermined period of the year (e.g. for a week or 10 days), of an annually recurrent nature (on the same days, the same month in each year). The right-to-use is received from the owner of the real estate (this could be the marketer as well), directly or indirectly from the marketer (if he/she is not identical to the owner of the real estate), or from a resaler agency (having OTE-membership–Organisation for Timeshare in Europe–, the company dealing with secondary sale).[6]

From a subjective aspect, the characteristic of the timeshare-construction is that the contracting parties usually found some kind of organization, or join one, in order to enforce their interests more effectively (see: Point 4): consumers usually found an association, club, or co-operative, while the marketers form exchange companies (RCI–Resort Condominiums International, II–Interval International).[7]

According to the Hungarian regulation, the direct subject matter of time-sharing contracts is the transfer of the right-to-use by the marketer to the consumer.[8] Under German, Dutch and Austrian law the marketer obliges himself to transmit the right-to-use (Nutzungsrecht überlassen). The general clause 'Acquiring the right-to-use' is used in the Spanish, Italian, Portuguese, Finn and Swedish provisions. Under Irish and Greek law the direct subject matter of the timesharing contract is the transfer of ownership referring to real estate, and other rights. Under Belgian law the consumer may acquire the right of joint ownership.[9]

According to the Hungarian Government decree, the indirect subject matter of the agreement is the right-to-use, under which the consumer may possess, use, possibly utilize (change) and alienate the given real estate (or part of the

[6] Papp: *op. cit.* 63.

[7] Drábik L.–Fábián A.: *Travel organizing and timesharing activity in the EU and in Hungary.* Budapest, 2004. 81. http://www.tug2.net/advice/TimeShare-101.htm#mKey TimeshareConcepts; http://www.ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3

[8] Papp: *op. cit.* 66.

[9] http://europa.eu.int/youreurope/nav/hu/citizens/factsheets/at/consumerprotection/timeshares/de.html

real estate) for an annual definite period.[10] The Hungarian legal solution specifies at least a three-year long period and recurring acquisition of the right-to-use. The member states of the European Union regulate–according to the Directive–a minimum of 3years and periodically recurring (usually annually) use.[11] The law's term of wide comprehension referring to the periodicity of timeshare was filled with 'more chiselled' content: not only by giving the possibility of annual rotation, but e.g.

- the right-to-use of a predetermined week is enforceable *biennually* and may be taken either in odd years *(odd year usage)* or in even years *(even year usage)*;
- or the so-called *accelerated use*, when the right-to-use is exercised in a shorter period as acquired (if the consumer acquires holiday ownership use for 10 years, annually 1 week, then in this usage mode–depending on the free capacity of the vacationer–yearly 2 weeks vacation through 5 years, or yearly 5 weeks vacation through 2 years);
- or the annual right-to-use may be exercised at the same time, at the same resort *(fixed unit)*.[12]

In respect of the period of annual exercise of recurring right-to-use, the member states of the Union generally adopted the determination of the minimum 1-week interval of the Directive, the exception being e.g. the Hungarian, Danish, Austrian, German, English and the Spanish regulations.[13]

The time-share practice may be:

a) one week long, annually exercisable right-to-use, which
   - fits with the calendar week number *(interval)*,
   - is for a fixed time *(fixed week)*,
   - has a *floating-week* schedule, when only the holiday season is predetermined (high, early, late season and off season), but the number is not,
   - has a *fexible* schedule: either the consumer may choose, according to the predetermined rules, the annually utilizable time, or the right-to-use, acquired by the consumer, may be expressed in points so the

[10] Government decree No. 20/1999 (II. 9), Article 7, Section (1), point c and k. Papp: *op. cit.* 66.

[11] http://europa.eu.int/youreurope/nav/hu/citizens/factsheets/at/consumerprotection/timeshares/de.html

[12] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3

[13] http://europa.eu.int/youreurope/nav/hu/citizens/factsheets/at/consumerprotection/timeshares/de.html

time and period of the legal practice (usually its place as well) may be altered as demanded,

- is taken in *accrued weeks*, because the consumer has not exercised his/her right-to-use for many years (and in exchange the company 'banked' the weeks) and he/she would like to utilize the accumulated weeks all at once;

b) *bonus time*, when in the term exceeding the period of recreation – depending on the free capacity of the vacationer – the consumer may exercise his/her right-to-use after an already utilized one week term (i.e. as an additional right);

c) quarterly, as a 3 month long right-to-use *(quartershare)*, that may be be utilized on a rotation basis: in alternate months, each year.[14]

Common features of the European regulation of the timesharing are that the right-to-use, as the subject matter of the contract, is negotiable, that it may be purchased for a valuable consideration, and that it may serve housing and recreational purposes as well (the latest is the service most generally received, which is why timeshare is often identified with holiday ownership, and termed as: *"holiday ownership"*).[15]

In connection with the special right-to-use acquired by the timesharing contract, new tendencies may be realized:

a) on the one hand, timeshare is regarded as the part of the sphere of increased tourist services (See: verdict of the European Court of Justice, in the case of Travel Vac);[16]

b) on the other hand the legal practice may not only focus on real estate, but on movables as well: on the basis of an American case, in the United Kingdom, shared, temporary fractional owning of luxury cars *('I own a Ferrari/Bentley/Hummer/Rolls-Royce')*, luxury yachts and aeroplanes is possible within the framework of a Timesharing Contract, or using them in luxury hotels, connected with the holiday ownership.[17]

[14] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3

[15] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3

[16] C-423/97, Travel Vac S. L. v M. J. A. Sanchis.

[17] Luxury cars in part-ownership. Common dream. *Heti Világgazdaság*, 25 December 2004, 52–53. Nagy G.: Holiday clubs for rich. Part-time luxury. *Heti Világgazdaság*, 11 June, 2005, 34–37. Common private aeroplane is spreading. <http://www.deluxe.hu/cikk.php?article=591&pat=14, 15 June 2005>.

3. The system of timeshare

In Hungary, the most widespread form of timeshare-construction is *(a) cooperative society for building and maintenance of holiday apartments, (b) company of shareholders, (c) indirect formation.*

(a) The cooperative society for building and maintenance of holiday apartments became general at the end of the 1970s (e.g. Hegyvidéki SCH Szövetkezeti Üdölőszálloda-lánc). In the cooperative society for building and maintenance of holiday apartments, with respect to recreational buildings owned by the cooperative, members have legal right-to-use the recreational unit temporarily. Such use shall be annual for the period determined in the articles of association. This holiday ownership is hereditable, donatable and sellable.[18] The mentioned Hegyvidék Üdülőépítő és Fenntartó Szövekezet, and Szövetkezeti Üdülőszálloda-lánc sell two types of recreational use, in scheduled mode: domestic, i.e. at least a 7 night long perpetual holiday ownership, and extended perpetual holiday ownership (associated with RCI club membership).[19]

(b) Utilization of company of shareholders ('on the basis of timeshare-shares', e.g. Abbázia Plc., Petneházy Plc.) covers a more complicated system:

ba) The owner of the real estate is the Plc., and the lessee is an Ltd. thereof. The Ltd., as lessee, has the right to sell the right-to-use–within the lease–in a scheduled way. Within the framework of a contract for recreational use, the consumer can acquire a right-to-use by purchasing shares: the consideration for the recreational right is payed by purchasing dividend preference shares. The shareholder, i.e. the consumer, shall not influence the adoption and alteration of the lease: this question is not assigned to the sphere of the member's meeting, but the Board of Directors of the Plc. shall decide thereon.[20] From a legal aspect, the construction is uncertainty: if the dividend after the share due to the consumer–as shareholder–is the timeshare itself, than embodying real right entitlement (in a given case, the use of a recreational unit), but it isn't embodying a real membership right.[21] A more lawful variation is if the fund of the manager (or owner) of the real estate is produced (or completed) by a share purchase, and, besides this, simultaneously they conclude a contract for recreational use (which condition is the purchase of the share) with the consumer. The utilization of

[18] Papp: *op. cit.* 74. Act CXV of 2004. Article 13.
[19] 154/1999. VJ (Decision of the Economic Competition Bureau).
[20] 59/2001. VJ.
[21] Act CXLIV of 1997. Article 179.

timeshare takes place within the framework of the contract for recreational use, generally according to the Government decree. Legally it is problematic that the shareholders (entitled persons of the timeshare) of the Plc. have no influence on the management of the Plc. and on the adoption and alteration of the condition of the timeshare, because they can exercise only limited membership rights, because the shares are acquired 'with combination sale, under duress' (otherwise they could not become entitled to recreational use).

bb) A more simple form of the above mentioned legal solution is when the owner, maintainer and manager of the real estate (resort) is the same legal entity (company of shareholders), which directly (not inserting the 'lessee') concludes a preference lease contract (for 99 years) with those consumers, who take up shares of a definite number and value, or purchase at the end of the subscription period.[22]

bc) From the consumer's aspect, maybe the most suitable way of purchasing timeshare is when a partnership purchases ½ of the incorporeal property quota of the real estate (resort village) and the Plc., to be funded by it, purchases the other ½ of the incorporeal property quota from the stocks originating from the quotation of shares for the purchase price, suiting the planned subscribed capital. From a legal-technical aspect, it is a share-purchase draft contract, which takes place in connection with the contract for the use of real estate. After the completion of the deal, the Plc. terminates, and the fund is divided between the shareholders at the rate of the nominal value of their shares. Simultaneously with the division, focusing thereon, they establish common property with an agreement among themselves and they have the suite-quote registered into the register of title deeds. The partnership undertakes the profit-oriented, hotel-kind management and maintenance of the resort-property. To provide this, they establish mortgage on the property quota of the partnership in favor of the timeshare-entitled persons.[23]

(c) Within the framework of indirect formation, the agencies, agents–not owning the given real estate–selling timeshare, get into connection with the consumers.[24] For selling timeshare, we find the contract for sole commerce agent more suitable than the agent, or commision legal relationship between the real estate owner and the agent.

In 1994 the dominant Hungarian timeshare companies founded the Hungarian Timeshare Association (with 11 members), which in 2001 transformed into a

[22] 45/1998. VJ.
[23] 247/1995. VJ
[24] Papp: *op. cit.* 75.

union, managing for information and orientation purposes.[25] Within the framework of the Organisation for Timeshare in Europe, OTE, the Hungarian department started its work in autumn of 2003.[26]

The system of timeshare is suitable mainly for satisfying holiday demands: generally a right for a one week interval recreation may be purchased, which can be used with maximum flexibility of time and space within the exchange systems. Before entering the exchange system–in the interest of better 'convertibility' of exchange value–it is worth to consider: where, how big and on which service providing real estate, on what season, annually how often and how long and for how much can holiday ownership be acquired. By the 21st century already 90 countries' 5400 vacationers participated in the exchange-system. The two largest exchange companies, the Resort Condominiums International (RCI) and the Interval International (II); at these, the consumer automatically becomes a 'club member' of the exchange company by purchasing timeshare.[27] The RCI's residence is in London and it has 4 other regional centers in Europe. Hungary- together with Germany, Austria, Switzerland, Scandinavian countries, Finnland, Russia, Czech Republic, Poland, Slovenia and Croatia–belongs to the representation of RCI Consulting in Munich.[28]

The consumers' demands for bigger diversity resulted in the formation of first, an exchange-system, then the points system.[29] So in the timeshare-system the acquired holiday ownership could be utilized in two ways:

- by exchange (the club members exchange their holiday ownership to another resort and/or another time, sorting from the exchange-base of the given company);
- or with the points system (which is the 'currency' expressing the value of holiday ownership), where, by using the available points, the consumer may reserve a resort (part of the resort) in the resort and time suitable for him. Utilization of the holiday ownership has costs as well: besides the single entering fee, an annual membership fee and organizational fee shall be payed.[30]

The timeshare-sector – in which 4000 companies are working worldwide – went through a profile-exchange:

[25] Drábik–Fábián: *op. cit.* 79–80.
[26] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3
[27] Papp: *op. cit.* 76.
[28] Drábik–Fábián: *op. cit.* 81.
[29] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3
[30] Papp: *op. cit.* 76.

- on the one hand, among the 40 most significant timeshare companies, 6 leading public catering companies appeared (e.g. Four Seasons, Hilton, Ramada, Hyatt),[31]
- on the other hand, exchange companies often provide preferential travel service (insurance, air-ticket, car hire etc.) for their club members,[32]
- thirdly, timeshares connected to holiday-parks and bathhouses became conspicuous.

The expanding timeshare-system became one of the dominant means of tourism, it concretized the opportunity, utilized more often by consumers, because of the flexibility and accordance to the legal regulations.

4. Qualification of the timesharing contract

Directive 94/47/EC does not have the purpose of regulating the legal basis of contracts of timesharing and it concludes that the legal nature of the rights, regarded as the subject matter of the contract, are very different in each member state. The Directive does not classify timesharing-agreements as lease contracts, mainly because of the transfer of right-to-use and the ways of payment.[33]

The international professional terminology gives three kinds of variation: (a) ownership, (b) lease right, (c) special right-to-use. *(The timeshare is somewhere between ownership and lease.*[34]*)*

(a) The point of timesharing is distinguished by the conception, identified with ownership:

aa) *deeded property* covers the negotiable (this can be inherited, sold, donated, or rented), registered in the authentic records in the country of location of the real estate,

ab) *fee simple* is a holiday ownership for the entitled person, under which he has negotiable ownership in respect of a pre-determined resort for a certain time period (it is an incorporeal property quota, which is based on common ownership not only in the sense of resort or a section of a resort, but in the sense of time as well i.e. a periodically recurrent interval);

(b) if it is impossible to originate and register timeshare as ownership, then the use of real estate is provided either by *lease, leasehold*;

[31] Drábik–Fábián: *op. cit.* 14.
[32] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3
[33] Papp: *op. cit.* 64. Preamble of Directive 94/47/EC, Point 3, 4, 5.
[34] http://www.timesharingproblems.org/Timesharing_GB/index.html

(c) or by *special right-to-use (RTU)*; these two latter rights are also negotiable, and may be founded for a longer, but always definite time (usually 20–99 years).[35]

In the United Kingdom, timeshare shall not rest on ownership, even though the entirety of the group of consumers is designated deceptively from the aspect of legal judgement: Vacation Ownership, Fractional Ownership, Homeowners Association. Those having timeshare may form *Vacation, Members' or Proprietary Clubs*, and authorize a *trust* to manage and maintain the real estate.[36] In Spain, the so-called *escritura* system was formed (Owners Community/Club), which is based on holiday ownership (multiple ownership), however, in the agreement the word '*propriedad*' shall not be used.[37] In Belgium the timeshare-entitled persons are regarded as *common owners*.[38] German and Austrian law categorizes timeshare as *Teilzeitwohnrecht/Teilzeitnutzungsrecht* (timeshared holiday ownership/timeshared right-to-use). In both countries, this special right-to-use may appear as property law, association membership and as a company interest, as well. In the Netherlands, timeshare can be *property law* (ownership, or right-to-use) and *personal right* as well: association membership or company interest. The Irish and Greek legal definitions mention *ownership and other rights* (this latter category is not determined). In Portugal the real legal nature, timeshared right-to-use (*DRHP, direito real de habitação periódica*) and holiday ownership (*DRT, direito de habitação turística*) are distinguished. In France, the company of shareholders-construction is spread: the timeshare-entitled persons are preference shareholders in the company. For timesharing, the French often, but not appropriately, use the phrase '*Multipropriété*' (because those having timeshare are not the owners). In Sweden, Finnland and in Italy, timeshare is regarded as a *special right-to-use*.[39]

The Hungarian Government decree, on contract for purchasing right-to-use of real estate on a timeshare basis, leaves the question of the nature of the right acquirable by contract unsettled: it may be right-to-use[40] or ownership.[41]

The Conception of the new Civil Code characterizes the contract for timesharing as a specific obligation to use, which includes real and civil law company

[35] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3

[36] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3; http://www.tug2.net/advice/TimeShare-101.htm#KeyTimeshareConcepts

[37] http://ote.hu/index.nof?o=O&k2=18&nyelvid=1&k1=3

[38] http://www.timesharingproblems.org/Timesharing_GB/index.html

[39] http://europa.eu.int/youreurope/nav/hu/citizens/factsheets/at/consumerprotection/timeshares/de.html

[40] Government decree No. 20/1995 (II. 9). Article 2. Point a).

[41] Government decree No. 20/1995 (II. 9). Article 7. Point c).

elements, besides the obligatory nature. According to this, the legislator finds it either among the rules of the law of obligations, or among special rules of property law.[42]

From other fields of law, financial law and competition law affect the construction of timeshare:

- financial law qualifies the right-to-use, acquired by contract for timeshare, as a valuable right and interest, without explaining its nature;[43]
- competition law tries to fit the timeshare in the civil law category: use of real estate property is divided on a timeshared basis among the joint proprietors so fractional usage is regarded as limited usage.[44]

In the Hungarian practice, a contract for timesharing may commence common property, usufruct, lease, company interest and cooperative, or association membership. In tourism advertisements timeshare is often called 'timeshared lease', 'legal-continuous lease contract', or as 'long-term lease right'.[45]

In economic special literature, we found a classification, which regarded timeshare as real right-to-use, arguing that it promotes the satisfaction of necessities, so it is connected to the res (object), and it is not a value-right, as with ownership and mortgage.[46]

We agree with the opinion of Vékás Lajos, who focuses on the contractual side (according to the Directive and the Government decree): the legal relationship, covered by the contract for timesharing, is a specific obligation to use, including property law and civil law company elements. [47]

Our opinion:

- if the special right-to-use is based on common property or usage, then the real nature of timeshare is stronger,
- if it is based on organizational membership, then the civil law company nature is dominant, so that the contractual relationship of the parties will be more stressful.[48]

[42] Papp: *op. cit.* 64.

[43] 87/2001. Accounting question.

[44] 247/1995. VJ.; 142/2001. VJ.

[45] Papp: *op. cit.* 64.

[46] Drábik–Fábián: *op. cit.* 66.

[47] Papp: *op. cit.*, 64. http://www.ajk.elte.hu/TudomanyosProfil/hallgatoktevekenysege/tdk/pjerkonyv2001/VekasLajos.html

[48] Papp: *op. cit.* 64.

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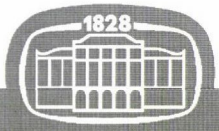

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