Volume 51 ▪ Number 1 ▪ March 2010

Editor-in-Chief ▪ VANDA LAMM

FOUNDED IN 1959

Acta Juridica Hungarica

Hungarian Journal of Legal Studies

WWW.AKADEMIAI.COM

AKADÉMIAI KIADÓ

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica publishes original papers on legal sciences with special emphasis on Hungarian jurisprudence, legislation and legal literature. The journal accepts articles from every field of legal sciences. The editors encourage contributions from outside Hungary, with the aim of covering legal sciences in the whole of Central and Eastern Europe. The articles should be written in English.

■

Abstracted/indexed in

Information Technology and the Law, International Bibliographies IBZ and IBR, Worldwide Political Science Abstracts, SCOPUS.

■

Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA
P.O. Box 25, H-1250 Budapest, Hungary
Phone: (+36 1) 355 7384
Fax: (+36 1) 375 7858

■

Subscription price

for Volume 51 (2010) in 4 issues EUR 304+ VAT (for North America: USD 424) including online access and normal postage; airmail delivery EUR 20 (USD 28).

■

Publisher and distributor

AKADÉMIAI KIADÓ
Scientific, Technical, Medical Business Unit
P.O. Box 245, H-1519 Budapest, Hungary
Phone: (+36 1) 464 8222
Fax: (+36 1) 464 8221
E-mail: journals@akkrt.hu
www.akademiai.com; www.akademiaikiado.hu

■

ISSN 1216-2574

AJur 51 (2010) 1

Printed in Hungary

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Volume 51, Number 1, March 2010

AKADÉMIAI KIADÓ
MEMBER OF WOLTERS KLUWER GROUP

Published by the financial support of the
Committee on Publishing Scientific Books and Periodicals,
Hungarian Academy of Sciences

Cover design: xfer grafikai műhely

CONTENTS

STUDIES

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 1, pp. 1–34 (2010)
DOI: 10.1556/AJur.51.2010.1.1

KANIYE S. A. EBEKU*

Revisiting the Acquittal of 10 Policemen: Issues of Judicial Independence, Trial by Media and Fair Trial in Cyprus

Abstract. In a recent judgment in the Efstathiou case, the Assize Court of Nicosia, Cyprus, acquitted ten Policemen charged with criminal offences related to alleged beating in 2005 of two Cypriot students. That verdict led to spontaneous reactions across the country, with people publicly protesting against and criticizing the judiciary. Among those that made scathing public comments were the Attorney-General of Cyprus and senior Cypriot lawyers. In its judgment, the court had suggested that media comments about the case unduly interfered with the fair trial of the case and amounted to contempt of court. On the whole, this case raises the issues of independence of the judiciary, trial by media and fair trial. There are two opposing views on the propriety or otherwise of the media coverage of the case as well as on whether, and if so, to what extent, the judiciary can be properly criticized. Essentially, this article seeks to consider the issues of judicial independence, trial by media and fair trial as well as the closely associated issue of contempt of court arising from the Efstathiou case and in relation to the common-law rooted Cypriot legal system. It argues that the right to fair trial is an inseparable part of a democratic society and that while the right to freedom of expression is a fundamental human right and undoubtedly the bulwark of a democratic society, it is not realizable without an independent judiciary which is equally indispensable in a democratic society. Hence, there is a great need to recognize the limits of the right to freedom of expression in order to sustain the independence of the judiciary and ensure the right to a fair trial.

Keywords: Judicial Independence, Trial by Media and Fair Trial, Contempt of Court, Common-law/Commonwealth Countries, European Convention of Human Rights and European Court of Human Rights, Cyprus and Cypriot Law

The author dedicates this article to all those who believe in Judicial Independence world-wide.

1. Introduction

On 19 March 2009 the Assize Court of Nicosia, Cyprus, stirred up a hornet's nest by its decision to discharge and acquit the ten policemen accused of various criminal offences in the case of *Republic* v. *Efstathiou & Others*.[1] The criminal charges had emanated from an alleged incident of high-handedness and brutality visited on two hapless Cypriot students by the accused persons in December 2005. Importantly, the unfortunate incident was allegedly captured by a secret video which was repeatedly shown on television programmes and published in print and online newspapers before and allegedly during the trial. The revulsion of the civil society over the incident was great, and so was a yearning for the

* Professor of Public Law and Chair, University of Nicosia Law School, Cyprus. Also, Visiting Professor of Law, University of Kent Law School, Canterbury, UK.

I am indebted to Athanasiou Thanasis Michalakis for his research assistance in writing this article. I am also grateful to him for the generous support he extended to me during my six years sojourn in the Republic of Cyprus.

E-mail: ebeku.k@unic.ac.cy, ksael@hotmail.com

[1] *Republic* v. *Efstathiou & Others* (Case No. 17179/06), unreported Judgment of 19 March 2009 (Assize Court, Nicosia, Cyprus).

perpetrators to face Cypriot criminal justice. Expectedly, the criminal justice system was put in motion against the accused persons and this ran into full course on 19 March 2009 with the verdict of the trial court (the Assize Court of Nicosia).

Going by media accounts of the incident, including the video footage, the accused persons were 'guilty as charged'. However, the three-member panel of judges that heard the case thought and decided otherwise; as earlier mentioned, they found the accused persons 'not guilty as charged' and accordingly set them free. This led to public outrage and spontaneous popular street protests against the Cypriot judiciary for what was considered to be an unjust decision.[2] The next day and on several occasions subsequently, local newspapers were awash with various reactions to the judicial verdict–mostly critical of the decision (see below). Surely, this may well be excused going by the general public sentiment against that incident, though this is not to suggest that it was entirely proper. It may well be that the trial judges were wrong in their decision on the case. However, this is to be ultimately decided locally by the appeal court–the Supreme Court of Cyprus.[3] Even so, there is no guarantee that the Supreme Court would necessarily satisfy the public's sense of justice.[4]

In the end, although the decision may rightly be criticized in the future for being erroneous in point of law (in the interim, it is sufficient to say that there are some difficulties in understanding the general approach and reasoning of the judges in relation to the merits of the case), it is important to consider, at this stage, the crucial issues raised by the various protests in relation to the working of the legal system. As will become clear below, the decision and various reactions thereto, have raised issues of independence of the judiciary, trial by media and fair trial. This article seeks to consider these issues here together with the closely related issue of contempt of court. As a point of departure, section 2 of this article will provide the background and context by outlining some of the reactions to the judicial

[2] Public protests against the decision continued for several days and weeks. See Hazou, E.: Latest protests over police acquittal "We are not doing this for our own kids, but rather for the children of other families who might get the same treatment". [*CyprusMail (Internet Edition)*, 24 March 2009]; Theodoulou, J.: Police beating appeal court date set for September. [*CyprusMail (Internet Edition)*, 28 April 2009]. Note that all references here to articles published in the *(CyprusMail Internet Edition)* are permanently searchable through its website: <http://www.cyprus-mail.com/news/>.

[3] The Supreme Court set down 14–18 September 2009 for the hearing of the appeal filed by the prosecution. See Theodoulou: Police beating appeal... *op. cit.* However, it had to hear first a preliminary objection filed by counsel for the first respondent in the appeal seeking to dismiss the appeal *in limine* for abuse of judicial process in that the Attorney-General had issued public statements declaring lack of confidence in the Cypriot judiciary after the decision of the trial court in the case. Although the application was found to be almost on all fours with the decision of the Supreme Court in *Constantinides* v. *Vima Ltd.*, Cyprus Law Reports, (1983) 348, the court was able to distinguish it, *inter alia*, on the ground that the Attorney-General was not a party 'stricto sensu' in the present appeal and accordingly dismissed the objection. The court frowned at the impugned statements, suggesting that they were contemptuous. However, that was not the question before them (only the 'contemnor' Attorney-General had the power to bring such contempt proceedings before the court). See *Attorney-General of the Republic* v. *Efstathiou* (Criminal Appeal No. 56/2009), unreported Ruling (in Greek) of 8 October 2009 (Supreme Court of Cyprus, Nicosia, Cyprus). As at 22 March 2010 the appeal was still pending.

[4] After exhausting the local remedies, the victims might further seek redress from the European Court of Human Rights (ECHR) in Strasbourg if they are unsatisfied with the outcome. In this regard, they would be suing the State for the violation of their human rights. However the accused persons, once acquitted by the Supreme Court, cannot be retried by the ECHR.

verdict. This will be followed in section 3 by an analysis of the focal issues in the context of the Cypriot common-law rooted legal system,[5] as influenced or modified by it's membership of the Council of Europe as well as the European Union. The last section, section 4, will be devoted to concluding remarks. It is hoped that this article will generate a lively debate, especially within the legal community in the country, which could lead to better appreciation of the working of the legal system by the general society and, perhaps, any necessary changes in the extant law.

2. Public Reactions: Background and Context

Media reports of reactions to the recent judicial verdict in the *Efstathiou* case show that they cut across the whole strata of the Cypriot society. Apart from the general public, there were also reactions from President Demetris Christofias of the Republic of Cyprus, senior Cypriot lawyers, professional associations (particularly the Cyprus Bar Association), and the Attorney-General of the Republic of Cyprus Petros Clerides. Furthermore, there was also a counter-reaction by the Supreme Court of Cyprus. For present purposes, some of those reactions–particularly those mentioned here–are briefly recounted hereunder.

It needs to be made clear from the outset that the present concern of this article is not with the merits of the court's decision. In other words, the article is not concerned with the question whether or not that decision was wrong. This could come in the future. Positively stated, this article is concerned with the propriety of the various reactions to the judicial verdict in the *Efstathiou* case–especially the reactions of the Attorney-General of the Republic of Cyprus, the President of the Republic of Cyprus, members of the legal profession in Cyprus (lawyers), and the Supreme Court of Cyprus. More specifically, this article is concerned with some of the issues raised by the various reactions as adumbrated above.

From available sources, the Attorney-General of the Republic of Cyprus (the Chief Legal Officer of the State of Cyprus[6]) was so furious about the verdict that he attempted to interrupt the judges while reading their judgment, but was refused.[7] Thereafter, he issued a press statement condemning the verdict thus: 'The Criminal Court's decision is wrong, from start to finish, and unfortunately it has harmed the prestige of the judicial system irreversibly... We can't always trust court decisions; each civilian has the right to judge them for themselves.'[8] He rejected the reasoning of the judges that the media's projection of the case amounted to trial by media and affected the rights of the accused persons to fair-hearing: 'In such a matter of importance and public interest, don't the media have the right to show scenes and make comments? ... The media did their jobs well and not only did they have the right, they had an obligation to inform the public'.[9] He also appeared on

[5] In *Constantinides* v. *Vima Ltd* [at p. 355], the Supreme Court of Cyprus noted that '[t]he administration of justice in Cyprus is modelled on the administration of justice under the common law judicial system...'

[6] The office of the Attorney-General is one of the independent offices established under Part 6 of the Constitution of Cyprus 1960. Holders of the office enjoy security of tenure as a judge of the High court.

[7] Theodoulou, J.: AG: Court decision wrong from start to finish [*CyprusMail (Internet Edition)*, 21 March 2009].

[8] *Ibid.*

[9] *Ibid.*

television programme, condemning the judicial verdict in very strong terms.[10] A former Deputy Attorney-General of Cyprus and former Cypriot Judge of the European Court of Human Rights, Loukis Loucaides, agreed with the position of the Attorney-General. He also launched a serious attack on the judges thus: 'There is something wrong with the way the judges approached the evidence. They may be not sufficiently trained...'.[11] Moreover, with a seeming tang of incontrovertible authority, he declared: 'The media influence is irrelevant to the proceedings, yet the court went out of its way to touch on the matter. ECHR [European Court of Human Rights] case law is clear on this. *In the cases of professional judges (with no jury), the issue of media influence does not arise'*.[12]

On his part, the President of the Republic of Cyprus expressed surprise at the decision, stating that it was a 'provocation to the sense of justice of every citizen of the Republic'.[13] Importantly, he also expressed his respect for the independence of the judiciary.

Further reactions, as indicated above, came from members of the legal profession and the Supreme Court. Speaking on behalf of the Cyprus Bar Association, its President, Doros Ioannides, cautioned against making public statements 'when a decision is under appeal'.[14] He insisted on the need to respect the integrity of the courts, arguing: 'Statements and counter-statements ... will not help justice. Cyprus justice has helped this country and under no circumstances should we try to diminish its role'.[15] On the contrary, the President of the Limassol Bar Association (Limassol Branch of the Cyprus Bar Association), Christos Melides, argues that lawyers, the general public and the media 'have the right to criticize the decision and make statements on the subject';[16] for him, this is part of the freedom of expression or the right to free speech.[17] It should be mentioned that on this position he is in tandem with a large section of the Cypriot society, including (particularly) the gentlemen of the press.

Lastly, the Supreme Court of Cyprus–reacting directly to the caustic public 'criticisms' of the Assize Court judges and the Cypriot judiciary by the Attorney-General–said in a public statement that it was shocked and discontented with the 'inappropriate statements of the Attorney-General to the media'.[18] The statement continued: 'The Attorney-General should be better aware of the fact that if he disagrees with a decision, the legal means he has at his disposal is to appeal, and not attack the courts and justice system through television... The Supreme Court condemns without reservations the televised attempts to diminish the prestige of the judicial system...'.[19]

[10] See: What sort of example are our justice officials setting? [*CyprusMail (Internet Edition)*, 27 March 2009] See also the view of Hazou, E. contained in Pissa, M.: Banana republic – rejoice in your justice system [*CyprusMail (Internet Edition)*, 20 March 2009].

[11] See Evripidou, S.: Former European Court of Human Rights Judge says cops acquittal "stupid and absurd" [*CyprusMail (Internet Edition)*, 22 March 2009].

[12] *Ibid* (emphasis added).

[13] See Theodoulou: *AG: Court decision... op. cit.*

[14] Theodoulou, J.: Black page in the history of Cypriot justice. [*CyprusMail (Internet Edition)*, 21 March 2009],

[15] *Ibid.*

[16] Hassapi, A.: Limassol Bar Association speaks out against court decision acquitting police officers [*CyprusMail (Internet Edition*, 25 March 2009].

[17] *Ibid.*

[18] Theodoulou: *AG: Court decision... op. cit.* See also Theodoulou: *Black page in the history... op. cit.*

[19] *Ibid.*

Interestingly, the recent development in Cyprus recalls similar incidents around the world: riots following acquittal on criminal charges. Two examples will suffice to illustrate this point. First, in 1992 the acquittal of the four policemen charged in *California* v. *Powell et al.* with the beating of Rodney King 'unleashed the rage of many in L.A. [Los Angeles]';[20] it caused terrible rioting. In a cruel coincidence, that incident, like the recent one in Cyprus, was caught on video when it occurred in 1991. The second example is *Jessica Lal* case that caused serious protests and riots in India in 1998. In fact, such was the impact of the riots that the government of India was forced to order a retrial of the case.[21] Importantly, both of these incidents, like the present *Efstathiou* case in Cyprus, raised the questions of trial by media and fair trial.

3. Analysis/Critique

From all the foregoing public reactions, it is clear that issues of judicial independence, trial by media and fair trial have been raised, among others. This article will attempt to briefly address the specifically mentioned issues here. For convenience and clarity, these issues will be addressed in two sub-sections. The first sub-section will address the issue of independence of the judiciary while the succeeding sub-section will deal with the issue of trial by media and fair trial as well as the closely related issue of contempt of court.

3. 1. Independence of the Judiciary[22]

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[23]

[20] Cannon, L.: Rodney King's Legacy. <http://www.courttv.com/archive/casefiles/rodneyking/> (accessed 27 April 2009).

[21] Samanta, N.: Trial by Media – Jessica Lal Case. <http://ssrn.com/abstract=1003644> (accessed 22 April 2009).

[22] There is a large body of literature on the concept of independence of the judiciary in relation to both national and international-regional courts and tribunals. See, by example, Bradley, A.W.–Ewing, K. D.: *Constitutional and Administrative Law*, 14th ed. Essex 2007, 388–395; Kirby, M.: A global approach to judicial independence and integrity, *University of Queensland Law Journal* 21/2 (2001) 147–159; Larkins, C. M.: Judicial independence and Democratization, *American Journal of Comparative Law*, 44 (1996) 605–626; Mackenzie, R.–Sands, P.: International courts and tribunals and the independence of the international judge. *Harvard International Law Journal*, 44 (2003) 271–285; Olbourne, B.: Independence and Impartiality: International Standards for National Judges and Courts. *The Law & Practice of International Courts and Tribunals*, 2 (2003) 97–126; Claus, L.: Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond. *American Journal of Comparative Law*, 64 (2006) 459–483; Lord Hope of Craighead: Judicial Independence. *Scots Law Times*, 13 (2003) 105–111; Plaxton, M.: The Neutrality Thesis and the Rothstein Hearing. *University of New Brunswick Law Journal*, 58 (2008) 92–104.

[23] Article 2:02 of the Universal Declaration on the Independence of Justice (the 'Montreal Declaration'); quoted in Olowofoyeku, A. A.: *Suing Judges: A Study of Judicial Immunity*. Oxford, 1993, 1. The author explained the importance of this international instrument thus: 'The declaration was adopted at the first plenary session of the 1st World Conference on the Independence of Justice which was held at Montreal on 10 June 1983. It was [and still is] a universal statement of principle. It stated the independence which "national judges" ought to enjoy.' *Ibid.* More recently, Article 1 of the Uni-

As a concept, independence of the judiciary (or judicial independence) is well-understood in most, if not all, parts of the world and has been defined or described by various authors[24] as well as in various national and international instruments, including the UN Basic Principles on the Independence of the Judiciary 1985,[25] the Latimer House Guidelines on Parliamentary Sovereignty and Judicial Independence 1998, and the Cairo Declaration on Judicial independence 2003. For present purposes, it is sufficient to refer to only two descriptions/definitions of the concept. According to Chris Maina Peter:

> *Independence of the judiciary means [that] every judge or magistrate, as the case may be, is free to decide matters brought before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements, or pressures direct or indirect from any quarter or for any reason.* There is a tendency of thinking that independence of the judiciary means just independence from the legislature and executive. In reality it means more than that. *It also means independence from political influence whether exerted by the political organ of the State, or by political parties, or the general public...*[26] (emphasis added).

Importantly, the above statement echoes the provision of Article 2 of the UN Basic Principles on the Independence of the Judiciary 1985, which states that 'the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'. Based on this, it is important to underline that judicial decisions are based on facts placed before the court and the extant law (*lex lata*), and not on *de lege ferenda* (the law as it ought to be).

---

versal Charter of the Judge 1999 provides that 'the independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence'. More importantly, Article 2 thereof provides, *inter alia*, that '...The Judge, as a holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure...' The Charter was adopted at the meeting of the Central Council of the International Association of Judges in Taipei (Taiwan) on 17 November 1999. See further Recommendation No. R (94) 12 (on the independence, efficiency and role of Judges)–adopted by the Committee of Ministers of the Council of Europe on 13 October 1994, esp. Principle 1; European Charter on the Statute for Judges (adopted at a multilateral meeting held 8–10 July 1998 in Strasbourg, under the auspices of the Council of Europe).

[24] See Canivet, G.–Andenas, M.–Fairgrieve, D. (eds.): *Independence, Accountability, and the Judiciary.* London, 2006.

[25] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[26] Peter, C. M.: Independence of the Judiciary in Tanzania: Many Rivers to Cross. In: Jjuuko, W. F. (ed.): *The Independence of the Judiciary and the Rule of Law: Strengthening Constitutional Activism in East Africa.* Kampala, 2005, 58. See also the speech of the Chief Justice of South Africa, Mohamed C. J.: The Role of the Judiciary in a Constitutional State, *South Africa Law Journal*, (1998) 111, at 112–113: 'What judicial independence means in principle is simply the right and the duty of judges to perform the function of judicial adjudication, through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution...' The speech was given at the occasion of the first orientation course for newly appointed judges in South Africa.

In summary, one can say that independence of the judiciary essentially requires that judges should be free to decide cases brought before them without fear of any reprisal against them. This ensures that they dispense justice fairly, impartially and without fear or favour. To be sure, the impartial dispensation of justice is in the interest of the society in general. As the Kenyan Section of the International Commission of Jurists (KSICJ) explains, 'the judiciary is the guardian of the rights of man and it protects the rights from all possibilities of individual and public encroachments'.[27] (One critical question raised in the recent Cypriot case under consideration here is whether the judiciary has failed in its constitutional role, but this is beyond the scope of the present article). This is why most, if not all countries of the world, institute constitutional, statutory and other measures to ensure the independence of the judiciary, including the concept of judicial immunity which insulates judges from legal (civil and criminal) actions based on what they said or did in the course of judicial proceedings. At the international level, Article 2: 24 of the Universal Declaration on the Independence of Justice (the 'Montreal Declaration') 1983 provides that 'Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity'. Furthermore, the 1985 UN instrument on the independence of the judiciary enjoins States to guarantee the independence of the judiciary and enshrine it in the Constitution or the law of the country.[28] On the aspect of judicial immunity at the national level, Olowofoyeku has explained the general position in the common-law world as follows:[29]

> Judges are not free from error and some do not always take good care. The errors or lack of due care may, if and when they occur, have disastrous consequences for a litigant. The problem is the correct course of action when such a situation occurs. Various legal systems have developed their own ways of coping with the problem. The common-law world [including Cyprus] has generally adopted a rather benign approach than stoning the judges–it has shrouded them in an almost impregnable protective cloak. A judge could go to sleep during trial, spend four years in reaching a decision, be slanderous, and yet anyone aggrieved by his behaviour will usually have no recourse. This is known as absolute immunity.[30]

This is consistent with the exposition of Lord Denning in his speech in *Sirros* v. *Moore*,[31] thus:

> Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an

[27] Kenyan Section of the International Commission of Jurists, *Best Practice Guide for Judicial Independence.* Nairobi, 2007.

[28] Article 1.

[29] Olowofoyeku: *op. cit.* 2.

[30] The author referred to relevant material drawn from common-law countries such as the U.K, U.S., New Zealand and Nigeria. Note that this author believes that the common law position needs reconsideration, especially in contemporary times. See Olowofoyeku, A. A.: Accountability versus Independence: The Impact of Judicial Immunity. In: Canivet–Andenas–Fairgrieve (eds.): *op. cit.* 357, esp. at 383.

[31] *Sirros* v. *Moore* [1975] Queen's Bench, 118. Note that the common law position re-stated by Lord Denning is reinforced by section 2(5) of the Crown Proceedings Act 1947 which absolves the Crown of any liability for any person discharging judicial or quasi-judicial functions.

absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling... The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden C.J. in *Garnett* v. *Ferrand* (1827) 6 B. & C. 611, 625: "This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be".[32]

With specific regard to Cyprus, it is important to note that the principle of judicial immunity is given expression in Articles 133(10) and 154(10) of the Constitution of Cyprus 1960 which provides that no action shall be brought against the President of the Supreme Court or the High Court or any other judge of the Supreme Court or the High Court for any act done or words spoken in his judicial capacity. The independence of the Cypriot judiciary is further guaranteed by other means, including: (1) the mode of appointment (designed to prevent executive or other institutional influence[33]); (2) security of salary (a judge's remuneration cannot be altered to his disadvantage after his appointment[34] and constitutes a charge on the consolidated fund[35]); (3) security of tenure (once appointed, a judge cannot be removed until he/she attains the retirement age of 68 years, except for misconduct determined by an independent Council established under the Constitution[36]). In fact, in a recent report on the state of human rights in Cyprus it was acknowledged that the Cypriot judiciary is independent.[37]

It is important to emphasize that the judicial immunity enjoyed by judges 'applies to both civil and criminal liability, and protests judges in respect of acts of a judicial nature'.[38] While the principle of judicial immunity do not purport to insulate judges against public

[32] *Sirros* v. *Moore* [at p. 132]. See also *Fray* v. *Blackburn* (1863) 122 ER 217, where Crompton J. said: 'It is a principle of our law that no action will lie against a judge of one of the superior courts [as well as inferior courts and persons presiding over quasi-judicial bodies] for a judicial act, though it be alleged to have been done maliciously and corruptly...The public are deeply interested in this rule, which, indeed exists for their benefit, and was established in order to secure the independence of judges'. See further *Scott* v. *Stansfield* (1868) LR 3 Ex 220, 223 per Kelly CB.

[33] See generally Constitution of Cyprus, Articles 133 and 153.

[34] Articles 133(12) and 153(12).

[35] Article 166(1)(b).

[36] See Constitution of Cyprus, Articles 133(7) & (8) and 153(7) & (8). The retirement age of first instance judges is 63 years. See Courts of Justice Law 14/60 (as amended), section 8(2). See also Constitution of Cyprus, Article 158(3).

[37] US Department of State, *2008 Human Rights Report*: *Cyprus* (Washington, DC 2009) section 1(e), <http://www.state.gov/g/drl/rls/hrrpt/2008/eur/119074.htm> (accessed 23 April 2009).

[38] Olowofoyeku: *op. cit.* 77. However, with regard to criminal liability, the immunity is not absolute. See *Ibid.* 76.

criticisms,[39] it is contended that certain kinds of public criticism–especially by certain responsible and highly-placed persons in the society (such as high officers of government and lawyers)–could amount to intimidation or political pressure and, more seriously, have the capacity to instill fear in judges[40] apart from their potential to undermine public confidence in the judiciary and/or lower the integrity and prestige of the courts in the eyes of the people. When this happens, the hallowed independence of the judiciary (or 'independence of justice', as the 1983 Montreal Declaration calls it)[41] is compromised, to the detriment of the judicial system and the society in general. This appears to be the present situation in Cyprus as a result of the high-profile criticisms of the judiciary by the President of the Republic of Cyprus, the Attorney-General of the Republic Cyprus and senior Cypriot lawyers, *inter alia*, following the decision of the Nicosia Assize Court to acquit the ten policemen charged with assaulting two young Cypriot students.[42]

In Britain, the need to preserve and protect the independence of the judiciary explains the existence of the British constitutional convention which forbids members of Parliament from asking Ministers questions which border on the criticism of judges in the Parliament.[43] This is also why British Ministers generally refrain from criticizing judges publicly, though instances of such criticisms can be pointed to.[44] It is possible that the President of the Cyprus Bar Association had this approach in mind when he issued the statement earlier stated above. Arguably, the British approach reflects the acceptable approach in the Republic of Cyprus as it is consistent with the general approach within the commonwealth. Viewed this way, it is submitted that the reaction of the Attorney-General of Cyprus (as briefly stated above) was unrestrained, precipitate, and against the spirit of independence of the judiciary, and probably unprofessional. Similar comments could apply to the reaction of the President of the Republic, but it is important to note that he recognized that his criticism might impinge on the independence of the judiciary and declared his respect for it. Importantly, the President's recognition of the independence of the judiciary is in line with Article 2: 04 of the 1983 Montreal Declaration which states that 'the judiciary shall be independent of the executive and the legislature'.

All in all, there is no gain-saying that the independence of the judiciary is important and indispensable in all democratic countries. In this context, Olowofoyeku has rightly stated:

[39] See *The Role of the Judge in Contemporary Society*, United Nations Crime and Justice Research Institute (UNICRI) Publication No 24, 1984, where it was stated: 'Independence does not, however, mean absence of responsibility for his own actions. The concept which regards the judge as unrestrained by law *(legibus solitus)* would end, sooner or later, in protecting not so much his necessary freedom, as the arbitrariness of his decisions'. *Ibid.* 20.

[40] Bradley and Ewing note that 'judicial independence requires that judges should be protected from political pressure to reach decisions which suit the government or other powerful interests' See Bradley–Ewing: *op. cit.* 390.

[41] For a recent and interesting discussions and debate on the independence of the judiciary in some parts of the world, see Canivet–Andenas–Fairgrieve (eds.): *op. cit.*

[42] Compare Addo, M. K.: *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards.* Dartmouth, 2000; Comella, F.: Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights. In: Wojciech Sadurski (ed.): *Political Rights Under Stress in 21st Century Europe.* Oxford, 2006, 116.

[43] See Barnett, H.: *Constitutional & Administrative Law.*, 7th ed. Oxford, 2009, 388.

[44] See Bradley–Ewing: *op. cit.* 390–391.

> In a publication released jointly by the International Association of Judges and the United Nations Social Defence Research Institution,[45] judicial independence was seen as an essential prerequisite for guaranteeing all the basic rights and freedoms acknowledged by modern civilized society. As such, the legal system [of all countries of the world, especially common law countries such as Cyprus] must protect such independence against any encroachment by other powers, and must clearly provide the means to defend the judge against all abuses and pressures from individuals or groups.[46]

The next question is whether the Supreme Court of Cyprus was right to issue a public response to the reaction of the Attorney-General. This is not an easy question which could be answered simply by 'yes' or 'no'. Going by English experience, and this is by no means a universal one, judges hardly respond to press criticisms. In an annual lecture of the Judicial Studies Board entitled 'Judicial Independence', delivered on 5 November 1996, Lord Bingham suggested that judges should be 'thick-skinned' enough to ignore press comments or criticisms.[47] On this view, judges should refrain from personal response to criticisms. This was also the view expressed by Lord Denning in *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn*[48] and the European Court of Human Rights (ECtHR) in the *Case of Prager and Oberschlick* v. *Austria*.[49] Yet, it has been asked, 'if the judge decides not to respond, who is to speak on behalf of the judiciary?'[50] Perhaps, this should be left for a Minister–particularly the Minister in charge of the Department of Justice, as in the U.K.[51] In fact, section 3 of the Constitutional Reform Act 2005 imposes a duty on the Lord Chancellor (i.e. U.K Minister of Justice) to uphold the continued independence of the judiciary.[52] Even so, it has also been forcefully and rightly argued that 'where necessary, an independent judiciary should be defending itself'.[53] An exemplary occasion, it has been suggested, is when a judge suffers a well-publicized and personal attack by a journalist of considerable seniority and influence.[54] It is submitted that caustic and sustained criticisms

[45] See UNICRI publication.

[46] Olowofoyeku: *op. cit.* 1–2.

[47] Bingham, T.: *The Business of Judging.* Oxford, 2000, 61–62. The expression "thick-skinned" enough to ignore press comments' was a summary made by Alisdair Gillespie. See Gillespie, A.: *The English Legal System.* Oxford, 2007, 205.

[48] *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn* [1968] 2 All England Law Reports, 319, at 320. ('Those who comment can deal faithfully with all that is done in a court of justice. They can say we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms.')

[49] *Case of Prager and Oberschlick* v. *Austria*, Judgment of 26 April 1995, Series A vol. 313, para. 34 ('...judges who have been criticized are subject to a duty of discretion that precludes them from replying').

[50] Pannick, D.: Should judges respond to criticism? (*The Times*, 27 November 2008).

[51] See Gillespie: *The English Legal System. op. cit.* 206–207.

[52] The duty extends to other Ministers (including the Prime Minister) and 'all with responsibility for matters relating to the judiciary or administration of justice'. *Ibid.* This may be regarded as a codification of a long-standing constitutional convention. See further Article 6 of the European Convention on Human Rights (made applicable domestically in the U.K by the Human Rights Act 1998).

[53] See Pannick: *Should judges respond... op. cit.* Lord Pannick, QC is one of the top 10 most influential UK lawyers. See 'The Times Law 100 2009' (*The Times*, 23 July 2009).

[54] *Ibid.*

by an Attorney-General, senior lawyers and/or other influential members of the society would qualify as such occasion. Hence, the Supreme Court of Cyprus was arguably right to have issued a statement in response to the avowed criticism by the Cypriot Attorney-General of the recent decision of the Nicosia Assize Court. Surely, it is respectfully submitted, the reaction of the Cypriot Attorney-General and other senior lawyers, more than that of the society in general, greatly damaged the legal profession and the integrity and prestige of the courts, judges and the entire Cypriot judicial system.

In 2008, the British Judicial Communications Office issued a brief written statement in response to a critical media statement of the Editor of Daily Mail against a judge.[55] The then Lord Chancellor, Lord Falconer of Thoroton, also gave an interview defending judicial independence. Importantly, the House of Lords Select Committee on the Constitution approves and encourages this approach. There are also instances in Britain when judges had felt able to defend themselves from public criticisms by sending their response as a letter to the press.[56] Interestingly, the response of the Supreme Court of Cyprus is in line with the approach of Lord Chancellor Lord Irvine of Lairg in 2003 in response to the criticism of judges by the Home Secretary. He said: 'Maturity requires that when you get a decision that favours you, you do not clap. And when you get one that goes against you, you do not boo'.[57] The Supreme Court of Cyprus said much the same when it suggested that in attacking the judges/judiciary the Attorney-General of Cyprus had lost his 'self-control'.[58]

3.2. Trial by Media versus Fair Trial[59]

> "Trial by newspaper," like all catch phrases, may be loosely used, but it summarizes an evil influence upon the administration of criminal justice...[60]

Another important issue that arose in the *Efstathiou* case was whether the media publicity of the unfortunate incident compromised fair trial in the case.[61] The trial court stated in its judgment that the media coverage of the alleged criminal act (before and during the proceedings)[62] 'constituted serious interference in the course of justice and pre-empted the outcome of the trial',[63] and that 'it constitutes a usurpation of the judicial authority and contempt of court'.[64] However, it has been doubted whether the media publications really affected the outcome of the case; if it did, it has been argued, the outcome of the case would

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

[58] See Theodoulou: *Black page in the history... op. cit.*

[59] See generally, Law Commission of India: *200th Report on Trial by Media: Free Speech and Fair Trial under Criminal Procedure Code, 1973.* New Delhi, 2006; available at: <http://lawcommissionofindia.nic.in/reports/rep200.pdf > (accessed 27 April 2009); Eady, D.–Eady, A.–Smith: *On Contempt*, 3rd ed., London, 2005; Bonnington, A. J.–McInnes, R.–McKain, B.: *Scots Law for Journalists* 7th ed., Edinburgh, 2000.

[60] Per Justice Frankfurter in *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), at 351.

[61] The Supreme Court of Cyprus condemned 'trial through the press' in *Constantinides* v. *Vima Ltd.*, [at p. 359].

[62] By the judges' count, the number of articles written in relation to the case amounted to 361. See Charalambous, L. Police acquittal sets an eerie precedent for Helios trial [*CyprusMail (Internet Edition)*, 29 March 2009].

[63] Reproduced in Evripidou: *Former European Court of Human Rights Judge... op. cit.*

[64] *Ibid.*

have been different.[65] Even so, it must be recognized that 'the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected'.[66] Burges has succinctly explained the difference between 'trial by media' and 'fair trial', when he said:[67]

> [T]rial by media by its very nature detracts from the notions of what the law describes as a fair trial. That is a trial free from prejudice. A trial where jurors [and judges] already have preconceived notions of the guilt or innocence of the accused can hardly be said to be "a fair and impartial trial" as defined in *The King* v. *MacFarlane, ex parte O'Flanaghan and O'Kelly* (1923) 32 CLR 518, 541–542.

The evil of trial by media was also disapproved in *Attorney-General* v. *English*.[68] Lord Diplock explained that the public policy that underlies the strict liability rule established under section 1 of the English Contempt of Court Act 1981 is 'deterrence'. He then declared:

> Trial by newspaper or, as it should be more compendiously expressed today, trial by media, is not to be permitted in this country [U.K and, indeed, elsewhere in the world]. That the risk that was created by the publication when it was actually published does not ultimately affect the outcome of the proceedings is, as Lord Goddard C.J. said in *Reg.* v. *Evening Standard Co. Ltd.* [1954] 1 Q.B. 578, 582, "neither here nor there..."[69]

Under the Cypriot legal system, as is the case in all common law countries, an accused person is presumed innocent until he has been found guilty in a judicial proceeding. Article 12(4) of the Constitution of Cyprus 1960 is categorical on this: 'Every person charged with an offence shall be presumed innocent until proved guilty according to law'.[70] The problem with media reporting of criminal acts or pending cases is that it often tends to find the accused guilty before trial or conclusion of trial, contrary to the requirements of fair hearing.[71] As Naylor categorically states, 'it is clear that some media reporting poses a threat to the fair trial of the defendant'.[72] In the same way, the Media Institute of Kenya has frankly admitted that 'in the coverage of court proceedings by the press, there are cases where such coverage can imperil the administration of justice'.[73] Hence, the law of contempt of court is meant to deter the potential effect of publications on an accused's right to fair

[65] *Ibid* (per Loucaides: 'if the media really had influenced opinion then the judges would not have acquitted the ten officers').

[66] UN Basic Principles on the Independence of the Judiciary 1985, Article 6.

[67] Burgess, C.: Can "Dr Death" Receive a fair Trial? *OUT Law & Justice Journal,* (2007), 2; available at: < http://www.austlii.edu.au/au/journals/QUTLJJ/2007/2.html > (accessed 24 April 2009).

[68] *Attorney-General* v. *English* [1983] 1 Appeal Cases, 116.

[69] *Ibid.* 141.

[70] This is exactly the provision of Article 6(2) of the European Convention on Human Rights 1950.

[71] This is not to suggest that issues of public interest should not be reported or discussed; far from that. What is objectionable is the tendency to interfere with judicial proceedings or find an accused person guilty on the pages of a newspaper.

[72] Naylor, B.: Fair Trial or Free Press: Legal Responses to Media Reports of Criminal Trials, *Cambridge Law Journal,* 53 (1994) 492, at 501.

[73] Makali, D. *et. al:* Fair Trial and the Freedom of the Press. In Makali, D. (ed.): *Media Law and Practice: The Kenyan Jurisprudence.* Nairobi, 2003.

and impartial trial as well as to protect the honour and integrity of courts of law. As adumbrated above, section 1 of the English Contempt of Court Act 1981[74] establishes 'strict liability rule' for contempt of court cases – defined to mean 'the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so'. According to section 2(2) thereof, this rule applies only to 'a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced'.[75] Importantly, the rule applies only if the proceedings in question are 'active'[76] as explained in the Act: for example, from arrest with or without warrant to the conclusion of the case – say by acquittal or sentence.[77]

In Cyprus, the law of contempt of court is contained in the Courts of Justice Law 14/60[78] (as recently amended by the Courts of Justice (Amendment) Law 36(1)/2009).[79] Article 44(1) thereof provides in part, as follows:[80]

Any person who,

a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner, of or with reference to such proceeding or any person before whom such proceeding is being had or taken,[81] or
b) causes an obstruction or disturbance in the course of a judicial proceeding, or
c) while a judicial proceeding is pending...publishes any writing, makes any speech, or does any act misrepresenting such proceeding or is capable of prejudicing the fair trial of such

[74] Revised Laws of the UK, Cap 49.

[75] See generally, Miller, C. J.: *Contempt of Court*, 2nd ed., Oxford, 1990, Chapter 10. The law of contempt of court in England can partly be found in the common law.

[76] Contempt of Court Act 1981, section 2(3).

[77] Contempt of Court Act 1981, section 2(4) and schedule 1. This provision is based on the leading case of *Hall* v. *Associated Newspaper (1978) SLT 241 (Scotland)*.

[78] This provision is largely based on Article 49 of the previous Cap. 8. Note that the law of contempt of court in Cyprus was made pursuant to Article 162 of the Constitution of Cyprus 1960. Furthermore, Articles 150 and 162 of the Constitution give the Supreme Court and the High Court respectively power to punish for contempt of itself.

[79] The law was earlier amended by Law 166/1987. The amendment effected by Law 36(1)/2009 was principally designed to bring the procedural aspects of contempt in the face of the court in Cyprus in line with the decision of the European Court of Human Rights in *Kyprianou v Cyprus* (App No. 73797/01) ECHR, Judgment of 27 January 2004. Essentially, while Cypriot courts still have the power to punish for contempt committed in the face of the court, if the act constituting the contempt 'turn against the person of the judge' (i.e. directed at the judge personally) he cannot adjudicate the matter personally but has to refer the matter to the President of the Supreme Court who may appoint another judge to adjudicate the matter. See Law 14/60 (as amended by Law 36(1)/2009), Article 44 paras 2–10. The idea is to prevent an affected judge being a judge in his own cause, in breach of the right to fair trial under Article 6 of the European Convention on Human Rights.

[80] I am grateful to my colleague, Dr Achilles Emilianides, for drawing my attention to the recent amendment of Law 14/60 by Law 36(1)/2009. Moreover, I am grateful to him for translating the original Greek text of Law 36(1)/2009 into English for my convenience and for his useful comments on the draft of this article. Furthermore, I would also like to acknowledge the assistance of another colleague, Nicolas Angelides, who translated other Greek texts into English for me. However, I accept sole responsibility for any errors found in this article.

[81] See *Mantis* v. *The Police*, Cyprus Law Reports, (1979) 125; *Evangelou* v. *Police (No. 2)* Cyprus Law Reports (2000) 224 (in Greek).

proceeding or of interrupting or delaying the course of justice or calculated to lower the authority of any person before whom such proceeding is being had or taken, or

d) publishes a report of the evidence taken in any judicial proceeding at which, under this Law or any other Law for the time being in force, only the parties and their advocates or other representatives, if any, and the officers of the Court are permitted to be present, or

e) publishes any writing, makes any speech or does any act containing scandalous matter respecting any Court which has adjudicated in any proceeding relating to any judicial proceeding, ...

is guilty of a misdemeanour and is liable to imprisonment up to six months or to a fine not exceeding 450 CP [450 Cyprus Pounds (£CY450)] or to both sentences.[82]

It is important to point out that the requirement of English law that to constitute contempt of court the criminal proceeding in question must be 'active' is generally the same as the requirement that the judicial proceeding be 'pending' under Cypriot law–i.e. from the time of arrest[83] to the conclusion of the case. This is also the position in Nigerian law,[84] as noted extra-judicially by Justice Alabi:[85] 'A criminal prosecution may be said to be pending...at any time after a person has been arrested and is in custody. It is not necessary that the accused person should have been committed for trial; nor is it necessary that he should have been brought before a court of summary jurisdiction'.[86] Importantly, the same position holds in other common-law/commonwealth countries. For example, in *AK Gopalan* v. *Noordeen*[87] the Indian Supreme Court held that a publication made after the 'arrest' of a person could be contempt if it was prejudicial to the suspect or accused.

In fact, under the common law it is also contempt of court to publish prejudicial material about a criminal case when criminal proceedings are 'imminent'.[88] Note that the

[82] Since 1 January 2008 Cyprus has adopted the Euro as its national currency. The sum of £CY450 is now approximately €765 (seven hundred and sixty-five Euros).

[83] This is consistent with the 24-hour rule under Article 11(5) of the 1960 Constitution of Cyprus: A 'person arrested shall, as soon as is practicable after his arrest, and in any event not later than twenty-four hours after the arrest, be brought before a judge, if not earlier released'. According to *Hall's* case, once a person is arrested he comes within the 'care and protection' of the court, as he has to be produced in court within 24 hours. In his introduction to the 200th Report of the Law [Reform] Commission of India, the Chairman, Justice M.J. Rao, explains that: 'The reason for fixing arrest as the starting point is that, if a publication is made after arrest referring to the person's character, previous conviction or confessions etc., the person's case will be prejudiced even in bail proceedings when issues arise as to whether bail is to be granted or refused, or as to what conditions are to be imposed and whether there should be police remand or judicial remand. Such publications may also affect the trial when it takes place later'. See Law Commission of India: *op. cit.*

[84] See generally, Fawehinmi, G.: *The Law of Contempt in Nigeria (Case Book).* Lagos, 1980.

[85] Justice Alabi, A. A. was sometime the Chief Judge of Lagos State, Nigeria.

[86] Alabi, A.A.: Contempt of Court and the Sub-Judice Rule. In Oyeyipo, T.A.–Gummi, L. H.–Umezulike, I. A. (eds.): *Judicial Integrity, Independence and Reforms: Essays in Honour of Hon. Justice M.L Uwais.* Enugu, 2006, 181, at 183.

[87] *A. K. Gopalan* v. *Noordeen* (1969) 2 Supreme Court of Cases, 734.

[88] *Ibid.* See also *Rex* v. *Parke* (1903) 2 KB 432, at 437–438; *R* v. *Savundranayagan,* All England Law Reports (1968), 439, 441; *Attorney-General* v. *News Group Newspapers plc* [1989] QB 110, at 125 and 130 (per Watkins LJ); *R.* v. *Horsham Justices* (1982) 2 QB 762 (dealing with the term 'imminent' in the 1981 Act, section 4(2)). Cf. *R.* v. *Clarke, ex parte Crippen* [1910] 27 TLR 32; *James* v. *Robinson* (1963) 109 Commonwealth Law Reports, 593 (High Court of Australia). Note that the English Contempt of Court Act 1981 only amended, and did not abolish, the common law of contempt of court.

contempt committed when a judicial proceeding is 'pending' or 'active' is known as *sub judice* contempt. Importantly, as can be gleaned from the provisions of Article 44 of Law 14/60 (as amended by Law 36(1)/2009) the central purpose of *sub judice* contempt of court is to guarantee fair hearing. As Burgess rightly surmised 'the principal aim of *sub judice* contempt is to prevent publications that may damage fair trial before any damage is done'.[89] Furthermore, note that a case remains *sub judice* until the time within which notice of appeal might be given has expired, or, if an appeal is brought, until the appeal is heard and determined. This is the common law position which still applies in Nigeria,[90] Cyprus and some other common law countries (not including Britain). Hence, some of the unrestrained adverse comments in the media about the decision of the Nicosia Assize Court on the *Efstathiou* case before the time of appeal to the Supreme Court of Cyprus had expired and also after an appeal had been lodged and pending determination could well be contemptuous of the court and the entire Cypriot judiciary.[91] In Britain, the Contempt of Court Act 1981 has given more latitude to freedom of speech by modifying the common law position in some important respects. For instance, Section 5 thereof exempts publications made as or as part of a discussion in good faith of public affairs or other matters of general public interest from the strict liability rule established under section 1 thereof 'if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion'. This development is well explained by Walker as follows:

> Under section 2(3) of the Contempt of Court Act 1981 (UK) a publisher is not liable under the strict liability rule unless proceedings were 'active' at the time of the publication of the material. The First Schedule to the Act sets out when proceedings are 'active'. In the case of criminal proceedings, the starting point is similar to the starting point for when criminal proceedings are 'pending' rather than 'imminent'. The legislation does, however, give greater freedom to publishers than the common law as it is applied in Australia [and some other common law countries such as Cyprus]. For example, under the Act, criminal proceedings are active until there is an acquittal, sentence, verdict or discontinuance of the proceedings; appellate proceedings are active from the time they are commenced until they are disposed of or abandoned, discontinued or withdrawn. Unlike the common law position, the media are free to publish material without fear of contempt proceedings during the gap between the conclusion of proceedings at first instance and the initiation of an appeal. Furthermore, where a court remits criminal proceedings to the court below or orders a new trial, the further proceedings are active only from the conclusion of the appellate proceedings. It follows that a statement published before a retrial is ordered cannot constitute contempt on the ground only of its possible effect on a judge or jurors in any new trial.[92]

[89] Burgess: *op. cit.*

[90] See *Fawehinmi* v. *A-G, Lagos State* (No. 2) Nigerian Weekly Law Reports, 3 (1989) 740, *Rex* v. *Duffy & ors. Ex-parte Nash,* All England Law Reports, 2 (1960) 891.

[91] See *Constantinides* v. *Vima Ltd.* This was an application in the Supreme Court of Cyprus for stay of appeal based on the contemptuous publications in newspapers made by the appellant before the appeal was heard. The court found that the impugned publications, 'however benevolently one may interpret them...contain a scurrilous attack on the Judges who tried the case and...the judiciary as well.' [At p. 357.] Accordingly, it ordered that the appeal be stayed until the appellant restores by appropriate action the authority of the court to do justice in the case.

[92] Walker, S.: Freedom of Speech and Contempt of Court: The English and Australian Approaches Compared, International and Comparative Law Quarterly, 40 (1991) 583, at 590. See also

It is equally important to note that in most common law jurisdictions it is settled law that mere criticism of the conduct of a judge or court, even if such criticism is strongly-worded, is not contempt, as long as the criticism is fair, temperate and made in good faith.[93] As the Nigerian Supreme Court has explained, 'the rationale for contempt is the need to vindicate the dignity of the court and thereby protect due administration of justice, rather than to bolster the power and dignity of the judge as an individual'.[94] Lord Denning made the same point earlier in *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn (No. 2)*.[95] Yet, as argued above, such criticism may impinge on the independence of the judiciary. In *Constantinides* v. *Vima Ltd*[96] the Supreme Court of Cyprus made this point as follows:

> On any view of the articles complained of, however benevolently one may interpret them, they contain a scurrilous attack on the Judges who tried the case and, the Judiciary as well. Mr. Constantinides, under the guise of criticism, in the first article published three days after the delivery of judgment, questioned the impartiality of the trial Court, as well as the Judiciary... Nothing said in this judgment is designed to limit the right of the public to criticize judicial action. Not only the public–especially the press–has a right, but a duty as well to criticize judicial action whenever they think that criticism is merited in the public interest. Nobody is above the law. Least of all Judges. We are duty bound to administer justice according to law. The administration of justice is all important to the wellbeing of society and concerns everyone. We are not here confronted...with a bona fide criticism of a judgment of the Court, but with a litigant attempting to vindicate his proclaimed rights through the press, by destroying the premises upon which justice is administered, that is, the impartiality of the Judiciary.[97]

Contempt of Court Act 1981, schedule 1 (paras 4, 5, 11, 15 and 16). To the like effect Parker L. J. said in *Attorney-General* v. *News Group Newspapers Ltd.* [1987] QB 1, 17: '[I]t is important to remember that the Act...provides that the strict liability rule does not apply until the proceedings concerned become active. Thus a publication will be wholly protected if it happens to be made the day before High Court proceedings, the course of justice in which it is alleged that it will seriously prejudice or impede, are set down. Thereafter it will not be completely protected...' The extant law on contempt of court in Cyprus may be modified along the current British law, since the recent amendment effected by Law 36(I)/2009 did not get to this extent. Note, however, that Walker maintains that the 1981 British Act did not go as far as the Australian High Court has gone (in developing the common law) in *Hinch* v. *Attorney-General (Victoria)* Commonwealth Law Reports, (1987) 15 (High Court of Australia). See Walker, *ibid,* 585. For an overview of the English contempt of court law, see Bradley–Ewing: *op. cit.* 395–404.

[93] See, by example, the Nigerian case of *Okoduwa* v. *State* Nigerian Weekly Law Reports, 2 (1988) 333. See also *R.* v. *Metropolitan Police Commissioner ex parte Blackburn* (No. 2), *Perere* v. *R.* (1951) Appeal Cases, 482.

[94] *Okoduwa* case, at 353–354 per Nnaemeka-Agu JSC. See also *Faluyi* v. *Oderinde,* Nigerian Weekly Law Reports, 1 (1987) 155 CA; *Boyo* v. *Midwest* (1971) 1 ALL NLR 342.

[95] *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn (No. 2)* 320. See also *Case of Prager and Oberschlick* v. *Austria*, para. 34.

[96] See *Constantinides* v. *Vima Ltd.*

[97] *Constantinides* v. *Vima Ltd.*, [at pp. 357–356 and 360 respectively, per Judge Pikis]. See also *ibid.* 358.

No doubt the public has a 'right to know' and the media/press has a constitutional/statutory and/or traditional duty to inform the public, particularly with regard to 'issues of public interest' (including judicial matters).[98] The 'right to know' is based on the fundamental right to 'freedom of expression' (also called 'freedom of speech'). The grievous assaults, inhuman and degrading treatments allegedly meted to the two hapless Cypriot students by the Cyprus Police was obviously a case of public interest and the media was generally right in reporting it, subject to what is said below. As has been seen above, most observers who commented on the decision of the Nicosia Assize Court argued that it was within their constitutional right to freedom of expression–which states that 'every person has the right to freedom of speech and expression in any form'[99]–to criticize government institutions, including courts of law. Importantly, they also suggest that the media was entirely right in its coverage of the case from the time of the unfortunate incident.

However, the point must be made that while the right to free speech is important it must not be forgotten that an accused person is equally entitled under Cypriot law and Constitution[100] as well as under the Council of Europe human rights instruments[101] and international law[102] to fair hearing.[103] These opposing rights–right to freedom of speech/expression and right to fair trial/hearing–can sometimes be in conflict. This is 'most likely to arise when a media organisation publishes material which may interfere with the course of particular legal proceedings'.[104] As Burgess has rightly observed, 'by exercising one's right to freedom of speech one can conceivably threaten another person's right to be presumed innocent until proved guilty according to law'.[105] In *Attorney-General* v. *MGN Ltd*,[106] Schiemann LJ put the problem in perspective when he stated:

> The present application focuses, as these applications usually do, on the tension between two desiderata–(1) the desire that a person facing trial should face a tribunal which is not prejudiced against him by reason of matters which have not been proved

[98] See *R.* v. *West* [1996] 2 Criminal Appeal Reports, 374, 385–386 per Lord Taylor CJ. The same recognition is expressed in the decisions of the European Court of Human Rights (ECHR). See, by example, the *Case of Prager and Oberschlick* v. *Austria*, para. 34; *Case of Worm* v. *Austria* (83/1996/702/894), Judgment of 29 August 1997, para 50.

[99] See Constitution of Cyprus 1960, Article 19(1).

[100] See Constitution of Cyprus 1960, Article 30(2). See also Article 12(4) thereof.

[101] For example, the European Convention on Human Rights, Article 6 provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...' Cyprus became a State Member of the European Union on 1 May 2004, and has been a State Party to the European Convention on Human Rights (made under the auspices of the Council of Europe) much earlier (since 6 October 1962). In fact, the Cypriot constitutional Bill of Rights was largely taken from the Convention.

[102] See, by example, International Covenant on Civil and Political Rights 1966, Article 14. Article 19 thereof provides for the right to freedom of expression.

[103] Everyone also has a right to reputation.

[104] See Walker: *op. cit.* 583.

[105] Burgess, *op. cit.* The right to be presumed innocent until found guilty according to law is guaranteed under Article 12(4) of the Constitution of Cyprus 1960.

[106] *Attorney-General* v. *MGN Ltd.* [1997] Entertaintment and Media Law Reports (1997) 284; All England Law Reports, (1997) 456.

> in evidence, and (2) the desire that newspapers should be free to publish what they please. The tension is particularly strong in cases which are of widespread public interest because of the notoriety of the persons or deeds involved. The problems posed by this tension are real and recurring.[107]

Hence, the critical question that arises is to what extent pre-trial reporting may be properly made without the risk of prejudicing the accused's 'right to fair trial' (also called 'right to fair hearing').[108] In *Sheppard* v. *Maxwell*,[109] the US Supreme court considered this question and held that the massive, pervasive, and prejudicial publicity attending the petitioner's prosecution prevented him from receiving a fair trial; and that though freedom of discussion (freedom of speech) should be given the widest range compatible with the fair and orderly administration of justice, it must not be allowed to divert a trial from its purpose of adjudicating controversies according to legal procedures based on evidence received only in open court. Accordingly, the court ordered a new trial for the petitioner/accused because of the prejudicial impact of the media publicity on his murder trial 12 years earlier.

More recently, the same approach has been sanctioned in English cases as can be seen in the case of *Attorney-General* v. *MGN Ltd.*[110] In that case, there had been a period of 'saturation coverage' over a number of years about the relationship between a well-known television personality and her boyfriend. The publications disclosed his violent behaviour and details of his previous convictions. He was later arrested and charged with serious assault. Various newspapers published stories about the alleged incident. The accused applied successfully for a stay of the criminal proceedings on the ground that the press coverage of the case made it impossible for him to have a fair and impartial/unprejudiced trial. Although the present application for committal of some newspapers for contempt of court failed on its facts, this did not affect the order of stay of criminal proceedings against the accused which was made by the trial judge. In fact, the Divisional Court which heard this case observed:

> The solicitor General has drawn our attention to no less than three cases in the last six months where ... a prosecution has been stayed indefinitely because of pre-trial publicity. Clearly that seriously prejudices the course of justice. There must be many others where a trial has had to be delayed or moved to a less convenient place and where it could be submitted that the course of justice has been seriously impeded.[111]

In a nutshell, these and other relevant authorities appear to suggest that prejudicial publications relating to criminal suspects and accused persons should be avoided in order not to imperil the path of justice. For example, previous convictions and other criminal records should not be published and the names of suspects and accused persons should not

[107] *Ibid.* at 287–288. Similarly, Bradley and Ewing have observed that 'there is a difficult tension between the right to a fair trial and the right to freedom of expression when newspapers publish material which might prejudice the position of an accused person...One of the functions of the law of contempt of court is to manage this tension...': Bradley–Ewing: *op. cit.* 396. See also *Scottish Daily Record, Sunday Mail Ltd.* v. *Procurator Fiscal, Edinburgh,* Appeal Court High Court of Justiciary, (2009) 24.

[108] See generally, the decision of the US Supreme Court in *Nebraska Press Association* v. *Stuart*, 49 L.Ed. 2d. 683 (1976); 427 US 539 (1976).

[109] *Sheppard* v. *Maxwell*, 384 US 333 (1966).

[110] *Attorney-General* v. *MGN Ltd.*

[111] *Ibid.* 288.

be mentioned when commenting on criminal issues of public interest which are the subject of imminent or pending judicial proceedings. Moreover, suggestions of guilt (or innocence) should be avoided: that is the job of the courts.

Although a 'pro-free speech approach'–i.e. granting greater freedom of speech and sometimes privileging the same over the right to fair trial–can sometimes be seen in contemporary UK jurisprudence (based on interpretation of the 1981 English Contempt of Court Act and following European Court of Human Rights (ECtHR) jurisprudence)[112] as well as in US cases (see below), the *Sheppard* case approach is still generally good law in most common-law/commonwealth countries, such as Nigeria and Kenya, and there is nothing to suggest that Cypriot law is different from the general common-law/commonwealth position, except to the extent that it reflects the current position of the ECtHR .[113]

Importantly, note that though the *Sheppard* case (as well as similar UK cases) relates to trial by jury, its principle applies with equal force to cases tried by a judge or judges alone (i.e. trial without jury). Yet, some commentators on the recent Nicosia Assize Court decision have suggested that since the case was decided by a panel of three legally qualified judges alone without a lay jury[114] there was no possibility of extraneous influence–such as newspaper publications–affecting their judgment.[115] For example, this was the unequivocal view of Loucaides.[116] However, it is contended that this view is wrong. Undoubtedly, a judge by his training is expected to avoid adverse media publicity affecting his judgment. Nevertheless, it must be remembered that he lives in the same society as others and does and feels very much like other members of the society; hence, he could be influenced by adverse/prejudicial publicity against an accused person standing trial before him. As Justice Cardozo of the US Supreme Court has pertinently reminded us in his seminal book *The nature of the Judicial Process*, 'the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by'.[117] Similarly, Justice Alabi made this point extra-judicially thus:

[112] See, by example, *HM Advocate* v. *Scottish Media Newspapers Ltd.* [2000] SLT 331; *Cox and Griffiths, Petitioners* (1998) JC 267 (High Court of Justiciary, Scotland); *Attorney-General* v. *Independent Television News Ltd. and Others* [1995] 1 Criminal Appeal Reports, 204.

[113] The current position in Australia is probably more developed than what obtains under the 1981 English Contempt of Court Act. See Walker, *op. cit.*, 584–585. See also *Hinch* v. *Attorney-General (Victoria)*.

[114] The Jury system (a system whereby lay persons determine questions of fact, leaving the judge/judges to determine questions of law) is not used in Cypriot judicial system.

[115] See *Attorney-General* v. *BBC* [1981] AC 303 (HL), at 315, per Lord Denning MR. Lord Denning's view on this was not accepted by the House of Lords in this case.

[116] Another commentator expressed the same view thus: '...the rule on prior publicity, adverse or favourable, would sit better if we had trials by jury; a judge (or, worse, a group of judges sitting together) cannot rightly claim that publicity may have affected their single or collective judgment... Such hinted admission should in fact disqualify them from being a judge in the first place'. See C. Lordes, 'Our justice system is in dire need of an overhaul' [*CyprusMail (Internet Edition)*, 25 March 2009].

[117] Justice Benjamin N Cardozo, *The Nature of the Judicial Process*, Yale. 1921. Lecture IV: Adherence to Precedent. The Subconscious Element in the Judicial Process; referring to the 'forces which enter into the conclusions of Judges, 168.

> In the case of a trial by a judge alone, it is only in rare cases that a publication will be held to constitute a contempt...as it is accepted that judges are capable of guarding against allowing any prejudicial matter to influence them in deciding a case; *but a campaign of pressure might be so great that even a judge could not be safely assumed to be unaffected by it.*[118] (emphasis added)

According to the Indian Supreme Court, publications which are prejudicial to a suspect or accused may also affect judges 'subconsciously', and this can be at the stage of granting or refusing bail or at the trial. In *In re PC Sen*,[119] the Supreme Court stated that 'no distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges'.[120] Importantly, this reasoning and conclusion can be seen in the decision of the Supreme Court of Cyprus in *Georgiades* v. *Republic*.[121] Furthermore, the point was made even much clearer by the US Supreme Court in *Pennekamp* v. *Florida*,[122] thus:

> *No judge fit to be one is likely to be influenced consciously except by what he sees and hears in court and by what is judicially appropriate for his deliberations. However, judges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process.* While the ramparts of reason have been found to be more fragile than the Age of Enlightenment had supposed, the means for arousing passion and confusing judgment have been reinforced. And since judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print... If men, including judges and journalists, were angels, there would be no problems of contempt of court. Angelic judges would be undisturbed by extraneous influences, and angelic journalists would not seek to influence them.[123] (emphasis added)

The same point was forcefully made in England by Lord Dilhorne in *Attorney-General* v. *BBC*:[124]

> It is sometimes asserted that no Judge will be influenced in his judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a judicial office does his utmost not to let his mind be affected by what he has seen or heard or read outside the court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman experienced in the discharge of judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard

[118] Alabi: *op. cit.* 184. See also *R.* v *Davies*, All England Law Reports, 2 (1945) 167.

[119] *In re PC Sen* (1970) All India Reporter, 1970 SC 1821.

[120] *Ibid.*, at 1829. See also *Reliance Petrochemicals* v. *Proprietor of Indian Express* (1988) 4 SCC 592.

[121] *Georgiades* v. *Republic*, 2 Cyprus Law Reports, 1 (2003) (in Greek).

[122] *Pennekamp* v. *Florida*.

[123] *Pennekamp* v. *Florida*, 357–366 per Justice Frankfurter.

[124] *Attorney-General* v. *BBC*.

> or read entirely out of his mind and that he may be subconsciously affected by it. It is the law, and it remains the law until it is changed by Parliament, that the publications of matter likely to prejudice the hearing of a case before a court of law will constitute contempt of court punishable by fine or imprisonment or both.[125]

Note that in accordance with the common-law doctrine of judicial precedents, under the Cypriot legal system foreign judgments–particularly from common-law/commonwealth jurisdictions (UK, US, India, Nigeria, etc.)–are regarded as persuasive precedents whereas judgments of superior courts (particularly the Supreme Court of Cyprus) are binding on all lower courts in the country. Hence, based on the above binding and persuasive precedents, it is arguable that the Nicosia Assize Court judges were entitled to hold, as they did hold (assuming the publications, under Cypriot law, can properly be considered as tending to interfere with the outcome of the case before them[126]) that the impugned media publications 'constituted serious interference in the course of justice and pre-empted the outcome of the trial', and that 'it constitutes a usurpation of the judicial authority and contempt of court' (see above). Moreover, they were right–based on the above authorities[127]–to conclude that prejudicial media publications can be held to interfere with judicial proceedings pending before a judge or judges sitting with or without jurors.[128] On the contrary, it is clear that the assertion of Loucaides that 'media influence is irrelevant to the proceedings, and in the cases of professional judges (with no jury), the issue of media influence does not arise' (see above) cannot be correct. In fact, there are several cases–for example *Efimeris "O Filathlos" & Anor.* v. *The Police*[129]–where Cypriot judges (sitting without jury) had punished persons who published articles adjudged capable of prejudicing the fair trial of a pending judicial proceeding, for contempt of court. The position is the same under the jurisprudence of the ECtHR, contrary to the assertion of Loucaides. Surely, the decision of the ECtHR in the *Case of Worm* v. *Austria*,[130] mentioning the possibility of adverse pre-trial publication affecting 'lay judges' did not imply, and was clearly not intended to imply, that 'legally learned judges' cannot be affected by adverse pre-trial publications.

The same conclusions had been reached a long time ago in Nigeria and in other common law countries–especially Britain, which was the former colonial master of both Nigeria and Cyprus. The 1926 Nigerian case of *Rex* v. *Ojukoko*,[131] decided by Tew, J (citing well-established English cases on the point) is a good case in point. In that case, some

[125] *Ibid.* 335.

[126] A guide can be found in several decisions of the Supreme Court of Cyprus. Under the English Contempt of Court Act 1981 (section 2(2)), two tests must be satisfied in order for publications to be held contemptuous–namely, that the publications created a 'substantial risk' and 'serious prejudice'. Moreover, the proximity of the publications to the trial is another important consideration. See *Attorney-General* v. *News Group Newspapers Ltd.*, 15–16; *Attorney-General* v. *Independent Television News Ltd. & Others,* Criminal Appeal Reports, 1 (1995) 204, at 208.

[127] Especially the binding authority of *Georgiades* v. *Republic*.

[128] A UK criminal court recently frowned against unfair media coverage of a pending criminal case. See 'Ibori's London case: Judge condemns unfair media coverage' (*Vanguard*, 23 September 2009); available at: <http://www.vanguardngr.com/2009/09/23/iboris-london-case-judge-condemns-unfair-media-coverage/> (accessed 23 September 2009).

[129] *Efimeris "O Filathlos" & Anor.* v. *The Police,* Cyprus Law Reports, 2 (1967) 249. See also *Georgiades* v. *Republic*.

[130] *Case of Worm* v. *Austria*.

[131] *Rex* v. *Ojukoko* (1926) 7 NLR 60.

newspapers had published articles alluding to a theft of various articles from Government House, Lagos, and stated that the crime had been traced to an ex-convict who had only recently been discharged from prison. Following this, the Attorney-General of Nigeria made applications to the Divisional Court in Lagos for the editors of three named newspapers involved in the publications to be committed to prison for contempt of court. The editors were found guilty of contempt of court.[132] In his judgment, the judge pertinently said:

> It cannot be too widely made known that the publication of such statements were calculated, in the language of Lord Hardwicke in *Roach v. Garvan*... "to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard", constitutes a serious contempt of court and will not be allowed to pass unnoticed or unpunished... In *Rex v. Tibbits*... Lord Alverstone, CJ said: ... It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either magistrate or judge, but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine that the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place... *[It] is not desirable that fair and proper comment on matters of public interest should be restrained; at the same time, the public and the press should be given clearly to understand that ... [the] court will not tolerate any interference with the right of any person who may be charged with an offence to a fair and impartial trial.* (emphasis added)

More importantly, under Cypriot constitutional law the right to freedom of expression is not absolute.[133] The Constitution provides that the exercise of this right 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic...or for the protection of the reputation or rights of others or ... *for maintaining the authority and impartiality of the judiciary*'.[134] This is consistent with Article 10(2) of the European Convention on Human Rights which provides, *inter alia*, that the right to freedom of expression may be restricted in order to maintain the authority and impartiality of the judiciary.[135] Clearly,

[132] Two of them admitted responsibility and apologized to the court before the judgment in the case and were ordered to pay the costs of the proceedings; the third who did not properly apologize was additionally fined and was to be committed to prison if he failed to pay the fine within twenty-four hours.

[133] Compare the First Amendment of the American Constitution (dealing with the freedom of speech and expression): though the right is couched in absolute terms, the Supreme Court has held in a long line of cases that its proper interpretation requires that it be not allowed to be used to frustrate the enjoyment of other rights; it is limited to the principle of 'clear and present danger' when it comes in conflict with the right to fair trial. See also the Fourteenth Amendment. See further *Schenck* v. *United States, 249 U.S. 47; Frohwerk* v. *United States, 249 U.S. 204; Debs* v. *United States, 249 U.S. 211.*

[134] Constitution of Cyprus 1960, Article 19(3) (emphasis added).

[135] See *Handyside v. United Kingdom,* Judgment of 7 December 1976, Series A, No. 24; 1 EHHR 737 (1979–80).

therefore, the exercise of the right to free speech is subject, *inter alia*, to the law of contempt of court: it cannot be used, for instance, to publish any writing or make any speech that is capable of prejudicing the fair trial of an accused person in a judicial proceeding,[136] or to publish any speech containing scandalous matter respecting any court which has adjudicated/ decided any case.[137] In *Constantinides v. Vima Ltd*[138] the Supreme Court of Cyprus categorically stated that 'Section 44 [of the Courts of Justice Law 14/60 (as amended)] limits freedom of expression safeguarded by Article 19 [of the Constitution of Cyprus 1960] for maintaining the authority and impartiality of the Judiciary,' and this is in accordance with Article 19(3) of the Constitution.[139] Based on this, it is possible that some of the pre- and during as well as post- trial comments on the *Efstathiou* case were contemptuous of the Nicosia Assize Court specifically (as already noted, the court itself had also described the pre-trial media publicity of the case as contemptuous) and/or the Cypriot judiciary in general.

Note that it could be contempt of court all the same even if the ten policemen had been convicted of the offences with which they were charged. As Lord Alverstone stated long ago in *Rex* v. *Tibbits*:[140]

> Though the accused be really guilty of the offence charged against him, the course of law and justice is nevertheless perverted and obstructed if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of the guilt or imputations against his life and character to which the laws of the land refuse admissibility as evidence.

More recently, Lord Diplock re-stated the same point thus: '...That the risk that was created by publication when it was actually published does not ultimately affect the outcome of the proceedings is... "neither here nor there". If there was a reasonable possibility that it might have done so if in the period subsequent to the publication the proceedings had not taken the course that in fact they did...the offence was complete. The true course of justice must not at any stage be put at risk'.[141] In *Rex v Parke*,[142] Wills J. explained that 'the reason why the publication of articles ... is treated as a contempt of court is because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists–namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it'.[143]

Having considered prejudicial publications that tend to interfere with judicial proceedings, it is now proposed to briefly advert to scandalous publications–i.e. publications scandalizing a judge or court.[144] There are reasonable grounds to suggest that some of the post-judgment media attacks on the judges who decided the *Efstathiou* case as well as on the Cypriot judiciary in general probably scandalized the judges and the entire Cypriot

[136] Courts of Justice Law 14/60, Article 44(1)(c) (as amended).

[137] Courts of Justice Law 14/60, Article 44(1)(e) (as amended).

[138] *Constantinides* v. *Vima Ltd.* [1983].

[139] *Ibid.* 354.

[140] *Rex* v. *Tibbits* [1902] 1 King's Bench, 77.

[141] See *Attorney-General* v. *English.*

[142] *Rex* v. *Parke.*

[143] Cf. *Hinch* v. *Attorney-General (Victoria).*

[144] See generally, Fawehinmi, G.: *Nigerian Law of the Press under the Constitution and the Criminal Law.* Lagos, 1987, Chapter 1 (on the aspect of the Press and Criminal Law).

judiciary, and were contemptuous in accordance with Article 44(1)(c) of the Courts of Justice Law 14/60 (as amended). For example, the statement of Loucaides that the judges who decided the case 'may be not sufficiently trained'–a suggestion that they were not qualified to sit as judges. (Another example is the Cypriot Attorney-General's statement that Cypriots 'can't always trust court decisions': see above.) The point is that this kind of statement is not a legitimate public criticism of a judge; rather it is a 'scurrilous personal abuse of a judge with reference to his conduct as a judge in a judicial proceeding which had terminated'[145]–and this is what makes it a contempt of court, according to well-established and long-standing legal authorities.[146] There are several instances in the case-law of common-law/commonwealth countries when contemnors of this species of contempt of court have been punished by the court. The same position can also be found in the jurisprudence of the European Court of Human Rights (ECtHR).[147] For present purposes, it is sufficient to refer only to the facts and outcome of two such cases from national courts and one decision of the ECtHR.

Firstly, in the Nigerian case of *Obiekwe Aniweta* v. *The State*,[148] an Advocate of the Supreme Court of Nigeria swore to two affidavits accusing a trial judge of corruption, and expressing his opinion that the judge is 'not fit to hold any judicial office'. By swearing them before a commissioner for oaths in a court registry, the lawyer had published the contents thereof. The trial judge considered the affidavits to be 'scandalous publications' and summarily convicted the lawyer for contempt of court after giving him an opportunity to enter his defence. Dissatisfied, the lawyer appealed to the Court of Appeal, but his appeal was dismissed for lacking merit.[149] In its judgment, the Court of Appeal stated:

[145] See *Rex* v. *Horatius* (1925) 6 NLR 49 per Combe C.J. See also Article 44(1)(e) of the Courts of Justice Law 14/60 (as amended).

[146] This kind of contempt is punishable *brevi manu* (i.e. by summary process). See *Mcleod* v. *St. Aubyn* (1899) AC 549; *R.* v. *Gray* (1900) 2 QB 36; *Ambard* v. *A-G for Trinidad and Tobago* (1936) AC 322. Cf. The UK Practice Direction of 5 June 2001 (though of limited application: applies only to inferior courts). Within the Council of Europe it is no longer possible for a judge to personally try such cases summarily if they are held to constitute contempt in the face of his court. According to a learned author, '*The Kyprianou* judgment [of the European Court of Human Rights] finally puts to sleep the practice that a judge can deal with contempt in the face of the court himself...Many leading authorities concerning contempt in the face of the court should be considered as obsolete, in so far as they provide for the possibility of the judge to deal with such cases himself'. See Emilianides, A. C.: Contempt in the Face of the Court and the Right to a Fair Trial: The Implications of Kyprianou v. Cyprus, *European Journal of Crime, Criminal Law and Criminal Justice,* 13 (2005) 401, at 412. Accordingly, the Cypriot Law 36 (2009), which recently amended Law 14/60 to implement the Kyprianou judgment, permits a continuation of summary trial of such cases, save that if the contempt affects the person of the presiding judge he cannot personally hear it.

[147] *Case of Prager and Oberschlick* v. *Austria.*

[148] *Obiekwe Aniweta* v. *The State*, Appeal No. FCA/E/47/78 decided on 16 June 1978. (Reported in Fawehinmi: *op. cit.* 98.)

[149] The trial judge committed the lawyer to prison for 200 days, but this was reduced to 120 days by the Court of Appeal after upholding the conviction of the appellant, on the ground that the sentence of 200 days was 'severe'. More recently (precisely on 25 September 2009), a senior Nigerian lawyer was sentenced to three months imprisonment for contempt of court (the charge was scurrilous personal abuse of a judge with reference to her conduct as a judge in a judicial proceeding which had terminated. Briefly, the lawyer, having suffered a default judgment from the judge, filed an application to set aside the judgment and supported it with a 28-paragraph af-

> Can anyone reading the two affidavits in the present case before us say that they were genuine criticism of the learned trial judge's judgment? Our answer is No. Those affidavits had nothing to do with any criticism. They were a brutal attack on the person of the judge as a most corrupt person unfit to hold his high office. We hold the view, and we are supported by the authorities, that in the circumstances of the case, as described by the learned trial judge, it was a matter that he could try summarily on his motion, because it was a contempt committed in the cognizance of the court... [In] the words of Holroyd, J in *R. v. Davison* (1821) 106 ER 958...no judge would "suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station and uphold the law, so that in his presence, at least it shall not be infringed."[150]

Among others, the Nigerian Court of Appeal relied on the English Court of Appeal decision in *Balogh* v. *Crown Court*,[151] where it was said, *inter alia*, that in cases of scandalous publications against a judge or court it mattered not whether it was 'a case that was being tried, or about to be tried, or just over – no matter whether the judge saw it with his own eyes or it was reported to him by the officers of the court, or by others...'

The second and more recent case was a decision of the High Court of Singapore in *Attorney-General v. Tan Liang Joo and Others*.[152] In that case, the Attorney-General of Singapore had applied to the High Court for an order committing three respondents to prison for contempt of court in that they scandalized the Singapore judiciary, *inter alia*, by publicly wearing a white T-shirt, imprinted with a palm-sized picture of a kangaroo dressed in a judge's gown within and in the vicinity of the Supreme Court on 26 May 2008 when a hearing was being held before Justice Belinda Ang. The applicant argued that by stigmatizing the Singapore judiciary as a 'kangaroo court' the respondents implied, *inter alia*, that the court was self-appointed or a mock court in which the principles of law and justice are disregarded, perverted, or parodied. In their defence, the respondents contended, *inter alia*, that wearing the T-shirt was an act of 'fair criticism and self-expression in the hope that the Singapore judiciary would improve from strength to strength'. They denied that they had committed any contempt and refused to apologize to the court. In her well-considered judgment, which went on excursus into the case-law of several commonwealth countries, including Britain, Australia and New Zealand, the judge rejected the defence of fair criticism and found the respondents guilty of contempt of court. In her words:

> It was clear to me that this case was about much more than merely wearing a T-shirt. The conduct of the respondents communicated to an average member of the public the

---

fidavit wherein he deposed, *inter alia*, that the judge is 'a complete failure in her capacity as a judge'). Note that the contempt charge was brought against the lawyer by the Attorney-General of Lagos state in order to protect the integrity, honour and independence of the judiciary. See 'Judge Jails Lawyer For Three Months Over Contempt' (*Guardian*, 26 September 2009); <http://nspace.nigeria.com/main/news/judge-jails-lawyer-three-months-over-contempt-guardian-nigeria> (accessed 27 September 2009).

[150] See also *Rex* v. *Horatius*; *In re Ekpu* (decision of a Special Military Tribunal in Lagos on 4 February 1986, convicting a journalist on a charge of contempt of court for calling the tribunal a 'Kangaroo court' in a magazine article; reported in Fawehinmi: *op. cit.* 573.

[151] *Balogh* v. *Crown Court*, 3 All England Law Reports, (1974) 283 CA.

[152] *Attorney-General* v. *Tan Liang Joo and Others* [2009] SGHC 41 (decided 18 February 2009).

> respondents' conviction that the Singapore courts are "kangaroo courts" as defined ... above...[153] The respondents' conduct amounted to contumacious contempt aimed at the integrity of the courts and was designed to degrade the administration of justice. Having considered all the circumstances, I came to the conclusion that a custodial sentence was appropriate.[154]

With regard to the ECtHR jurisprudence, in the *Case of Prager and Oberschlick* v. *Austria*[155] the applicants had been convicted by Austrian courts for unjustified personal attacks on some Austrian judges (especially Judge J.) published in a periodical called *Forum*. Among others, the publication alleged that the named Austrian judges 'treat each accused at the outset as if he had already been convicted'. In this application, the applicants claimed that their conviction for contempt of court[156] was a violation of their right to freedom of expression. However, after considering the circumstances of the case, the ECtHR concluded that the applicants' right to freedom of expression under Article 10 of the European Convention on Human Rights was not breached by their conviction by the Austrian courts. In an important passage of its judgment, the court stated:

> Of the accusations levelled by those allegations, some were extremely serious. It is therefore hardly surprising that their author should be expected to explain himself. By maintaining that the Viennese judges "treat each accused at the outset as if he had already been convicted", or in attributing to Judge J. an "arrogant" and "bullying" attitude in the performance of his duties, the applicant had, by implication, accused the persons concerned of having, as judges, broken the law or, at the very least, of having breached their professional obligations. He had thus not only damaged their reputation, but also undermined public confidence in the integrity of the judiciary as a whole. (para. 36).

To sum up, it can be seen that courts of law have awesome powers to punish for contempt of court in order, primarily, to maintain the dignity, integrity and authority of the courts. This position remains the same today, although within the Council of Europe the jurisprudence of the European Court of Human Rights (ECtHR) dictates that, in order to ensure fair trial, contempt proceedings–particularly *ex facie*–should be heard by a judge other than the one against whom (and probably against whose court) it was allegedly committed.[157]

On the other hand, it must be noted that the courts are slow to invoke their powers of contempt to abridge the right to freedom of expression.[158] The US, British and other commonwealth courts, for instance, adopt a careful balancing of the conflicting rights of free speech and fair hearing. As Lord Reid has stated in *Attorney-General* v. *Times*

[153] *Ibid.*, para. 28.

[154] *Ibid.*, para. 45.

[155] *Case of Prager and Oberschlick* v. *Austria.*

[156] The ECHR agreed with the government of Austria that the conviction of the accused was intended, *inter alia*, to maintain the authority of the judiciary. See ibid, para. 31 of the judgment.

[157] See *Kyprianou v Cyprus*. See also Emilianides: *op. cit.*

[158] Courts usually exercise their powers of contempt of court sparingly. In *R.* v. *Metropolitan Police Commissioner, Ex parte* Blackburn (No. 2), at p. 320 Lord Denning observed: '... [T]his court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.' See also *R.* v. *Moran*, 81 Criminal Appeal Reports, (1985) 51.

Newspapers,[159] 'public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice'.[160] This approach was followed in the US in *Bridges* v. *California*.[161] In that case, a litigant who had been found guilty of contempt of court for publishing a telegram wherein he had described a judge's decision as 'outrageous', while a motion for a new trial was pending, had his conviction set aside on the ground that the publication did not present 'a clear and present danger'. Mr. Justice Hugo Black, writing for the US Supreme Court, stated:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion... An enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

It is important to emphasize that this is a reasonable approach, which can also be found in a long line of cases decided by the ECtHR. In the end, it can be surmised that courts in common law jurisdictions as well as the ECtHR strive (to a greater or lesser extent in practical terms) to achieve a proper balance between freedom of expression and the need to maintain the authority and independence of the judiciary.[162] The critical question remains how the balancing exercise may be conducted. A number of cases decided by the courts of common-law/commonwealth countries[163] as well as the jurisprudence of the ECtHR provide some guidelines to this complex act. For present purposes, it is sufficient to briefly explain the approach of the ECtHR. Within the Council of Europe, the question is, essentially and quite often, whether an adjudged interference with the right to freedom of expression under Article 10(1) of the European Convention on Human Rights[164] can be justified under any of the exceptions stated under Article 10(2) thereof.[165] In which case, there would be no

[159] *Attorney-General* v. *Times Newspapers* (1974) AC 273.

[160] The Indian Supreme Court follows the same approach: see *AK Gopalan* v. *Noordeen*.

[161] *Bridges* v. *California*, 314 US 252 (1941). This case has been followed by a long line of cases in the U.S., including *Pennekamp* v. *Florida*.

[162] On the need for balance, see ECHR decision in Case of *Amihalachioaie* v. *Moldova* (Application no. 60115/00), Judgment of 20 April 2004, para. 28.

[163] See, for example, *Hinch* v. *Attorney-General (Victoria)*; *Attorney-General* v. *English*; *Attorney-General* v. *News Group Newspapers Ltd.* See also Walker: *op. cit.* 594–595.

[164] The 1950 European Convention on Human Rights greatly influenced the Bill of Rights found in the Constitution of most commonwealth countries. In fact, the Convention provisions are in most cases reproduced verbatim.

[165] Article 10 provides in full as follows:

1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

violation of Article 10(1). Importantly, to reach a conclusion one way or the other involves examining the interference to determine whether it is prescribed by an existing law; whether the aim pursued by the interference was legitimate; and whether it is necessary in a democratic society, *inter alia*, for maintaining the authority and impartiality of the judiciary. If any of these considerations fail, then the interference would be held to violate the right to freedom of expression. In the Case of *Amihalachioaie* v. *Moldova*[166] the ECtHR explained as follows:

> In performing its supervisory role, the Court [ECtHR] has to look at the interference complained of in the light of the case as a whole, including the tenor of the applicant's remarks and the context in which they were made, and determine whether it "correspond[ed] to a pressing social need", was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see The Sunday Times (no. 2)..., and Nikula v. Finland, no. 31611/96, § 44, ECHR 2002-II). (para. 30).[167]

Note that within the Council of Europe the assessment of these factors falls in the first place to the national authorities (including an independent court), which enjoys a certain margin of appreciation in determining the existence and extent of the necessity of an interference with the freedom of expression.[168]

Nevertheless, while the balancing approach remains generally true in most common-law/commonwealth countries, a pro-freedom of the press/freedom of speech approach can be observed in several decisions of the ECtHR[169] as well as decisions of US courts (e.g. *Bridges* case) and English courts (particularly since the 1981 English Contempt of Court Act was made and following ECtHR jurisprudence). As Lloyd L.J. observed in *Attorney-General* v. *Newspaper Publishing Plc*:[170]

> [T]he statutory purpose behind the 1981 Act was to effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech. Such a shift was forced on the United Kingdom by the decision of the European Court [of Human Rights] in *The Sunday Times v. U.K.*...[171]

[166] Case of *Amihalachioaie* v. *Moldova*. See also *Jersild* v. *Denmark*, Judgment of 23 September 1994 (Series A no. 298); *Case of Prager and Oberschlick* v. *Austria*, para. 35; *Case of Kobenter and Standard Verlags GMBH* v. *Austria* (Application no. 60899/00), Judgment of 2 November 2006.

[167] The ECHR found in this case that even though the impugned critical remarks may be regarded as showing a certain lack of regard for the Constitutional Court of Moldova following its decision on the constitutionality of legislation regulating the legal profession, they cannot be described as grave or as insulting to the judges of the court. Accordingly, it was held that restricting the applicant's right to freedom of expression (he was ordered to pay administrative fine for his remarks) was a violation of his right to freedom of expression under Article 10 of the European Convention on Human Rights.

[168] See *Case of Prager and Oberschlick* v. *Austria*, para. 35.

[169] See, by example, *The Sunday Times* v. *United Kingdom* (Series A No 30), European Court of Human Rights (1979–1980) 2 European Human Rights Reports, 245, Judgment of 26 April 1979; *The Times (No. 2)* v. *The United Kingdom* (Application no. 13166/87), Judgment of 26 November 1990; Case of *Amihalachioaie* v. *Moldova*.

[170] *Attorney-General v Newspaper Publishing Plc,* 3 All England Law Reports, (1987) 276.

[171] *Ibid,* 310; *Attorney-General* v. *Newspaper Publishing Plc* [1988] Ch. 333, at 382.

A similar statement, albeit not quite extremist as the above, can also be found in the judgment of the Supreme Court of Cyprus in *Cosmos Press Ltd & Anor.* v. *The Police*:[172]

> In the light of the modern trend in interpreting and applying provisions relating to human rights, such as Article 19 of our Constitution and corresponding Article 10 of the European Convention on Human Rights, which forms part of our own law as well, [see European Convention on Human Rights (Ratification) Law 1962–Law 39/62] and in the light, also, of weighty dicta such as those of the European Court of Human Rights in the judgment of "The Sunday Times case,"... section 122(b) of Cap. 154, which is a restriction of the right of expression, must be applied in each particular case in a manner as favourable as possible for the freedom of the press.

Even so, this does not spell the end of criminal contempt of court; it only means that the courts are slow to abridge the right to freedom of speech but in clear cases it will still find certain publications, for instance, as contemptuous.[173] This is arguably the current position in Cyprus, given that it is a reflection of the jurisprudence of the ECtHR.[174]

4. Concluding Remarks

The recent *Efstathiou* case decision in Cyprus has provided an opportunity to re-appraise the issues of independence of the judiciary, trial by media and fair trial in the country as well as the closely linked issue of contempt of court. While there is no suggestion that the Cypriot judiciary has no independence, the case has raised issues which threaten the independence – for example, whether the right to freedom of speech can be used to interfere with judicial proceedings or engage in scurrilous abuse of a judge because of his judicial opinion in a case.

As could be observed from various cases cited here from various common-law jurisdictions, in criminal contempt of court cases–particularly with regard to prejudicial and scandalous publications–the application to commit the accused to prison for contempt of court is normally brought by the Attorney-General of the State.[175] This is also true in the Republic of Cyprus, as suggested by the Supreme Court in *Constantinides* v. *Vima Ltd.*[176] Note that this position is based on constitutional and/or statutory provisions that invest the Attorney-General with the power to commence and/or discontinue all criminal prosecutions (including the criminal offence of contempt of court). More importantly, this is a pre-eminent way by which the Attorney-General ensures the maintenance of respect, honour and dignity for the judiciary or, to put it differently, the protection and defence of the independence of the judiciary.[177] In the Republic of Cyprus, the prosecutory power of the

[172] *Cosmos Press Ltd. & Anor* v. *The Police*, Cyprus Law Reports, (1985) 73, at 81.

[173] See, by example, *Attorney-General* v. *Express Newspapers* England and Wales High Court, (2004) 2859 (Admin); *Attorney-General* v. *MGN Ltd.*; *Scottish Daily Record, Sunday Mail Ltd.* v. *Procurator Fiscal, Edinburgh*. See generally *Attorney-General of the Republic* v. *Efstathiou*.

[174] See, by example, *Case of Worm* v. *Austria*; *Case of Prager and Oberschlick* v. *Austria*. See generally *Attorney-General of the Republic* v. *Efstathiou*.

[175] In Australia it is possible for any person to bring an action alleging contempt of court by publication. See *R.* v. *Dunbabin*, 53 *Commonwealth Law Reports*, (1935) 434 (High Court of Australia), at 445 (per Rich J.). See also Walker: *op. cit.* 588.

[176] *Constantinides* v. *Vima Ltd.*, at 353.

[177] It is also the case that the Attorney-General of a State normally responds to public criticisms of judges. See, by example, C. Dyer, 'Plea for end to attacks on Woolf' (*Guardian*, 13 Novem-

Attorney-General is provided in Article 113(2) of the Constitution of Cyprus 1960 which states that:

> The Attorney-General of the Republic shall have power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the Republic. Such power may be exercised by him in person or by officers subordinate to him acting under and in accordance with his instructions.[178]

The recent sad development in Cyprus, where the Attorney-General was himself probably liable for contempt of court, has revealed the limitation of this position and raised the question 'who prosecutes the prosecutor?'[179] This is particularly serious having regard to the decision of the European Court of Human Rights (ECtHR) in *Kyprianou* case.[180] In that case, a Cypriot trial court had convicted a lawyer for alleged contempt in the face of the court (the lawyer suggested that a male and female member of a 3-member panel of judges were sending 'love notes' to each other while he was conducting his case for his client before them instead of listening to him) and sentenced him to a term of imprisonment.[181] However, the conviction and sentence were set aside on the application of the lawyer to the ECtHR on the ground that it breached his right to a fair trial guaranteed under Article 6 of the European Convention on Human Rights. According to the court (ECtHR), the proper thing to do is to 'refer the question to the competent prosecuting authorities for investigation and, if warranted, prosecution, and to have the matter determined by a different bench from the one before which the problem arose'.[182]

Importantly, the Cypriot government has recently amended the Cypriot contempt of court law in order to bring it in line with the *Kyprianou* case decision of the ECtHR.[183] Essentially, Article 44(3) of the Courts of Justice (Amendment) Law 36(1)/2009 forbids a Cypriot judge from trying an *ex facie* contempt of court case where the act constituting the contempt affects the judge personally.[184] Moreover, under Article 44(9) of Law 36(1)/2009 lawyers conducting cases before a court are immune from the offence of contempt of court in the face of the court.[185] The reason for this is said to be 'the need to safeguard freedom of

---

ber 2004); <http://www.guardian.co.uk/uk/2004/nov/13/ukcrime.media> (accessed 12 May 2009). The Plea was made by Lord Goldsmith, Attorney-General of the UK, in defence of Lord Chief Justice Lord Woolf who was suffering persistent press attack.

[178] See. Loizu, A. N.–Pikis, G. M.: *Criminal Procedure in Cyprus.* Nicosia, 1975.

[179] The difficulties of this situation can be gleaned from the recent Ruling of the Supreme Court of Cyprus in *Attorney-General of the Republic* v. *Efstathiou* (Supreme Court Ruling of 8 October 2009).

[180] See *Kyprianou* v. *Cyprus*. For a useful comment on this decision, see Emilianides: *op. cit.*

[181] The lawyer's appeal to the Supreme Court of Cyprus was unsuccessful.

[182] *Kyprianou* v. *Cyprus*, para. 37.

[183] See Courts of Justice (Amendment) Law 36(1)/2009.

[184] Query: Did the amendment effected by the Courts of Justice (Amendment) Law 36(1)/2009) fully comply with the ECHR decision in the *Kyprianou* case? A Cypriot Advocate and scholar, Dr Achilles Emilianides, answers this query in the affirmative (email communication, 21/09/09).

[185] On grounds of public policy, they are also immune from an action for negligence at the suit of a client in respect of their conduct or management of a cause in court. See *Rondel* v. *Worsley,* 1 Appeal Cases, (1969) 191, at 227. This is no longer the case in England. See *Arthur J.S. Hall and Co.* v. *Simons,* 1 Appeal Cases, (2002) 615.

expression and speech of advocates and the right to a fair trial of parties represented by the advocates'.[186] (Further amendment in line with the English Contempt of Court Act 1981 may be considered in order to further enlarge the right to freedom of expression). However, acts which hitherto would have constituted contempt of court *ex facie* within the meaning of Article 44(1) of Law 14/60 (as amended by Law 36(1)/2009) – for example showing disrespect to a court by word or conduct – are now regarded as a 'disciplinary offence'[187] triable by the Disciplinary Board[188] established by the Advocates Law,[189] and headed by the Attorney-General.[190] This position may have been brought about by the suggestion of the ECtHR in the *Kyprianou* case that punishing lawyers for contempt committed during their conduct of a client's case in court could have a 'chilling effect' on the performance of lawyers in court. However, it is contended that the court was not advocating immunity for lawyers from *ex facie* contempt of court; rather, it was urging judicial restraint when considering a contempt case affecting a lawyer and in sentencing a contemnor lawyer in order to strike a fair balance between the need to protect the authority of the judiciary on the one hand and on the other hand the protection of the lawyer's freedom of expression in his professional capacity.

From the foregoing, one can deduce two implications. First, the Nicosia Assize Court (and, indeed, other courts in Cyprus) is effectively powerless against anyone who commits contempt in the face of the court (*ex facie* contempt of court)–specifically, where the act constituting the contempt 'turns against the person of the judge of the said court'.[191] Although an affected court/judge has power under Article 44(3) of the Courts of Justice (Amendment) Law 36 (1) 2009 to 'refer the case and the relative proceedings to the President of the Supreme Court, in order for the latter to appoint another court to adjudicate the offence', in the case of an Attorney-General it seems that such a reference is potentially ineffective as he could invoke his constitutional power to discontinue the case. Secondly, a deliberate act of disrespect by a lawyer (including the Attorney-General) who is conducting a case before a court does not constitute the offence of contempt of court but merely a disciplinary offence, which may be tried by a Board headed by the Attorney-General. All of this probably explains why Attorney-General Petros Clerides interfered with impunity with the reading of the judgment in the recent *Efstathiou* case.[192]

[186] Courts of Justice (Amendment) Law 36(1)/2009, Article 44(9).

[187] *Ibid.*

[188] *Ibid.*

[189] Advocates Law, Cap 2 (as amended). The court before which the disrespect occurred may refer the matter to the Disciplinary Board, which is required to examine the conduct 'as a matter of urgency'. See Courts of Justice (Amendment) Law 36(1)/2009, Article 44(9).

[190] There are six other members of the Board, apart from the Attorney-General. See Cyprus Bar Association, 'The Board Members' <http://www.cyprusbarassociation.org/thebodymembers_en.php> (accessed 21 October 2009).

[191] See Courts of Justice (Amendment) Law 36(1)/2009), Article 44(3). See also generally Article 44 (2)–(10).

[192] It must be mentioned that though the Courts of Justice (Amendment) Law 36 (1) 2009) was passed shortly after the *Efstathiou* case was decided, it was never in doubt in Cyprus that the ECHR decision in the *Kyprianou* case effectively precluded the Nicosia Assize Court from taking any action against the Attorney-General when he interfered with the reading of the judgment in the case. Furthermore, the conduct of the Attorney-General and other justice officials following the acquittal of the ten policemen charged with offences in the *Efstathiou* case has been condemned in an article in the CyprusMail. After recounting their various reactions and public statements, it was concluded:

Regrettably, while Law 36(1)/2009 may have been well-intentioned, it seems it has unwittingly added to the power of the Cypriot Attorney-General in a manner that may well be contrary to the rule of law and democracy. Prior to the amendment, a Cypriot Attorney-General was an established powerful State officer[193]–the Attorney-General's office is an independent office[194] and the occupant enjoys security of tenure[195] and salary[196] (he cannot easily be removed from office nor can his salary be reduced) unlike the case in some commonwealth countries (such as Nigeria) where the Attorney-General's office is at the pleasure of the Head of Government. In the interests of justice, the rule of law and democracy, it is strongly recommended that the Cypriot government should consider amending the prosecutory and other laws appropriately to ensure that the prosecutor is not above the law nor have the semblance of being above the law in any way, although it must be acknowledged that this may not be easily achieved within the complex Cypriot constitutional context.

The Cypriot judiciary has truly helped the country, even as recognized by the President of the Cyprus Bar Association Doros Ioannides. The celebrated Supreme Court of Cyprus decision in *Attorney-General of Cyprus* v. *Mustapha Ibrahim*,[197] eloquently illustrates this point. That was the case where both Greek and Turkish Cypriot judges cooperated to render a decision which has helped to hold the fabric of the Cypriot society together on the doctrine of 'state necessity' since the 1964 inter-communal clashes led to the enduring problem of the country.[198] More recently, the contribution of the Cypriot judiciary to the general interests of the citizenry can be seen in the landmark decision in the *Orams* case, which the European of Justice (ECJ) recently ruled to be binding and legally enforceable throughout

---

We have an Attorney-general [AG] who does not completely trust the justice system, a deputy AG who feels that judges get things wrong and a senior counsel who insists that many police officers are corrupt crooks. And these officials are supposed to work together with the allegedly corrupt police in order to prosecute suspected law-breakers? They are also supposed to cultivate respect for the law, the justice system and the state, but they are doing the exact opposite. How can they serve the very state in which they have so little faith and have gone out of their way to discredit? Only they could answer. See 'What sort of example are our justice officials setting?'.

[193] It is perhaps a measure of the degree of contempt with which the Attorney-General holds the Cypriot judiciary that he chose to reward a possible contemnor, Loukis Loucaides, with a fat brief–counsel for the State-Appellant in the *Efstathiou* case–instead of prosecuting him for contempt of court as would have happened elsewhere. A commentator also thinks that the choice of Loucaides (former ECHR judge now in private legal practice) was wrong for other reasons. See Charalambous, L.: Of all the lawyers to appeal the beatings ruling, why Loucaides? [*CyprusMail (Internet Edition)*, 10 May 2009].

[194] Constitution of Cyprus 1960, Article 112(2).

[195] Constitution of Cyprus 1960, Article 112(4).

[196] Constitution of Cyprus 1960, Article 166(1)(b). See further Article 153 (7)–(12).

[197] *Attorney-General of Cyprus* v. *Mustapha Ibrahim,* Cyprus Law Reports, (1964) 195.

[198] Following inter-communal clashes (Greek versus Turkish Cypriots) in 1963 and the attempted military coup in 1974, Turkey had invaded and occupied the northern part of Cyprus since 1974; thus effectively partitioning the small Island country (it is estimated that Turkey is occupying some 37% of the country: an area which the Turkish Cypriots now call Turkish Republic of Northern Cyprus, recognized only by the Republic of Turkey). Presently, there are discussions and negotiations between the President of Cyprus and the political leader of the occupied part of Cyprus (Turkish Cypriot leader) towards finding a solution to the problem and ending the Turkish occupation (dubbed re-unification talks).

the European Union.[199] In that case, a Cypriot court had decided in favour of a Greek Cypriot who claimed title to land located in the Turkish occupied northern Cyprus on which a British couple had built a villa.

The point must be made that without independence, no judiciary can satisfactorily play its important role in the society, not least the Cypriot judiciary. Yet, it was the case that the reactions and comments which followed the *Efstathiou case* decision greatly impinged on the independence of the judiciary as explained above. Among others, the reactions and comments grossly violated the prescriptions of Article 2 of the Universal Charter of the Judge 1999, which states that 'the Judge, as a holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure', and Principle 1(d) of Recommendation No. R (94) 12 of 1994 (on the independence, efficiency and role of Judges) of the Council of Europe, which states, *inter alia*, that 'judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason'. In the end, given the importance of the judiciary in any democratic society as shown above and having regard to the fact that it cannot properly function without independence and public confidence in it, nothing should be done that may destroy the independence of the Cypriot judiciary in any way.

Furthermore, lawyers must remember that their special status in the society gives them a central position in the administration of justice 'as intermediaries between the public and the courts', and that this position leads to restrictions on their conduct. So, while they, like other members of the society, can comment in public on the administration of justice, their criticism must not overstep certain bounds: it must not degrade the courts.[200] In the *Case of Schöpfer* v. *Switzerland*,[201] the ECtHR reiterated that 'the courts–the guarantors of justice, whose role is fundamental in a State based on the rule of law–must enjoy public confidence...[202] Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein'. Undoubtedly, the comments of most Cypriot lawyers (including the Attorney-General of Cyprus) regarding the decision in *Efstathiou* case undermined the public confidence in the judiciary instead of contributing thereto.[203] In fact, as already suggested above, the statements of Loucaides and Attorney-General Petros Clerides

[199] See B. Waterfield, 'Landmark court ruling means Britons could be forced to return homes in Northern Cyprus' (Telegraph, 29 April 2009); available at: <http://www.telegraph.co.uk/news/worldnews/europe/cyprus/5242294/Landmark-court-ruling-means-Britons-could-be-forced-to-return-homes-in-Northern-Cyprus.html> (accessed 9 May 2009). See also S. Bahceli, 'Orams lose at Court of Justice' [*CyprusMail (Internet Edition)*, 29 April 2009], Although some, particularly Turkish Cypriots, contend that the *Orams* decision will complicate the ongoing re-unification talks, Greek Cypriots are generally exhilarated by the decision. As at 20 October 2009, there is no evidence that that decision has caused any significant obstacle to the progress of the talks.

[200] See *Case of Amihalachioaie* v. *Moldova*, paras. 27 and 28.

[201] Case of *Schöpfer* v. *Switzerland*, Judgment of 20 May 1998, Reports 1998-III, para. 29. See also *Casado* v. *Spain*, Judgment of 24 February 1994, Series A no. 285-A. See also *Veraart* v. *The Netherlands* (Application No. 10807/04), Judgment of 30 November 2006, para. 51; *Case of Steur* v. *The Netherlands* (Application no. 39657/98), Judgment of 23 October 2003, para. 38.

[202] See also *Case of Prager and Oberschlick* v. *Austria*, para. 34.

[203] See generally *Citizens for Independent Courts, Uncertain Justice: Politics and America's Courts* (New York 2000), esp. at 149.

amounted to scurrilous attack on the trial judges and the Cypriot judiciary 'under the guise of criticism'.[204]

The media is equally important to the Cypriot society, as elsewhere in the world. In fact, neither the judiciary nor the media is more important than the other in a democratic society. Hence, what is needed is a thorough recognition of the limits of all institutions of government. Moreover, it must be noted that while freedom of speech is important in a democratic society, it is not an absolute right. It cannot be used, for instance, to peddle dirt in terms of defamatory statements or in terms of scurrilous abuse of the judicial system or to interfere with judicial proceedings. In the end, a fitting conclusion to this article is the following immortal words of Justice Frankfurter in the US Supreme Court in 1946:

> Without a free press there can be no free society. Freedom of the press, however, is not an end, in itself, but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light, and in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. A judiciary is not independent unless courts of justice are enabled to administer law by absence of pressure from without, whether exerted through the blandishments of reward or the menace of disfavour.[205]

[204] This was an expression of the Supreme Court of Cyprus in *Constantinides* v. *Vima Ltd.*, at p. 357. See generally *Attorney-General of the Republic* v. *Efstathiou* (Supreme Court Ruling of 8 October 2009).

[205] *Pennekamp* v. *Florida*, at 354–357. The Judge said more: In the noble words, penned by John Adams, of the First Constitution of Massachusetts: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press, in itself, presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press. A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself... In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise...These are generalities. But they are generalities of the most practical importance in achieving a proper adjustment between a free press and an independent judiciary. Especially in the administration of the criminal law–that most awesome aspect of government–society needs independent courts of justice. This means judges free from control by the executive, free from all ties with political interests, free from all fears of reprisal or hopes of reward. The safety of society and the security of the innocent alike depend upon wise and impartial criminal justice. Misuse of its machinery may undermine the safety of the State; its misuse may deprive the individual of all that makes a free man's life dear. *Ibid.*

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 1, pp. 35–53 (2010)
DOI: 10.1556/AJur.51.2010.1.2

TAMÁS NÓTÁRI*

On Quintus Tullius Cicero's *Commentariolum petitionis*

Abstract. The Commentariolum petitionis written in 64 B.C. is the oldest campaign strategy document that has been preserved for us. In this handbook Quintus Tullius Cicero, younger brother of the most excellent orator of the Antiquity, Marcus Tullius Cicero, gives advice to his elder brother on how Marcus can win consul's elections, that is, how he can rise to the highest position of the Roman Republic. In the present paper Commentariolum will be analysed in detail examining the following aspects: the Antique genre commentary (I.); the issue of authorship of Commentariolum (II.); the characterisation of the competitors, Antonius and Catilina, provided in Commentariolum (III.); the system of elections in Anciet Rome and the crime of election fraud/bribery, i.e. the crimen ambitus (IV.) and the role of associations and clients in Roman elections (V.).

Keywords: Elections in Ancient Rome, Cicero, Commentariolum petitionis

I. The Latin genre commentary *(commentarius)* comes from the Greek *hypomnema. Hypomnemata* were meant to support memory *(mimneskesthai)*, either in form of lists and invoices on business transactions, or private notes not intended for publication.[1] Given a wide scope of meaning, the genre of *hypomnema* was suitable for being extended in several directions; so for denoting descriptions of noteworthy events as autobiographical notes or practical guidelines.[2] From the age of Hellenism, *hypomnema* served more and more to denote exegetic comments on literary texts; the locus quoted was followed by explanation and various interpretations. Later, especially in the last century of the Roman Republic, plain presentations confined to sheer description of facts were called *commentarius*, which could be elaborated into annals *(libri annales)* or historical works *(historia)* by historians. At the same time, the notion of *commentarius* used in the sense of notes meant for private use, or at least not for being made public in the given form, did not vanish completely.[3]

The question arises which literary genre *Commentariolum petitionis* is the closest to. The form with diminutive suffix in the title *(commentariolum)* gives the impression that the author intended to sum up his views on applying for office merely in minor notes rather than in an exhaustive writing. At the beginning of the work one can read the greetings addressed to Marcus Tullius Cicero,[4] on the other hand, it implies that he wanted to send this writing as a letter.[5] Both in the opening lines and in the last paragraph of the work Quintus Tullius Cicero speaks to his brother Marcus in a fairly direct, fraternal tone, and at

* PhD, Associate Professor, Department of Roman Law, Faculty of Legal and Political Sciences, Károli Gáspár University, H-1042 Budapest, Viola u. 2–4; Research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.
E-mail: notari@jog.mta.hu, tamasnotari@yahoo.de

[1] Laser, G.: *Quintus Tullius Cicero: Commentariolum petitionis.* Darmstadt 2001. 3; Rüpke, J.: Commentarii. In: *Der Neue Pauly III.* Stuttgart–Weimar 1997. 99 sqq.

[2] Gellius, *Noctes Atticae* 1, 12, 6; 20, 6, 3; Plutarchus, *Sulla* 5 sqq.

[3] Laser: *Quintus Tullius Cicero. ... op. cit.* 3 sq.

[4] *Commentariolum petitionis* 1.

[5] Waibel, L.: *Das commentariolum petitionis – Untersuchungen zur Frage der Echtheit.* München 1969. 58 sqq.

the end of the letter he asks him to share his comments on, supplementing, correcting the writing with him so that it could be published as a genuine *commentarius*.[6] By that the author made it clear that his writing in the form sent by him was not to be considered real commentary, but the improved text he wanted to publish as such. Furthermore, most of the manuscripts of *Commentariolum petitionis* bequeath this work as Quintus Tullius Cicero's work included in books 9–16 of Marcus Tullius Cicero's correspondence with his kin and friends *(ad familiares)*. On the other hand, the text cannot be considered a letter in the strict sense for the structure, introduction and closure of the writing as well as its attention to detail imply that the author considered the work to be made public later completed in most of its parts. Except for its private aspects and greetings, the text, or a significant part thereof that can be published as *commentarius*, is fully presented to us.[7]

It is rather dubious if Quintus published–could have published–this work after it had been revised by Marcus, in which he outlines the organisation and management of the election campaign since he explored the details of the fight for votes with relentless honesty. Günter Laser sums up the core of Quintus's writing as follows: in order to obtain the *consul*'s office the applicant should not shrink back from any tricks, false promises, lies, pretence and approaching/flattering any group that fits the purpose.[8]

Even more important than discrediting opponents is to win as many friends as possible.[9] It is important to appear in the company of popular people, even if they do not support the candidate since those who can see them together will not necessarily know that.[10] Quintus lists three kinds of ways of how to arouse sympathy: when one does good to somebody; when people hope that we will do good to them, or when people likes us.[11] One should send the message to the friends of our friends that one will not be ungrateful if they support us. One should promise them offices since the worst that could happen is that we might possibly not keep our promise once having won the *consul's* office.[12] The most important thing, however, is that when one appears in a village, everybody who counts must be called by their name.[13] Quintus asserts that a candidate should keep the map of entire Italy in his mind so that there should be no village where he has no sufficient support.[14] Each electoral district should be covered by a web of friendly relations.[15] The most important thing, however, is that when one appears in a village, everybody who counts must be called by their name. However, so many names to keep in mind is an impossible task for anybody. To this end, *nomeclatores* (name reminders) were used, who whispered who was who into one's ears.[16] In Quintus Cicero's view, to contact those who are hesitating between political

[6] *Commentariolum petitionis* 1. 58.

[7] Laser: *Quintus Tullius Cicero. ... op. cit.* 4 sq.

[8] *Ibid.* 5; Németh Gy.–Nótári T: *Hogyan nyerjük meg a választásokat? Quintus Tullius Cicero: A hivatalra pályázók kézikönyve. (How to Win Elections? Quintus Tullius Cicero: Handbook for Applicants for Offices.)* Szeged 2006. 149 sqq.; Takács, A.: Election Campaign in the Antiquity. *Acta Juridica Hungarica* 50. 2009/1. 111 sqq.

[9] *Commentariolum petitionis* 16 sqq.

[10] *Ibid.* 24.

[11] *Ibid.* 21.

[12] *Ibid.* 20.

[13] *Ibid.* 31.

[14] *Ibid.* 30.

[15] *Ibid.* 29.

[16] *Ibid.* 31 sq.

sides three things are needed: generosity, attention and, occasionally, some pretension and flattery.[17] One should let everybody to have access to him day and night; everybody should be helped; or at least one's help should be promised but all this in such manner that one does not hurt self-esteem of those whom one helps.[18]

II. The issue of authorship of the *Commentariolum petitionis* has many times divided researchers. At the turn of the 19th and 20th centuries, G. L. Henderson questioned the originality of *Commentariolum* but his assertion drew no significant responses, either for or against, in the literature;[19] and in his entry on Quintus Cicero Fr. Münzer took the position that the work was original.[20] In the middle of the 20th century, W. S. Watt, the publisher of *Commentariolum* expressed his amazement that this work could have ever been considered by anybody Quintus Cicero's letter written to his brother, Marcus;[21] and refusing the standpoint of hypercriticism. The recent publisher, G. Laser alleged the text was Q. Cicero's work.[22] Against Quintus's authorship the following arguments have been put forward. They deem it exaggerated naivety that the younger brother, Quintus would have made notes for his elder brother, Marcus on what strategy he should follow while applying for the *consul*'s office, and in these notes–as he himself confessed–he would not have made known anything to his brother that he had not already known, or could have known. Also, it might definitely give rise to suspicion that the arguments against the competitors, Antonius and Catilina put forth in the *Commentariolum* return almost word for word in Marcus's oration registered under the tile *In toga candida* handed down to us by Asconius in fragments. On the grounds of the above, they qualify the *Commentariolum* forgery compiled from *In toga candida* and *Pro Murena* and Marcus's letter written on the public administration of the provinces addressed to Quintus.[23]

These arguments have been denied by several experts, including R. Till, with the following reasons. The inherited manuscripts of Cicero's works can hardly give an answer to the question of originality. Quintus's four letters preserved for us, three of them addressed to Tiro and one to Marcus, cannot support any linguistic or stylistic conclusions drawn with regard to his author profile. On the other hand, it is highly improbable that his style would have been greatly different from the language of his brother's letters who was almost the same age as him and had the same education. The assumption claiming that *Commentariolum* can be dated as well to the late period of the Age of Augustus can be refused by putting the question whether who could have been the person in the last years of the reign of Augustus that deemed it was in his interest to give a detailed description on the election and campaign secrets of the year 64 B.C. And even if somebody had decided to do that why would he have chosen Quintus Cicero, a rather grey figure both in literary and political terms, as the authority of what he wanted to expound. What benefit could he have gained from using Quintus's name after Marcus's death for revealing his brother's policy of opportunism? Who could have been the author who had such exact knowledge of the

[17] *Ibid.* 42.

[18] *Ibid.* 44 sqq.

[19] See Schanz, M.–Hosius, C.: *Geschichte der römischen Literatur I.* München 1927. 551.

[20] Münzer, F.: Q. Tullius Cicero. In: *Paulys Realencyclopädie der classischen Alterthumswissenschaft VIIa.* Stuttgart–München 1943. 1288.

[21] Watt, S. W.: *M. Tulli Ciceronis epistulae III.* Oxford 1958. 179.

[22] Laser: *Quintus Tullius Cicero. ... op. cit.* 5 sqq.

[23] Cicero, *Epistulae ad Quintum fratrem* 1, 1.

conditions and events of the given year that no errors whatsoever were made in his writing? Why would he have chosen just the period as the subject of his description when Catilina had not been swept off the scene of public life? Finally, what forger would have been so modest to emphasise right at the beginning of his writing that the fictitious addressee could not learn anything new from his summary?[24]

The author hardly wanted to win rhetor's laurel since his style is dry, his sentences have an unpleasant ring.[25] The *Commentariolum* provides formidable knowledge of the events of the years discussed in it, so its author must have by all means been a contemporary who experienced these events from quite close. References made to Marcus's situation and background[26] give account of such knowledge that it can be bravely assumed that from words let drop or sentences left unfinished the addressee exactly understood what the author meant. As a matter of fact, Marcus was not lacking knowledge of the process of applying for offices either, however, it can justify Quintus's effort to sum up relevant experience that he had also applied for minor offices *(magistratus minores)*, and so he could add his personal observations to his brother's strategy.[27] The plural used in sentences with more personal tone[28] also indicates that the writer of the letter might have had a direct relation with the addressee. The fact that certain sentences from *Commentariolum* return almost word for word in *In toga candida* cannot be an argument against originality. Quintus sent his notes to his brother with a view to have them supplemented and corrected,[29] from which one can draw the conclusion that later on he wanted to make his writing public–at a later point of time, in May 59, he forwarded his work entitled *Annales* to Marcus also for correction with the intention to publish it.[30] As a matter of fact, the *Commentariolum* was not published by Marcus either in 64 or later since by doing that he would have allowed to have an insight into his own political intentions and opportunism, but the charges against Antonius and Catilina gathered in these notes he could use with clear conscience and comfortably in his later oration, *In toga candida*.[31] The publication of the work later was just as against Marcus's purposes as the publication of several of his letters addressed to Atticus. Taking all the above into consideration, albeit for lack of direct evidence we are forced to dismiss the standpoint of hypercriticism and until the contrary is proved unambiguously we need to allege that Quintus Tullius Cicero is the author of *Commentariolum petitionis*.[32]

Quite openly, Quintus explores his brother's far from favourable situation in applying for the *consul*'s office. In the eye of the nobility he is considered 'a new man' *(homo novus)*,[33] who is not backed either by a proper group of *clientes*, or sufficient financial support; while his competitors, Antonius and Catilina are abounding in all these.[34] Although the term *homo novus* was never defined exactly, it was used in a dual sense: as a narrower

[24] *Commentariolum petitionis* 1.

[25] Till, R.: Ciceros Bewerbung ums Konsulat. (Ein Beitrag zum commentariolum petitionis.) *Historia* 11. 1962. 316.

[26] Cf. *Commentariolum petitionis* 29.

[27] Laser: *Quintus Tullius Cicero. ... op. cit.* 7.

[28] Cf. *Commentariolum petitionis* 56.

[29] *Ibid.* 58.

[30] Cicero, *Epistulae ad Atticum* 2, 16, 4; *Epistulae ad Quintum fratrem* 2, 12, 4.

[31] Till: *op. cit.* 317.

[32] Laser: *Quintus Tullius Cicero. ... op. cit.* 7.

[33] *Commentariolum petitionis* 2. 13.

[34] *Ibid.* 55.

denotation it meant all of those who did not have any *consul* among their ancestors; in a wider sense it denoted those whose forefathers, even if not having obtained the highest rank, did obtain some office or were allowed to be the members of the *senatus*. The *optimates* used this term properly since for them it meant only the parvenu; however, Cicero declared about himself quite proudly that he had obtained all possible offices at the youngest age permitted by law *(in suo anno)*, although he did not come from the aristocracy of the *senatus*. A similar thought can be read in *Pro Murena* too.[35]

For Marcus his own character and view of life must have meant a disadvantage too since being a Platonist it was alien to him to apply pretence *(simulatio)* indispensably necessary for application[36] and the ability to make friends with people in order to adjust to voters.[37] His key weapon was his oratory skills that helped him to make himself popular among the people *(popularis)*.[38] On the other hand, he had to beware of appearing a populist politician since it was not the urban masses *(urbana multitudo)* that would decide the outcome of the election.[39] Interestingly, Quintus did not attribute any special significance to the help Marcus had recently given to populists (C. Fundanius, Q. Gallus, C. Cornelius and C. Orchivius), regarding the election he considered it simply a useful step to win the relevant associations *(sodalitates)*.[40] From first to last, Marcus attempted to avoid appearing a populist but in his efforts he got several times in unpleasant situations; so, for example, when he undertook C. Manilius's case.[41] What happened was that the urban masses forced Marcus to live up his word to undertake the defense of C. Manilius;[42] the proceedings were not held in early 65 due to the political situation, and so Cicero escaped from being forced to make an unambiguously clear political statement in public.[43] Although Quintus does not consider the aforesaid statements of defense a standpoint of especially great weight, he deems the action taken for the benefit of Pompeius in 67 even after such a long time an act that could cast shadow on his brother's career.[44] The reason for that can be most probably looked for in the fact that while statements of defense made in court of justice were considered events soon forgotten in the turmoil of everyday life, Marcus himself protested against being confronted with his standpoints formulated in statements of defense later on as his own opinion.[45] This oration made in the popular assembly for the first time as *praetor* entering office represented an unambiguous confrontation with the *senatus* since it was the popular assembly and not the *senatus* that was competent to decide the superior commander's authority *(imperium)* to be granted to Pompeius. To promote his popularity, Cicero gave free rein to diminuting the authority of the *senatus*, and subsequently many were very much offended by his act–so he had to manoeuvre quite skilfully during the process of application

35 Cicero, *Pro Murena* 17.
36 *Commentariolum petitionis* 1. 45.
37 *Ibid.* 42. 45. 54.
38 *Ibid.* 2. 55.
39 *Ibid.* 52.
40 *Ibid.* 19. 50.
41 *Ibid.* 51.
42 Cicero, *De imperio Cnaei Pompei* 69. 71.
43 Till: *op. cit.* 318.
44 *Commentariolum petitionis* 5.
45 Cicero, *Pro Cluentio* 130.

not to alienate Pompeius and his adherents, on the one hand, and not to worsen his chances in the circles of *senatores* by asserting his commitment to Pompeius, on the other.[46]

How does Quintus in early 64 evaluate his brother's chances in the election, and what opinions does he formulate on the competitors? He considers it a fortunate circumstance that his brother does not have any respectful competitors who come from the nobility *(nobilitas)*, and he points out that C. Coelius Caldus, the *consul* of the year 94–the last *homo novus* who fulfilled the *consul*'s office before Cicero–must have had quite a difficult job since he had to overcome outstanding figures of the nobility.[47] The nobility of the age considered the *consulatus* their own monopoly;[48] they believed that electing Cicero *consul* would defile and desecrate this office.[49] After that, Quintus enumerates the four possible opponents, of whom Galba and Cassius albeit coming from high-born families had no chances because they do not have enough persistence and drive.[50] The criminal procedure against Catilina turned out favourably in spite of anticipations,[51] although somewhat earlier, in July 65 Marcus did not think it was possible, and was pondering over possibly undertaking Catilina's defense as by that he wanted to win Crassus and Caesar standing behind Catilina for his later election campaign.[52] Eventually, Marcus did not undertake to defend Catilina, and after the verdict of acquittal Catilina entered into an election alliance with Antonius, which was approved by the aforesaid influential political factors too. All this unambiguously shows that political alliances of the period were formed accidentally based on current interests, and that in order to increase his chances Cicero would have been willing to enter into alliance even with Catilina, and after their election most probably he would have applied the same tactic against him as against Antonius–these assumptions, however, are on the verge of unhistorical speculations.[53]

III. The characterisation of the competitors, Antonius and Catilina[54] is perhaps the most remarkable part of the *Commentariolum* both in terms of language and the palpable description. Quintus considers both persons unpleasant for his brother; at the same time, he is compelled to see them as factors that must be reckoned with–regarding both of them he states that their past is obscure and sinful, both of them live to fulfil his desires, and none of them has the necessary financial means to be able to conduct the election campaign successfully[55] (with this last remark he opposes them to the wealthy upper and middle classes who want to protect their wealth).[56] At the end of the presentation he underlines as their common feature that it is not so much their origin from high-born families but their sins that make them well-known, and those casting their votes on them would stab two daggers at the same time into the state.[57] The use of the term dagger *(sica)* is not by chance,

[46] Till: *op. cit.* 319.
[47] *Commentariolum petitionis* 7.
[48] Sallustius, *De bello Iugurtino* 63, 3.
[49] Sallustius, *De coniuratione Catilinae* 23, 6.
[50] *Commentariolum petitionis* 7.
[51] *Ibid.* 10.
[52] Cicero, *Epistulae ad Atticum* 1, 2, 1.
[53] Till: *op. cit.* 322.
[54] *Commentariolum petitionis* 8–12.
[55] *Ibid.* 8.
[56] Till: *op. cit.* 322.
[57] *Commentariolum petitionis* 12.

by that Quintus lets Marcus associate it with Antonius's and Catilina's aforesaid characterisation, in particular, that both of them are assassins *(sicarii)*.

C. Antonius, son of M. Antonius, the orator, who taught Cicero too,[58] bore the sobriquet Hybrida (bastard), and is kept in evidence among others as the uncle and father-in-law of the later triumvir M. Antonius. Quintus adduced against him that in 70 the *censores* excluded him from the *senatus*[59] because he sold his plots and property in auction due to his debts.[60] As the next charge he mentions the lawsuit successfully brought against him by the inhabitants of Achaia in 76 before M. Licinius Lucullus *praetor peregrinus* as a competent forum having jurisdiction in the disputes of Roman citizens and aliens:[61] they charged him with looting them as the commander of the cavalry during Sulla's rule of terror.[62] The counsel for the prosecution was the then twenty-four year old Caesar,[63] and although Antonius withdrew himself from the *praetor's* jurisdiction, six years later it was this act due to which the *censores* excluded him from the *senatus*. Nevertheless, he was admitted to the *senatus* again in 66 as *praetor*, and later in 42 he fulfilled the *censor*'s office too.[64] When elected *praetor* he was not able to name friends in sufficient rank for counting and checking the ballots, only the ill-famed Sabidius and Panthera.[65] His father's name was probably of great help to him in successfully applying both for the *praetor*'s and later the *consul*'s office; however, Quintus does not mention that in his election to be *praetor* Antonius got from the third place to the first with Cicero's help[66]–this fact also shows that election alliances were short-term partnerships based on interests of the moment.[67] Concubinage with a slave woman *(concubinatus)* itself was not considered a rare thing or an exceptionally scandalous act.[68] What caused dissatisfaction in the case of Antonius was that he bought the slave girl whom he kept beside him in an open auction *(de machinis)* as a *praetor* in office, and by doing so he injured the dignity of the office he fulfilled.[69]

When the application procedure commenced Antonius did not stay in Rome but we do not know where his journey took him.[70] On official missions *(legatio libera)* the traveller was entitled to reimbursement of travel expenses and accommodation and board; also he had the opportunity, in addition to compulsory benefits, to make the innkeepers hosting him pay tributes–the fleeced innkeeper *(copo compilatus)* as a proverbial phrase was used by Petronius too.[71] On official missions one could get enormously rich as it is proved by a locus from one of Cato maior's orations on his own costs and expenses *(De sumptu suo)*.[72] In 59 Caesar made an attempt to eliminate the abuse of public funds by statutory instrument

[58] Cicero, *Tusculanae disputationes* 5, 55.

[59] *Commentariolum petitionis* 8.

[60] Cf. Asconius, *Commentarius* 84, 23 sqq.

[61] *Commentariolum petitionis* 8.

[62] Cf. Asconius, *Commenarius* 83, 26; 84, 18.

[63] Plutarchus, *Caesar* 4, 2 sqq.

[64] Till: *op. cit.* 323 sqq.

[65] *Commentariolum petitionis* 8.

[66] Asconius, *Commentarius* 85, 21 sqq.

[67] Till: *op. cit.* 324.

[68] Plutarchus, *Cato maior* 24, 1; *Crassus* 5, 2; Mommsen, Th.: *Römisches Strafrecht.* Leipzig 1899. 693.

[69] *Commentariolum petitionis* 8.

[70] *Ibid.* 8.

[71] Petronius, *Satyricon* 62, 12.

[72] *Oratorum Romanorum Fragmenta*, Frgm. 173.

(lex Iulia de repetundis); and in Cilicia Cicero waived even the reimbursement of expenses he was entitled to.[73] On his official journey mentioned by Quintus, Antonius substantially replenished his financial resources to accumulate proper funds for generous distribution of gifts during the election campaign *(largitio)*; on the other hand, he injured the people of Rome too–points out the author–since he failed to fulfil his obligation to ask for the support of the people of Rome personally during the process of application *(populo Romano supplicare)*.[74] Later, Cicero was yet compelled to exercise his *consul*'s office in concordance with *(concordia)* him[75] since the popular assembly *(comitia centuriata)* elected Antonius *consul* on the second place after Cicero–it praises Marcus's sense of tactic that by doing favours to him he was able to make the competitor attacked earlier stand by him as an associate in the office during the times when he had to cope with the dangers of the Catilina plot.[76]

Expressing his indignation over Catilina's past and way of life Quintus took to more powerful means as in the characterisation of Antonius, which can be clearly identified in the series of pathetic poetic questions.[77] At the same time, these questions and exclamations do not lack irony as he sharply questions the nobleness of Catilina's origin, on the one hand–although in theory Catilina was more high-born than Antonius, his ancestors obtained only the *praetor*'s office while Antonius's father was one of the leading personalities of the State–and the lack of nobleness of his character, on the other.[78] Contrary to Antonius who was frightened even by his own shadow, Quintus characterises Catilina in general as an uninhibited scoundrel who despises and defames the law;[79] then, he turns to the list of his outrageous deeds.[80] He underlines his poor family conditions, also referred to by Sallustius,[81] as it was only through Sulla's proscriptions that Catilina took possession of considerable wealth,[82] and the fact that his rakish and violent sexual nature was reinforced by what he experienced at home, seeing his elder sister's conduct.[83] The greatest part of the crimes in the presentation comprises the murders committed during Sulla's rule of terror against Roman citizens.[84] Quintus enumerates the names of the murdered Roman knights, who supported Cinna and by doing so evoked Sulla's revenge, in a generalising plural even if Catilina's bloodlust demanded only one victim from the given clan.[85] As one of the most outrages examples of these murders he recalls the murder of Q. Caecilius, Catilina's own brother-in-law, who played no political role at all, and considering his age the only thing he wanted was quiet old age;[86] it is highly weird that to the best of our knowledge Marcus never mentions the murder of relatives committed by Catilina.[87]

[73] Cicero, *Epistulae ad Atticum* 5, 16, 3.
[74] *Commentariolum petitionis* 8.
[75] Cicero, *De lege agraria* 2, 103.
[76] Till: *op. cit.* 326.
[77] *Commentariolum petitionis* 9.
[78] *Ibid.* 9.
[79] Cf. Asconius, *Commentarius* 86, 24 sqq.; Cicero, *In Catilinam* 1, 18.
[80] *Commentariolum petitionis* 9.
[81] Sallustius, *De coniuratione Catilinae* 5, 7.
[82] Till: *op. cit.* 328.
[83] Cf. Sallustius, *De coniuratione Catilinae* 15, 1.
[84] *Commentariolum petitionis* 9.
[85] Cf. Asconius, *Commentarius* 84. 5 sqq.
[86] *Commentariolum petitionis* 9.
[87] Till: *op. cit.* 329.

Quintus gives a longer pathetic description not shrinking back from depicting naturalistic details of the brutal murder of Catilina's wife, Gratidia's sister, by M. Marius Gratidianus Catilina.[88] This murder must have affected the brothers closely since through their grandmother they were relatives of Gratidianus.[89] This man highly dear to the people of Rome *(homo carissimus populo Romano)* was very popular among others because during the two consecutive years, in 85 and 84 when he fulfilled the *praetor*'s office he took several measures to prevent the people from being injured; so at several points of the city they erected statues of him, which were respected with cultic ceremonies.[90] On the other hand, both Quintus and Marcus conceals that in 87 Gratidianus as a popular tribune and as Cinna's adherent threatened Q. Lutatius Catulus with crucifixion, who escaped into suicide–the *Commentariolum* renders the merciless revenge of Catulus's son and especially Catilina perceptible.[91] Quintus demonstrates Catilina's corruptness and dangerous nature when he does not fail to mention that Catilina lived together with actors and gladiators–both occupations were inflicted by loss of honour *(infamia)* in Roman law[92]–and while actors satisfied only his lust, gladiators meant grave threat to all the citizens.[93] Since the Spartacus uprising, contacts with gladiators represented threat to the peace of the State–Catilina obtained a troop of gladiators from Q. Gallus.[94] The danger implied by it is indicated also by the resolution of the *senatus (senatus consultum)* dated 12 October 63, twelve days before Cicero's first oration against Catilina, claiming that Catilina's gladiators must be dispersed to Capua and other provincial towns.[95]

Catilina committed sacrilege *(sacrilegium)* both when he washed his hands besmeared with blood in the holy water basin of the Apollo temple after murdering Gratidianus,[96] and later by other acts. However, Quintus puts it quite obliquely and speaks about defiling only one sacred place and some other persons who became the innocent victims of Catilina's crime.[97] Quintus's vague description is understandable since the case is from 73 when Clodius charged Catilina with incest, *incestum*, committed with Fabia (Fabia was a Vesta priestess and half-sister of Cicero's wife, Terentia). Owing to Catulus's help, Catilina was acquitted but the case left the reputation of Fabia, and by that of Terentia's and Cicero's family in tatters. There are a few loci available on the case; e.g., Sallustius[98] and Plutarch[99] asserts Catilina's outrageous deed as a fact, but Cicero, should he refer to the fact, never associated his sister-in-law's name with him. After that Quintus enumerates some persons by name who belonged to the circle of Catilina's close friends *(amicissimi)*;[100] this, however, cannot be interpreted to imply that Marcus or Quintus suspected as early as that

[88] *Commentariolum petitionis* 10.

[89] Cicero, *De officiis* 3, 67.

[90] *Ibid.* 3, 80.

[91] Cf. Asconius, *Commentarius* 84, 9 sqq.; Till: *op. cit.* 1962. 330.

[92] Cf. Földi A.–Hamza G.: *A római jog története és institúciói. (History and Institutions of Roman Law.)* Budapest 2009[14]. 223 sq.

[93] *Commentariolum petitionis* 10.

[94] Asconius, *Commentarius* 88, 2 sqq.

[95] Sallustius, *De coniuratione Catilinae* 30, 7.

[96] Plutarchus, *Sulla* 32.

[97] *Commentariolum petitionis* 10; Asconius, *Commentarius* 91, 16 sqq.

[98] Sallustius, *De coniuratione Catilinae* 15, 1.

[99] Plutarchus, *Cato minor* 19, 3.

[100] *Commentariolum petitionis* 10.

anything about the plot prepared by Catilina[101]–nevertheless, certain names (Q. Curius, L. Vettius) related later to the plot already appeared here.[102]

To make the list of crimes complete, Quintus points out that Catilina seduced free-born boys almost in their parents' lap–Sulla's legislation and the *lex Sca(n)tinia* imposed a fine of ten thousand *sestertius* on this state of facts[103]–which was public knowledge all over the city,[104] and was absolutely contrary to Cicero's relation to youth several times underlined by Quintus too.[105] To cover Catilina's recent scandal, Quintus adduces to the case well-known to his brother: the acquittal from the charge brought against him for robbing goods from the province Africa *(crimen repetundarum)*.[106] This lawsuit could have prevented Catilina from applying for the *consul*'s office[107] but in late 65 at Catilina's demand the purportedly biased jurors were recalled with the prosecutor's, P. Clodius Pulcher's consent, and the newly set up jury acquitted Catilina.[108] Quintus, and later Marcus spoke about the corrupt jurors with contempt.[109] On the other hand, Quintus does not talk about Crassus and Caesar who supported Catilina from the background.[110]

Most probably Quintus summed up the negative features of the two competitors well-known to his brother to help Marcus to make the citizens aware of them in a concise form,[111] or to make him able to properly threaten Catilina and Antonius with charging them with their outrageous deeds.[112] Against Antonius he enumerates the following acts, in brief summary: his debts; selling his estates; his contempt of the court; his exclusion from the *senatus*; his suspicious acquaintance with Sabidius and Panthera; defiling the dignity of the office by buying the girl friend on the slave market; and, from the recent period, looting the innkeepers; and despising the people of Rome by not attending the application in person. Legally, it was only the abuse of the rights of official mission–or his participation in Sulla's proscriptions–that could give proper grounds for calling him to account for his deeds.[113]

In the description of Catilina's past, when Quintus enumerated the names of the knights killed by him, and pathetically described the murder of Gratidianus, he must have had kept current political issues in view and not just the requirements of historical authenticity as that was the time when those who committed murders during Sulla's reign of terror were called to account for their deeds[114] –in spite of the fact that pursuant to the *dictator*'s regulations the killers of proscribed persons should have enjoyed impunity.[115] As part of this process, a short time before the election of the *consules*, L. Liscius, Sulla's well-known

[101] Cf. Cicero, *Pro Caelio* 14.

[102] Till: *op. cit.* 333.

[103] *Commentariolum petitionis* 10; Asconius, *Commentarius* 86, 23.

[104] Cicero, *In Catilinam* 1, 13; *Pro Caelio* 12 sq.; Sallustius, *De coniuratione Catilinae* 14, 5 sq.

[105] *Commentariolum petitionis* 3. 33.

[106] *Ibid.* 10.

[107] Sallustius, *De coniuratione Catilinae* 18, 3.

[108] Asconius, *Commentarius* 87, 13 sqq.

[109] Cicero, *De haruspicum responso* 42; *In Pisonem* 23; *Epistulae ad Atticum* 2, 1, 8; Asconius, *Commentarius* 85, 8 sqq.; 87, 5 sqq.; 89, 17, 92, 4 sqq.

[110] Till: *op. cit.* 335.

[111] *Commentariolum petitionis* 27.

[112] *Ibid.* 55.

[113] Asconius, *Commentarius* 88, 26.

[114] *Ibid* 26 sqq.; Dio Cassius 37, 10, 2.

[115] Suetonius, *Divus Iulius* 11.

captain and Bellienus, Catilina's uncle were sentenced due to murdering proscribed persons during Sulla's rule, although both of them were quite ignorant persons and they could have said that they had committed all that on the orders of Sulla.[116] At the end of 64, Catilina was also brought to the court of justice competent to pass judgment on homicide *(quaestio inter sicarios)*, the investigator's office *(quaesitor)* was fulfilled by Caesar, the chairman's office by L. Lucceius, known as a historian, who was good friends with Cicero.[117] In spite of the fact that Catilina could not give an excuse for his deeds by saying that he acted on the orders of the *dictator*, he was acquitted because Caesar and Cassius backed him.[118] Furthermore, he could have been charged with seducing boys and unlawfully keeping gladiators; and many people demanded retrial of the case of looting the province. Although the first lawsuit ended with acquittal, the public opinion of the period evaluated it as a scandalous outcome. So owing to Quintus's instructions, Marcus had sufficient material for being able to threaten both of his competitors, primarily Catilina with possibly charging them.[119]

Marcus amply used the material compiled by his brother in his oration entitled *In toga candida* handed down to us by Asconius in fragments: what happened was he claimed to make the law motioned by C. Calpurnius Piso to sanction election fraud in 67 *(lex Calpurnia de ambitu)* stricter when the amount of the bribery monies distributed by Antonius and Catilina went far beyond any usual extent.[120] Q. Maucius Orestinus exercised his right of veto *(intercessio)*, and Marcus heavily attacked his competitors before the *senatus* enumerating the following deeds. Regarding Antonius: looting Achaia and despising the court; his own favour he did to Antonius in the election of the *praetor*; assigning his goods; and holding back the shepherds who worked on his estate in order to organise an army from them; Antonius's participation in Sulla's proscriptions and the role taken by him when driving a cart *(quadrigarius)* in Sulla's triumphal procession.

In the rest of the speech, he attacked Catilina: he charged him with murdering Roman citizens; financial abuses and crimes; immorality and debauchery; despising the law; killing Marius Gratidianus; gathering gladiators and seducing the Vesta priestess–and called both of them a dagger pointed against the State.[121] The two competitors made efforts to defend themselves; however, not being able to come up with anything against Cicero's personality and conduct of life, the only thing they cast on his eyes was that he was 'a new man' *(homo novus)*.[122] The oration produced its impact: it seemed more prudent to elect an applicant who did not have noble descent from the old times but was eligible for each layer of society and the masses than Catilina.[123] Antonius achieved the second place after Cicero, and his father's former authority was of great help to him.[124]

[116] Asconius, *Commentarius* 91, 6 sqq.
[117] Suetonius, *Divus Iulius* 11.
[118] Till: *op. cit.* 336.
[119] *Commentariolum petitionis* 56.
[120] Asconius, *Commentarius* 83, 5 sqq.
[121] Till: *op. cit.* 337.
[122] Asconius, *Commentarius* 93, 24 sqq.
[123] Cf. *Commentariolum petitionis* 53.
[124] Asconius, *Commentarius* 94, 3 sqq.; Cicero, *De officiis* 2, 59.

IV. The Republic of Rome recognised four kinds of popular assemblies; three of them played a part in the elections. The *comitia centuriata* based on property *census* elected the prime leaders of the Empire, the *consules* and the *praetores* who carried out administration of justice as well as the *censores* who implemented property estimation. The point of the system was that based on their property status, income the population was ranked among military/political *centuriae*. The *centuriae* of the wealthier as a matter of fact did not amount to one hundred persons while the number of persons in a single *centuria* of the pauper was at least as large as the whole first class; that is, the total of the eighty *centuriae* of the aristocracy. *Equites* constituted eighteen *centuriae*. The wealthier the people recruited were, the higher the number of *centuriae* was; i.e., the number of citizens classified in each *centuria* was steadily increasing when the given *centuria* consisted of less and less wealthy people. Through that it was possible to attain that people without any property were represented only by five *centuriae*. Elections were held in a process per *centuriae*–and "from up to down". This means that first wealthier people cast their vote and after that the poorer, finally the pauper, who constituted the major part of the population. Although the ballots cast by each citizen were equal but their ballots were aggregated per *centuria* and their *centuria* eventually represented only a single 'yes' or 'no' vote, depending on which response the majority of the ballots was cast in the *centuria*. If a case had to be decided or an official had to be voted for, voting was carried out only up to the stage where the *centuriae* that had already cast their vote had reached fifty percent plus one ballot. As the eighty votes of the eighteen votes of the *equites* and the eighty votes of the first class of the patricians/the aristocracy themselves were more than half of the one hundred and ninety-three *centuriae* in total, it can be clearly realised that even the twenty *centuriae* of the second property class had to cast their ballots only in the very rare case that the *centuriae* of the knights and the first class had not reached accord for some reason. As, however, the first ninety-eight *centuriae* actually represented merely a fraction of the whole of the citizens, the election was far from reflecting the will of the majority of the citizens.[125]

The day of the election of the consuls always fell on the second half of July. The electors went out to the Mars field early morning and gathered by *centuriae*. The persons controlling the elections announced the names of the candidates; and, after that voting began. The identity of the voters appearing per *centuriae* was verified by the guards at the gateway to the voting bridge. Voters wrote the initials of the name of the candidate they supported on a wax covered piece of wooden board. At the other end of the voting bridge a ballot-box was set up where they cast their boards. Once one *centuria* has cast their votes, ballots were aggregated in the ballot counting chamber, and the names of the candidates were written in a predetermined order, with the decisions of the *centuriae* added beside the names. When a candidate had reached fifty percent plus one vote of the ballots of the *centuriae*, voting was discontinued, and the result was proclaimed. The institution of campaign silence was unknown to the Romans since agents tried to convince voters to vote for specific candidates even at the gate of the bridge. If it was foreseen that the result would be unfavourable for patricians, then the voting bridge collapsed "accidentally", and the voting had to be interrupted–and be postponed for several days. Then, in some cases, *augures* showed up, who stated that they were seeing ill *omina*, and this allowed declaring the whole procedure null and void.[126]

[125] Németh–Nótári: *op. cit.* 136 sqq.

[126] *Ibid.* 144 sq.; Takács: *op. cit.* 111 sqq.

Just as the election of magistrates was a necessary part of the order of the state of the Republic of Rome, in these elections election fraud/bribery *(ambitus)* played a part too. Very soon after the making of the Twelve Table Law, in 432, the first statutory provision was published, which prohibited for applicants to call their fellow citizens' attention to themselves with specially whitened clothes made shining.[127] Initially, *ambitus* (walking around) indicated not more than the activity when the applicant for the office walked around among electors to secure their votes for him.[128] It is linked with the name of C. Poetelius *tribunus plebis* that in 358 a *plebiscitum* prohibited for the applicants to walk around on markets and in villages among electors,[129] which provision was obviously intended to prevent unethical practices to obtain votes outside Rome. In accordance with Roman terminology, it was always only *ambitus* that violated legal order, *ambitio* did not;[130] the latter was often used in the sense of *petitio*, its meaning was sometimes undoubtedly pejorative but it never became a legal term.[131] It should be noted, however, that the aforesaid two *plebiscita* cannot be considered punitive statutes.[132]

From the second half of the second century we know of the existence of two acts that sanctioned *ambitus*–they are *lex Cornelia Baebia* from 181[133] and an act from 159,[134] but their content is not known. In the age between C. Gracchus and Sulla, the system of *quaestiones perpetuae* was already quite extended. The first news provided on a lawsuit specifically on the charge of *ambitus* is dated to this period: in 116 one of the *consul*'s offices for the year of 115 was won by a *homo novus* Marcus Aemilius Scaurus, who was charged by his rival having lost the election, P. Rutilius Rufus with *ambitus*. In turn Scaurus did the same against Rufus; otherwise both of the accused–who were prosecutors at the same time–were acquitted.[135] The existence of *lex Cornelia de ambitu* made by Sulla is somewhat disputed;[136] our understanding of *leges Corneliae* is not complete since there are two sources on these acts available. First, Cicero's speeches; secondly, the writings of the lawyers of late principate, which are known only in the form bequeathed in the *Digest*. Cicero refers to these acts only to the extent his interests manifested in the given speech, that is, the rhetoric situation makes it necessary; so in no way does he make an effort to be exhaustive as it is not his duty. The lawyers of the principatus dealt with only those acts of Sulla that remained in force after Augustus's reforms. The following reference, however, gives ground for considering the existence of *lex Cornelia de ambitu* possible. It asserts that in earlier ages the convicted were condemned to refrain from applying for magistrates for ten years. The aforesaid *lex Cornelia* can be hardly the *lex Cornelia Baebia* from 181 since between his

[127] Livius, *Ab urbe condita* 4, 25.

[128] Varro, *De lingua Latina* 5, 28; Festus 16.

[129] Livius, *Ab urbe condita* 17, 25, 13.

[130] Plauts, *Trinummus* 1033.

[131] Mommsen: *op. cit.* 866; Jehne, M.: Die Beeinflussung von Entscheidungen durch „Bestechung": Zur Funktion des ambitus in der römischen Republik. In: *Demokratie in Rom? Die Rolle des Volkes in der Politik der römischen Republik.* Hrsg. von M. Jehne. Historia Einzelschriften 96. Stuttgart 1995. 51 sqq.

[132] Mommsen: *op. cit.* 866; Adamietz, J.: *Marcus Tullius Cicero: Pro Murena.* Darmstadt 1989. 24.

[133] Livius, *Ab urbe condita* 40, 19, 11.

[134] Livius, *Epitoma* 47.

[135] Gruen, E. S.: *Roman Politics and the Criminal Courts 149-78 B.C.* Cambridge 1968. 120. sqq.

[136] Kunkel, W.: Quaestio. In: *Kleine Schriften.* Weimar 1974. 61.

speech delivered in defense of Publius Cornelius Sulla and *lex Cornelia* more than ten years had passed, and as in this period other laws sanctioning *ambitus* were also made, it cannot be supposed that the extent of punishment would have remained the same.[137]

In the periods after Sulla, *quaestio de ambitu* was usually headed by a *praetor*, so for example in 66 C. Aquilius Gallus fulfilled the office of *praetor ambitus*.[138] On the laws following this stage, information is supplied by Cicero in *Pro Murena*. At the request of C. Cornelius *tribunus plebis*, in 67, *lex Calpurnia* was born;[139] what can be known about its sanctions is as follows. It contained expulsion from the *senatus*, banning from applying for offices for life (contrary to the ten years' term defined under *lex Cornelia*) and certain pecuniary punishments.[140] A *senatus consultum* from 63 emphatically sanctioned a part of the acts regulated under *lex Calpurnia*; so for example, the act of recruiting party adherents for money upon the reception of the applicant in Rome; the act of distributing a great number of free tickets and seats for gladiators' games; and the act of hospitality to an excessive extent;[141] this *senatus consultum* probably interpreted and specified the aforesaid law.[142] The events of the year 64, however–primarily the increasing losses of Antonius and Catilina–made it necessary to make a new law. This law became *lex Tullia* enacted in 63, supported by all the candidates applying for the *consulatus* of the year 62,[143] which threatened with ten years' exile as a new punishment, and took firmer action against distributing money, and punished absence from legislation due to alleged illness. Furthermore, it banned the arrangement of gladiators' games during two years before applying, with the only exemption from such ban being an obligation to do so as set forth in a last will and testament. That is how the law wanted to prevent paying money directly to voters, and intended to limit the number of the entourage of the applicants (as an increasingly great entourage almost appearing to be a triumphal procession might have suggested sure victory to voters). It is a fact however–as Joachim Adamietz's witty and quite to the point remark reveals–that the actual limits of *ambitus* were determined by nothing else than the confines of the financial possibilities of the candidates.[144]

V. The associations founded by private persons, usually called *collegium*, held together the communities providing protection and assistance for persons living at the same settlement and belonging to the same religious cult but were primarily not meant to serve everyday political fights.[145] To cover their expenses certain associations claimed admission fees *(capitulare)* or regular monthly membership fees *(stips menstrua)*,[146] which of course limited the number of members; that is, most often the members of the *collegia* were from the wealthier layers of urban common people *(plebs urbana)*, traders, craftsmen, ship

[137] Mommsen: *op. cit.* 867.

[138] Cicero, *Pro Cluentio* 147.

[139] Cicero, *Pro Murena* 46; Dio Cassius 36, 38, 39.

[140] Cicero, *Pro Murena* 47; Jehne: *op. cit.* 66 sq.

[141] Cicero, *Pro Murena* 67. Cf. Laser: *Quintus Tullius Cicero. ... op. cit.* 14 sqq.; 22 sqq.

[142] Adamietz: *op. cit.* 25.

[143] Cicero, *Pro Murena* 5.

[144] Adamietz: *op. cit.* 27.

[145] Kornemann, E.: Collegium. In: *Paulys Realencyclopädie der classischen Alterthumswissenschaft* IV, 1. München–Stuttgart 1900. 380; Laser, G.: *Populo et scaenae serviendum est. Die Bedeutung der städtischen Masse in der Späten Römischen Republik.* Trier 1997. 102.

[146] *Digesta Iustiniani* 47, 22, 1; *Corpus Inscriptionum Latinarum* 14, 2112.

owners and not from simple labourers.[147] If an association, which did not claim any membership fees, was not able to finance its expenses from its own resources, it could rely on the generosity of its leaders, or a *patronus* but if it engaged a conduct which was contrary to the maintainer's intentions, then it could lose the support.[148] The political significance of *collegia* increased during periods of applications for magistrates; however, even then it was enough for the applicant to win over the leading personalities of the *collegium* to his goals, the rest of the members obediently followed the opinion leaders.[149] Clodius's activity added a peculiar element to the political operation of certain associations. Clodius definitely raised the number of *collegia* that did not claim any membership fees and brought together the scum of the city, which highly shocked Cicero.[150] The maintenance and "representation" expenses of these associations were most probably covered by Clodius himself, and in return the members could express their gratitude to their *patronus* in several ways and forms; consequently, in theory Clodius could easily mobilise masses.[151] These *collegia* lead by Clodius were actually gangs operated by keeping the appearance of legality but used as tools to raise riots; and it was not in the interest of decent citizens to risk their reputation, proceeds and life–by closing their shops and leaving their daily jobs–for the sake of Clodius.[152] Later, Clodius made efforts to use the *collegia* maintained by him as a kind of private army,[153] which were, looking at their "results", sufficient for Clodius achieving his short-term plans and disturbing the privacy of the public for a short while, but for seizing power for a longer period (which was perhaps not included in Clodius's intentions) both financial resources and proper motivation were missing. After Clodius's death, the *collegia* lost their impact produced on political events; nevertheless, later on the leaders of the State were very careful in their ways with associations.[154]

The question arises what proportion of the population the institution of the *clientela* covered–Gelzer believes it was the common people of the city *(plebs urbana)* who belonged to the *clientela*[155]–and as part of that what services the *clientes* were obliged to provide for their *patronus*; and to what extent the wider masses could be manipulated and mobilised through the *clientela*. Since the early period of the Republic the relation between the *patronus* and the *cliens* had been based on mutual trust *(fides)*, under which patricians having outstanding authority *(auctoritas)*, dignity *(dignitas)* and wealth *(vires)*, and later plebeians undertook to protect citizens in need of and asking for protection[156] as well as

[147] Ausbüttel, F. M.: *Untersuchungen zu den Vereinen im Westen des Römischen Reiches.* Frankfurter Althistorische Studien 11. Kallmünz 1982. 42 sqq.

[148] Laser: *Populo et scaenae... op. cit.* 103.

[149] *Commentariolum petitionis* 30.

[150] Cicero, *In Pisonem* 9.

[151] Laser: *Populo et scaenae... op. cit.* 104.

[152] Cicero, *De domo sua* 13. 54. 89; *Academici libri* 2, 144; Sallustius, *De coniuratione Catiline* 50, 1; *De bello Iugurtino* 73, 6.

[153] Cicero, *Pro Milone* 25; *Post reditum in senatu* 33; *Pro Sestio* 34. 85; *In Pisonem* 11. 23.

[154] Laser: *Populo et scaenae... op. cit.* 105 sq.

[155] Gelzer, M.: *Die Nobilität der römischen Republik.* Leipzig–Berlin 1912. 134 sqq.

[156] Spielvogel, J.: *Amicitia und res publica. Ciceros Maxime während der innnenpolitischen Auseinandersetzungen der Jahre 59–50 v. Chr.* Stuttgart 1993. 10; Laser: *Populo et scaenae... op. cit.* 111; Cicero, *Brutus* 97; *Pro Roscio Amerino* 5. 58; *In Verrem* 2, 4, 41. 80; *Pro Quinctio* 2. 34; *Pro Cluentio* 51. 109; *Pro Caecina* 57; *Pro Murena* 10; *Pro Plancio* 75; *Pro Scauro* 26; *Philippicae in Marcum Antonium* 6, 15; *De finibus bonorum et malorum* 4, 56; *Commentariolum petitionis* 2; *Digesta Iustiniani* 49, 15, 7, 1.

travelling aliens *(hospites)* in the form of various benefits and favours *(beneficia, merita)* both financially and before the law.[157] In spite of their dependant relation to their *patronus* the *clientes* preserved their personal freedom, and were not compelled to waive their right to political activity or participation in public life; what is more, their patrons promoted them to do so.[158] In addition to expressing esteem *(reverentia)* and gratitude *(gratia)* the *clientes* were obliged to provide several services for their *patronus*.[159] So, for example, they arranged for accommodation for their patron or his friends,[160] shared the payment of penalties,[161] supported their *patronus* in court proceedings,[162] during the period of applying for or fulfilling offices they provided spiritual and financial support for their patron,[163] in danger they undertook to protect him personally,[164] as a foreign *cliens* they supplied goods to the *patronus*,[165] and preferably they informed as many people as possible about the generosity of their patron.[166] On the grounds of all the above, the *clientes* were in many cases meant to articulate the *patronus*'s interests and views to the wider masses clearly and efficiently.[167] Although the *clientela* provided an essential basis of support for the *patronus*, the citizens fulfilling *patronatus* were far from relying only on *clientes* in search of tools that could be used for their political purposes since the attachment of the *clientela* was of ethical rather than legal nature, on the one hand–consequently, the patron was not able to enforce support given to him through legal means, or he could get this support only by holding out the prospect of appropriate consideration–and the *clientes*, pursuing their own occupation, could not always be available to the *patronus*, on the other.

The social significance of the *clientela* depended to a great extent on the social position of the *cliens*, and, therefore, the *patronus–ingenuus* (free-born citizen) relation and the *patronus–libertus* (freedman, liberated slave) relation must be clearly separated from each other. A part of free-born *clientes* belonged to a social and economic layer identical with or similar to that of the *patronus*, and needed the *patronus*'s support only for the sake of strengthening their own position, or for obtaining an office[168]–in this case the *clientela* meant friendship between persons of equal rank *(amicitia)*.[169] These *clientes* belonged to the higher *census* class, and so at the *comitia centuriata* and in a provincial *tribus* they could articulate their opinion and advance their *patronus*'s interests as competent persons.[170] As a matter of fact, not all free-born citizens belonged to the wealthier layers, and they turned to the *patronus* primarily for urgent legal or financial help, but they could hardly return the favours did to them as due to the peculiar features of the Roman election system

[157] Cicero, *Pro Roscio Amerino* 106; *In Catilinam* 4, 23; *Pro Sestio* 10; *Cato maior de senectute* 32; Livius, *Ab urbe condita* 3, 16, 5; 4, 13, 2.

[158] Spielvogel: *op. cit.* 1993. 11; Laser: *Populo et scaenae... op. cit.* 112.

[159] Livius, *Ab urbe condita* 3, 44, 5. 57, 3.

[160] *Ibid.* 39, 14, 3.

[161] *Ibid.* 38, 60, 9.

[162] *Ibid.* 3, 58, 1.

[163] Plutarchus, *Cicero* 8, 2.

[164] Sallustius, *De coniuratione Catilinae* 19, 5; 26, 4; Livius, *Ab urbe condita* 23, 3, 2.

[165] Cicero, *Epistulae ad Atticum* 1, 20, 7; Livius, *Ab urbe condita* 4, 13, 2.

[166] Laser: *Populo et scaenae... op cit.* 113.

[167] Cf. *Commentariolum petitionis* 17.

[168] Cicero, *De officiis* 1, 122 sq.

[169] Cicero, *Laelius de amicitia* 26.

[170] *Commentariolum petitionis* 29.

they did not have the opportunity to cast their votes and these votes were not evaluated unless the elections were expected to produce a dubious outcome.[171] Compared to the latter, the applicant for the office appreciated the support of men with greater prestige much more; so, for example, the support of the leaders of *collegia (principes)*, who in the given case did not constitute a part of the *clientela* but produced major influence in their association, district and their entire place of living, and had considerable impact on changes in the morale of voters.[172]

The representation of the institution of salutation *(salutatio)* casts interesting light on the applicant's social relations: saluters from lower layers of society *(salutatores)* visited several applicants on the same day *(plures competitores)*, so the conduct engaged by them during the election could not be considered secure and stable *(communes/fucosi suffragatores)*. Therefore, the *patronus* applying for the office ought to have appeared grateful to them, and had to praise their activity both to their face and in front of their friends as by doing so he could expect them to leave their other *patroni* and become firm and committed voters *(proprii/firmi suffragatores)*–the applicant was not supposed to bring up his suspicion arising or proved regarding their loyalty, and against his better conviction he had to assert his trust in them.[173] The *patronus* could never be absolutely sure of the support and gratitude of *salutatores* for they could compare the goods and benefits received from him to the allowances granted by other applicants they had also visited–i.e., economically independent citizens seemed more secure voter's base. The endeavour to recruit and hold inconstant *salutatores* and *clientes* becomes understandable when one considers that the *patronus* applying for an office could produce the appearance of popularity and influence by having a lot of people crowding around him during salutation.[174]

More important and more respectful *salutatores* were allowed to have a word directly with the *patronus*; their presence made the masses aware that the applicant was worthy of more extensive support.[175] The *salutatio* provided opportunities for the applicant for gathering information on the morale and desires of common people, which their close circle of friends *(amici)* did not provide insight into; consequently, the *patronus–cliens* relation served mostly exchange of information. The relation between the *patronus* and the freedmen *(liberti)* developed somewhat differently: their relation remained closer even after liberation *(manumissio)* but this relation was based as much on the requirements of moral standards than on the requirements of legal norms: In 118 Rutilius Rufus's *praetor edictum* limited the range of services that could be demanded by the *patronus*,[176] but a freedman was not allowed to take legal action against the *patronus*,[177] and it was only Augustus's *lex Aelia Sentia* that formulated statutory sanctions against ungrateful freedmen.[178]

Accordingly, the *clientela* made up of free-born citizens and freedmen cannot be considered uniform in terms of the strength of their attachment to the *patronus* since it was exactly due to the moral nature of the attachment that the *patronus* did not have any

[171] Laser: *Populo et scaenae... op. cit.* 115.
[172] *Commentariolum petitionis* 30.
[173] *Ibid.* 42. 35.
[174] Laser: *Populo et scaenae... op. cit.* 117.
[175] *Commentariolum petitionis* 30.
[176] *Digesta Iustiniani* 38, 1, 1.
[177] Cf. Cicero, *Epistulae ad Atticum* 7, 2, 8; Suetonius, *Claudius* 25, 1.
[178] *Digesta Iustiniani* 37, 14, 19, 1.

legal means to collect outstanding claims and unfulfilled obligations. Although a *patronus* deceitfully acting against his *clientes* became the object of the contempt of society, this did not mean that he was deprived of his rights. Servius's commentary quoting the text of the Twelve Table Law attached to the relevant locus of Vergil's *Aeneis*[179]–which asserted that the *patronus* deceiving his *cliens* should be damned *(sacer)*–implied ethical offence and not criminal law facts. In this case the term *sacer* presumably meant the person who engaged culpable, that is, despiseable conduct[180] rather than a person who could be sacrificed to the gods or freely killed. [181] Most probably Servius followed the tendency of the late period of the Age of the Republic that idealised the Roman past.[182] Even if we presume close *patronus–cliens* relations regarding the archaic age, the significance of *clientelae* dramatically diminished by the 3rd c. B.C., and owing to the growth of the number of citizens we can no longer reckon with stable *clientelae* during Sulla's rule of terror, much rather ad hoc *patronus–cliens* relations organised for specific purposes should be presumed under which fulfilment of moral obligations was no longer of great account.[183] If there had been no mobility of such a great extent within and between *clientelae*, then the *patroni* and applicants for offices would not have been compelled–even at the expense of *ambitus* (election fraud)–to recruit *clients.*[184] *Clientes* from lower layers of society became important to the *patronus* not so much for getting their votes–which sometimes they were not even allowed to cast in the elections–much rather for their capacity to mediate the opinion of the masses to him, which helped him to prepare for what opinion they would like to hear from him in public appearances.[185]

With the loosening of the *patronus–cliens* relation, or owing to the fact that the *cliens* would seek a *patronus* that represented his interests better, and the *patronus* would seek *clientes* in his environment who had more considerable influence and so had greater capital of relations, this process reached the stage where the lower layers of society, which constituted a considerable part of *clientes*, were able to produce direct influence on political leaders. A grand entourage represented the acknowledgement of the politician and his legitimisation by the citizens,[186] whereas a decreasing number of people forced him to revise his views entertained so far.[187] On the other hand, it was just due to the unstable and unreliable nature of the *clientela* that in the last century of the Republic applicants for offices relied, in addition to their *clientes*, on their relatives, friends, neighbours in the district, their freedmen and slaves when compiling the urban accompaniment–this diversity enriched not only the spectacular entourage but opened roads to each layer of society and created relations for the applicant.[188] So the *clientela* was only one of the means

[179] Servius, *Commentarius in Verg. Aen.* 6, 609.

[180] Festus 467; Dionysius Halicarnassensis 2, 9–11. 10, 3; Brunt, P.: *Italian Manpower 225 B. C.–A. D. 14.* Oxford 1971. 403.

[181] Plautus, *Poenulus* 88; Vergilius, *Aeneis* 3, 57.

[182] Laser: *Populo et scaenae... op. cit.* 120.

[183] Brunt: *op. cit.* 32; Laser: *Populo et scaenae... op cit.* 121.

[184] *Commentariolum petitionis* 40. 47.

[185] Cicero, *Pro Roscio Amerino* 19. 96; *De oratore* 3, 225; Sallustius, *De bello Iugurtino* 71, 5.

[186] Dionysius Halicarnassensis 2, 10, 4.

[187] Laser: *Populo et scaenae... op. cit.* 124.

[188] Cicero, *Pro Cluentio* 94; *Pro Murena* 69; *Pro Roscio Amerino* 93; *Philippicae in Marcum Antonium* 6, 12; 8, 26; Brunt: *op. cit.* 415 sq.

of political fight, and far from being the only or the most important one;[189] all the more as Livius's description asserts that the purpose of the *clientes* taking action before the court of justice was not to raise sympathy with the defendant much rather to prevent a larger mass from getting together.[190]

Conclusions

The exploration of uninhibited opportunism and manoeuvring described in Commentariolum petitionis by Quintus Tullius Cicero was in no way in the interest of the ruling class of the late Republic, and it would have put especially Marcus Tullius Cicero in an unpleasant situation since he could not have shielded himself from the shadow of the suspicion that–especially as *homo novus*–he was able to win *consulatus* because he used all these tools in practice. In the mirror of all the above, it can be ascertained that the *Commentariolum petitionis* was produced primarily as a personal writing addressed to Marcus, in which his brother, Quintus wanted to give him help by summing up the key aspects and tools of the election campaign to win the *consul*'s office.

[189] Laser: *Populo et scaenae... op. cit.* 125 sq.
[190] Livius, *Ab urbe condita* 2, 35, 4.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 1, pp. 54–66 (2010)
DOI: 10.1556/AJur.51.2010.1.3

OLENA MELNYCHUK*

Contemporary Interpretation of the Conception of World Heritage in International Law and Practice

Abstract. This presentation examines some of the complex issues that pertain to the perspective of the conception of World Heritage embodied in the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage closely related to the currently observed changes in its conceptual development. By today, it has become the most widely accepted international instrument demonstrating successful implementation on different levels. At the same time, new issues regarding new categories of objects, responsibility etc. have emerged. Conclusions are drawn in favour of an adequate re-examination and re-adaptation of the conceptual framework of cultural heritage based on accepting its new functional dimension and integrating multiple perspectives from a variety of academic fields.

Keywords: world cultural and natural heritage, common heritage of mankind, World Heritage Committee, World Heritage Fund, World Heritage List of UNESCO, responsibility, erga omnes obligation, international community, cultural landscapes

The conception of "World Cultural Heritage" appeared in international law and practice in the late '60s of 20th century. The main idea of the conception is that certain states are credited with cultural assets and these states have the duty to maintain and protect them in the interest of the whole humankind[1] for future generations. Thus, states are merely trustees of the treasures of importance for the whole humanity. As a result, the state in which the object is situated has the duty to protect it and prevent its destruction. If the state is not able to provide sufficient protection, it is obliged to request the international community of states for assistance. International instruments often regard cultural heritage as the common heritage of mankind. Thus, the Declaration of the Principles of International Cultural Cooperation (1966) confirms that "all cultures are part of the common heritage of mankind, and accordingly, the tangible forms of such cultures are cultural monuments". The UNESCO Universal Declaration on Cultural Diversity (2001) recognises cultural diversity as a source of exchange, innovation and creativity and the common heritage of humanity.[2]

The concept of cultural heritage has expanded considerably in recent years. This greatly increased popular attention is based on an ever-increasing public awareness of the richness of heritage as well as of its vulnerability. Today, information and communication technologies along with tourism facilitate a better response to this social demand. For heritage must be appropriated and made accessible in more imaginative ways, shared more widely within and among nations, used more creatively to re-invent a living culture (which will soon be valued as the heritage of the future) and last but not least, nurtured more wisely as an important source of income and employment. Yet today, the gap between ends and

* Candidate in legal science in Koretsky Institute of Political and Legal Sciences of National Academy of Sciences of Ukraine, Ukraine, Triohsvyatitelska str., 4.
E-mail: Elya.Melnychuk@gmail.com

[1] Fechner, F. G.: The Fundamental Aims of Cultural Property Law. *International Journal of Cultural Property*, 7 (1998) 388.

[2] http://www.unesco.ru

means is even larger: wars, natural disasters, urbanization and industrialization continue to jeopardize cultural heritage and its relationship with development has become increasingly complex. In the modern world of global markets, national and international rules must be harmonized, thus, an effective system for the protection of cultural property should incorporate different branches of law.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) was bound to encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity. Concrete action began in 1960 with an international campaign to save the temples of Nubia, a landmark operation that was notably followed by campaigns in Venice (1966), Carthage, Borobudur (1970) and Angkor (1991). The great scale and spectacular repercussions of these enterprises rallied unprecedented contributions in favour of threatened sites.

The successful international campaigns furthered working out an international legal instrument regarding the international protection of cultural heritage. At the same time, the International Union for Conservation of Nature and Natural Resources (hereinafter: IUCN) paid great attention to deteriorating natural objects, scilicet, national parks, reservations, outstanding natural sights, the protection of which was obviously needed. An international conference in Stockholm (1972) approved of the proposal to adopt an international instrument of international cooperation in respect of cultural property and natural objects.

The recognition of the need to establish a universally recognized ethical-legal foundation so as to safeguard world heritage along with the concurrent activity of the IUCN prompted the UNESCO to examine the subject further with the Convention pertaining to the Protection of Cultural and Natural World Heritage adopted in 1972. Today, there are 186 State Parties to the Convention and its universal application makes the concept of World Heritage exceptional.

According to Para. 1 of Art. 6 of the Convention, whilst it fully respects the sovereignty of the states on whose territories the cultural and natural heritage is situated and without prejudice to property rights provided by national legislation, each State Party to the Convention recognizes that the duty of ensuring conservation of the elements of world heritage situated on its territory lies primarily with it and undertakes to act to this end. This fundamental provision is the basis of international law concerning the protection of cultural values.

For this purpose, each State Party to the Convention is required to compile an inventory of property forming part of cultural and natural heritage, which is situated on its territory and suitable for protection under the Convention. The duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of cultural and natural heritage situated on their territories is also recognized by states as a measure of national protection. Thus, the state is responsible for the protection of values composing world heritage. Such state employs the utmost of its own resources. The core obligation of protection, conservation and transmission to future generations incumbent on a State Party according to the World Heritage Convention in respect of monuments, groups of buildings and sites of outstanding universal value situated on its territory constitutes an obligation recognized by general international law.[3] Each State Party should endeavour to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of such heritage.

[3] O'Keefe, R.: World Cultural Heritage: Obligation to the International Community as a Whole? *International & Comparative Law Quarterly*, January, 2004. 193.

At the same time, State Parties undertake to contribute to the identification, protection, conservation and preservation of world cultural and natural heritage, if the state on whose territory it is situated is so requested and do not take any deliberate measures which might damage directly or indirectly the cultural and natural heritage situated on the territory of other State Parties to the Convention. It means the positive responsibility, that is, the duties of the Parties to the Convention. The provisions of the Convention instantiate a "delicate balance between national sovereignty and international intervention".[4]

Apart from specific safeguarding actions, the most significant achievement has been the adoption of a permanent instrument of international cooperation, where there had not been one before. The result, in effect, is a commitment to solidarity, which is at the heart of the notion of world heritage.[5] The Convention stipulates the duty "of the international community as a whole to cooperate" (Art. 6), which should be achieved via the establishment of a "system of international cooperation and assistance" (Art. 7). Such system is created by an Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage of Outstanding Universal Value, the World Heritage Committee (hereinafter: the Committee), which was established via the Convention. Its Rules of Procedure were adopted by the Committee at its first session (Paris, 1977). Its members are elected by the General Assembly of the State Parties to the Convention ensuring "an equitable representation of the different regions and cultures of the world" (Art. 8). With its 21 members, the Committee is the final decision-making body, the responsibilities of which include establishing, keeping up to date and publishing both the "World Heritage List" and the "List of World Heritage in Danger", furthermore, administering the World Heritage Fund (Art. 15) and deciding on granting financial assistance (Art. 13, 21). The World Heritage Centre appointed by the Director-General of the UNESCO assists the Committee to perform its task (Art. 14). Under Art. 29 of the Convention, the Committee submits a report on its activities at each General Assembly of State Parties and at each of the ordinary sessions of the General Conference of the UNESCO.

The Convention refers only to the immovable and tangible heritage, whether "cultural" (Art. 1 – monuments, groups of buildings, sites) or "natural" (Art. 2). On the basis of national inventories (an inventory of property forming part of the cultural and natural heritage situated on the state's territory), the World Heritage Committee has established the World Heritage List. The World Heritage List consists of cultural and natural sites. They include the *Palace and Park of Versailles* (France), Stonehenge, Avebury and associated sites, the Tower of London, (the United Kingdom of Great Britain), the *Wet Tropics of Queensland, Shark Bay (Australia)*, the *Vilnius Historic Centre*, the *Kernavė Archaeological Site* (Lithuania), the *Acropolis, Athens*, the *Archaeological Site of Delphi*, the *Medieval City of Rhodes* (Greece), the *Archaeological site of Troy* (Turkey), the *Saint-Sophia Cathedral* and *Kiev-Pechersk Lavra*, the *Ensemble of the Historic Centre of Lviv* (Ukraine) and others.[6] Today, the List of World Heritage consists of 890 sites, including 689 cultural, 176 natural objects and 25 mixed properties in 148 State Parties. The Convention does not set a numerical limit for the List.

[4] Cameron, C.: The Strengths and Weaknesses of the World Heritage Convention. *Nature and Resources*, 28 (1992) 3, 18–21.

[5] Musitelli, J.: Opinion World Heritage, between Universalism and Globalization. *International Journal of Cultural Property*, 11 (2002) 326.

[6] *Ibid.*

The nominations presented to the Committee shall entail the full commitment of the State Party to preserve the heritage concerned within its means. Such commitment shall take the form of appropriate policy, legal, scientific, technical, administrative and financial measures proposed and adopted to protect the property and its outstanding universal value.

The Convention is not intended to ensure the protection of all properties of great interest, importance or value, but only of a selection of the most outstanding of these from an international viewpoint. It cannot be assumed that a property of national and/or regional importance will be automatically included in the World Heritage List.

Outstanding universal value means cultural and/or natural significance, which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as a whole. The Committee defines the criteria for the inclusion of properties in the World Heritage List under the Operational Guidelines for the Implementation of the World Heritage Convention (January, 2008).[7] The Operational Guidelines are periodically revised to reflect the decisions of the World Heritage Committee.

The Convention does nor specify clear guidelines regarding the deletion of property from the List, whereas, it is Art. 11 (2) that refers to the task of the Committee to "establish, keep up to date and publish" the List. These tasks also include deletion as the Committee drafted it under extensive provisions in the Operational Guidelines. Some paragraphs of the Chapter of Operational Guidelines, that is, the "Procedure for the eventual deletion of properties from the World Heritage List" are devoted to that purpose.

The Committee adopted a procedure for the deletion of properties from the World Heritage List in cases:

a) where the property has deteriorated to the extent that it has lost those characteristics which determined its inclusion in the World Heritage List; and

b) where the intrinsic qualities of a World Heritage Site were already threatened at the time of its nomination by action of man and where the necessary corrective measures as outlined by the State Party at the time have not been taken within the time proposed.

The Committee will examine all the information available and will take a decision. Such a decision shall, in accordance with Art. 13 (8) of the Convention, be taken by a majority of two-thirds of its members present and voting.

The Guidelines do not seem to require the consent of the State Party concerned, only its consultation shall be achieved. The Committee shall not decide to delete any property, unless the State Party has been consulted on the question. The Committee shall not apply the deletion procedure as an alternative to the inscription of sites on the List in Danger.

The State Party shall be informed of the Committee's decision and public notice of such a decision shall be immediately given by the Committee. If the Committee's decision entails any modification to the World Heritage List, this modification will be reflected in the next updated List that is published.

For a long time, deletions have not been implemented, by reason of political and legal deliberations.[8] The Committee has refrained from setting an example–a decision

[7] *Ibid.*

[8] Strasser, P.: Putting Reform into Action–Thirty Years of the World Heritage Convention: How to Reform a Convention without Changing its Regulations. *International Journal of Cultural Property*, 7 (1998).

which may cause political repercussions and irritations. An example of the deletion procedure took place in 2007: The World Heritage Committee de-listed a property because of Oman's decision to reduce the size of the protected area by 90% in contravention of the Operational Guidelines of the Convention. This was seen by the Committee as destroying the outstanding universal value of the site, which was inscribed in 1994. In 1996, the number of the population of the Arabian Oryx on the site had been 450, but it dwindled to 65 with only about four breeding pairs, which makes its future viability uncertain. This decline was due to poaching and habitat degradation.[9]

After extensive consultations with the State Party, the Committee held that the unilateral reduction of the size of the Sanctuary and plans to proceed with hydrocarbon prospecting would destroy the value and integrity of the property, which is also home to endangered species including the Arabian Gazelle and the houbara bustard.

The second instance of deletion has taken place in 2009, when the World Heritage Committee decided to remove Germany's *Dresden Elbe Valley* from the UNESCO's World Heritage List due to the construction of a four-lane bridge in the heart of the cultural landscape, which meant that the property failed to keep its "outstanding universal value as inscribed".[10]

Dresden was inscribed as a *cultural landscape* in 2004. The Committee held that Germany could present a new nomination related to Dresden in the future. In doing so, the Committee recognized that parts of the site might be considered to be of outstanding universal value, but that it would have to be presented under different criteria and boundaries.

The Convention of 1972 foresees the establishment of the List of World Heritage in Danger. The World Heritage Committee includes property "appearing in the World Heritage List, for the conservation of which major operations are necessary and for which assistance has been requested under the Convention". Sites can be listed, if they are threatened by natural disasters such as floods and volcanic eruptions, earthquakes, serious fires, and they can be listed because of human-caused disasters such as urbanization, changing land ownership, tourism and armed conflicts. The List was criticized as not paying tribute to the real situation. Its inclusion of only about 35 inscribed sites does not reflect the dangers and threats with which World Heritage is faced or as described, for example, in the List of 100 Most Endangered Sites compiled by the World Monument Fund.[11]

[9] The Arabian Oryx Sanctuary is an area within the bio-geographical regions of the Central Desert and Coastal Hills in Oman. Seasonal fogs and dews support a unique desert ecosystem, the diverse flora of which includes several endemic plants. Its rare fauna includes the first free-ranging herd of the Arabian Oryx with the global extinction of the species in the wild in 1972 and its reintroduction here in 1982. The only wild breeding sites in Arabia of the endangered houbara bustard and a species of wader are also to be found here as well as the Nubian ibex, the Arabian wolves, honey badgers, caracals and the largest wild population of the Arabian gazelle.

[10] The 18th and 19th century cultural landscape of the Dresden Elbe Valley stretches some 18 kms along the river from Übigau Palace and Ostragehege fields in the north-west to the Pillnitz Palace and the Elbe River Island in the south-east. The property, which features low meadows and is crowned by the Pillnitz Palace as well as numerous monuments and parks from the 16th to 20th centuries in the city of Dresden was inscribed on the List of World Heritage in Danger in 2006 because of the planned construction of the Waldschlösschen Bridge.

[11] *Ibid.* 252.

One of the main functions of the World Heritage Committee is to administer the World Heritage Fund and to determine how financial resources are to be allocated to the countries and organizations which request assistance (according to Art. 15). Moneys accumulated in the Fund come from: 1) obligatory contributions from State Parties to the Convention, which are fixed at one percent of their contribution to the budget of the UNESCO; 2) from voluntary contributions from State Parties; 3) donations from institutions or private individuals or from promotional activities. The World Heritage Fund provides assistance on grounds of concrete provisions, as the international institute can't satisfy all requests for international financial assistance with regard to limited resources. The Convention of 1972 foresees arrangements for international assistance such as studies concerning artistic, scientific and technical problems, training of staff and specialists, supply of equipment and so on. The benefit of the Fund consists in the allocation of finances to the mechanisms of assistance.[12]

In 1997, the General Conference of the UNESCO adopted the Declaration on the Responsibilities of the Present Generations towards Future Generations, Art. 7 of which states in part that "the present generations have the responsibility to identify, protect and safeguard the tangible cultural heritage and to transmit this common heritage to future generations".[13] Customary norms lay in the principle that the preservation of cultural heritage constitutes part of the general interest of the international community as a whole. This principle has its theoretical foundation in the concept of erga omnes obligations formulated by the International Court of Justice in the well-known Barcelona Traction case. In this case, the Court distinguished between norms that create bilateral obligations of reciprocal character binding upon individual states *inter se* and norms that create international obligations *erga omnes* or obligations owing to all states in the public interest. The prohibition of acts of wilful and systematic destruction of cultural heritage of great importance for humanity also falls under the category of *erga omnes* obligations.[14] On the other hand, the "international community as a whole" is an abstraction. There is no legal entity or person by that name. As Sir Gerald Fitzmaurice put it in his trenchant dissenting opinion in the *Namibia case* in 1971, "the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression".[15]

According to the GA UN Res. 56\589 12 December 2001, the breach of an international obligation of the State constitutes an internationally wrongful act, which entails the international responsibility of that State. Under Art. 42 of the GA UN Res. 2001, a State as an injured state is entitled to invoke the responsibility of another state, if the obligation breached owes to a group of states including that state or the international community as a whole. This provision is a substantial step in the progressive development of international

[12] Musitelli: *op. cit.* 326.

[13] Declaration on the Responsibilities of the Present Generations towards Future Generations, 12 Nov. 1997: UNESCO DOC 29 C / Res 44.

[14] Francioni, F.–Lenzerini, F.: The Destruction of the Buddhas of Bamiyan and International Law. *European Journal of International Law*, 14 (2003) 619–651.

[15] *Cf.*, Judge Fitzmaurice (dissenting) in the *Namibia Opinion*, I.C.J. Reports, 1971. 12 at 241 (Para. 33).

law as Law of the International Community.[16] Thus, the prescription of collective measures in the common interest of the states is the first task.[17]

Art. 48 foresees the invocation of responsibility by a state other than an injured state: "any state other than an injured state is entitled to invoke the responsibility of another state, if the obligation breached owes to a group of states including that state and it is established for the protection of the collective interest of the group, or if the obligation breached owes to the international community as a whole."

By virtue of its non-synallagmatic nature and of the Convention's express textual references to a universal interest in the preservation of the cultural heritage in question, the obligation laid down in Art. 4 is an obligation owing to all State Parties to the Convention and it is established for the protection of a collective interest of the group" according to the phrasing of Art. 48 (1) (a) of the International La Commission's Articles on the Responsibility of States for Internationally Wrongful Acts. It is an erga omnes partes obligation, to use the traditional terminology.[18]

Having established this, it becomes apparent which subjects of international law are injured by such violation. International norms related to cultural heritage consider the destruction of any nation's cultural property as a loss and an injury to the collective heritage of humankind's civilization. The duty not to destroy cultural heritage, therefore, is merely a manifestation of an erga omnes obligation.

Few events have caused such a great shock and condemnation within the international community in recent years as the destruction of the great Buddhas of Bamiyan in 2001. Mullah Mohammed Omar issued the order for the destruction of all "statues", which were "un-Islamic". His main target was a 1,500-year-old statue of Buddha in the central Afghan province of Bamiyan. This 53-meter-high sculpture, carved into a cliff face, was the most famous landmark in Afghanistan and the most visible testimony to the country's Buddhist past before the arrival of Islam in the ninth century. It was one of the few historical treasures to have survived the country's turbulent and violent history.[19]

It is important to point out that while at the relevant time there were no Afghan properties inscribed on the World Heritage List, Art. 12 of the Convention states expressly that the fact that a property belonging to the cultural or natural heritage has not been included in either the World Heritage List or in the List of World Heritage in Danger shall in no way be construed to mean that it does not have an outstanding universal value for purposes other than those resulting from inclusion in these lists. This provision must be read in connection with Art. 4, which points out: the duty of ensuring the protection, conservation, presentation and transmission to future generations of the cultural heritage situated on the territory of each State Party to this Convention belongs primarily to that state.

The joint reading of these provisions makes it clear that membership in the World Heritage Convention obliges State Parties to conserve and protect their own cultural properties, even if these are not inscribed in the World Heritage List. As for the Bamiyan

[16] Лукашук И. И.: *Право международной ответственности* [The Law of Internation Responsibility]. Moszkva, 2004, 300.

[17] Лукашук И. И.: *Глобализация, государство и право XXI век* [Globalisation, State and Law of the 21st Century]. Moszkva, 2000.

[18] O'Keefe: *op. cit.* 190.

[19] Amin, S.–Ramesh, Th.: Vandalism in Afghanistan and No One to Stop It. *The International Herald Tribune*, Tuesday, March 6, 2001.

Buddhas, there is no doubt that they were included in the concept of cultural heritage relevant to the Convention. Regardless of whether they meet the standard of 'outstanding universal value' set forth in Art. 1, the Buddhas were certainly 'works of monumental sculpture' and of generally recognized historical importance.

Individual states, international organizations, such as the United Nations and the UNESCO, religious authorities including some of the most influential Islamic authorities, NGOs and people all over the world have called for international mobilization against such acts of barbarity and religious intolerance. First of all, such destruction gives rise to a breach of duties falling to Afghanistan under its membership to the 1972 World Heritage Convention. According to the Preamble of this Convention, "deterioration or disappearance of any item of cultural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world".

Having established this, it becomes apparent which subjects of international law are thus injured by such violation. International norms related to cultural heritage consider the destruction of any nation's cultural property as a loss and an injury to the collective heritage of humankind's civilization. The duty not to destroy cultural heritage, therefore, is a manifestation of an erga omnes obligation. In the Afghan case, the erga omnes character of the obligation is confirmed by the fact that there is no directly and materially injured third state, since the act of violence is committed on the territory and against a value belonging to the transgressor state as such. In other words, faced with a customary obligation limiting the power that the territorial state has over assets that belong to its sovereignty, such an obligation may exist only with regard to the international community as a whole, and thus, with regard to all states. It follows that every state, unilaterally or in the context of an international organization, could have adopted appropriate measures as a reaction to the wrongful act committed by the Taliban against the cultural heritage located on its territory.[20]

There is no doubt that the deliberate, wanton destruction of the great Buddhas is inconsistent with the letter and spirit of the 1972 Convention. The World Heritage Committee, in its aforementioned 1997 resolution, had considered the statues to be of 'inestimable value' and 'not only part of the heritage of Afghanistan, but part of the heritage of humankind'. Therefore, there is sufficient legal basis for the adoption of countermeasures, such as the suspension of technical assistance, withdrawal of financial aid and similar measures by states party to the World Heritage Convention and by the UNESCO.

The catalogue and inventory of national treasures are generally intended to limit such private rights in view of safeguarding the public interest in the conservation and transmission of the cultural heritage to future generations. In the case of the Buddhas of Bamiyan, the injury to the international public interest, which was to conserve these monuments and prevent their destruction, was all the more apparent because a) the destruction was motivated by invidious and discriminatory intent; b) it was systematic; and c) it was carried out in blatant defiance of appeals coming from the UNESCO, the UN, the ICOMOS and many individual states.

Thus, the General Conference of the UNESCO 17 October 2003 proclaimed the Declaration concerning the International Destruction of Cultural Heritage, under Part 6 of which "a State that intentionally destroys or intentionally fails to take appropriate measures

[20] Francioni–Lenzerini: *op. cit.* 20.

to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity, whether or not it is inscribed on a list maintained by UNESCO or another international organization, bears the responsibility for such destruction to the extent provided for by international law".

This analysis leads us to conclude that the wilful and discriminatory destruction of the great Buddhas of Bamiyan perpetrated by the Taliban in March 2001 constitutes a breach of international law forbidding the wanton destruction of cultural heritage. Additionally, such destruction is a specific breach of the commitment under the World Heritage Convention to ensure the protection of cultural heritage located on the territory of State Parties.

The law of state responsibility is in practice an unlikely and ill-adapted mechanism for compelling a state to preserve cultural heritage situated on its territory. Jurisdictional hurdles make judicial proceedings notoriously difficult. As for countermeasures, it is unresolved whether they are available at all to those states invoking responsibility solely under Art. 48 of the Articles. Even if it were so, assessing proportionality might pose a bar, given that simple reciprocity in the form of damage by another state to cultural heritage found on their respective territories would be preposterous and possibly impermissible. State responsibility can only be invoked, once it has breached the relevant international obligation and by then, in most cases of damage to or destruction of cultural heritage, it is too late. Thus, in the great majority of cases, diplomatic pressure would be the only practicable option. As such, given that states not party to the world heritage convention are permitted to intervene diplomatically, if another state fails to preserve elements of the world's cultural heritage situated on its territory, it scarcely matters in practice that they are not entitled to compel preservation through the invocation of state responsibility. In practice, since diplomatic coercion is the only realistic course of action, it is perhaps immaterial that states which are parties to the World Heritage Convention may in principle invoke another's responsibility for failing to preserve this heritage.[21]

The mechanisms put in place by the Convention resulted in a reinforcement, on a global and national level, of the politics of protection that until then had been very unequally developed and rarely coherent from one region to the next. The UNESCO has no power to police or to sanction. Its authority is purely moral. It exercises its authority in various ways: persuasion or political pressure on governments, the classification of a site of heritage in peril, the promise of technical and financial assistance. In this way, it can stop the projects whose realization would bring grave, possibly irreparable effects to registered goods now or in the future.[22] On the long list of avoided catastrophes, we should mention the prevention of the placement of a bauxite treatment factory near an archaeological site in Delphi, of the flooding of sites of rock art in the valley of Coa in Portugal by the construction of a dam, of the disfigurement of the plateau of Giza by the creation of a highway near the pyramids and of the immense saline construction on the site of El Vizcaino in Mexico or of cable car access for tourists in Machu Picchu. The UNESCO sometimes intervenes to support the action of small states in the face of powerful economic forces and sometimes to prevent governments from undertaking operations that could damage the integrity of protected

[21] O'Keefe: *op. cit.* 207.

[22] Musitelli: *op. cit.* 325.

monuments.[23] The UNESCO plays a decisive role in raising awareness of a collective responsibility with regard to world heritage.[24]

Considering the high rate of ratifications of the World Heritage Convention as well as the authoritative character of UNESCO recommendations, which in effect represent nearly the totality of the nations of the world that participate in the General Conference, it is not possible to deny that a general *opinio juris* exists in the international community on the binding character of principles prohibiting the deliberate destruction of cultural heritage of significant importance for humanity. This conclusion is reinforced by the fact that the protection of cultural heritage as a matter of public interest, and not only as part of private property rights, is recognized in most of the advanced domestic legal systems in the world.

The concept of identifying and conserving the values of heritage places has been at the heart of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, and indeed, of all international heritage conservation policies. However, the application of the Convention in different countries with diverse cultural roots has been a key issue. Experience shows that only via the understanding of the influence of culture on an understanding of nature, with a complete assessment of the interrelationship of the two in theory and in practice, can world heritage be protected in a meaningful and holistic way.[25]

It should be mentioned that at present the expression "World Heritage" no longer has the same meaning as it did in 1972. It may be queried whether the aim of universalism is still the goal, when economic and financial logic penetrates and remodels the cultural sphere and tends to impose a "global model" of heritage as an alternative.[26]

Since 1994, as a result of the adoption of "Global Strategy", the World Heritage List has become more open to heritage that had not been presented on the List or had been rejected by the Committee some years before: cultural landscapes, modern architecture, railways, waterways and different kinds of industrial heritage. These new categories finding entry into World Heritage "reflect a significant change in our concept of heritage": by finally questioning the idea inherited from ancient times and firmly rooted in European culture of what a masterpiece is, "the World Heritage Committee opened the way to a more balanced view of humanity's heritage".[27]

The doctrinal consistency of world heritage is compromised by the difficulty of clearly articulating the relationship between universality and cultural diversity.[28] For some years, the controversy has focused on the theme of "imbalance" or even "lack of representativity" of the List. At the same time, a double imbalance, geographic and thematic, persists. From the geographic point of view, in one region alone, that is, in Europe half of the cultural sites are inscribed on the List. The absence of inscribed African sites, whether archaeological or urban, devalues the List and even the concept of world heritage. The typology established produces a clear preponderance of three categories of cultural items that essentially pertain to European civilization: archaeological sites, historical cities, Christian monuments.

[23] *Ibid.* 325.

[24] *Ibid.* 327.

[25] Dailoo, Sh. I.–Pannekoek, F.: Nature and Culture: A New World Heritage Context. *International Journal of Cultural Property*, 15 (2008) 25–47.

[26] Musitelli: *op. cit.* 330.

[27] Pressouyre, L.: The Past Is Not Just Made of Stone. *UNESCO Courier,* December, 2000. 19.

[28] Musitelli: *op. cit.* 328.

A broad consensus existed concerning the proposition that all reform steps must be achieved without changing the Convention. Amending the Convention would be a long and risky option and would result in the existence, for a period of undefined length, of two parallel conventions, a source of permanent and serious problems as to its implementation.[29]

The Committee acknowledged that cultural landscapes represent the "combined works of nature and of man" as formulated under Art. 1 of the Convention. They are illustrative of the evolution of human society and settlement over time under the influence of physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.

Certain sites reflect specific techniques of land use that guarantee and sustain biological diversity. Others associated in the minds of the communities with powerful beliefs, artistic and traditional customs embody an exceptional spiritual relationship of people with nature. So as to reveal and sustain the great diversity of the interactions between humans and their environment, to protect living traditional cultures and preserve the traces of those which have disappeared, these sites called cultural landscapes have been inscribed on the World Heritage List. Cultural landscapes (cultivated terraces on lofty mountains, gardens, sacred places) testify to the creative genius, social development, imaginative and spiritual vitality of humanity. They are part of our collective identity.

To date, 55 properties have been included as cultural landscapes in the World Heritage List, such as: *Australia* – Uluru-Kata Tjuta National Park (1987), *Austria* – Hallstatt-Dachstein Salzkammergut Cultural Landscape (1997), Wachau Cultural Landscape (2000), *Hungary* – Hortobágy National Park – the Puszta (1999), Tokaj Wine Region Historic Cultural Landscape (2002), *Italy* – Sacri Monti of Piedmont and Lombardy (2003), Cilento and Vallo di Diano National Park with the Archaeological Sites of Paestum and Velia and the Certosa di Padula (1998), Costiera Amalfitana (1997), Portovenere, Cinque Terre and the Islands (Palmaria, Tino and Tinetto) (1997), Val d'Orcia (2004), *Philippines* – Rice Terraces of the Philippine Cordilleras (1995), *Poland* – Kalwaria Zebrzydowska: the Mannerist Architectural and Park Landscape Complex and Pilgrimage Park (1999), *Portugal* – Alto Douro Wine Region (2001), Cultural Landscape of Sintra (1995), Landscape of the Pico Island Vineyard Culture (2004), *South Africa* – Mapungubwe Cultural Landscape (2003), *Spain* – Aranjuez Cultural Landscape (2001), *Sweden* – Agricultural Landscape of Southern Öland (2000), *Togo* – Koutammakou, the Land of the Batammariba (2004), *United Kingdom of Great Britain and Northern Ireland* – Blaenavon Industrial Landscape (2000), Cornwall and West Devon Mining Landscape (2006), *Austria, Hungary* – Fertő/ Neusiedlersee Cultural Landscape (2001), *Germany, Poland* – Muskauer Park / Park Muzakowski 2004) and so on.

In 1992, the World Heritage Convention became the first international legal instrument to recognize and protect cultural landscapes. The Committee at its 16th session adopted guidelines concerning their inclusion in the World Heritage List.

Intentions to introduce reforms in the implementation of the Convention and to render its contemporary interpretation are almost as old as the Convention itself and have transformed the World Heritage Programme into a forum of permanent discussion, evaluation and intervention. An increasing number of State Parties and sites will not only contribute to an enhanced and more global approach in identifying and addressing problems,

[29] Strasser: *op. cit.* 233.

but will also turn the reform procedure into a more complex and time-consuming task. On the other hand, greater awareness of the specific problems of World Heritage and increasing demands for changes might accelerate the reform procedure. The elaboration and implementation of the globally important and recognized World Heritage program can continue to be successful only as long as the different entities concerned by the Convention, scilicet, the State Parties, the Committee, its Bureau and the advisory bodies cooperate closely by applying clear legal provisions, concepts and strategies.[30]

In particular, the concept of World Heritage lacks the support of an encompassing conception of culture that takes into account the facts of anthropology. This results in the crystallization of the artificial distinctions between natural and cultural goods, material remains and spiritual values, history and authenticity. The rigidity of these categories, which lack pertinence in most non-European civilizations, has privileged the classic architectural heritage–grand monuments and urban areas that are charged with history–to the detriment of forms of heritage that integrate intangible values, such as sacred sites, traditional habitats, religious or merchant routes.[31]

There are civilizations for which the notion of heritage is not the same as the notion of monuments. The efforts made by world heritage organs to integrate this dimension of the problem, which exposes representations and a symbolic system unfamiliar to Western paradigms, remain too timid to adsorb the contradiction between universality and diversity. Even if the trend has evolved favourably since 1972, there still remains resistance to surpass pure monuments and an elitist conception to avoid an approach that would integrate the heritage within its environment.[32]

At the same time, experiences at international level can influence national practices. In this variegated landscape, it becomes crucial to verify whether there is a conflict or coherence between different treaty regimes protecting cultural heritage on the one hand and investors' rights on the other hand.[33]

The scientific relevance of representativity in relation to heritage can always be contested. The reality of imbalance and the ethnocentric grievance it encourages has given rise in recent years to the supposition of north-south tensions. This evolution would be very harmful if, in the name of a "politically correct" concept of world heritage, each state or each cultural community believed in its right to claim a quota of sites in the enforcement of a presumed right of the representativity of its heritage or even its powers of negotiation. If it were not based on scientific premises, the representativity of World Heritage would risk being reduced to questionable political arithmetic.[34]

The corpus of norms largely elaborated by the UNESCO itself does not appear to need radical renewal. What is needed is its radical application. In particular, basic guidelines concerning taking stock of the cultural heritage, training qualified personnel and the holistic management of heritage resources are still not adequately respected.

It will be necessary to integrate research from social sciences and humanities, in particular from the area of history by bringing universities, research institutes and religious authorities into the picture and into constructive dialogue with classical studies departments

[30] Strasser: *op. cit.* 255.

[31] Musitelli: *op. cit.* 329.

[32] *Ibid.* 330.

[33] Vadi, Valentina Sara: Cultural Heritage and International Investment Law: A Stormy Relationship. *International Journal of Cultural Property*, Vol. 15. 1–24.

[34] Musitelli: *op. cit.* 330.

and other 'guardian' institutions as well as with the media and educational authorities. Each society will need to assess the nature and precariousness of its cultural as well as natural heritage in its own terms and determine the uses it wishes to make of both and the links it might build between them. Within nations, therefore, it is particularly important that this sort of heritage is recognised by and for all groups (women, children, cultural minorities including Indigenous Peoples). Equally, the means to do this work needs to be specified not just by the central organs of the state, but also, perhaps above all by municipalities and regions. The method employed should draw on current experience and new knowledge not just to conserve, but also to establish meaningful connections between past and present, East and West, North and South, tangible and intangible values, culture and nature.

Summary

The presentation is devoted to legal issues related to the conception of World Cultural and Natural Heritage and the tendency of its development within the frameworks of international law. We've provided the analysis of international legal relations among the Parties to the Convention Regarding the Protection of the World Cultural and Natural Heritage of 1972, the Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage and the Fund for the Protection of the World Cultural and Natural Heritage regarding protection, conservation, presentation, and transmission to future generations of cultural and natural objects included in the World Heritage List. The items protected by the Convention are those pertaining to the cultural or natural heritage, which are of outstanding universal value from the point of view of history, art, science or aesthetics.

The Convention lays down two basic principles, which are at the same time the basis of the World Heritage Conception. First, each State Party to the Convention recognizes that the duty of ensuring conservation of the elements of World Heritage situated on its territory lies primarily with it and undertakes to act to this end to the utmost of its own resources. World Heritage sites belong to all the peoples of the world, irrespective of the territory on which they are located. Secondly, all the Contracting States recognize that it is the duty of the international community as a whole to cooperate in ensuring the conservation of a heritage, which is of universal character.

At the moment, the expression "World Heritage" no longer has the same meaning as it did back in 1972 because of globalization and commercialization. We argue that the conceptual focus has shifted alongside interrelated and complementary directions: from monuments to people; from objects to functions; from preservation per se to purposeful preservation, sustainable use and development. Reappearing functional heritage is discussed as opposed to the objectified heritage of the past by referring to both practical and theoretical heritage domains.

If today's collective memory is to be shared more widely and more creatively to form that of future generations, broader participation appears essential. But this will be possible only if people themselves have a better understanding of their heritage. Hence the paramount need for inventories of heritage which are not only more complete, but also more meaningful. As it was pointed out by the World Heritage Committee, the knowledge basis for the elaboration of integrated conservation policy remains scarce in many countries. Governments need to examine more comprehensively what society defines as heritage and raise awareness of its value.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 1, pp. 67–78 (2010)
DOI: 10.1556/AJur.51.2010.1.4

BALÁZS FEKETE*

Practice Elements in the Hungarian Legal Education System**

Abstract. The main aim of this paper is to analyze certain features of the Hungarian legal education system with special regard to the role of practice. In its first parts it highlights those institutional and sociological dynamics that touched upon legal education during the last decades and briefly introduce the reader into the legal background of legal education. Concerning the role of practice the paper examines the role of seminary education compared to the general system of "lectures" as well as the recent constellation of clinical legal education in Hungary in detail. As conclusion, the paper argues that the growth of practice-oriented ways of teaching should lead toward the general acceptance of an educational conception in which theory and practice can work in harmony.

Keywords: legal education, clinical legal education, practice in legal education, skill training

I. General features of the Hungarian legal education

1. Historical introduction and some general information

1. A key feature of the Hungarian legal educational system is its strong historical traditions. The first law school of the country was founded in 1667 as the third faculty of the Jesuit University of Nagyszombat, in the northern part of medieval Hungary. The town of Nagyszombat was also the centre of the Hungarian counter-reformation movement at this time. This university was established by Péter Pázmány, the archbishop of Esztergom in 1635 and it already had two faculties: humanities and theology. Domestic customary law, canon law and Roman law were the main forms taught at the law faculty of Nagyszombat, in harmony with the general trends of legal education in the 17th century.[1] Hungarian legal education therefore has an almost 350 year long history.

Today eight faculties of law exist in a country with more than 10 million inhabitants with half of them being established following the political changes of 1989. The regional division of Hungarian law schools is relatively balanced as one can find at least one law

* Junior research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30, Hungary, Lecturer, Pázmány Péter Catholic University, Faculty of Law and Political Sciences, H-1088, Szentkirályi u. 28, Budapest, Hungary.
E-mail: fbazsa@jak.ppke.hu

** Hungarian national report submitted to the 18th International Congress on Comparative Law, Section I D. Formation juridique / Legal education–Le rôle de la pratique dans la formation des juristes / The Role of Practice in Legal Education.

[1] For a deeper and more detailed discussion of the early centuries of Hungarian legal education, with special regard to the role of comparative law see Péteri, Z.: Teaching of Comparative Law and Comparative Law Teaching. *Acta Juridica Hungarica* 43 (2002) 255–257; for a general introduction into the history of Hungarian legal education see Nagy Zs.: A magyar jogi oktatás történeti vázlata [A Historical Draft on the Hungarian Legal Education]. *Jogelméleti Szemle* 2003/3. http://jesz.ajk.elte.hu/nagy15.html; for the history of the oldest faculty of law see Horváth, P.: 300 Jahre Staats- und Rechtswissentschaftliche Fakultät der Budapester Eötvös-Loránd-Universität. *Annales Universitatis Scientiarum Budapestinensis De Rolando Eötvös Nominatae Sectio Iuridica* 8 (1967) 3–26.

faculty in each regional centre except Central Transdanubia.[2] There are three faculties of law in Budapest, the capital city of the country, and this fact appropriately indicates that the heart of Hungarian legal education can be found here.

It is worth mentioning at this point that the institutional dynamics of the Hungarian legal education system went through a "golden age" or "blooming period" from the second half of the 1990's onwards. Four faculties of law was established between 1995 and 2002,[3] doubling the number when compared to the number of faculties that existed in the socialist era. An additional point of interest is that, of the four law faculties established during the "post-socialist or transitory" period, two of them were directly founded by two Hungarian Christian churches, the Catholic and the Protestant.[4] Thus both traditional universities and churches anticipated many opportunities in the foundation and management of law schools in the period following the political changes.

2. The number of students participating in legal education significantly increased in parallel to the establishment of new faculties. One can see from the data that in the academic year 1980/1981 law faculties had 4629 students and 4738 in the academic year 1990/1991.[5] Therefore less than 5000 law students were studying in some of the four law schools yearly during the last decade of socialism. However, in the next decade this number almost tripled as 15776 law students participated in various forms of legal education in the academic year of 1999/2000 increasing to 17935 in the academic year of 2002/2003.[6] Looking at the number of graduating law students one can point to a similar trend, 899 students graduated in 1980, 741 in 1990, 1881 in 2000 and 3190 in 2003.[7] The numbers of enrolling and graduating law students have remained more or less constant in the following years. One can conclude therefore from this data that legal education reflects a more broadened and democratic picture than it did during the socialist period.

With reference to the costs of legal education it should firstly be mentioned that in the Hungarian higher education system students can study for free or on a tuition fee basis. A certain number of law students are assisted by the government in the form of a direct financial support every year. However, law schools, as in all the other faculties, are also

[2] Faculties per regions, their seats, names and dates of foundation: Western Transdanubia: Győr, Deák Ferenc Faculty of Law and Political Sciences, [(1995) 2002]; Southern Transdanubia: Pécs, Faculty of Political and Legal Sciences of the University of Pécs (1923); Central Hungary: Budapest, Eötvös Loránd University Faculty of Law and Political Sciences (1667), Pázmány Péter Catholic University Faculty of Law and Political Sciences (1995), Károli Gáspár University Faculty of Law (1998); Southern Great Plain: Szeged, University of Szeged Faculty of Law (1872); Northern Great Plain: Debrecen, University of Debrecen Faculty of Law (1996); Northern Hungary: Miskolc, University of Miskolc Faculty of Law (1981).

[3] Deák Ferenc Faculty of Law and Political Sciences [(1995) 2002]; Pázmány Péter Catholic University Faculty of Law and Political Sciences (1995); University of Debrecen Faculty of Law (1996); Károli Gáspár University Faculty of Law (1998).

[4] Pázmány Péter Catholic University Faculty of Law and Political Sciences (1995); Károli Gáspár University Faculty of Law (1998).

[5] Szabó M.: A jogászképzés társadalmi funkciójáról – húsz év múlva [On the Social Function of Legal Education–Twenty Years Following]. In: Szabadfalvi J. (ed.): *Amablissimus–Loss Sándor emlékkönyv* [Amablissimus–A Volume Dedicated to Sándor Loss]. Debrecen, 2005. 318.

[6] Kissné Pap M.: A jogi felsőoktatás néhány jellemzője [Some Features of the Legal Education]. In: Takács P. (ed.): *A jogászképzés múltja, jelene és jövője* [The Past, Present and Future of Legal Education]. Budapest, 2003. 327–328.

[7] Szabó: *op. cit.* 325.

allowed to accept students on a tuition fee-paying basis. The tuition fees for a semester range between 130 000–200 000 HUF (715–1060 USD) this year.[8] The ten semester long legal education therefore costs about 7150–10 600 USD (based on today's prices) in Hungary if a student can only enroll in a law school on a fee-paying basis.

In the recent past there was a special written entrance exam consisting of history and Hungarian literature for law students, but the system has changed following the introduction of the so-called Bologna model[9] in Hungary. Nowadays prospective students are accepted on the basis of the results of their high school graduation. The maximum result of high school graduation is 480 points including all the possible bonuses, and the acceptance points this year were between 426–405 for normal places and between 400–172 for the fee-paying places. As a result of this, students with lower results from high school could also be accepted to a law school if they are or their families are able to pay the tuition fee.

3. It is also a characteristic feature of the Hungarian legal education that law school graduates cannot work as an independent practicing attorney or lawyer immediately after graduation. Having worked for three years in a legal position under the supervision of a senior lawyer–mainly an attorney, a judge, a prosecutor or other persons having responsibility in legal work–the trainee or assistant has the right to register for a special examination called the *szakvizsga*. The underlying idea of this examination is fairly similar to that of the examination for entry into the bar in common law countries, the sole exception is that it is open to candidates coming from other spheres of legal life and it is administered and coordinated by the Ministry of Justice, not by the Bar Associations.

This examination consists of three modules: (i) civil law, family law, economic law and civil procedure; (ii) criminal law, criminal procedure and penitentiary law; iii.) labour law, social security law, constitutional law, administrative law, and the law of the European Community.[10] A candidate has to choose one subject from which he or she intends to make both a written and an oral exam, while from the other modules the only requirement is a successful exam before a committee composed of professionals. These exams are explicitly to measure the practice skills of the candidates since they have to prepare a submission in the context of a hypothetical case in the written part,[11] and the subsequent oral exams are also about the discussion of a fictitious case with the members of the committee.[12]

2. The legal background

4. There is no special act regulating the requirements for the licensing of law schools in Hungary, but the Higher Education Act of 2005 provides a general framework for their functioning. This act, as the basis of the entire system of Hungarian higher education,

[8] It must be mentioned that the average gross monthly income was around 199 000 HUF (1050 USD) in 2008. Source: Hungarian Central Statistical Office. http://portal.ksh.hu/pls/ksh/docs/hun/xstadat/xstadat_eves/tabl2_01_25_01i.html

[9] The main aim of the so-called Bologna Process is to create the European Higher Education Area by harmonizing academic degrees and quality assurance standards. It began in 1999 with signing of the Bologna Declaration by Ministers of Education of 29 European countries. Cf.: http://www.ond.vlaanderen.be/hogeronderwijs/bologna/

[10] Decree of the Ministry of Justice No. 5/1991 (IV. 4) § 5 (1).

[11] *Ibid.* § 7 (1).

[12] *Ibid.* § 9 (2).

clarifies general questions such as the establishment of higher education institutions,[13] the principles of their functioning,[14] the structure and organs of higher education institutions[15] and governmental competences in higher education.[16] Moreover, it provides a detailed regulation on the position of students including their rights and obligations,[17] it defines the main lines of the exam and grading system,[18] and also regulates both the right of appeal against university or faculty decisions[19] and the organization of student bodies and their representation.[20] All in all, this act comprehensively rules the sphere of higher education and therefore sets forth a stable legal framework for it; so it could be regarded as the "constitution" of Hungarian higher education.

The Act set up the so-called Hungarian Accreditation Committee to create a regulatory body for the management of the whole system of higher education. This Committee is an independent body and its main aim is the assessment and monitoring of the quality of the entire system of higher education. In doing so, the Accreditation Committee delivers opinions on the different bachelor, master and doctoral formations prior to their governmental recognition as well as regularly–every eight years–monitoring the functioning of every higher education institution from the aspect of the fulfillment of all necessary, mainly personal, physical and financial preconditions.[21]

The Accreditation Committee has a very important position regarding the establishment of faculties since the act explicitly sets forth that prior to creating a new faculty in the framework of an existing higher education institution, a preliminary opinion shall be asked from the Committee.[22] Therefore, from the aspect of accrediting a law faculty the decisive point is the preliminary opinion delivered by the Hungarian Accreditation Committee since according to the act a new faculty can be only established if the Committee supports it in its opinion.[23] In the case of a negative or non-supportive opinion the given higher education institution can appeal to the so-called Registration Centre[24] and then to the Minister of Education who may depart from the opinion of the Committee.[25]

In the opinion of the Accreditation Committee the fulfillment of the so-called minimal conditions–as they are outlined in Appendix 5 of Governmental Decree No. 79/2006 (IV. 5) on the realization of certain articles of the Act of Higher Education–could play a preeminent role. According to this decree the most important conditions for the establishment of a new faculty are the following: firstly, the faculty shall at a minimum incorporate two different levels of formation (bachelor, master or doctoral), secondly,

[13] Act CXXXIX of 2005 on the Higher Education § 12–18.
[14] *Ibid.* § 19–22.
[15] *Ibid.* § 23–30.
[16] *Ibid.* § 99–114.
[17] *Ibid.* § 46–51.
[18] *Ibid.* § 57–61.
[19] *Ibid.* § 73–75.
[20] *Ibid.* § 77–79.
[21] *Ibid.* § 109 (1) g and § 110 (1).
[22] *Ibid.* § 30 (6).
[23] *Ibid.* § 32 (10).
[24] An agency set up by the Act in order to register higher education institutions.
[25] *Ibid.* § 106 (2).

a minimum of two hundred students must be enrolled to these formations in the year prior to the submission of the registration claim and lastly, the full tenure of forty teachers is also required.[26] The first condition in the case of a law school practically means that the future faculty of law has to offer both graduate legal education and doctoral formation–due to the fact there are no LL.B. or LL.M degrees in Hungary but only a five year long, and therefore undivided, lawyer degree.

5. One cannot find a standard course of study at law faculties since the general structure of legal education was regulated in relatively broad terms by the legislator. Law students have ten semesters for their studies and they must collect 300 credits during these five years. It is required to prepare and defend a master thesis at the end of the studies and the passing of four so-called state exams[27] are also mandatory. In relation to the remaining nine semesters the relevant decree of the Ministry of Education[28] only outlines the main lines for the curricula of law schools by diving them into three major parts. A legal curriculum must contain (i) basic studies[29] (80–110 credits), (ii) professional studies[30] (115–130 credits) and (iii) elective studies[31] (30–50 credits). Besides these guiding principles and credit numbers, law schools are almost absolutely free to compose their curriculum, the only thing that they must respect is the earlier general structure.

This decree also defines that law students must fulfill an obligatory period of apprenticeship of 6–12 weeks in order to facilitate the formation of their practical skills. This period could be spent in the judiciary, public administration or in other fields as is determined by the curriculum of the given law school. Law faculties therefore have broad opportunities to offer externships to their students. It should be stated that this is the sole point where the legislator mentions practice in the most general sense, in the other parts of the decree one cannot find any reference to it. Hence, one may conclude that the practical aspects of legal education were not the primary focus of the legislator when it created its basic principles.

On the basis of this general introduction we can acknowledge that the current regime of governmental regulations barely deals with the role of practice in legal education, the sole exception is the mentioning of the obligatory period of apprenticeship as a requirement. The introduction of practice elements into the curriculum remains the responsibility of law schools, and therefore their diffusion depends mainly on the policies of a given faculty.

[26] Governmental Decree No. 79/2006 (IV. 5) on the realization of certain articles of the Act on the Higher Education, Appendix 5.

[27] The first three of these state exams are same at all the faculties: private law, public law and criminal law, but the last one could differ depending on the given faculty since it could be international and European law or legal theory.

[28] Decree of the Ministry of Education No. 15/2006 (IV. 3) on the requirements of bachelor and master degrees.

[29] For instance: general social science, professional language, latin, basic jurisprudence, legal theory, legal sociology, legal history classes.

[30] For instance: private law, constitutional law, administrative law, criminal law, international law, European law classes.

[31] For instance: in-depth classes related a given legal institution, ethical studies and comparative law classes.

II. Practice elements in the Hungarian legal education

6. The guidelines kindly provided by the general reporter suggest that practice elements could be conceived of in a relatively broad sense. As a first step it is worthwhile separating two fundamentally different dimensions: the aforementioned period of compulsory apprenticeship which is dedicated to gaining experience of professional life and the different ways and methods of offering "practical" education in the curriculum of a given faculty. This paper will firstly scrutinize certain characteristics of this externship period, then it will turn to the various forms of "in-house" practical training, that is to say to those courses in which some practice elements are included.

At the outset, it must be mentioned that law schools are absolutely free in the determination of the detailed rules of this externship period. In these regulations law schools generally appoint a teacher or a professor–practically called a coordinator–who is responsible for the administration and coordination of the whole program. The crucial question of this period is the place of the apprenticeship i.e. which institutions are willing to accept and integrate law students for 30 workdays or six weeks into their life. It is obvious that a prestigious international law firm can offer very different experience than, for instance, an administrative agency in a small town. Many faculties handle this problem with the help of different framework cooperation agreements concluded among the given law school and various administrative bodies, courts and other legal institutions. Of course, students can choose institutions as place of externship other than these official partners, but they must organize it on their own in this instance. Normally law schools are flexible in accepting various propositions coming from their students. The only thing that students must keep in mind is that all the necessary administrative requirements–an agreement to accept the student, a report about his or her work, signed by a responsible person–must be fulfilled.

Accordingly, law students can fulfill this obligatory period by participating in the work of various institutions, e.g. courts, administrative agencies and national or international law firms. An example of this institutional agreement–the Faculty of Political and Legal Sciences of the University of Pécs concluded cooperation framework agreements with the County Court of Pest, that of Baranya, the Parliamentary Commissioners' Office and the regional inspectorate for the environment, nature and water.[32] Thus the law students of this faculty can choose from a relatively broad "menu", since the various offers of the law school comprise of judiciary, public administration as well as legal assistance experience, and they can even look for other options independently.

7. The traditional setting for teaching certain dimensions of legal practice are the so-called seminars or seminary classes in the general curriculum. In order to understand the peculiarities of the Hungarian system, we must firstly look at the two ways of law school teaching. Firstly, law schools offer to all students who fulfil each necessary precondition, general courses which are normally managed by a professor or professors. These courses are accessible to all students and they are basically comprehensive lectures provided by a professor. They generally work as a one-way channel, since the main emphasis lies on the lecture of the professor and does not include the active participation of students. That is why these classes are usually referred to as "lectures" in the informal language of both students and professors.

[32] Announcement of Dr. Cs. Herger, coordinator of the externship program (07. 03. 08). http://www.law.pte.hu/tartalom/110

However, to provide a different kind or quality of education than that of passive listening and making notes, law schools also offer courses dedicated to small groups of students, maximum 20 or 25 students depending on the institution, and these kind of classes are generally called seminars. These seminars are always linked to the "lectures" and their main aim is to interactively discuss the subject in a detailed manner. It is also worthwhile mentioning that these seminars are often taught by younger teachers, mainly assistants or lecturers,[33] which makes possible the creation of a more informal, open and cooperative atmosphere compared to the general features of "lectures". For instance, at the Pázmány Péter Catholic University Faculty of Law and Political Sciences the general course or the "lecture" entitled Private Law I.–this class is about the theory, history and general principles of private law as well as personal law–seminars of Private Law I. are always attached. Finally, it should also be mentioned that the attendance requirements of seminars are always more strict than those of the "lectures" and if someone has already chosen a general class it might also be compulsory to choose a seminar from the same subject at many faculties.

In this regard seminars could be the ideal place for teaching practical legal knowledge due to the small number of students and their specialized nature. Ideally, these classes are about the interactive discussion of case-law related to the main subject.[34] During these in-depth case analyses, students could be familiarized with the reasoning of courts as well as the general legal arguments. However, it must also be borne in mind that the success of the course is always dependent on the capacities of the given teacher; therefore it is impossible to generally assess this seminary education system. With a good and well-prepared teacher these classes can substantially enrich the practical, case-law oriented knowledge of the students.

However, one of the manifest weaknesses of seminars is the fact that these classes are normally devoted to the national case-law and thus they usually miss the comparative approach. As a result, students cannot gain a broader view on a given legal problem by definition, which would help them to recognize that the general principles behind the various legal solutions could often be almost the same or very similar.[35] Additionally, these classes are exclusively aimed to bring students closer to the case-law, thus they do not intend to improve the practical skills that they will require in their future professional life, e.g. writing memorials or pleading before the courts. Therefore, one can generalise that the seminary teaching method can overcome the manifest disadvantages of the "lecture" method as they include detailed case-law analyses and have a strong interactive element. But this way of teaching has usually nothing to do with the improvement of the practical skills.

8. Clinical legal education is a relatively new element in the curricula of Hungarian faculties of law. The first of these courses started in 1996 at the Eötvös Loránd University Faculty of Law and Political Sciences,[36] and other legal clinics have been founded in Győr,

[33] A certain part of those who teach seminary courses even could come from the "practice", as for instance attorneys, prosecutors or even judges depending on the policy of the given law school.

[34] For a detailed analysis of the advantages and disadvantages of the so-called case-method see: Jakab, A.: Dilemmas of Legal Education–A Comparative Overview. *Journal of Legal Education* 2007/2, 253–265.

[35] Cf.: Schlesinger, R. B.: The Common Core of Legal Systems. In: Zweigert, K.–Puttfarken, H. J.: *Rechtsvergleichung*. Darmstadt, 1978. 249–269.

[36] http://jogklinika.cjb.hu

Szeged, Debrecen and Miskolc. More than half of all law schools now offer some kind of clinical legal education to law students, and it can be regarded as a considerable achievement in the field of practical education.

As an illustration of the work and effectiveness of the clinical legal education in Hungary it is worthwhile examining two of them in detail. The most comprehensive practical legal education is offered by the legal clinics hosted by the Eötvös Loránd University Faculty of Law and Political Sciences. These legal clinics are administered by an independent foundation – the Jogklinka (legal clinic) and Street Law Foundation–and their financial background has been provided by external donors such as Open Society Foundation, Soros Foundation and Ford Foundation since their establishment.[37] It is very important to emphasize that due to this financial independence the legal clinics provided all of their services–from education to legal assistance–to the law faculty free of charge.

According to the Foundation, legal clinics have various but closely interrelated goals. They are aimed at providing legal services for socially disadvantaged people, to improve the quality of legal education by organizing practice-oriented and skill-training focused courses and to prepare comparative and critical analyses about the normal functioning of the legal system.[38] In addition to these major aims the founders also defined some supplementary goals: that these courses are dedicated to enhancing the social sensitivity of students and their social responsibility; that they also assist in the deepening of the values of democracy and those of the rule of law; and that they can help in the development of professional skills; moreover that these classes are also able to support equality before law by providing free legal assistance for those who need it.[39] The improvements of the practical thinking and skills of law students as well as the promotion of values such as social responsibility and equality before law are viewed equally as the key focus of this program.

Currently six different legal clinics operate at the Eötvös Loránd University Faculty of Law and Political Sciences, and each of them is an elective course of at least two or even more semesters. Each legal clinic is focused on a special segment of legal affairs and their programs could be divided into three consecutive parts: improvement of the theoretical knowledge, specific skill training such as conducting interviews with clients, fact investigation etc., and learning through the general practice. It must also be mentioned that the teaching team of these legal clinics is always a special composition of university teachers as well as practicing professionals. Depending on the area of the various legal clinics one can find attorneys, judges, or other professionals e.g. psychologists or aftercare experts within the teachers excluding professors or assistant professors. Obviously students would profit a lot from the personal meetings and supervision of such experts in the field of practical thinking and skills.

The eldest is the Criminal Law legal clinic, which offers free legal assistance to disadvantaged and young people. According to the data this legal clinic deals with approximately 60 cases yearly, the majority of which are related to young and roma people. The second legal clinic is called the Nonprofit Law legal clinic dealing mainly with cases related to civil organizations such as establishment, tax problems or legal assistance. The third legal clinic program is also related to criminal law since it is focused on the aftercare of former prisoners. In the framework of this Aftercare Law legal clinic students become

[37] http://www.jogklinika.cjb.hu/alapitvanyunkrol.html

[38] A jogklinikák bemutatása [Introduction to the various legal clinics]. http://www.jogklinika.cjb.hu/jogklinikak.html

[39] *Ibid.*

familiar with the difficulties of reintegration as well as the socio-cultural effects of imprisonment. The fourth legal clinic in this web of clinical legal education is the Labour Law legal clinic, its work is focused on a very special target group since this legal clinic helps people with epilepsy to integrate into the labour market. In this special assistance activity the legal clinic cooperates with a foundation (Foundation Umbrella) specializing in helping and assisting people with epilepsy. The "youngest" legal clinic, which was established in 2003, is the Rights of the Child legal clinic. As is obvious from its name, the main goal of this legal clinic is assistance in the protection of children, with special regard to their rights as they are expressed in Hungarian law. The last legal clinic could be regarded as the most peculiar one since its aim is teaching law in high schools and in various penitentiary institutions. Its name is the Street Law legal clinic and it offers a comprehensive education about the different methods of law teaching in secondary education.[40]

As one can see this "web" of clinical legal education could be regarded as quite complex and sophisticated since it includes six specialized clinics and many really interesting issues from the teaching of law to labour law assistance. The varied specialization and appeal of this form of education as well as the choice of interesting and hot topics could be one of the main reasons that about 100 students enrolled to these legal clinics every year.[41]

Compared to this system of legal clinics the Freedom of Information legal clinic–also included in the curriculum of the Eötvös Loránd University Faculty of Law and Political Sciences–might be regarded as a slightly more modest but also very interesting enterprise. This legal clinic is one of the newest legal clinics in the country since it was started in the first semester of 2008 as a two-semester long elective course. As one can clearly see from its name its aim is to familiarize students with the practical problems of the law with special regard to the access of public data and information.[42] There is a broad institutional background behind this legal clinic since six civil associations dealing with a wide-range of affairs related to public data and information–Open Society Justice Initiative, Association for Public Data, Reflex Environmental Protection Association, Enviromental Management and Law Association, Eötvös Károly Institute and Hungarian civil Liberties Union–participate in its program mainly by offering internships for the enrolled students.

One should state that the establishment of this system of legal clinics has only successfully begun in the last years. This process is properly illustrated by the fact that an Administrative and Constitutional Law legal clinic related to the University of Szeged Faculty of Law as well as an Anti-discrimination legal clinic hosted by both the University of Miskolc Faculty of Law and Eötvös Loránd University Faculty of Law and Political Sciences also started to work in 2007 and in 2009. This fast proliferation of legal clinics in various law schools proves that there is a constant demand for the enhancement of the practical side of legal education, and the Hungarian students are open to this qualitatively new and complex form of legal education. It is highly probable that newer legal clinics will be created in the future, if the dynamics of this process remain the same.

9. In addition to the seminary education and the work of legal clinics there are some other opportunities, which could also include certain practical elements. First of all, the so-

40 For the details see *ibid.*

41 *Ibid.*

42 http://tasz.hu/jogklinika

called pleading competitions[43] should be mentioned. Both, law schools and governmental agencies organize competitions e.g. the Criminal Law Pleading Competition of University of Miskolc Faculty of Law could be regarded as a tradition, since it has been organized for many years.[44] But one can find many other pleading competitions, too e.g. the pleading competitions organized by various Bar Associations,[45] or the national Labour Law pleading competition. Additionally, the University of Miskolc has also been organizing a European law moot court competition in Hungarian since 2004, which might be regarded as a preparatory step toward the international moot court competitions. These competitions offer wide-ranging challenges for law students by which they can improve their speech making, public speaking and performance skills.

III. Concluding thoughts

10. Primarily one can easily recognize that the amount of practical education has considerably increased in the Hungarian legal education system during the last few years. Law schools are more and more willing to provide various courses focused on certain segments of practice. The most comprehensive practical education is undoubtedly granted by the numerous legal clinics which exist to provide a detailed knowledge based on theory, skills and supervised but independent partice. Compared to the clinical legal education method the system of seminars has somehow slightly more modest goals, concentrating on the presentation of the relevant national, or in case of International Law or "European Law", international case-law. By reading and discussing judicial decisions many skills of law students could be improved, for example reading and interpreting cases, distinguishing between legally relevant and irrelevant facts, understanding and following legal reasoning etc.. In addition, the mandatory externship period is also able to familiarize students with the everyday work of a given law firm or governmental agency so that they can broaden their view on real functioning law.

However, this considerable expansion of practice in the legal education does need refining. Regarding the legal clinics, it must be emphasized that only half of the law schools use this innovative form of legal education and they are only accessible to a limited number of students, the others have not established legal clinics so far. It should be incumbent upon the other faculties to start these clinics in their curricula since the lack of clinical legal education could be a reason for serious student deficiencies. This lack may deprive a considerable number of students of the complex practical experience provided by this form of education, and it could even affect their chances in the labour market. The lack of legal clinics could also be a problem for the faculties themselves due to the very severe competition within the legal educational system. It is obvious that the work of legal clinics can offer a more advantageous position to a faculty since it can then argue that it provides a

[43] It is worthwhile knowing that these pleading or orator competitions differ from the so-called moot-court competitions, as for instance, the Philip c. Jessup International Law Moot Court Competition, in certain points. In Hungary the pleading competitions are focused on individual pleading in front of a bench, that is to say, on the individual eloquence and skills in public speaking. Participants are required neither to form teams, nor prepare and submit memorials, they only have to plead before a bench consisting of professionals.

[44] http://www.mertnet.net/cikkek/2008/aktualis/perbeszedverseny-2008

[45] For instance by the Bar Association of the County of Bács-Kiskun, cf. http://www.bacs-kiskunmegyeiugyvedikamara.hu/index.php?option=com_content&task=view&id=63&Itemid=1

much more comprehensive education to students than the others, and it could even be the decisive point when someone chooses a law school.

Another problem regarding the practical education could be the fact that law schools, even those who provide clinical legal education, do not put serious emphasis on skill-training in a broad sense. Seminars concentrate on the discussion of case-law, the mandatory externship period and legal clinics intend to introduce students to the everyday practice of legal work, but nothing–or almost nothing–is devoted to improving the general skills of students. Take for example rhetoric, which should be regarded as one of the most important skills of a lawyer, due to the fact that argument has an eminent role in legal culture,[46] is only included in the curriculum of two law schools as an elective course.[47] Other faculties do not teach it at all. Professional ethics or ethics has a slightly broader role, but these courses are only introductory classes at the beginning of the legal education and they are usually parts of more comprehensive philosophy courses.[48] Needless to say it is important for a lawyer to have a solid ethical education since his or her profession has to make difficult and complex decisions. Otherwise, studying professional or at least general ethics is important from the point of view of empathy since it facilitates the understanding of human motives and decisions. On the whole, the practical side of Hungarian legal education should be completed with such subjects, which can enable law students to master these basic skills of their future profession that are not explicitly related to case-law or everyday legal work but extremely important in the ethos of lawyers such as logical thinking, public speaking or human understanding.[49]

11. As an epilogue, the points outlined above are re-enforced by an empirical survey taken among the students of the University of Szeged Faculty of Law in 2002.[50] This research concentrated on the factors influencing legal education and its conclusions revealed certain interesting findings on the role of practice in legal education from the student's perspective. In this study the researchers asked fifty randomly chosen students from the third year to list and explain such things with which they were dissatisfied, concerning their education. This survey did not apply any questionnaire therefore enabling the students to

[46] James Boyd White argues that the work of the rhetorician and the lawyer is very close to each other in many senses. Moreover, law or legal practice could also be conceived of a special branch of rhetoric. Thus rhetoric should play a primordial role in legal education with special regard to skill-training. Cf. White, J. B.: Rhetoric and Law. The Arts of Cultural and Communal Life. In: James, B. W.: *Heracles's Bow. Essays on the Rhetoric and Poetics of Law*. Wisconsin, 1985. 32–35.

[47] At the University of Szeged Faculty of Law and Károli Gáspár University Faculty of Law.

[48] The volume of János Zlinszky–professor emeritus of Roman Law at the Pázmány Péter Catholic University Faculty of Law and Political Sciences–could be regarded as a symbol of that approach which treats legal ethics as a separate subject. Cf. Zlinszky J.: *Keresztény erkölcs és jogászi etika* [Christian Morals and Legal Ethics]. Budapest, 1998.

[49] There is one very innovative initiative in this field. Miklós Szabó–Dean of University of Miskolc Faculty of Law and Head of Legal Theory and Sociology of Law Department–published a course-book entitled *Trivium* at the beginning of 2000. This book concentrates on the improvement of such elementary skills which are related to language in the broadest sense, such as grammar, logic and rhetoric. Cf. Szabó M.: *Trivium. Grammatika, logika, retorika joghallgatók számára* [Trivium. Grammar, Logic and Rhetoric for Law Students]. Miskolc, 2001.

[50] Nagy Zs.–Tóth J. Z.: A jogi oktatás helyzete (Felmérés a jogi oktatást befolyásoló tényezőkről) [The Situation of Legal Education (A Survey on those Factors which can Influence Legal Education)]. *Jogelméleti Szemle* 2002/4. http://jesz.ajk.elte.hu/nagy12.html

formulate their own opinions without any external influence encoded into the phrasing of questions.[51]

The participants generally touched on six different problems in their replies. According to the researchers on the basis of these replies it is possible to classify seven factors which influence the effectiveness of legal education. The most important three factors are the number of students, the subjectivity of examinations, and the problems of teaching methods.[52] With regard to the methodology of teaching, 54 percent of the students mentioned the lack of practical legal education as a serious deficiency. In their eyes the general legal education is excessively theory oriented, which means that professors and teachers are only concerned with the discussion of abstract concepts and do not concentrate on the practical dimension of law. Students were also highly critical of the system of seminary education; they unequivocally complained that many of these seminars cannot be regarded as more than "mini lectures" or they even miss the discussion of case-law because of the endless explanations of the teacher. Some students also pointed out that verbal communication has only a secondary place in legal education due to the fact that most of the exams are written and seminars are also mostly about making notes on the basis of the explanation of the teacher.[53]

Consequently, students are also aware of the many deficiencies of the practical legal education system, and this can be regarded as good news in itself. The explicit or implicit expectations of law students might also be a factor which may compel law schools to integrate more and more practical elements into their curricula in the long run.

11. In conclusion, the field of practical education in the system of Hungarian legal education is in a transitory phase.[54] Transitory since many new and inventive elements have already appeared e.g. legal clinics or the teaching of rhetoric, but they have not extended generally so far. Hopefully, this transition signals an unambiguous advance towards a much more modern form of legal education in which practice in the broadest sense will have a more balanced position compared to the theoretical oriented teaching. It should be borne in mind however that the roots of the Hungarian legal education are deeply interconnected to the continental, dogmatic approach, which does not intend to prepare law students for the challenges of practical life, but concentrates on providing lawyers with a broad intellectual background.[55] It might be illusory to anticipate a complete reform of the Hungarian legal education on the basis of the "practical"–originally North-American–model, but the growth of different forms of practical education is certainly a positive step towards the formation of a system of legal education where the theoretical and practical dimensions could work in harmony.

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

[54] For a broader discussion of the relationship between socio-political transition and Hungarian legal thinking see: Meleg Cs.: Társadalmi változások és jogászi gondolkodásmód [The Impact of Social Changes on the Legal Way of Thinking]. *Jura* 2001/2, 58–73.

[55] René David, classic of modern comparative law literature, explicitly argues that the task of legal education is the teaching of general legal culture since law students in this system could acquire such a broad view of legal problems which protects them to become simple bureaucrats and comparative law must play a preeminent role in it. Cf. David, R.: Le droit comparé enseignement de culture general. *Revue Internationale de Droit Comparé* 2 (1950) 682–685.

INSTRUCTIONS FOR AUTHORS

Acta Juridica Hungarica publishes original research papers, review articles, book reviews and announcements in the field of legal sciences. Papers are accepted on the understanding that they have not been published or submitted for publication elsewhere in English, French, German or Spanish. The Editors will consider for publication manuscripts by contributors from any state. All articles will be subjected to a review procedure. A copy of the Publishing Agreement will be sent to authors of papers accepted for publication. Manuscripts will be proceeded only after receiving the signed copy of the agreement.

Authors are requested to submit manuscripts to the Editor as an attachment by e-mail in MS Word file to lamm@jog.mta.hu. A printout must also be sent to *Prof. Vanda Lamm,* Editorial Office of Acta Juridica Hungarica, Országház u. 30, P.O. Box 25, H–1250 Budapest, Hungary.

Manuscripts should normally range from 4,000 to 10,000 words. A 200-word *abstract* and 5–6 *keywords* should be supplied. A submission of less than 4,000 words may be considered for the *Kaleidoscope* section.

Manuscripts should be written in clear, concise, and grammatically correct English. The printout should be typed double-spaced on one side of the paper, with wide margins. The order should be as follows: author, title, abstract, keywords. Authors should submit their current affiliation(s) and the mailing address, e-mail address and fax number must also be given in a footnote.

Authors are responsible for the accuracy of their citations.

Footnotes should be consecutively numbered and should appear at the bottom of the page.

References to books should include the facts of publication (city and date). References to articles appearing in journals should include the volume number of the journal, the year of publication (in parentheses), and the page numbers of the article; the names of journals should be italicized and spelled out in full. Subsequent references to books, articles may be shortened, as illustrated below (*Ibid.;* Smith: *op. cit.* 18–23; or Smith: Civil Law... *op. cit.* 34–42). When citing a non-English source, please cite the original title (or a transcribed version, if the language does not use the Roman alphabet) and a translation in brackets.

Tables should have a title and should be self-explanatory. They should be mentioned in the text, numbered consecutively with Arabic numerals.

New subject collections available

2010

Akadémiai Kiadó is offering new, minor and more adaptable collections in Arts & Antiques, Health Science, Hungary & Beyond, HiCited, Linguistics & Literature, and Social Studies with significant pricing discounts. Subscribers of any collection can pick an additional title from the Plus collection for free; its fee is included in the price of the subscribed pack.

Akadémiai Journals Collection ■ **Social Studies**

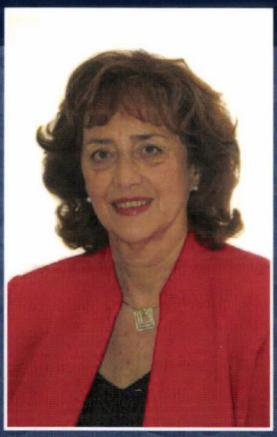
Acta Juridica Hungarica
Acta Oeconomica
European Journal of Mental Health
Journal of Evolutionary Psychology
Learning & Perception
Society and Economy

Akadémiai Journals Collection ■ **Plus**

Acta Geodaetica et Geophysica Hungarica
Central European Geology
Nanopages
Pollack Periodica
Studia Scientiarum Mathematicarum Hungarica

Additional details about the prices and conditions can be found at www.akademiaikiado.hu/collections

AKADÉMIAI KIADÓ



VANDA LAMM, editor-in-chief
Corresponding member of the
Hungarian Academy of Sciences
Professor of International Law
Széchenyi István University (Győr)
Director, Institute for Legal Studies, HAS
Member and Vice-President
Institut de Droit International
Research fields:
public international law, nuclear law

ISSN 1216-2574

constitutional law ■ administrative law ■ human rights ■ legal philosophy ■ European law ■ civil law ■ penal law, public and private international law ■ labour law

Volume 51 ▪ Number 2 ▪ June 2010

Editor-in-Chief ▪ VANDA LAMM

FOUNDED IN 1959

Acta Juridica Hungarica

Hungarian Journal of Legal Studies

WWW.AKADEMIAI.COM

1828

AKADÉMIAI KIADÓ

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica publishes original papers on legal sciences with special emphasis on Hungarian jurisprudence, legislation and legal literature. The journal accepts articles from every field of legal sciences. The editors encourage contributions from outside Hungary, with the aim of covering legal sciences in the whole of Central and Eastern Europe. The articles should be written in English.

■

Abstracted/indexed in

Information Technology and the Law, International Bibliographies IBZ and IBR, Worldwide Political Science Abstracts, SCOPUS.

■

Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA
P.O. Box 25, H-1250 Budapest, Hungary
Phone: (+36 1) 355 7384
Fax: (+36 1) 375 7858

■

Subscription price

for Volume 51 (2010) in 4 issues EUR 304+ VAT (for North America: USD 424) including online access and normal postage; airmail delivery EUR 20 (USD 28).

■

Publisher and distributor

AKADÉMIAI KIADÓ
Scientific, Technical, Medical Business Unit
P.O. Box 245, H-1519 Budapest, Hungary
Phone: (+36 1) 464 8222
Fax: (+36 1) 464 8221
E-mail: journals@akkrt.hu
www.akademiai.com; www.akademiaikiado.hu

■

ISSN 1216-2574

AJur 51 (2010) 2

Printed in Hungary

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Volume 51, Number 2, June 2010

AKADÉMIAI KIADÓ
MEMBER OF WOLTERS KLUWER GROUP

Published by the financial support of the
Committee on Publishing Scientific Books and Periodicals,
Hungarian Academy of Sciences

Cover design: xfer grafikai műhely

CONTENTS

STUDIES

KALEIDOSCOPE

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 2, pp. 79–96 (2010)
DOI: 10.1556/AJur.51.2010.2.1

GARY CHARTIER*

Natural Law and Non-Aggression

Abstract. Natural law theory can render the so-called "non-aggression principle" (NAP), which prohibits the initiation of force against person or property, intelligible and can ground a robust, even if not exceptionless, version of the principle. Natural law and natural rights theories share common roots, but are often seen as divergent, if not antagonistic. But I believe it can plausibly be maintained that claims about natural rights find their home within the context of more comprehensive natural law theories. I seek to illustrate this claim by showing how a central claim about natural rights can be defended using the resources provided by the best contemporary version of natural law theory. I consider the significance of the NAP and its place in natural rights theory. I outline the contours of one contemporary natural law position, the new classical natural law (NCNL) theory. I go on to indicate what form I suspect a version of the NAP framed using the categories provided by the NCNL theory might take.

Keywords: natural law, non-aggression principle, natural rights, Finnis, John, Rothbard, Murray, property

I. Introduction

Natural law theory can render the so-called "non-aggression principle" (NAP), which prohibits the initiation of force against person or property, intelligible and can ground a robust, even if not exceptionless, version of the principle.

Natural law and natural rights theories share common roots, but are often seen as divergent, if not antagonistic. But I believe it can plausibly be maintained that claims about natural rights find their home within the context of more comprehensive natural law theories. I seek to illustrate this claim by showing how a central claim about natural rights can be defended using the resources provided by the best contemporary version of natural law theory. In Part II, I consider the significance of the NAP and its place in natural rights theory. In Part III, I outline the contours of one contemporary natural law position, the new classical natural law (NCNL) theory. In Part IV, I indicate what form I suspect a version of the NAP framed using the categories provided by the NCNL theory might take. I suggest that NCNL theory provides a strong foundation for absolute prohibitions on purposeful or instrumental attacks on people's bodily and mental health, rooted in what is often called the Pauline Principle, and a sturdy but less-than-absolute basis for rights in tangible property, grounded in the Golden Rule. I conclude with a recap in Part V.

II. The Place of the NAP in Natural Rights Theory

An influential strand of natural rights thinking gives pride of place, as far as political ethics are concerned, to the non-aggression principle. One of its most influential advocates frames the principle this way: "no one may threaten or commit violence ('aggress') against another man's person or property. Violence may be employed only against the man who commits such violence; that is, only defensively against the aggressive violence of another. In short,

* Associate Dean and Associate Professor of Law and Business Ethics, School of Business, La Sierra University Riverside, CA 92515-8247.
E-mail: Gary.Chartier@GMail.Com

no violence may be employed against a nonaggressor".[1] (For convenience, we can call the two aspects of the principle its person-aspect and its property-aspect.)

The principle is sometimes described as an axiom, given its arguably crucial position as the foundation for civilized life. A range of justifications have been offered for it, however, including ones purporting to derive it from the notion of self-ownership and from the simple fact of the agent's status as a living being. I want to argue here that an important contemporary expositions of the natural law tradition in which much natural rights thinking is rooted can provide limited philosophical grounding for the NAP.

Natural rights theory is characteristically concerned not with "personal morality" but only with "the proper sphere of 'politics', i.e. with violence and non-violence as modes of interpersonal relations.[2] Talk about rights in this context is narrow: to say that a given interest is safeguarded by a right is to say that that interest may not be "interfered with by violence"; it is not at all to deny that there may be "immoral ways of exercising that right". Whether there are is a question for ethics, not for political philosophy–the subset of ethics concerned specifically with the just use of force.[3] Natural rights theory is thus not a general theory of ethics: serious moral inquiry extends well beyond questions about when force might be appropriate. However, natural law theorists may be inclined to argue, it is most important to get clear on the moral limits of violence. As long as rejecting aggression is accepted as a ground-rule, people can get along satisfactorily even if their views on other moral questions differ. This does not, of course, imply that all moral stances compatible with a commitment to the NAP are, for natural rights theorists, equally appropriate.[4] Talk about natural rights, rooted in the natural law tradition, is plausibly understood as a subset of natural law ethics more broadly construed. Natural law political ethics cannot reasonably be seen as free-standing; rather, natural law convictions about proper limits on the use of force are intelligible to the extent that they flow from natural law ethics more generally. This way of thinking about the relationship between political ethics and general ethics does not follow strictly, of course; perhaps there are moral principles that are concerned exclusively with the use of force and don not depend on more general principles. But it seems more economical and elegant to suppose that, if there are more general natural law principles of ethics, principles of political ethics make sense in light of those more general principles.

There are obviously multiple strands in the natural law tradition. The Spanish Scholastics, for instance, have been seen as in many ways the precursors of contemporary natural rights theorists. But their thought, of course, was grounded in the earlier work of Aquinas and Aristotle. And subsequent descendants of Aquinas have reworked the Aristotelian tradition to which he was a major contributor in ways quite different from those of the Spanish (and other) Scholastics.

The position of the contemporary "new classical natural law" (NCNL) theorists is an obvious example. It reflects the influence of the post-World War II analytic tradition in

[1] Rothbard, M. N.: War, Peace, and the State. In: Hoppe, H.-H. (ed.): *The Myth of National Defense: Essays on the Theory and History of Security Production*. Auburn (AL), 2003, 66.

[2] Rothbard, M. N.: *The Ethics of Liberty*. Atlantic Heights (NJ), 1982, 25.

[3] *Ibid.* 24.

[4] Johnson, Ch. W.: Liberty, Equality, Solidarity: Toward a Dialectical Anarchism. In: Long, R. T.–Machan, T. (eds): *Anarchism/Minarchism: Is a Government Part of a Free Country?* Aldershot, 2008, 155–188.

English-language philosophy, and is particularly dependent on the work of the late G. E. M. Anscombe. I believe a plausible version of NCNL theory can provide a version of the NAP with both intelligibility and justification.

III. The Contours of the New Classical Natural Law Theory

A. Introduction

NCNL theory features two key components: basic aspects of well being and basic practical principles. I consider the first in Section B and the second in Section C. In Section D, I explain why NCNL theory can regard basic moral principles as absolute while treating others as relative. I sum up in Section E.

B. Basic Aspects of Well Being

Basic goods, or aspects of human welfare or well being, are central to the NCNL view. These goods include life, speculative knowledge, practical reasonableness, friendship, religion, self-integration, æsthetic experience, and play.[5] What matters, in general, is not just what counts as a basic aspect or dimension of welfare or well being. What's significant, instead, is that these aspects of welfare are not reducible to anything else (either a substantive good like pleasure or felt satisfaction, or a formal good like preference-satisfaction) and that each category and each instance of each category is incommensurable and non-fungible.[6] An aspect of well being may be identified as basic in multiple ways.[7] Classifying it this way may be the result of a process of reasoning that leading to reflective equilibrium among convictions including the belief that a given dimension of welfare is basic. It may simply be *seen* non-inferentially to be fundamental in nature. Denying its status as a basic good can be shown to be self-contradictory. A phenomenological analysis of reflection and choice can lead to the conclusion that a given good provides a terminus for reasoning, so that no further justification is required to pursue it. And the experience of privation or loss may be seen, by implication, to point to the value of what has been lost.

It is possible, the NCNL theorists emphasize, to choose among instances of various aspects of welfare in various combinations. And our choices are constrained by reason in two ways–to be reasonable, they must be for real goods rather than illusory ones (like emotional satisfaction untethered to objectively satisfactory states of affairs in the real world) and they must be consistent with the principles of practical reasonableness (about which more anon). But provided a choice is a choice for a real good and is otherwise consistent with the demands of practical reasonableness, there will be no objective way to rank one choice as "better" or "worse" than another (except in terms of the actor's own prior commitments).

[5] Some heterodox NCNL thinkers have been inclined to include more subjective aspects of welfare, like sensory pleasure and peace of mind on the list see Murphy, M. C.: *Natural Law and Practical Rationality*. Cambridge, 1999; Chartier, G.: *Economic Justice and Natural Law*. Cambridge, 2009; and there may be good reason *not* to include self-integration (Chartier 2007). The details are not crucial.

[6] Finnis, J.: *Natural Law and Natural Rights*. Oxford, 1980; Finnis, J.: *Fundamentals of Ethics*. Oxford, 1986.

[7] Chartier: *op. cit.*

This basic fact of incommensurability and non-fungibility renders consequentialism a non-starter. For standard consequentialism, at least, depends on the ability to rank-order states of affairs incorporating many different aspects of welfare. And if there is no rationally inescapable way to combine all of the goods realized in a given state of affairs–as one cannot if the assignment of weights to different instances of different goods must be a matter of choice rather than of rational necessity–then there will be, can be, no objectively required ranking of states of affairs in the standard consequentialism demands. (Classical utilitarianism offers the possibility of objective ranking by focusing on the amount of pleasure embodied each possibility to be ranked; but as early as Mill it was becoming apparent that this sort of Benthamite project was inattentive to crucial aspects of the human experiences of valuation and moral judgment.)

C. Practical Principles

NCNL theory maintains that reasonable participation in basic aspects of well being is participation governed by a set of practical principles. Two of these principles, the Golden Rule and the Pauline Principle, provide the basis for a version of the NAP grounded in NCNL theory.

1. The Golden Rule

The Golden Rule requires that one treat those affected by one's actions fairly. It can be variously formulated, of course. NCNL theory characteristically emphasizes two features. First, if one treats two moral subjects differently, one should do so only for the purpose of participating, or fostering someone else's participation, in a genuine aspect of well being. (Thus, one may reasonably pick capable players for a football team in order to foster the good of play; one may reasonably select good art over trash in order to foster the good of æsthetic experience; friendship requires distinctions between friends and non-friends.) Second, one should not treat another moral subject–even when in otherwise reasonable pursuit of an intelligible aspect of welfare–in a way such that one would be resentful if one were treated that way oneself.

2. The Pauline Principle

The Pauline Principle as understood by NCNL theorists is grounded in the incommensurability of basic aspects of well being. The expression "Pauline Principle" reflects St. Paul's exasperated rejection[8] of the notion that we might reasonably do evil to bring about good. The twist in the NCNL version of this principle, though, is that the principle is not seen as dependent on previously specified deontic norms.

The idea behind the principle is often cashed in something like this way: a set of rules (say, the Ten Commandments) is treated as given; and the Pauline Principle is understood as stipulating that the rules should be treated as exceptionless, so that they may not be violated even in pursuit of particularly good consequences. Framed this way, the principle appears unavoidably arbitrary. Why should I accept the relevant moral rules in the first place? And what reason, exactly, does the Pauline Principle give me to treat them as exceptionless? Thus, the strength of the NCNL version. The NCNL theorists *do not* offer a version of the Pauline Principle that begins with a set of specific moral rules treated as

[8] Romans Chapter 3 Verse 8.

givens. Rather, they derive it in large part simply from the idea that there are objective aspects of human welfare. The NCNL version of the Principle can be framed like this: *do not purposefully or instrumentally cause harm to any basic aspect of a moral subject's welfare.*

Now, consider someone contemplating an attack on someone else's welfare. If her action is to be reasonable, she will need to act in order to participate in some aspect of well being or in order to foster someone else's participation in some dimension of welfare. Presuming she correctly understands what she is doing as an attack on some aspect of someone else's good, then she needs to see her attack as justified in virtue of the good she seeks to realize or pursue. It can not, *ex hypothesi*, be because the good she's attacking is valueless. But the good she's attempting to realize does not, could not, outweigh the good she's attacking: it's not commensurable with it. So any purposeful attack on an acknowledged basic good in the service of another acknowledged basic good will be unreasonable, because it will involve treating a genuine good as if it were not a genuine good, or as if it could be rationally subordinated to another genuine good when it can not. (The same line of argument fairly clearly rules out acting with hostility toward any basic aspect of well being.)

Another way the point is sometimes made by NCNL theorists is to say that attacking a basic good directly amounts to the choice to make being an attacker of basic goods part of one's identity. Thus, Grisez[9] talks about treating oneself as giver of life and death when one chooses to attack someone's life.

There's obviously more to be said about this argument, and my purpose here is not to spell out all of its ramifications or to defend it against all possible objections. The point of this post is to talk about the degree to which the NCNL approach to natural law theory might be able to justify something similar to the NAP. But I wanted to outline the basis an NCNL theorist might offer for the Pauline Principle so it would be clear how the NCNL version differs from other versions of "Don't do evil to bring about good." No detailed moral principles are presupposed: all the argument needs to get off the ground is the recognition that certain aspects of welfare are, indeed, aspects of welfare and that they're incommensurable and non-fungible.

D. Practical Principles as Absolute

The Golden Rule, the Pauline Principle, and other relevant practical principles are all, on the NCNL view, absolute and exceptionless. That is, there is never a time when it is reasonable to ignore the Golden Rule or the Pauline Principle. But there's one fairly obvious difference between the two. The Pauline Principle rules out certain generically specifiable action-types absolutely. For example: any instance of targeting non-combatants in war-time is fairly clearly going to be an instance of purposefully causing harm to one or more basic aspects of well being. So it is possible to be quite clear in general terms about various sorts of conduct that will always be inconsistent with the Pauline Principle. And this means, in turn, that someone potentially on the receiving end of such conduct will have an absolute right not to be subjected to the ill effects of that conduct. By contrast, while everyone has an absolute right not to be treated in a manner inconsistent with the Golden Rule, just what conduct will prove inconsistent with this prohibition on arbitrariness will vary significantly from situation to situation. (For instance: supposing that promissory obligation is rooted in

[9] Grisez, G.: Toward a Consistent Natural-Law Ethics of Killing. *American Journal of Jurisprudence*, 15 (1970), 64 96.

the Golden Rule, there will likely be no way to specify whether someone may be exempted from the requirement to keep a promise without a good deal of quite situation-specific information.)

The Pauline Principle is quite compatible with causing unintended but foreseen harm, harm as an anticipated but unsought by-product or side-effect of action intended to realize or pursue a genuine good. (Thus, it can allow for the use of force to defend oneself or others: one's purpose in this case need not be to cause harm, but simply to repel or resist an attack.) But the fact that the harm is not purposeful or instrumental does not mean it's automatically permissible. There will be multiple constraints on bringing about unintended harms. But the most important will be the Golden Rule: one may not impose a risk of unintended but anticipated harm on someone else if one would resent the imposition of a similar risk, in comparable circumstances, on oneself or one's loved ones.

E. Conclusion

Practical reasonableness, as understood by NCNL theorists, calls for consistent acknowledgement of the value of all of the varied aspects of well being and of those who participate in them. Discerned in diverse ways, the basic aspects of welfare are objective, incommensurable, and non-fungible. Regard for the welfare of real people requires acknowledgement of the irreducible significance of these aspects of well being. The Pauline Principle precludes acting purposefully or instrumentally to harm any of these aspects of welfare, or out of hostility toward it; the Golden Rule requires that we treat the moral subjects with whom we interact fairly. Moral rules derived from the Pauline Principle are exceptionless; the Golden Rule itself is exceptionless, but rules derived from it will of necessity be more flexible and responsive to particular circumstances.

IV. Natural Law and the Property-Aspect of the NAP

A. Alternative Natural Law Grounds for Property Rights

It is clear that the Pauline Principle provides very solid grounding for the person-aspect of the NAP. Any purposeful or instrumental violence against a person's body, mental health, or peace of mind will clearly be ruled out by the Pauline Principle; using force to defend oneself or others will be permissible, but imposing unreasonable risks of harm on others will not.

The NAP as standardly formulated implies that a person's property in material realities external to her person should be treated as equivalent to her person, as an extension of her body. Just as it would be wrong to attack a person's body, on this view, it would be equally wrong, and wrong for the same basic reason, to attack her property. However, the NCNL theorists typically demarcate body and property quite clearly. They would be inclined, I think, to treat regarding one's property as an extension of oneself as an instance of fetishization. That does not mean, though, that they could not come to endorse something similar to the property-aspect of the NAP. In the remainder of Part IV, I consider three ways in which they might be able to do so: they could seek to show that the Golden Rule could justify robust property rights (Section B); they could treat property as a basic good, view individual pieces of property as aspects of the self, or resist interferences with property rights as exercises in retrospective enslavement (Section C); or while distinguishing property from the basic goods, they could argue that essentially any assault on property is simultaneously a purposeful or instrumental assault on a basic aspect of well being (Section D). I conclude in Section E.

B. Property Rights and the Golden Rule

Standard NCNL theory grounds property rights primarily in the Golden Rule. It can provide strong support for property rights; it is not clear, though, that the Golden Rule can ground the full property-aspect of the NAP. Just as there's an absolute right not to be treated in a manner inconsistent with the Pauline Principle, there's also an absolute right not to be treated in a manner inconsistent with the Golden Rule. But what the Golden Rule requires will vary far more from situation to situation than what the Pauline Principle requires. Thus, mid-level general norms that flow from the Golden Rule–like *Keep promises* or *Avoid rudeness*–may admit of a variety of exceptions. In Subsection 1, I explain the basis for such rights in standard NCNL theory. In Subsection 2, I outline some proposed additions to the typical NCNL rationales for property rights. In Subsection 3, I consider the limitations on Golden Rule-based property rights that would seem to flow even from the sort of robust grounding for them I envision.

1. Standard NCNL Rationales for Property Rights

The NCNL theorists begin from what they see as essentially Aristotle's point of view: everything in principle belongs to everyone, but there are good reasons to give responsibility for each thing to someone or some group of people in particular, for the benefit of all.[10] Their view, in effect, is that property rights flow primarily from the Golden Rule. This basic principle of fairness, along with some contingent but persistent facts about human nature and the human situation, impose some limits on what might count as a just property regime. Finnis focuses primarily on three constraints, overlapping and mutually reinforcing rationales for property rights which may also be seen as justifications for particular property claims (the labels are mine):

> 1. *Incentivization:* in general, a just property system will be one that facilitates people's contribution to the productivity of a community's economy through the use of incentives; someone can sometimes reasonably offer the fact that a property rule would incentivize people to engage in productive activity as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.[11]
> 2. *Stewardship:* in general, a just property system will facilitate stewardship–taking good care of property, cultivating and developing it responsibly, and preventing it from falling into disrepair; someone can sometimes reasonably offer the fact that a property rule would likely foster the effective stewardship of property as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.[12]
> 3. *Autonomy*: in general, a just property system will be one that facilitates people's autonomy–their freedom to determine the contours of their own lives and major life choices without intrusion by others; someone can sometimes reasonably offer the fact that a property rule would help people to be autonomous as a reason for others to

[10] Aristotle: *Politics.* (Trans. Benjamin Jowett), Oxford, 1905, II. 5.

[11] Finnis, J.: *Natural Law and... op. cit.* 170, 173; Grisez, G.: *The Way of the Lord Jesus 2: Living a Christian Life.* Steubenville, 1994, 794.

[12] *Ibid.* 170.

support the rule and so in support of her claim to a piece of property that would be hers under the rule.[13]

3. Additional Considerations Supportive of Property Rights

Each of the standard NCNL rationales is plausible and persuasive, but I suggest that several others might also be relevant, too. Someone evaluating a given property rule in light of the Golden Rule could reasonably be expected to take all of these additional rationales into account along with those highlighted by the NCNL theorists.

1. *Generosity*: in general, a just property system will be one that makes it possible for people to be generous; someone can sometimes reasonably offer the fact that a property rule would enable people to be generous as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.[14]
2. *Reliability*: in general, a just property system will enable people to rely on their expectations that otherwise just property rules will continue in force, that decisions made about individual claims in light of such rules will be respected, and that otherwise just property titles will be respected; someone can sometimes reasonably offer the fact that a property rule would honor people's past expectations or enable them to depend on their expectations in the future as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.[15]
3. *Productivity:* in general, a just property system will be one that ensures that property is put to its most productive use; someone can sometimes reasonably offer the fact that a property rule would ensure that property was put to its most productive use as a reason for others to support the rule and so in support of her claim to a piece of property that would be hers under the rule.[16]
4. *Compensation*: in general, a just property system will be one that makes it possible for people to receive, and likely that they will receive, compensation for the goods and services they provide to others; someone can sometimes reasonably offer the fact that a property rule would enable people to be compensated for providing goods and services as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.[17]
5. *Identity*: in general, a just property system will take reasonable account of people's identity-constitutive attachments to pieces of property; someone can sometimes reasonably offer the fact that a property rule would protect people's identity-constitutive attachment to pieces of property as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.[18]
6. *Simplicity*: in general, a just property system will be one that features rules that are simple–that are easy to formulate, articulate, learn, and apply; someone can sometimes reasonably offer the fact that a property rule is simple as a reason for others to support

[13] *Ibid.* 172; 168–169, 192, Grisez: *The Way of the Lord Jesus* 2... *op. cit.* 794–795.

[14] Aristotle: *op. cit.* II. 5.

[15] Fried, Ch.: *Modern Liberty and the Limits of Government.* New York, 2006, 156–160; Munzer, S. R.: *A Theory of Property.* Cambridge, 1991, 191–226.

[16] Cp. the discussion of utility and efficiency in Munzer: *ibid.* 191–226.

[17] *Ibid.* 254–291.

[18] Radin, M.: *Reinterpreting Property.* Chicago, 1994, 35–71; Chartier: *op. cit.*

the rule, and so in support of her claim to a piece of property that would be hers under the rule.[19]

7. *Peacemaking*: in general, a just property system will be one that features rules that minimize conflict–notably by clearly allocating responsibility for particular things to particular people; someone can sometimes reasonably offer the fact that a property rule would be conflict-minimizing as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.[20]

8. *Coordination*: in general, a just property system will be one that coordinates people's interactions by making possible the aggregation of information about their interests and needs and the determination of appropriate production patterns and distribution levels for goods and services; someone can sometimes reasonably offer the fact that a property rule would foster this kind of coordination as a reason for others to support the rule, and so in support of her claim to a piece of property that would be hers under the rule.[21]

These additional concerns (1) add to the support for a system of private property provided by the considerations adduced by the NCNL theorists and (2) further constrain the kinds of systems that could reasonably count as just.

4. Limited Implications of Golden Rule-Based Support for Property Rights

The standard natural law approach to property, grounded in the Golden Rule, can justify a system of private ownership safeguarded by reliable rights. The stability and determinateness of the system is, in general, enhanced when the multiple additional considerations I have identified as relevant are also taken into account. But the Golden Rule does not require that people endorse the Lockean property rules many natural rights proponents read into the NAP.

The Golden Rule does not leave reasonable people with a single option as regards property rules as regards *(i)* acquisition, *(ii)* abandonment, or *(iii)* the extent of control. (Thus, for instance, it does not seem to provide one for a definitive basis for deciding between Lockean and occupancy-and-use views, and they certainly leave open, say, the length of time property might need to be abandoned before title might pass to a homesteader.) It constrains and highlights the range of considerations relevant to the deliberations of reasonable people seek to determine which property rules their legal system should enforce, but they leave open the question just what option is finally chosen.[22]

[19] Epstein, R.: *Simple Rules for a Complex World.* Cambridge (MA), 1995.

[20] Hasnas, J.: Toward a Theory of Empirical Natural Rights. *Social Philosophy and Policy,* 22 (2005) 1, 111 147; Shaffer, B.: *Boundaries of Order.* Auburn (AL), 2009; Friedman, D.: A Positive Account of Property Rights. *Social Philosophy and Policy,* 11 (1994) 2, 1–16.

[21] Barnett, R.: *The Structure of Liberty: Justice and the Rule of Law.* Oxford, 1998; Friedman: *ibid.*

[22] To be clear, I do not regard this as a criticism: variability in property rules seems perfectly reasonable to me. *(i)* Some empirical facts and some implications of particular ideas are unclear and need still to be discovered or understood more fully, and experimentation among different property rules, within the constraints of justice, will facilitate greater understanding. *(ii)* Different people's personalities will obviously vary, and some people will simply be more comfortable with some rules than other people will be and there seems no reason why they should not be able to proceed accordingly.

In addition, whatever general rules *are* compatible with the Golden Rule in light of these considerations, *these rules will not be exceptionless*. To take an obvious example: both Aquinas and Locke explicitly acknowledged that emergencies justified violating otherwise stable, reliable property rights. Aquinas maintains that when a need is "so manifest and urgent, that it is evident that the present need must be remedied by whatever means be at hand (for instance when a person is in some imminent danger, and there is no other possible remedy), then it is lawful for a man to succor his own need by means of another's property, by taking it either openly or secretly: nor is this properly speaking theft or robbery".[23]

Aquinas seems primarily to be thinking of emergency cases. But Locke, so far from being the exemplar of "possessive individualism" Macpherson and others claimed him to be, is if anything more expansive in this regard. He writes: "charity gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has no means to subsist otherwise".[24] Locke and Aquinas both seem to see property rules as fuzzy in just the way one might expect them to be if they were rooted in a general principle of fairness like the Golden Rule.

C. Property as a Basic Good

An alternative approach to generating a version of the property-aspect of the NAP using natural law theory would be to argue that justly acquired property, or controlling the disposition of such property–we can use *ownership* as a useful short-hand for this possibility–is itself a basic aspect of well being.

This is not, of course, an approach the NCNL theorists take themselves. They clearly view the value of property as instrumental. They argue that "anything human persons make, or have, considered as distinct from persons ... cannot be basic. It is always for ... reasons which culminate within persons ... that individuals and communities are concerned with such goods".[25] But of course they might be mistaken about this. And, of course, even if individual items of property are sought and held for instrumental reasons, it does not follow that *ownership itself* is instrumental. Perhaps one or more pathway to the identification of other aspects of human well being as basic might also justify characterizing ownership of and control over justly acquired property in this way (Subsection 1). It might also be possible to treat, not ownership, but actual goods made or acquired by persons as aspects of those persons' selves, deserving the same sort of immunity from purposeful or instrumental assault as their bodies because directly or indirectly acquired through labor (Subsection 2). A similarly labor-related approach might frame justify absolute property rights by framing interference with someone's property as a kind of retrospective enslavement (Subsection 3).

1. Ownership as a Basic Good

i) Reflective Equilibrium. One might simply seek to ascertain whether affirming the good of ownership can be grounded in the attempt to achieve reflective equilibrium among one's

[23] Aquinas, St. Th.: *Summa Theologica*. (Trans. Fathers of the English Dominican Province), London, 1920, II–II q. 94 a. 7c.

[24] Locke, J.: *Two Treatises of Government*. London, 1689. ch. IV, § 42.

[25] Finnis, J. Boyle, J.–Grisez, G.: *Nuclear Deterrence, Morality and Realism*. Oxford, 1987, 178.

considered judgments about basic aspects of well being.[26] It seems to me that recognition of ownership rights of some sort will form part of a system of beliefs in reflective equilibrium, but it is unclear to me that a reflective equilibrium-based approach would be sufficient to justify the claim that ownership was a basic good.

ii) Non-Inferential Discernment. Perhaps we might directly, non-inferentially *see* that ownership was a basic good.[27] I suspect that many people *have*, indeed, understood themselves to see this: but note that they have not seen the same thing. While cross-cultural support for the identification of something as a basic good is a pointer to–not a demonstration of–its status,[28] cultural variation in this area is enormous. Some control over resources has been seen as crucial, but whether that control has been individual or collective, how far it has extended, and how it has been established have been viewed quite differently. It does not seem, then, that this sort of non-inferential discernment would yield and understanding of ownership as a basic aspect of well being that would undergird property rights any more robust than those grounded in the Golden Rule.

iii) Undeniability or Self-Evidence. We might attempt to determine whether the good of ownership is undeniable or self-evident.[29] However, even if it really were undeniable that assuming some kind of control over the natural environment was reasonable, it would not follow that Lockean rules were. And there is really no plausible claim that denying the value of ownership, much less Lockean ownership, is self-refuting. I suspect that a sufficiently clever dialectician[30] could produce an argument designed to show that assertion presupposes the value of autonomy and that this value cannot be affirmed or preserved without property rights of some kind, but I am not clear that any very specific theory could be generated in this way.[31]

iv) Reflection on the Deliberative Process. Alternatively, we might seek to determine whether we in fact treat ownership as a reason-terminator, whether we regard acquiring or maintaining ownership as itself an exhaustive explanation of or justification for an action.[32] But there is little reason to think that we *do* reason this way. We acquire property because it is beautiful, because it will provide space for a family to flourish–because it will enable us to achieve other goals. Even if we do not know just what we will want to do with money we acquire, we understand that we acquire it to achieve other ends. We can and do explain our acquisition of particular items of property in terms of the value of intrinsically valuable dimensions of fulfillment in which we will or might participate.

But though owning particular items is instrumentally valuable, it may be that we value ownership itself–control over aspects of the non-sentient world that have come legitimately to be ours. That is because we extend ourselves into the physical world when we own things: property rights would seem to be constitutive components of personal autonomy.

[26] Rawls, J.: *A Theory of Justice*. Rev. ed. Cambridge (MA), 1999, 18–19, 42–46; Larmore, Ch.: *The Morals of Modernity*. Cambridge, 1996, 55–64; McNaughton, D.: *Moral Vision: An Introduction to Ethics*. Oxford, 1988, 102–103.

[27] See Gomez-Lobo, A.: *Morality and the Human Goods: An Introduction to Natural Law Ethics*. Washington (DC), 2002, 9–10; Finnis: *Fundamentals of Ethics. op. cit.* 51.

[28] Finnis: *Natural Law and... op. cit.* 83–85, 97.

[29] Chappell, T.: *Understanding Human Goods*. Edinburgh, 1998, 36.

[30] Hoppe, H.-H.: *The Economics and Ethics of Private Property*. Auburn (AL), 2006.

[31] Friedman n.d.

[32] Finnis: *Fundamentals of Ethics. op. cit.* 51–52; Finnis: *Natural Law and... op. cit.* 51–99; Chappell: *op. cit.* 35.

It remains an open question, however, whether recognizing that they are is sufficient to generate a scheme of property rights any sturdier than those supported by the Golden Rule.

v) Privation. Perhaps it is. We can see why it might be by means of an approach to the status of ownership as a basic good by way of *privation.*[33] The general idea, for natural law theorists, is that a basic good is what has been damaged any time we can agree that someone has suffered a genuine harm or loss. Certainly, when something has been stolen from me, I am inclined to see the wrong done not only as instrumental–so that theft, say, is objectionable just because it keeps me from enjoying some future benefit–but also as a violation of a protected sphere of my existence. Taking something that is mine is, apart from its obvious instrumental undesirability, itself a violation. And it is easy to characterize what has been harmed as something like the good of ownership.

We ordinarily pursue the ownership of particular things as an instrumental rather than as an intrinsic good, and I think we would be inclined to regard the pursuit individual objects, or of material wealth more broadly, as fetishistic unless undertaken for some ulterior purpose (we might be inclined to regard the attempt to obtain or retain ownership of a specific identity-constitutive piece of property, understood as inherently valuable, as a different matter). This is clearly the way the NCNL theorists view political liberty: they argue that "[p]eople want liberty in order to pursue the truth, to worship as they think right, to participate in the responsible play of political decision-making, to live in friendship, and so on".[34] If property only mattered instrumentally, as the NCNL theorists believe liberty matters, then, of course, it could not reasonably be regarded as a basic aspect of well being.

I suspect, in fact, that people often seek liberty because they do not wish to be dominated, subordinated, pushed around–that they value liberty for its own sake. Similarly, we *do* seem sometimes to regard an attack on ownership as a harm in its own right, apart from any particular property loss resulting from the attack. Our concern in these cases may be seen as with the attacker's *attitude*–her disrespect for our ownership–as well as with her *violation* of our *autonomy* and our related right to *control* our property.

It is important not to let the approach from privation prove too much. After all, thieves with no claim at all to property they have stolen may be angrily resentful when it is reclaimed–even by the rightful owners. While the recognition of harm in the case of theft does highlight something of moral importance, it is crucial to build into any account of ownership as a basic good the requirement that the ownership that is a basic good be ownership of justly acquired property. That this is so highlights the dependence of any credible account of ownership as a basic good on independently specified rules governing the acquisition, retention, and extent of property rights.

vi) The Limited Implications of Conceiving of Ownership as a Basic Good. Reflective equilibrium might provide some general support for the value of ownership, but certainly quite little support for treating it as an intrinsic good. There is little reason to think that Lockean property rights can be seen to be self-evident or undeniable–or even just non-inferentially evident. Asking whether ownership of some particular thing serves as the terminus in a plausible chain of practical reasoning seems to lead to a negative answer; but ownership itself seems a more likely candidate for status as a basic good. And the approach

[33] Grisez, G.: *The Way of the Lord Jesus* 1: *Christian Moral Principles.* Chicago, 1983, 123; Murphy: *op. cit.* 40.

[34] Finnis Boyle-Grisez: *op. cit.* 278.

by way of privation also suggests that we may see, at least, control over what is already legitimately ours as a basic value.

But even if there might be some limited reason to think of ownership as a basic good, many infringements on someone's property cannot plausibly be understood as purposeful or instrumental attacks on that person's right to own. Theft will be, since the thief's project can succeed only if she is the owner of a piece of property and the prior owner is not. There is no way to understand theft except as an attack on the ownership of the existing owner. But other actions which cause harm to property and may impede the owner's control over her property may be incidental rather than purposeful or instrumental, and so will potentially be justifiable in terms of the more permissive Golden Rule.

The fundamental problem, in any case, is that acknowledging the intrinsic value of ownership would not answer the question of what scheme or schemes of ownership rights are just. Treating ownership as intrinsically valuable does provide a strong moral argument against theft, once property rights are defined. But it provides no particular basis for defining just what rights ought to be secure against theft and how these rights ought to be acquired.

If the definition of property rights–including both their acquisition and their extent–is primarily dependent on the Golden Rule, the case, the actual contours of property rights will be little different from what they would be if they had been defined in light of the Golden Rule without any reference to a basic good of ownership. If the Golden Rule, for instance, were understood to underwrite Aquinas/Locke-style exceptions to general property rules in the context of a system defined exclusively by the Golden Rule, it is not clear why it would not similarly be understood to do so if a good of ownership were acknowledged. It's just that, in this latter case, while theft would clearly be out of moral bounds, the Golden Rule would ground a prior definition of the boundaries theft would be seen as trespassing in such a way that those boundaries would not be understood to be violated by someone taking another's property in an Aquinas/Locke-style case.

2. Property as an Aspect of Identity

Alternatively, a natural rights theorists working within the constraints of NCNL theory might argue, not that ownership was a basic good, but rather that individual items of justly acquired property should be treated as aspects of the self, so that an attack on a person's justly acquired property was morally objectionable for the same reasons as an attack on her body. On this sort of view, property might be acquired justly either in virtue of the labor of the person acquiring it (who has either directly created it using unowned materials, claimed it from among unowned resources, or acquired it using resources gained in exchange for her labor or other justly acquired property) or, if it is a gift, in virtue of the labor of the person giving it to her. In virtue of this labor, the property would be understood to be incorporated into the identity of the person acquiring it.

On this view, the things people make or have really are aspects of those who make or have them. The labor involved in making or acquiring property would be what justified treating the property as an aspect of the self. And it would simultaneously provide a non-arbitrary basis for defining the limits of property distinct from general considerations rooted in the Golden Rule.

The NCNL theorists argue, recall, that "anything human persons make, or have, considered as distinct from persons ... cannot be basic. It is always for ... reasons which culminate within persons ... that individuals and communities are concerned with such

goods".[35] But this cannot be entirely correct, even from the standpoint of the NCNL theorists themselves. Consider a prosthesis, for instance–made by persons and attached to a person's body. While the prosthesis is an artifact, an attack on it seems to be invasive, an assault on well being, for the same reasons as an attack on a healthy leg. It does not seem reasonable to regard the prosthesis "as distinct from" the person who employs it.

The NCNL theorists might argue, in response, that the prosthesis was no longer distinct from the person employing it once it was attached to her body. But what kind of attachment is required? Does an artificial leg that is attached by straps count as distinct from its owner, while one that is attached surgically does not? A focus on the mode of attachment seems arbitrary. It is easy enough to imagine an entirely artificial body that is physically distant from a human brain but which is fully controlled by the brain, say, via radio transmission, and which provides a full range of sensory inputs to the brain in the same way. Despite the lack of direct physical connection, it could certainly be argued that body was not distinct from the person controlling it. It seems, in short, as if the extent of control over an item, rather than the precise physical relationship between the item and the person's brain, might be decisive for the question whether the item was or was not distinct from its owner.

Even this cannot be quite right, of course, because a person whose body was completely paralyzed, and who thus had no control over it at all, might well regard it, almost certainly would regard it, as an integral aspect of herself. Perhaps, then, whether something counts as distinct from a person or not might be understood to be in part of a function of how she understood it.

It is clear that this criterion cannot reasonably be employed by the law or by a general system of social norms or rules, however, since how people regard things will vary quite dramatically from person to person. The law could certainly establish a limited number of presumptions concerned with familiar, predictable cases–so that, for instance, a person's paralyzed body might be expected to be identity-constitutive for the person, and a home that had been owned by successive members of a given family for generations might be expected to be identity-constitutive for members of the family. In general, however, the identity-constitutive character of a piece of property can only be introduced into a legal dispute at the cost of considerable confusion. The extent of a person's control over something is, by contrast, relatively easy to ascertain.

If the extent of control is used, however, to determine whether the property control is distinct from the owner, it is clear that very few items of property–essentially only the person possesses and controls bodily on a consistent basis–might have any reasonable chance of being seen as not distinct from their owners. The labor involved in the production and acquisition of the property would not seem to be sufficient on its own to justify treating the property as incorporated into the owner's identity: the property can be distinguished from the owner.

3. Interference with Property as Retrospective Enslavement

A related approach might seek to bridge the gap between person and property by arguing that interfering with someone's justly acquired property was tantamount to enslaving her. This view would begin, again, with the claim that justly acquired property was property acquired directly or indirectly or indirectly through labor. To use force to compel someone to labor is to enslave her. But to use force to acquire what she has already labored to produce or

[35] Finnis–Boyle–Grisez: *op. cit.* 178.

acquire seems morally similar to using force to make her labor to produce or acquire it in the first place. But if the former is enslavement, then the latter arguably is as well. If enslavement is unjust, then using force to acquire someone's property is unjust. Slavery is generally regarded as a paradigmatic instance of injustice. So it seems to follow that partially or completing depriving someone of her justly acquired property by force is unjust.

Whether this intuitively plausible argument can be persuasively defended using NCNL theory depends, of course, on how NCNL theory understands the wrongness of slavery. NCNL theory begins with a conviction that persons are morally equal, and that there is thus no "natural right to rule".[36] There cannot, therefore, be any permanent classes of slaves or slave-owners. Similarly, one cannot reasonably attack another's physical or mental health in order to realize the goods achievable through her labor as a slave: to do so would be to violate the Pauline Principle by causing harm instrumentally. And even if retributive punishment is justified (as I maintain that it is not), punishing someone for failing to labor as a slave will obviously be justified only if one may justly enslave her.

For the NCNL theorists, then, using bodily force to keep someone as a slave or to punish her for not laboring as a slave will be wrong in principle. But it will be wrong because it involves actual or threatened purposeful or instrumental attacks on bodily health or other basic aspects of well being. The aspect of enslavement that is inconsistent with the Pauline Principle is not, *per se*, the control of someone's labor without her consent but rather the use of force against someone's bodily well being in order to compel her to serve the enslaver's purposes. To be sure, other techniques used to influence slaves' behavior will also be objectionable, from the standpoint of NCNL theory, because they are inconsistent with the Golden Rule. But interference with property after labor has already been used to acquire it, by contrast, will not involve attacks on basic goods. It may involve conduct inconsistent with the Golden Rule, of course; but whether it does will depend on just what kinds of property rights the Golden Rule requires people to acknowledge or support. It does not seem, then, that the right not to be enslaved entails a right to possess labor-based property without interference. The argument from slavery does not provide a route within NCNL theory to an account of property rights rooted in something other than the Golden Rule.

4. Conclusion

If the goods of ownership were understood as involving a full array of Lockean constraints on the acquisition, retention, and extent of property rights, the Pauline Principle might generate something quite like the NAP. But it is difficult to see how the panoply of procedures natural law theorists employ to identify fundamental aspects of well being would lead to the identification not just of ownership, but of *this sort of Lockean ownership*, as a basic good. Labor-based approaches might be thought to provide non-arbitrary limits on the kind of ownership that could be seen as a basic good. But there do not seem to be good arguments either for treating labor-based property as incorporated into the self or for judging interference with rights to such property as retrospective enslavement.[37]

[36] Finnis, J.: *Aquinas*. Oxford, 1998, 184 185.

[37] While the understanding of interference with property rights as retrospective enslavement is to some degree intuitively attractive, it does have counter-intuitive implications. I would be unlikely to judge that your breaking into my mountain cottage to escape an avalanche was equivalent to enslaving me (cp. the range of cases discussed in Friedman, D.: *The Machinery of Freedom: Guide to a Radical Capitalism*. 2d ed. Chicago, 1989, 168 176).

D. Property Interests as Coincident with Basic Goods

Whether or not ownership is a basic aspect of well being, claims on specific items of property clearly function instrumentally to foster participation in various basic goods. Another alternative grounding for a natural-law version of the NAP might build on this recognition. Someone might argue, that is, that because of this instrumental relationship, any attempt to damage a person's property or deprive her of it will also, at the same time, be an attack on one or more basic aspects of well being and so be precluded by the Pauline Principle.

Clearly, people sometimes seek to participate in unreal goods using their property, or to participate unjustly in genuine goods. But this possibility need pose no serious threat to the argument linking property instrumentally with basic goods. The legal system cannot meaningfully distinguish between property used in pursuit of unreal goods from property used in pursuit of real ones. In the interests of simplicity, in recognition of the value of autonomous decision-making, and in full view of the legal system's frequent and unavoidable ignorance of people's purposes, it will characteristically be most reasonable for the legal system to operate as if people are pursuing real goods whether they are or not. The legal system, then, should, if this argument were correct, incorporate a straightforward prohibition on attacks on property, even though not all property actually functioned to facilitate participation in one or more basic aspects of well being.

A property right need not be entitled to full protection to the extent that it is being employed in pursuit even of a genuine aspect of well being but in the course of an unjust attack on person or property. I have no particular right to use a weapon I legitimately own to engage in aggression against someone else, and others may rightly interfere with my control over my property to stop me from doing so (as well as to require restitution, etc.).[38] The use of my property to rob another can (ordinarily) be clearly distinguished from uses of my property that are consistent with just property rules. So the possibility that there might be unjust uses of property need not make a moral or legal principle precluding all direct attacks on property being used justly unduly difficult to operationalize. It does, however, make the Golden Rule decisive, again, since without the Golden Rule (or some similar principle) it will be difficult to know just what uses will count as just or unjust. The argument does not feature any independent specification of just uses. Perhaps, for instance, any use that precludes someone else's access in an Aquinas/Locke-style cases will count as an unjust use.

Suppose, however, that we could provide a reasonable independent specification of just uses which was not simply a specification of the Golden Rule, so that the second argument I have envisioned could, in principle, do some further work in addition to the Golden Rule in safeguarding property rights if it succeeded. We would still need to determine whether the argument's premise, that purposeful or instrumental assaults on property rights are, at the same time, purposeful or instrumental assaults on basic goods, was correct. (Obviously, if they are not purposeful or instrumental, they would not fall foul of the Pauline Principle whether they affected basic goods or not.)

While there are many cases in which assaults on property will be assaults on basic goods (an attack on a painting may be both an attack on someone's property *and* an attack

[38] That others have the right to restrain me does not imply that they also have the right to permanently deprive me of the property I am using unjustly. Thanks to Roman Pearah for emphasizing the need to clarify this point.

on the basic good of æsthetic experience) it is hard to see that this will be true in every case. Using a computer to embezzle money from someone's bank account *could* be an attack on some basic good if its purpose was to keep someone from participating in that good (the thief might want the victim not to be able to pay medical bills and so to die; this would surely count as an attack on the good of life and bodily well being), but harm to a basic good might well be neither the thief's purpose nor an accepted means to some other end embraced by the thief. And it would be easy to identify a range of other cases in which an attack on someone's property did not count as an attack on any basic aspect of well being.

E. Conclusion

A set of mutually reinforcing, overlapping rationales rooted in the Golden Rule can ground robust individual property rights that deserve acknowledgement within legal systems and respect by individual moral actors. Such rationales will not, however, be absolute in character. Property rights rooted in the Golden Rule will almost certainly not be as sacrosanct as rights against purposeful or instrumental attacks on basic aspects of one's well being. Assaults on the latter are ruled out absolutely by the Pauline Principle; interference with the former will often be unjust, but need not always be.

Alternate approaches to grounding property rights that are as robust as rights against, say, purposeful bodily harm are hard to defend within the terms of NCNL theory. Ownership might qualify as a basic good, but its boundaries are relatively undefined. A limited number of items of property distinct from persons might be viewed as aspects of those persons' identities comparable to their bodies, and so subject to the same protections, but most items of property, even if clearly rooted in labor, are clearly distinct from their owners. Interfering with labor-based property after it is acquired is importantly different from compelling people to labor to acquire it, and so does not seem to fall foul of the moral prohibitions that preclude enslavement. And assaults on property need not involve purposeful or instrumental attacks on basic aspects of well being recognized as such by the NCNL theorists. An account of property rights consistent with NCNL theory will likely be rooted in the Golden Rule.

V. Conclusion

The NCNL theory gives pride of place to an account of human flourishing and a set of basic practical principles. It provides a straightforward grounding for the person-aspect of the NAP and, through a more tortuous path, strong support for a robust but non-absolute version of the property-aspect of the NAP.

1. The basic fairness considerations embodied in the Golden Rule will count against the cost shifting represented by many of the property regulations the NAP is rightly seen as attacking. Most people will resent being asked to pay for the realization of other people's æsthetic, religious, or cultural preferences or to pay for services they could obtain more inexpensively on the market; and, if they do, they will act unreasonably if they ask other people to do so. More generally, whatever judgments people tend to make about their own property rights will be judgments fairness will demand that they accept when reaching conclusions about others'.
2. Our participation in basic goods will characteristically involve the use of property. Attacks on someone's property will sometimes be ruled out precisely because they are also purposeful or instrumental attacks on basic goods.

3. Similarly, people often protect their property using their bodies, and attacks on their property will thus sometimes be inappropriate precisely because it involves using force purposefully or instrumentally in ways that harm people's bodies.
4. Acting out of hostility toward someone by harming her or his property will always be consistent with the Pauline Principle.
5. The overlapping considerations I have adduced in support of a property rights regime tend to provide mutually reinforcing, and so quite robust, justification for largely undisturbed property rights.
6. The NCNL theorists offer a set of rock-solid arguments against classical utilitarianism and its various consequentialist cousins: global consequentialism is, they show persuasively, incoherent.[39] That does not mean, of course, that expected consequences are never relevant to deliberation about reasonable action; but their reasonableness is to be gauged in light of the Golden Rule rather than in terms of a putatively objective metric that allows a "best overall state of affairs" to be identified. Multiple options are consistent with the demands of reason. So, while pragmatic considerations can certainly enter into moral deliberation, *global consequentialism* can not justify any sort of attack on someone's person, and can not be invoked in support of any infringement of someone's property rights.

A version of the NAP that can be defended on natural-law grounds–with the person-aspect rooted in the Pauline Principle and the property-aspect rooted in the Golden Rule–may not feature all of the elements preferred by some natural rights theorists, but it can provide moral grounding for the security of both persons and property. Instead of proceeding from a simple, free-standing, substantive value–self-ownership or life, for instance–a natural-law approach to the NAP renders this principle intelligible and defensible in light of a comprehensive moral theory. In so doing, it can make a modest contribution to justifying a norm that is basic to all civilized interaction and so, perhaps, to fostering the creation of a society in which that norm is more consistently observed.

[39] Grisez, G.: Against Consequentialism. *American Journal of Jurisprudence,* 23 (1978), 21 72.; Finnis Boyle Grisez: *op. cit.* 254 260.

1216-2574/USD 20.00

Acta Juridica Hungarica
51, No 2, pp. 97–108 (2010)
DOI: 10.1556/AJur.51.2010.2.2

Csaba Varga*

Law, Understanding of Law, Application of Law

Abstract. After the classical heritage of both Civil Law and Common Law is characterised, their *juristische Weltanschauung* as professional deontology is reconstructed in parallel with their respective assumptions in theory formation. As to the nature of legal process, the moment of concealment is identified in both types with the final conclusion reached that humans' individual activity and personal responsibility is hidden in the machinery. Civil Law is defined by rules enacted as the sole embodiment of the law, treated conceptually in a linguistico-logical way so as to be suitable to lead to mechanical application within the range of a meta-level dogmatic system. The interplay between logical subsumption and volitional classificatory subordination is analysed in order to show what legal ascriptivity is and why it ends with the artificial construction of legal force. Accordingly, Civil Law ideology is imbued with analogies as if cognition were at stake, in contrast to Common Law openly undertaking fiction to explain in what manner the judicial deliberation on facts whilst reconstruing the whys and hows of past instances can result in ascertaining what the law has allegedly ever been. The law's understanding–theorised in the former and pragmatised in the latter case is part of its applying as an ontic component of the very existence of the complex social phenomenon called law.

Keywords: concept of law, law-applying, *juristische Weltanschauung* as professional deontology, disanthropomorphisation, legal ideologies theorised/pragmatised, Civil Law, Common Law, comparative judicial mind

I. Classical Heritage

1. The rich legal heritage of the *Romans,* with *its* changing internal emphases, assured a basis for the development of two differing traditions during the European Middle Ages and Modern Times. In the course of this formative process, starting in the 16th and 17th centuries the approaches to law characteristic of our Continent and of the Anglo-Saxon archipelago were gradually separated as they were strengthened by the failure of attempts to codify the law in England.[1]

1. Continental Law

2. As soon as this separation has been perfected, in *continental* law nothing remains from the *ius* except that which has been posited as a *lex*. In terms of this transformation process, the *regola*–once serving as a didactic exercise and summation–becomes the sole bearer of any legal quality as a set of linguistic signs that is destined to embody the law.

From that time on, anyone who is eager to know what the law is (in terms of its sense, message or significance) must turn to its embodiment in and by *rules*.

3. By this act and starting from the Roman imperial epoch, such a *form* becomes the exclusive source of any contents hidden in and by it. Of course, this form may easily prove to be casual, random and/or fallible; nevertheless, nothing else can be taken as law other than precisely that which has been edicted. This form is no longer an external gown veiling

* Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.; Professor, Director of the Institute for Legal Philosophy of the Catholic University of Hungary, H-1088, Budapest, Szentkirályi u. 28–30.
E-mail: varga@jog.mta.hu

[1] Cf., by Varga, Cs.: *Codification as a Socio-historical Phenomenon.* Budapest, 1991.

the legislator's idea but the *sole embodiment*. With such a solution principally strengthened (but still as a correction mechanism building around the original idea), it will be accepted only later that whatever interpretation of the law's provisions may nevertheless draw from the law-maker's intent–as an auxiliary source (that is, among other additional sources)– anything that can be read from (a) the conditions understood by the legislator, (b) the whole texture of regulation, (c) the actual knowledge as to the historical circumstances of legislation or (d) the intentions expressed during the bureaucratic procedure of legislation.

4. Law is, therefore, a *text* with a meaning that can be ascertained through textual analysis, that is, by the help of *linguistic* and *logical* devices used to look for connections and their disclosure. As interpretation theories would also formulate it, in case of necessity the interpreter might also have recourse to a search for proper meaning through the law's context as drawn from either (a) the intent of the legislator or (b) the historical conditions or (c) the systematic setting of the given piece of legislation.

5. The very fact that the law is embodied by enacted texts and, therefore, it is treated textually in practice makes it possible for jurisprudential interpretation to forge *concepts* out of mere *words* used in the legal texture, in the course of classifications. It is no longer simple words but conceptualisations that stand for–as a representation of–diverse aspects of reality, conceptualisations that are developed into a complex and hierarchically organised notional system, which is defined in its components' mutual relations by boundaries with edged contours. These concepts are positioned as *loci of a taxonomic systemicity*, erected in place of mere words.

6. Such conceptuality is, however, not imbued directly by the law's texture itself; the words used in the *gesetztes Recht* do not simply contain it. For *legis latio* is a *practical* act throughout. It is the *volitional* product of the agent authorised to issue normative texts. This is the mere result of some *volitio*: contingent in principle, plainly arbitrary in a philosophical sense, since, optionally, it could be something else as well.

7. What pulls law as such to the conceptual world is the jurisprudents' conceptual analysis: classification and system-building, through which the jurisprudential reasoning over the internal connections of the law-stuff will create concepts by drawing analogies amongst individual words or by breaking down and/or splitting already established concepts into others. As an obvious denominational analogy–supported by the memory of the strict conceptuality disassembled from Biblical texts–this is what we call *Rechtsdogmatik*. Such a doctrine is the production of legal scholars having analysed law texts with the intent of forging an internal systemic connection in view of reaching *this* availably perfect conceptual systemic network from *that* resource of processing. Once established–and only provided that such a demand for conceptual systemic building is grounded on the common ethos of the given legal profession (not as an unnoticed pioneering attempt but expressing the mainstream of the age as, for instance, in *Leibniz*' epoch)–, such a doctrinal net (with the actual shape it has acquired) will form a *web of understanding* around the law, i.e. a weakly (though informal) normative environment that already serves as a kind of pre-understanding [*Vorverständnis*] for all kinds of juristic activity when those professionals (making, applying or just studying law) start dealing with normative or other legal texts.

Accordingly, and as a point of principle, *legal texts* themselves have ever been and will remain *incidental* and *fallible*. Their human understanding in this very culture (with the law already taken at a conceptual meta-level) will become *imbued* with such a *doctrinal knowledge*, slowly to be entirely presupposed by it.

(This is why in such cultures law, legal practice and their doctrinal representation may stand as relatively separate but mutually preconditioned and interactive entities, albeit in the social division of labour specialists are accustomed to cultivate one or the other as their specific fields.)

8. As soon as the legal text is seen as ordered by conceptual limitations and additional adjustments (e.g. by making exceptions through further internal splitting)–with any element or partial field treated as the product of the *breakdown* of the overall total regulation, considered (in given time segments) as a closed unit, logically coherent and settled in details–well, then whatever idea we can form about law will from the outset be *marked by a systemic place* or *locus*, the basic features and definitions of which will already derive from its systemic definition.

9. As a pattern of thought, thereby, the *mos geometricus* is given a shape. This is a concept deriving from the movement characteristic of the 16th century, when the European continental manner of studying law was set for centuries, that is, a methodological ideal that laid the constant foundation of our approach to law, prevalent even now. Beginning from classical times in Bologna, this idea permeated the reception of Roman law all over Latinic and Germanic Europe; despite all kinds of shaking, rectification, challenge and enrichment with new trends, this is the model that grants commonality in our respective understanding of law, while defining our identity and membership in one definite legal culture.

Within this intellectuality, the cultivation of law is seen in the composition of a series of operations similar to those in mathematics, upon the basis of which the ideal has ever been to build up a perfect system both closed and exclusive, which, if challenged, can only be replaced by another, completely new in principle, according to EUCLID's axiomatism.

10. The ideal of law represented by such an idea of normative systemicity will at the same time produce its pair and completion reflected in the world of factual reality, referenced in and by the law. This is the *Tatbestand*–taken as the aggregate of those *facts that constitute a case in law*–, which can only be thought of within the frame of a doctrinally organised approach to law (as a representation of *Sein* in counterpart to *Sollen*, with the former featuring the marks qualified by the latter). The notion of *Tatbestand* is a product of the mid-19th century continental culture, of the idea that legal scholarship reduced to *Begriffsjurisprudenz* [conceptual jurisprudence]–while approaching law-related (law-referenced) factual reality in a conceptual way–can be developed. It is not by chance that the term *Tatbestand* has no proper equivalent in English, where–without any polarisation between *Rechtssetzung* [law-making] and *Rechtsanwendung* [law-applying], *administration of justice* is practiced (instead of the law's 'application')[2]–it can only be circumscribed (as translated from *Max Weber,* for instance) by "operative facts", "actual circumstances" or "facts that constitute a case in law".

11. Well, according to its theoretical model, *law-application* projects the world of norms onto that of facts, ascribing the former's normative requirements to the latter. Or, what is modelled here is the set of reality aspects of those actual events, actions and situations that, matched separately one by one, will in their entirety add to define a particular *Tatbestand*, taken as a *case of the rule*, representing those reality aspects defined through

[2] Cf. Sack, P. S.: Law and Custom: Reflections on the Relations between English Law and the English Language. *Rechtstheorie*, 18 (1987) 4, 421 436.

the abstract formulations of a rule, to which the rule ascribes some legal conclusion (or sanction).

12. This model is based on logical *inclusion*. What is at stake here is a particular actualisation on the plane of *individuality*, of what the norm has defined on the plane of *generality*. Starting from the norm, this will ground the logical necessity of judicial syllogism [*subsumptio*] that will lead to the judgment, based on the given norm, concluded from its generality. (For instance, providing the norm sanctions humans killing humans, and our case is about homicide, then the sanction imputed to anyone having performed the deed must be meted out.)[3]

2. Anglo-Saxon Law

13. The Anglo-Saxon mentality has adapted quite a differing pattern of legal regulation and judicial settlement of conflicts from the same Roman legacy. It continued its patterner's earlier attempts towards methodicalness, not departing too much further from the ancient Jewish and Islamic traditions.

It did not look for safety in either conceptualising generalisation or the systemicity it had achieved; it did not dedicate its exclusive trust to the force of central edicts, believed to be suitable to settle everything. It was satisfied to build up law through *examples* following other examples, progressing casually by concrete situations answered by justices, who drew their pattern from their comparisons with earlier patterns, with the final outcome being that the judges themselves, proceeding in individual cases, could became the agents to declare what the legal tradition (reflected in their case) had always been. In order to master the very process of such a continual actualisation of the law, discipline and rational safety had to be assured to the extent feasible. This way, the Anglo-Saxon law's casual and inductive processing and its respect for the unique in the genuine representation of the fullness of life (and, thereby, also its openness towards any novelty in a given situation) could preserve a bit of sensitivity toward practical reason and daily moral deliberations, notwithstanding the fact that it could also successfully separate itself from the heterogeneity of everyday life through the *artificial reason* it erected. On the one hand, in the case of adjudication it alleges it has based its judgment on *unstated rules* but, on the other, it refrains from declaring what *regola*s have indeed been serving it. In consequence, almost until today it has not cultivated the kind of doctrinal culture that may build on general abstract norms exclusively.

The Anglo-Saxon law cannot be taken as thoroughly conceptualised into an overall taxonomic system, independent of whether an enormous amount of rationalising literature has for centuries edified rather considerable meta-intellectuality above it. Instead of employing conceptual systemic consistency and completeness to build a replacement of the given chaotic accumulation, this literature responds mostly to practical challenges in terms of functionality and practicality.[4]

[3] Cf., in first formulation, by Varga, Cs.: Moderne Staatlichkeit und modernes formales Rechts. *Acta Juridica Hungarica*, 26 (1984) 1–2, 235–241.

[4] Cf., by Varga, Cs.: Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law. *Acta Juridica Hungarica*, 48 (2007) 4, 401–410 {and <http://akademiai.om.hu/content/b0m8x67227572219/fulltext.pdf>, abridged as Rule and/or Norm, or the Conceptualisibility and Logifiability of Law. In: Schweighofer, E. Liebwald, D. Angeneder, S. Menzel, T. (hrsg.): *Effizienz von e-Lösungen in Staat und Gesellschaft.* Aktuelle Fragen der Rechtsinformatik. Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005. Stuttgart München Hannover–Berlin–

II. Reality in our Approach to Law

14. The question arises whether or not our view formed on law in Civil Law cultures comports with institutional reality. The answer can only be ambivalent, that is, *duplicate* as formulated at *different levels.*

1. As Professional Deontology

15. Our previous characterisation is *true* in a *descriptive* sense in so far as it gives an account of the ideal pattern of our legal thought. For *ideology* as a kind of professional deontology, a manner of thinking specific to the legal profession, and in this sense a *juristische Weltanschauung*, has been and continues to be undoubtedly present in the approach to law rooted in our continental culture. In the above sense as well, ideology is *consciousness that exerts impacts onto practice;* consequently, it is a decisive component of the social ontological description of humans in action. This is part of a culture that assigns frames, within the boundaries of which we appropriate the world intellectually. Within them, we form key categories for understanding the world, while we also sense and/or attribute definite value-contexts of/to the same world. In its turn, *juristische Weltanschauung* is the foundation stone of legal cultures that shapes human abilities (skills and sensitivities) by which we may sense law at all and search for paths and spheres of action with reference to it. As a consequence, independent of its epistemological status (namely, of the issue of whether or not our specific law does indeed function this way, under its conditions and fulfilling its criteria), the lawyers' professional deontology is *part of the genuine ontology of legal arrangements.* Accordingly, it is part of the operation we can describe starting from the accumulated experience of (a) human practice making use of law, (b) the overall societal *praxis* and (c) *jurisprudentia* as the total sum of legal *praxis.*[5]

2. In its Theoretical Explanation

16. At the same time, *theoretical reconstruction* raises reasonable questions as to what indeed the existence of law does consist of, what are the consequences of its being carried by a linguistic medium, what are the chances of humans as socially exclusive acting agents and, at last but not least, in what exactly does their responsibility lie? Therefore, the inquiry goes on further: are we perhaps ourselves passive observers (perhaps mere reference points) in a structure operating like clockwork (possibly without our personal presence as well), since the law works as thoroughly logified within its pure formalism in a quasi-automatic way, broken down into a homogenised network that is empowered to produce its output, and which can reproduce itself continually–on the basis of its own presuppositions as equipped with its own laws and consequences, built in by some next-to-mechanical safety?

Weimar–Dresden, 2005, 58–65}, as well as Varga, Cs.: Law and its Doctrinal Study (On Legal Dogmatics). *Acta Juridica Hungarica*, 49 (2008) 3, 253–274 {and <http://akademiai.om.hu/content/g352w44h21258427/fulltext.pdf>} and Varga, Cs.: Legal Traditions? In Search for Families and Cultures of Law. In: Moreso, J. J. (eds): *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 {and [as a national report presented at the World Congress of the Académie internationale de Droit comparé] in <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf> and *Acta Juridica Hungarica*, 46 (2005) 3–4, 177–197 and <http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>}.

[5] Cf., by Varga, Cs.: *The Place of Law in Lukács' World Concept.* Budapest, 1985, 193.

The answer can only be formulated in terms of the *suitability of human practice for self-reproduction through its own traditions* as characterised by today's social theories, on the one hand, and of the *irrevocable human responsibility* as cultivated by the known theologies of morals, on the other.

17. Well, the ideological stand implied by our *juristische Weltanschauung* approaches both language and law as if they were simple objects of the world's reality; as if it was going to suggest exactly what metaphysically inspired logic wanted to inspire actual belief in (particularly in Germanic philosophies[6])–namely, that relations (of logic and dialectic especially) are hidden in, or implied by, things and objects (their moves, coincidences or configurations) themselves. Nonetheless, it is exclusively *statements* that we can make as to objects and as to whatever kind of virtuality, that is, practically as to anything that can be specified by human ingenuity in the course of our mental appropriation of any imaginable world (involving the Golden Fleece or a unicorn, or hypothesising such limiting units of reference as the absolute cold or the arithmetic zero point, or abstracting the philosophical conclusion of "*Das Nicht nichtet*", as developed by *Martin Heidegger*[7]). If and insofar as we treat such statements within one single coherently comprehensive perspective, then once the truth/falsity of any of them, grounding our argumentation, is acknowledged, we may deduce true/false conclusions from them.

18. At the same time, law is thoroughly *disantropomorphised*, and it is we who have done this. By abstracting from our subject's substance and genuine nature (dependent directly on human volition, practice, consideration or pure interest), we are used to investing our trust (which we have not undertaken, because it is not relegated to our rational common sense) in something else–notably, in some virtually reified entity or safety, projected from ourselves into a kind of substitute authority. Accordingly, we began to treat law as a reified construction alienated from ourselves, as if it could operate without us, like the Delphi oracle or a God-judgment set in motion as a specific slot-machine to settle our case, into which (as we are made to believe under the constraints of our professional socialisation) we might feed the parameters of the given case so that it would then dispense from its "black box" the single conclusive decision.

19. As to the device of our communication, we have to be aware of the fact that law as *linguistic practice* also can only be intelligible for those who are skilled enough to use it properly. The case is by no means one of mute signs that catch or address us. It is we who make the language sounded in sending and receiving *signs as markers*. Of course, we do not act as isolated Robinsons. We are equipped with general societal (and added professional) education, socialisation and practice of common understanding. This is strengthened by daily use, suitable to re-conventionalise language practice. Thereby, we actualise the language that may make both our procedures and life in society liveable and reasonable.

20. Language is certainly not exact, on the one hand. This continues to be so notwithstanding the fact that, as the most available mediator in societal contact and commerce, only such an ambivalent medium can fulfil language's ontological role, on the

[6] See, e.g. the discussion on the ontology of nature between *Eugen Dühring* and *Friedrich Engels*.

[7] What has already been (reminding this above form of "*The nothing noths*") raised as a problem in English- American analytics (by *Rudolf Carnap, John Austin,* etc.) as well.

other hand. Moreover, not even in principle could language be reduced into a less unambiguous mediator or conveyor of meanings. At the most, we may try to be more precise in our handling and resolution (dedicated to given relationships or limiting issues, when we draw limits or weigh individual situations), by asserting in a socially valid way what we want to express then and there. When we proceed by defining an actualised meaning (instead of the physical act or linguistic symbolism pointing directly at what we actually mean), a step forward is taken indeed, but without ameliorating *the* language itself, its state of being *fuzzy* from the beginning. Our innovation or rectification generated at one moment will inevitably become like mist when problematising at another moment and this goes on infinitely. For the next moment we have language as it has ever been: silent–and defective in counselling. This is to say that the next moment is faced with a new situation, with novel expectations toward language, or mediation through language.

21. That which may catch and bind us in fact is neither language nor law expressed lingually, but our *conventionality*. In societal cooperation we do rely on law, among other things. We call upon it, refer to and interpret it, trying to settle affairs according to patterns it has forwarded. For law offers orientation in settling disputable practical issues. It offers guidance and proposes a normative model. It serves us by being wedged *amongst us*, separating the partners in dispute, by being *independent* of each of us and disposing of relative *consistency*. For it is suitable for mediation by offering a *pattern* to our action. That is, it can model dispute resolution so that the outcome will be not of mine or yours but that foreseen with respect to all such (essentially or substantially similar) situations, cognoscible by anyone in advance. So, what will be concluded will have already been patterned.

22. It is facts that surround us in nature and social life. These are mostly facts simple and unmediated, "brute" and formless. What we are faced with in the law's *Tatbestand* are already *institutional* facts. For law is not to be found in our affairs themselves. We identify it mostly *outside of* and *above*, and *subsequent* to, the elementary formative components of our affairs, at a time when we, reinterpreting them in the law's normative context, try to project the law's structured messages onto a factual or hypothetic case. Life is going on incessantly, following heterogeneous tracks. And the law is–allegorically speaking–withdrawn like a spider, expecting now and then to strike at any of its selected aspects. Once that happens, the law will assimilate this whole life event (by denaturing the latter's heterogeneous full complexity) to the former's homogenised–simplified–norming [*Normierung*]. Literally expressed, no one can any longer identify what the law has made out of it, and perhaps not those who are targeted by it; since one given *Tatbestand* (predefined by the law) will have been distilled from its primitively unique full-of-life richness. And this is so because the *Tatbestand* cannot be anything other than the factual reflection of the corresponding normative ruling. The only features that can be included as imputed to the humans in question (to their casual drama or luck, taken as a personal, non-recurrently individual event) are those who have already been specified as *relevant* in the abstract regulation.

23. All this is as if artificially erected nightmarish shades were looking for opportunities, with projective nets, in the density of life, with the aim of picking suitable relevance-sets from it. That is, an *external logic* is projected upon *acts in life*, according to different available considerations–for instance, to impute to a flighty irascibility (attributed, e.g. to

O. J. Simpson[8]) homicide, adultery, personal injury, perhaps breach of contract, or even failure to meet his obligations for maintenance, out of the caldron of the legal witches' kitchen. This is to say that as long as we have not decided at all *what* of this or that qualifies *as having occurred* according to the law, we may only ponder in silence. However, as soon as that is decided, we start banging on every gate: this is *that*, and only *that*, moreover, a master case of *that*–as if *that* had been invented from the beginning and only to sanction our client's case.

Our game could appear to be funny as well if it were not both serious and indispensable. This structured and more-or-less homogenised thought is applied in all fields of socialisation and societal transmission, that is, within the bounds of our humanly created *second nature*. As a consequence, life itself will be arranged following such a logic, destitute of the values and intimacy of the heterogeneity of everyday life but equipped with the force of social ordering and engineering, and, therefore, desired as the *sine qua non* of civilised human existence. For the sake of generating law and order for ourselves, we raise fixed points that are extrapolated and alienated from ourselves as the standards addressing us.

24. I may happen to carry only a potato to you. However, I cannot know in advance whether and when my or your lawyer will call it delivery, agency or necessity, supply or disturbance of possession, perhaps theft, or something else. In any case, the internal (primitive) logic of my action (with its process-like development and gradualness) may well differ considerably from that which will be ascribed to me in law. This is so because the action in question may have followed its own path alongside its *ad hoc* "logic" (chaotic in itself as having been formed from one moment to the next), with open alternatives in every movement forward here and there. And all this notwithstanding, the juridically constructed *Tatbestand* will reconstruct a cumulative development out of this, as a one-way process that may have pursued one preset end with features that involve nothing more than those facts that may make a case in law. And what is more, the way I shall be *judged* will be seen as the outcome of *cognition,* as if I were tracked all the way through by the knowledge of a neutral outsider–instead of treating me as the subject to whom the normative consequence of a system of norms is meted out.

25. The declared result of normative imputation is *ascriptive.* It will conclude some normative consequences of my action by the force of someone's volitive act and discretion. The legal status as to which my action is being *qualified* or *classified* will be defined with the above *intention of imposing those consequences,* and not as issuing from mere cognition. The whole process is not cognition as a result of someone having (with a magnifier) searched in the law or examined the collective memory of my action in order to identify exactly what (and how) may have met in the two (normative and factual) components. In fact, my judge has tested variations to couple them–according to additional considerations such as the prevailing interests and, maybe, intuitive sym/anti-pathy towards me. By the very fact of having *qualified* the event *as the case* of the given legal category, my case has already been *decided.* This legal category being an institutional fact itself, it is not cognition but exclusively a *volitional classification* that will classify my action as a case of the law. In law, nothing is described: we only classify actual life situations here and there. Instead of cognising, we decide–with as much rationally as we can, and based on evidence as much as we can. Therefore, instead of converting the action into anything of logical necessity (that

[8] Cf. <http://en.wikipedia.org/wiki/O._J._Simpson_murder_case>.

is, into subsumption or a logically obvious conclusion), we *subordinate* it to something else with the justices' volitional act's force.

26. Let us pay attention to the change in emphasis here, from the logical model establishing necessary connections amongst our things in an impersonal way, to the social ontological nature of what in fact is stricken out and produced by our social action of fore-planning, since all the connected steps are of such a type here that could have not ensued without their actual performance. Our human involvement is, therefore, creative and strictly *constitutive*, irreplaceably effectuating something. In other words, it is *arbitrary* in the sense of logical necessity, even if not otherwise senseless, indefensible or irrational. This is to say that it is mostly *practical problem-solving* that we are engaged in, whilst the motivation for our verdict–its *justification*–will prove, from the texture of the law, to be the compelling *demand,* that is, the necessity (even in details) of such–and only such–a solution.

27. All this takes the form of *a decision.* For the given solution never could be completed in another way without artificially *cutting off* all the further (and otherwise feasible) paths and ways of the endless series of doubts, including the temptation to consider crossroads with alternative solutions. Until we have manipulated (interpreted and arranged) the facts to an adequate depth, not even their legal classification is finalised. Nevertheless, disputing what *this* was, actually how *this* happened and what grounds we have for qualifying *this* as the case of *that*, can only be cut as a Gordian knot. This is equal to saying that our *certainty* is by no means absolute; therefore, the certainty concerned will be termed as "judicial" (i.e. *artificial*), "rational" (i.e. *limited*) and/or "procedural" (i.e. with exclusive *validity for the judgment)* at most.[9]

[9] We should consider how much we are used to ignore, when approaching law-application in a purely juristic manner (breaking it down into a syllogistic form), its fallible and contingent nature only justifiable through the long-term reliability of human *praxis* in the last resort (which reproduces itself incessantly) in general, and the underlying character of the *qualification of facts* for the story itself is to be reconstructed from the witnesses' narrations expressed in different object-languages, which has to be transformed (transcribed) into a fact in the law, that is, "qualified" as the case, or subordinated to be a case, of an abstract definition and of the gaining of *judicial certainty* with compiling the story in the course of evidence anyhow: from bare fragments, probability conclusions at different levels that may result mostly from additional circumstances, all them serving as the sufficient base to declare categorically sometime that *that* happened in fact in particular. For all these components with their most elementary constituents are creative with a constructive force, irreducible to formal certainty in a scientific sense, and as such, unsuitable to total rational reconstruction; the fact notwithstanding that these are the most substantive moments–serving as the turning points [*Eckdaten*]–of each and every judgement in justice.

Methodologically speaking, it could only be compared to *theology* in explanation of the transcendence of human life, which, since the age of Saint *Thomas Aquinas*, was explicated in masses of volumes of great systemic corpuses, expressed in incessant discussions (in lines of competing directions) for centuries. Behind the whole undertaking, however, it is the humanity's fullness of being–their total existential and practical consideration and decision, their extraordinary complex (psychological and other) attitude–that stands, which, in their finite life and personal options, express an act of volition that, beyond a certain limit, cannot be stressed further by the mere means of *ratio*. This is the moment of *credo* (specified as the realisation of *credo quia absurdum*). Such realisation will be socialised by us as a *Ding für uns*, as something given to us, that we have to develop in our earthly life by the intervention of *faith*, that is, by recognising our created nature with the whole chain of ensuing conclusions. Once this recognition is achieved as wedged in our socialisation, every

28. This is why adjudication is eventually finalised with *legal force.* Whatever decision is reached, it cannot tempt any longer. It must be finally accomplished, placed in the archives' oblivion, as a past instance of accomplishment of the then-prevalent law and order.

29. Musing on the ordering role of law in society, we may ponder on how many thousands of thousandths of our daily transactions are selected in order to provoke law-sensitive deliberation at all, how many thousandths of them are made controversial in order to await judicial deliberation. A great volume, the overwhelming majority, of both deviances and actions that are hardly defensible in law will remain free from legal reaction. What percentage of the other part will gain final force without any appeal against its first adjudication? Perhaps this will be a majority of the cases whose juridical solution would presumably never reach reconfirmation in legal reconsideration, while convenience, triviality or other petty conditions may have been in play in promoting their first conclusion with legal force.[10;11]

III. The Complexity of the Lawyers' World Concept

30. The unification in institutional operation of conceptual patterning, on the one hand, with linguistic formulations, on the other, presumes complex constructions, together with the formation of human skills (mentalities and procedures) matched to these.

1. The Complexity of Civil Law Mentality

31. Within the range of utmost possibilities, the continental legal game builds up law-application processes as an *analogy* of *the cognitive* ones common to the sciences: firm platforms (as indubitable stepping stones), logified steps (inspired by mathematics), strictly methodical interpretation (of rules) and verification (of facts), all concluded to a certainty. Behind such an analogy, the lawyers' ideology assists. It suggests logical force as a necessity with no alternative. As the entire construct is humanly operated, only a role of the police officer who directs traffic at turnouts seems to have been assigned to the lawyer. And behind

---

component of the reconstructions from such theologies (with their mission's vocation) turns at once to be intelligible for us, raising the awareness of its conclusions as well. But when this is missing, in the given field -and in regards of the actor in question the object itself (together with the complex net of relevancies) will be lost: it will cancel itself out of their well-developed potential.

[10] Cf., by Varga, Cs.: *Theory of the Judicial Process. The Establishment of Facts.* Budapest, 1995; and Varga, Cs.: *Lectures on the Paradigms of Legal Thinking.* Budapest, 1999.

[11] The historical explanation by Shapiro, M.: Islam and Appeal. *California Law Review,* 68 (1980) 2, 350 381. In: Varga, Cs. (ed.): *Comparative Legal Cultures.* Aldershot Hong Kong–Singapore Sydney: Dartmouth New York, 1992, 299 330, is inspired by such recognition. According to it, the state power that controls the course of "law and order" implementation has to tolerate up to a certain level, grade and depth, having in view the practical considerations of practical operationability-the variety of jurisprudence effected in the name of law (with the competition of divergences involved), as inseparable from the total function. However, as a practical test of the legally relevant qualities of jurisprudence (such as unity, security, justice, and expediency) it will subject a randomly selected part of jurisprudential issues to sample-taking, in order to filter their quality. So, historically speaking, this is the origin and the mental root *appeal.*

the scenes nothing but our well-educated professional socialisation stands, requiring that the sole *right* decision will be reached from all available alternatives, the one which can be identified within the polarity of either truth or falsity.

2. The Complexity of Common Law Mentality

32. From a European continental perspective, we are used to considering the Anglo-Saxon approach as freed from ideology, because it abounds in marks of unsophisticated naturalness without artificial mediatedness. No consideration is usually given to the fact that even its myth-coloured basic definition is formed ideologically from the outset. For, as is well known, that approach generates a judicial declaration of what the law *is* from the alleged positivity of the *immemorial custom of the Realm*. Moreover, it is expressedly alienating by tripping the entire justice-game into lawyerly technical subtleties and tricks, in opposition to the logical clarity and transparent foreseeability of the continental *Professorenrecht*.[12] And, last but not least (and unless it creates its own subject of analysis as the result of today's analytics) its demands are strikingly *a*-theoretical, with no receptivity to conceptual issues.[13]

IV. With Humans in the Legal Machinery

33. In turn, *"humans are hidden in the machinery"* as the law cannot function without an active human component. This is obvious, since there are no "correct" answers in themselves, as no exemplar of them can be found.[14] We may endeavour to reach a rational

[12] It is no chance that legal theories of alienation were mainly formulated in the domain of Common Law. Cf., e.g. Conklin, W. E.: *The Phenomenology of Modern Legal Discourse. The Juridical Production and the Disclosure of Suffering*. Aldershot and Brookfield (USA), 1998. Moreover, the exclusive purpose of the modern mainstream trend of Critical Legal Studies – cf., e.g. Bauman, R. W.: *Ideology and Community in the First Wave of Critical Legal Studies*. Toronto, 2002 – is to unseal the relations of dominance (as its fighters claim: the capitalistic, male-chauvinistic, or European regimes, or the ones ruled by the centres of the world economy or by the *Christ*ian faith, and so on) from the artificial ideological (defensive) linguistic cover of the law (provided with codes of mere technicality).

[13] Almost the only exception I have taken cognisance about is Samuel, G.: *Epistemology and Method in Law*. Aldershot and Burlington (VA), 2003.

It is an alarming instance to learn from a dispute – *Ratio Juris*, 20 (2007) 2, 302–334 – launched by Italian and Polish scholars about a volume Shiner, R. A.: *Legal Institutions and the Sources of Law*: Dordrecht, 2005 of a representative international series Pattaro, E. (ed.): *A Treatise of Legal Philosophy and General Jurisprudence* 3 – the doubts expressed on the sense of such a universalising bosh, which is destitute of the lowest theoretical sensitivity in the author's exclusive dealings with American daily topics under the aegis of global legal theorising, stuffed with the want of genuine academic knowledge, as if the author never heard, for instance, of the doctrine on the sources of law, legal institutionalism, or *Hans Kelsen*'s foundational doctrine. Rounding this specimen of intellectual poverty by not even understanding the stake, in his rebutter the author calls its European critics to the respect of liberal tolerance and academic freedom, perhaps for lack of anything better.

[14] In theoretical reconstruction, my concern is certainly not the validity of propositions that *natural law doctrines* (aiming at ontological foundations inspired by theological presuppositions) or *practical philosophies* (in their rebirth today) may advance in search for connections, but exclusively the specific issue of the ways in which prevalent trends (or their comparable analogons) may exert fermentative effect on the daily administration of justice.

justification at the most, and through benevolent discourses in human communities, an optimum solution has to be targeted somehow. We are fallible humans, as fallible as are our endeavours to make the world better. We may try to find salvation exclusively with skills and instruments we have developed, and, of course, through unceasingly adapting and correcting them.

34. Irrevocably and unavoidably, all that remains is to draw on the recognition that, notwithstanding our different societal roles, somehow we all are parts of the practice of reproducing this understanding with full *personal responsibility*–whether as citizens, or as educators and socialisers (who form the public understanding professionally as teachers, priests, journalists and other social workers), or as intellectuals or politicians (who shape the former's frameworks), or having been specifically initiated as actors in the law's workings.

35. In the final analysis, our law as actually practiced will hardly be anything other than that which we have formed out of it through our social co-operation and the fights we have undertaken.[15]

36. In the end, law is a mode of speaking. It is practiced as a specific field of communication with a game of open scenes, which is actualised if played by humans through actual referencing. Accordingly–and instead of "what *it* is?"–"all that notwithstanding: how *it* can be achieved" will be the final question that serves as a criterion as well.

This also involves a call for axiology, in order to set some standard as a foundational stepping stone. This is to be done even if in the absence of a claim that we have made it suitable to conclude anything from it or subordinate anything to it (as the past antagonistic rivalry between the doctrines of natural law and legal positivism stressed). And this may presume to arrive finally at a development from thesis via anti-thesis to syn-thesis related to the correlation among humanity's natural, societal and spiritually founded intellectual world, perhaps strengthened as well by the re-/dis-solution of the law's positivistic self-definition. Thereby, a genuine re-foundation may also be achieved in order to master humanity's response to the global challenges that are at our door.

[15] For an outlook, cf., by Varga, Cs.: Doctrine and Technique in Law. *Iustum Aequum Salutare*, IV (2008) 1, 23–37 {and <http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf> and www.univie.ac.at/RI/IRIS2004/Arbeitspapierln/ Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc}.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 2, pp. 109–121 (2010)
DOI: 10.1556/AJur.51.2010.2.3

IVÁN HALÁSZ*– GÁBOR SCHWEITZER**

Peregrination in Germany

Bódog Somló at the Universities of Leipzig and Heidelberg (1896–1897)

Abstract. The literature dealing with the life of Bódog Somló (1873–1920), one of the most outstanding authors of jurisprudence in Hungary in the last century, does not pay special attention to his study-tour in Germany. Somló spent the fall semester of academic year 1896/97 at the faculty of humanities of the Leipzig University, while the spring semester int the law school at the Heidelberg University. Somló's peregrinatio academica, which is equally remarkable for both historical and cultural aspects, can be reconstructed on the basis of his correspodence. He was influenced by the lectures and seminars of K. G. Lamprecht and W. Wundt in Leipzig, and later by O. Karlowa and E. E. Bekker in Heidelberg. Because of the preparations of his acceptance as a lecturer in 1899 at the University of Cluj, the grand tour in Germany had a great importance in Somló's life.

Keywords: Jurisprudence in Hungary, Bódog Somló, study-tour in Germany, peregrinatio academica, legal academies of Hungary, Hungarian Encyclopaedia of Law

Not long after graduation, Bódog Somló (1873–1920) spent two semesters of the academic year 1896/97 with a study trip in Germany, more precisely in Leipzig and Heidelberg. Considering that peregrination in itself is a noteworthy period of a scientifically prominent career with regard to the knowledge and experience acquired abroad, therefore, the role of the months spent abroad can not be overrated with regard to the delimited life-course of Bódog Somló. Nevertheless, it is peculiar that apart from the laconic mentioning of factual statements, this period has not aroused the attention of technical literature. At the same time, the view that the "outward life" of Bódog Somló in contrast with his "inward life" was quasi uneventful has stricken inexplicably deep roots.[1] On the contrary, we think that the history of the peregrination in Germany in itself supports the opposite of this opinion.

* Senior research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.; Assistant professor, Corvinus University of Budapest, Faculty of Public Administration, H-1118 Budapest, Ménesi út 5.
E-mail: halasz@jog.mta.hu

** Senior research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.; Senior lecturer, ELTE University, Faculty of Law, H-1053 Budapest, Egyetem tér 1 3.
E-mail: schweitz@jog.mta.hu

[1] Nagy, E.: Erény és tudomány. Vázlat Somló Bódog gondolkodói pályájáról (Virtue and Science. A Sketch of the Career of Bódog Somló as a Thinker). *Világosság*, 12 (1981), 765. The writing on Bódog Somló in the volume Hell, J. Lendvai, L. F Perecz, L. (eds): *Hungarian Philosophy in the 20th Century*. ("His outward life-course is uneventful, whereas his inward life is extraordinarily exuberant as his memoranda in manuscript justify.") Budapest, 2000, 107. A similar opinion is formulated in the unpublished Ph.D. dissertation of László Seres, in which the chapter "Career Conceptual Impacts" does not deal with the studies of Somló at all. Nevertheless, the author establishes "The life of Somló is an unvaried life-course." See Seres, L.: *Somló Bódog (1873–1920) társadalom- és történetfilozófiai tanai* (Bódog Somló's Tenets in Social Philosophy and the Philosophy of History). h. n. 1971, 13. In: The Manuscript Archive of the Library of the Hungarian Scientific Academy, Reference no. D 5067.

For decades, the most abundant information on the studies in Germany was provided by a contemporaneous biography-résumé published by Csaba Varga. In the biography, which was retained in the compilation of the prodirector of the legal academy from the period of the unsuccessful job application to the episcopal legal academy of Pécs in 1898 by Bódog Somló, we can read the following concerning the peregrination: "Following his graduation, the Hungarian government sent him to Germany with a view to his further training in specialised branches of science, namely, in the philosophy of law and Roman law with a state grant of 800 Frs. for the academic year of 1896/97 and he spent the first semester at the university of Leipzig and the second one in Heidelberg.[2] In the meantime, Bódog Somló's "humble appeal" of 10th July, 1898 to bishop Sámuel Hetyey has come to light, in which he wrote the following about his studies in Germany: "At the university of Leipzig I studied humanities, the history of economics, constitutional law and social history, while at the university of Heidelberg I dealt with positive law."[3]

I.

Plans and Preparations

The thought of the study trip abroad emerged in Bódog Somló at the end of his studies at university. It turns out from the letters of Iván Herepei, his classmate and friend in Cluj that they submitted their application for state grant jointly, or at least in agreement in 1895. During the summer, Herepei inquired about the status of the applications in the Ministry of Culture, where he was informed that "nothing had arrived there yet", that is, the university may have not furthered the applications to the Ministry. As he wrote to Somló, he had little prospect for winning the competition and travelling, "although I would like it very much. (...) We would at least spend a year together."[4] During the autumn, even these faint hopes were ruined. Again, we are quoting the letter of Herepei. "I daresay it grieves me that I should give up our nice plan to spend a year together abroad. What an illuminating year it would have been. Believe me, my boy, I considered going with You as important as whether I go or not. (...) I am thinking about not waiting for the reply of the Minister, but looking for a job." If, however, they received "the vicious grant", Somló can find a way for the postponement of the impending joining up the army.[5] The expectations of Herepei were fulfilled, namely they did not receive the grant. By reason of the cancellation of the study trip abroad, Bódog Somló put on the battledress to do his term of voluntary military service. During his service, he got around to finish his studies. Namely, in this period he acquired the doctoral degree in political science–he had been initiated to a doctor of law already in September, 1895–and simultaneously, the issue of the study trip abroad was settled, at that time without Iván Herepei. About all this, we learn from the letter of Ferenc Knörr, another

[2] Varga, Cs.: Somló Bódog esete a pécsi jogakadémiával (The Case of Bódog Somló with the Legal Academy of Pécs). *Jogtudományi Közlöny*, 35 (1980) 8, 544. See further Zódi, Zs.: Erény és tudomány. Somló Bódog állam- és jogbölcseleti munkássága (Virtue and Science. Bódog Somló's Work in Political Science and The Philosophy of Law). In: Loss, S.–Szabadfalvi, J. et al.: *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* (Portrait Sketches from the History of Hungarian Thinking in the Philosophy of Law). Miskolc, 1995, 65.

[3] The Episcopal Archive of Pécs. I/1/k. Acta Lycei. 2575/1898. (Budapest, 10th July, 1898).

[4] *The letter of Iván Herepei to Bódog Somló.* Zernest, 20th June, 1895. National Széchenyi Library, Manuscript Archive (hereinafter NSzL, MA).

[5] *The letter of Iván Herepei to Bódog Somló.* Zernest, 14th September, 1895. NSzL, MA.

classmate and close friend in Cluj doing military service in Brasov, who must have been informed about the favourable developments by Somló. "You are doing splendidly. How did the military react to your new doctoral degree? (...) I wish you all the best to the grant and your new degree."[6] About the developments concerning the grant abroad we are informed from a letter of Gusztáv, Bódog Somló's younger brother studying in Vienna, according to which his brother's application was cordially supported by Mór Kiss, his professor in Cluj.[7] In a further letter, Gusztáv interpreted the joy of aunt Nelly, a relative in Vienna to his brother concerning his fine prospects "to travel to Berlin the next year".[8]

As an objective of the study trip abroad the biographical summary stemming from the period of the application to Pécs in 1898 designated studying two areas of law, scilicet, Roman law and the philosophy of law, however, as it turns out from his autobiography, Somló dealt with more disciplines during the years of the peregrination. His orientation towards Roman law was probably down to the influence of Lajos Farkas, his professor in Cluj,[9] the support and advice of whom Somló referred to several times in his letters written from Germany to his parents. Concerning his plans related to the philosophy of law, he requested the advice of Gyula Pikler.[10] We do not know exactly, when and under what circumstances they met each other. Howewer, it is certain that Somló's attention was attracted to Gyula Pikler years before, in the spring of 1893 by a former classmate in Timisoara, Aladár Bartl, a student at the Faculty of Law in Budapest. "I missed you again very much at Gyula Pickler's (sic) lecture, he speaks fully to our taste, therefore, when I have obtained his book, I will send it to you after the exam in line with my notes." During his lectures, Pikler talks about "the justification of the regularities of nature, he refutes natural law and the justifiability of a final goal". "The day before yesterday he explained Darwinism and generally, his knowledge is a prolific and his habit of mind is interesting."[11] Maybe this enthusiastic account aroused the interest of Somló in the person and work of Pikler. At any rate, during the months before the trip to Germany Bódog Somló turned to Gyula Pikler for advice in a letter. Although, this letter has not been retained, the question of Somló can be inferred from the reply. "I am glad to fulfil your request," reads the letter of Pikler in the middle of August, 1896, "but its best method would be a discussion by word of mouth, all the more so, that I must get informed about your studies so far and generally your whole personality."[12] Although, since they cannot meet before two and a half months (at the time of writing the letter Pikler was staying in Trsztena in Árva county), he suggested the following concerning Somló's objectives. First of all, he advised Somló "not to stick to Berlin", instead with regard to teachers, he suggested Leipzig or an English university, depending on Somló's "personality and views of life". "I suggest Berlin in the least." At the same time, he recommended reading some technical literature, first of all Herbert Spencer's "First Principles of a New System of Philosophy" and "Principles of Psychology", furthermore, his university textbooks to be published soon. And a further good advice: "Learn so much English that is necessary for reading scientific books." In view of that, Pikler considered reading Spencer

[6] *The letter of Ferenc Knörr to Bódog Somló.* Brasov, 12th January, 1896. NSzL, MA.

[7] *The letter of Gusztáv Somló to Bódog Somló.* Vienna, 19th November, 1895. NSzL, MA.

[8] *The letter of Gusztáv Somló to Bódog Somló.* Vienna, 26th November, 1895. NSzL, MA.

[9] Lajos Farkas (1841 1921) was a professor of Roman law at the university of Cluj after 1872.

[10] Gyula Pikler (1864 1937) taught philosophy of law after 1891 at the university of Budapest (from 1896 he was a visiting professor, from 1903 a university professor).

[11] *The letter of Aladár Bartl to Bódog Somló.* Budapest, 20th March, 1893. NSzL, MA.

[12] *The letter of Gyula Pikler to Bódog Somló.* Trsztena, 15th August, 1896. NSzL, MA.

the most expedient.[13] Somló paid heed to Pikler's advice. He chose Leipzig instead of Berlin and read the recommended literature one after the other. In his diary, under the title "Notes and extracts in the philosophy of law", he made notes on the works of Georg Simmel, Rudolf Stammler and Ernst Grosse and on those recommended by Pikler.[14] Before his trip, on 14th September, 1896, he made notes on Spencer's work "Die Principien der Psychologie" and made an abstract of Pikler's "The Rules of the Origin and Development of Law and Their Reduction to Elementary Causes" at home, on 1st October, 1896. Nevertheless, he read Spencer's "Grundlagen der Philosophie" already in Leipzig on 8th November, 1896.[15] In the spirit of the more and more absorbing professional and human relationship, Pikler further provided Somló with his professional directions and advice for conduct.

Thereby, Bódog Somló started his study trip in Germany with this spiritual send-off in the autumn of 1896. At the moment, we can inspect the story of the months spent abroad via the family correspondence conducted overwhelmingly in German and via the letters of friends and professional mentors. The correspondence outlines not only the course of university and the parallelly conducted private studies according to the guidelines of mentors, primarily of Pikler, but also the everyday life of the peregrination noteworthy from scientific and cultural historical aspects. The accounts written to the parents and his brother evoke even the trivial details of the campus and off-campus life with due precision: the participants, sites and habits of social life, his old and new friends, the stories of journeys and excursions, the relation to exercise and sports, the turns of the weather, the circumstances of accommodation and eating.

II.

"I usually attend the lectures of Wundt and Lamprecht, sometimes others, as well..."

Somló in Leipzig

Somló arrived in Leipzig at the end of October, 1896. He did not travel directly, since he stopped and spent days in Vienna, Prague and Dresden, partly to visit his relatives. At first he did not find Leipzig appealing, though after a while he changed his mind, because he did not like the buildings made mostly out of red brick with high pediment in Old German style.[16] Nevertheless, he accustomed himself to the university from the beginning. The university, at least the part I visited, i.e. the Albertinum is a brand new, splendidly furnished building."[17] Not much after his arrival, on 28th October, 1896, he matriculated at the

[13] *Ibid.* It seems that their earliest meeting took place directly before his trip to Germany. *Cf. The letter of Bódog Somló to his parents.* Leipzig, 30th October, 1896. National Széchenyi Library, Manuscript Archive.

[14] *Bódog Somló's diary (1896).* NSzL, MA. Quart. Hung. 3038/1.

[15] See *ibid.* It is probable that he also made abstracts of the monographies of Spencer's "Einleitung in das Studium der Sociologie" and Pikler's "Bevezetés a jogbölcseletbe" (Introduction into the Philosophy of Law) before his trip.

[16] It is interesting that a later scholarship holder, Károly Szladits did not consider Leipzig a sightly town, either. As he put it in one of his letters exactly to Somló: "Leipzig totally lacks the concept of Beauty: neither the city, nor the landscape or the women are beautiful. What wouldn't I give for a Danube bank?" *The letter of Károly Szladits to Bódog Somló.* Leipzig, 19th April, 1902. NSzL, MA.

[17] *The letter of Bódog Somló to his parents.* Leipzig, 27th October, 1896. NSzL, MA. The building of the Albertinum, i.e. the Biblioteca Albertina mentioned in the letter was completed in 1891.

Humanities Faculty of the University of Leipzig, which was founded in the 15th century and reorganised in Lutheran spirit in 1542 by the Saxon duke, Maurice.[18] In the letter informing about his matriculation he related at length about his decision to apply to the history seminar of Karl Lamprecht.[19] As a professor highly respected also in Hungary he was one of those whom Pikler not only recommended, but to whom he also wrote a letter of reference.[20] As Somló informed his parents, the advantages of the seminar included that admitted students had an access to the premises of the seminar including the library form 9 a.m. to 9 p.m., furthermore, a separate writing-desk was due to everyone, and last but not least, signing up was also favourable, because thereby a great deal of the heating costs at home could be saved.[21]

Days had passed before the final time-table was composed. Against the payment of 60 Marks, Somló signed up for the following courses: Wilhelm Wundt–Philosophical encyclopaedia (4 classes per week); Lamprecht–German economic, social and constitutional history (3 classes per week); Introduction to the apprehension of contemporary politics and society (2 classes per week, one of which was held on Sunday afternoon). As it was expectable, besides the lectures, he also enrolled in the economic and constitutional history practice of the history seminar of Lamprecht (two classes on Sunday morning). Out of the total tuition fee, Lamprecht's seminar cost 10 Marks in itself. Somló explained this with the fact that only 12 students were admitted to the seminar, which set very high requirements and facilitated the establishment of personal connections with the professor and the students, who had access to the premises of the seminar the whole day, as he referred to that in an earlier letter.[22] At the same time, he also met Lamprecht personally. The professor, as he wrote to his parents, "welcomed him very friendly", informed him about his seminar and encouraged Somló to turn to him safely, if he needed anything. Furthermore, he offered to introduce him to the History Society, where he may find proper company mostly consisting of young people with PhDs.[23] Besides the lectures at the Humanities Faculty, he also attended the lectures of "famous" law professors, whose names he did not mention either at that time or later. He found that the lectures were generally of high standard, although it disturbed him that the professors laid much stress upon the approval of their audience.[24]

Already from this early period, a shift of emphasis is discernible from university classes towards private studies. During the second week of his stay in Leipzig, he reported that concerning his studies, he was following the instructions of Pikler and Farkas professors in every respect. He wrote accordingly, "I much more need private studies than attending lectures."[25] At the same time, he considered the chosen lectures multiply motivating. "Wundt is the most prominent German philosopher of our days, who is completely worthy of his fame. His broad-minded lectures on the philosophical encyclopaedia create good basis for studies in the philosophy of law."[26] Whereas, the lectures of Lamprecht are useful

[18] Szögi, L.: *Magyarországi diákok németországi egyetemeken és főiskolákon 1789–1919* (Hungarian Students at German Universities and Colleges). Budapest, 2001, 405.

[19] Karl Gotthard Lamprecht (1856 1915) was professor of comparative world and cultural history at the University of Leipzig.

[20] *The letter of Bódog Somló to his parents.* Leipzig, 28th October, 1896. NSzL, MA.

[21] *Ibid.*

[22] *The letter of Bódog Somló to his parents.* Leipzig, 1st November, 1896. NSzL, MA.

[23] *Ibid.*

[24] *The letter of Bódog Somló to his parents.* Leipzig, 9th November, 1896. NSzL, MA.

[25] *Ibid.*

[26] *Ibid.*

only indirectly for him. "Namely, Lamprecht points out several discerning coherences and the interaction among economic, political and social facts provide very precious knowledge from the viewpoint of studies in the philosophy of law."

The emphasis, however, shifted to studying at home and in the library. As he put it, this is the situation in case of all professions. If somebody wants to achieve results, he argued, after a time independent research and thinking must come to the fore. In view of that, he studied the literature of the philosophy of law according to the guidance of Pikler. He recorded his notes in his diary of 1896. Besides, in this period he was also interested in theoretical problems related to criminal law, such as the meaning of the sense of justice and its impact on criminal law.[27]

Apparently, Somló shared his doubts concerning the university studies in Leipzig with Pikler, who wrote surely by reason of this in November, 1896 that if "you had appeared earlier, I would have suggested Graz instead of Leipzig."[28] Months later, in the first months of 1897, when it was still not decided, where Somló would continue his studies, Pikler repeatedly came up with the University of Graz. "Graz is the place of modern spirit. You will learn from Gumplovitz[29] and primarily from Hildebrand.[30] The town is healthy, lovely, its surroundings is beautiful, besides, living is cheap.[31]

III.

Via Britannia! – Via Britannia?

Somló started learning English during his stay in Leipzig. This was due not only to Pikler's advice, but it was obviously related to Somló's intention to continue his German study trip in England. As early as at the beginning of his stay in Leipzig, on 9th November, 1896, he informed his parents that for the sake of familiarisation with special literature, he was learning English, which he would soon acquire according to his hopes. Nevertheless, he could not decide, whether to start leaning alone or in Berlitz school within the framework of a language course.[32] Finally, he enrolled in a language course.

Apart from Somló, a "Fraulein" and a young "Hungarian doctor" belonged to the group, who pursued his studies in Leipzig like him.[33] We can fist read in Somló's letter to his brother about "the Hungarian doctor", Béla Kreutzer (later Kenéz 1874–1946), his future fellow professor in Cluj. "Yesterday at noon a young doctor juris arrived here in Leipzig, who graduated in Budapest and deals with scientific issues like me and seems to be quite a sensible man. Maybe I will meet him frequently."[34] The Kenéz letters included in the Somló bequest refer to the fact that after returning to Hungary, they maintained a close relationship for years.

[27] *The letter of Bódog Somló to his parents.* Leipzig, 9th November, 1896 and 14th January, 1897. NSzL, MA.

[28] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 19th November, 1896. NSzL, MA.

[29] Ludwig Gumplowitz (1838–1909) was sociologist, professor of constitutional and administrative law at the University of Graz.

[30] Richard Hildebrand (1840–1918) was national economist, university professor, then vice chancellor of the University of Graz.

[31] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 24th March, 1897. NSzL, MA.

[32] *The letter of Bódog Somló to his parents.* Leipzig, 9th November, 1896. NSzL, MA

[33] *The letter of Bódog Somló to his parents.* Leipzig, 26th November, 1896. NSzL, MA.

[34] *The letter of Bódog Somló to Gusztáv Somló.* Leipzig, 19th November, 1896. NSzL, MA.

Somló raised the idea of travelling to England in his letter of 20th November, 1896. "I haven't inquired about the English relations. I would prefer spending the second semester there than in Germany."[35] Besides learning the language, he naturally tried to find English relations. His letters manifest that he turned to British universities for information. During the weeks before his travel home for the holidays he wrote to his parents that he had received merely one answer letter from a professor in Edinburgh. He wrote that they would discuss the details at home by word of mouth. Of course, Somló searched for English relations in other directions, as well. Namely, the letter of Gyula Mandello, the Chief Secretary of the Hungarian Economic Society manifests that Somló requested Mandello's and obviously others' support for his prospective trip to England. "I've received your letter and as I stated verbally, I will be at your disposal, when you prepare to travel to England", Mandello wrote on 30th March, 1897.[36] By that time, however, Somló had given up, or at least had postponed his plans concerning England. Nevertheless, Pikler must have known about his decision, since he acknowledged the negative announcement with the following remarks in his letter of 24th March, 1897: "I highly approve of your decision not to travel to England also with regard to your sickness."[37] This letter is puzzling because of two reasons. What kind of sickness could Pikler refer to and what could the word "also" imply? Somló did not mention his contingent health problems in his extant letters, obviously, he did not wish to worry his parents, conversely, we can infer from the lines of Pikler that Somló had confidence in him in this respect, as well. The conclusion can be drawn from the word "also" that disregarding the sickness, Pikler did not approve of the trip to England, which he raised in an earlier letter half a year before, the realisation of which he made dependent on Somló's personality and views of life.

IV.

"The lectures of Karlowa ... (Pandects) and Bekker ... (Institutions and the History of Roman law) are the most important for me" – Somló in Heidelberg

After he had provisionally abandoned his plans concerning England, after the autumn semester he travelled home to Cluj via Dresden, Prague, Vienna and Budapest in February, 1897.[38] During the holiday at home the next semester was settled. Although, as we referred to that earlier, Gyula Pikler called Somló's attention to the university of Graz, he finally decided in favour of Heidelberg. Pikler's letter also informs us about Somló's increasing interest in international law. "You have made a right choice for international law from both a scientific and a practical point of view. (...) I hope you remember in what direction I suggested its study."[39]

Subsequently to the long winter holiday, Somló set off at the end of April so as to arrive in Heidelberg via Vienna and Munich. During the days following his arrival, on 5th of

[35] *The letter of Bódog Somló to his parents.* Leipzig, 20th November, 1896. NSzL, MA.

[36] *The letter of Gyula Mandello to Bódog Somló.* Bratislava, 30th March, 1897. NSzL, MA.
It is interesting to note that Somló did not form an extremely positive opinion about Mandello, since according to a later diary note, he called him a "conceited swindler". *Bódog Somló's diary.* A note of 14th December, 1898. NSzL, MA. Quart. Hung. 3038/1.

[37] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 24th March, 1897. NSzL, MA.

[38] At the beginning of August, 1898, Somló spent some days in England. See his relevant notes in *Bódog Somló's diary* of 1898. NSzL, MA. Quart. Hung. 3038/2.

[39] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 24th March, 1897. NSzL, MA.

May, 1897 he matriculated at the Faculty of Law of Ruprecht-Karls University founded in 1386 and reorganised in 1652.[40] The town impressed him as "tiny", but "smart". When wandering about the town, one feels as if a magical hand threw one back from the 19th century into the distant past, he informed his parents. Nevertheless, he found the building of the university "gloomy", but this did not influence his favourable opinion of Heidelberg.[41] "I have the time of my life here", he wrote to his parents after a week and this did not change further on, either.[42] Later on, he also wrote that he was very satisfied with the major goal of his trip (the university) and with all the accessory circumstances (food, accommodation, town and company).[43]

In one of his early letters from Heidelberg he informed his parents about his "firm" intention to study private law further on. He gave an explanation for his novel interest in private law in a further letter. Private law is "more concrete", which explains a greater interest in it in the world of law, than in the philosophy of law.[44] At that time it also occurred to him that he would habilitate in private law at the university of Cluj.[45]

Since he wrote this to his parents, we surely know that out of his university commitments at Heidelberg, he attended the lectures of Karlowa Privy Councillor[46] (Pandects) and of Bekker Privy Councillor[47] (Institutions and the History of Roman Law), as ones that were the most important for him. Both of them are very famous and sagacious lawyers, Somló wrote to his parents.[48] Apart from the lectures, with which he was all the time satisfied as opposed to those attended in Leipzig, he also signed up for the private law seminars of Karlowa and von Buhl.[49] After the university commitments, he pursued his studies at home, in the boarding house.

About his provisionally intensifying interest in Roman law and consequently, in private law, he informed his earlier professor, Lajos Farkas, who accepted this decision favourably. "I am very pleased that my guidance turned out to your satisfaction. I am convinced that you will not regret it later, either. (...) It is not harmful that you have changed the object of your studies, I also find it more expedient if you devote yourself to the study of private law, since that will be the most topical before long. You can establish from the curriculum of German universities that the new civil code overshadows everything else. (...) This is surely a decisive turning point as to the German civilistic science and I cannot predict what the new trend will be like without the 'Quellen'."[50]

Somló's orientation towards private law could be in connection with his seeking ways and means, at least we can infer this from one of the letters of professor Pikler written in a resigned tone. "I am very sorry that I didn't have the time earlier to inform you that despite

[40] Szögi: *op. cit.* 316.

[41] *The letter of Bódog Somló to his parents.* Heidelberg, 30th April, 1897. NSzL, MA.

[42] *The letter of Bódog Somló to his parents.* Heidelberg, 5th May, 1897. NSzL, MA.

[43] *The letter of Bódog Somló to his parents.* Heidelberg, 7th May, 1897. NSzL, MA.

[44] *The letter of Bódog Somló to his parents.* Heidelberg, 11th May, 1897. NSzL, MA.

[45] *The letter of Bódog Somló to his parents.* Heidelberg, 12th June, 1897. NSzL, MA.

[46] Otto Karlowa (1836–1904) was professor of Roman law and procedural law in Heidelberg after 1872.

[47] Ernst Emmanuel Bekker (1827–1916) was professor of Roman law in Heidelberg after 1874.

[48] *The letter of Bódog Somló to his parents.* Heidelberg, 7th May, 1897.

[49] Heinrich von Buhl (1848–1907) was professor of Roman law and private law in Heidelberg after 1886.

[50] *The letter of Lajos Farkas to Bódog Somló.* Cluj, 6th June, 1897. NSzL, MA.

the news you wrote to me I am fully congenial and concerned about your ambitions further on, about the seriousness and eagerness of which I am firmly convinced. Of course, I am interested in what you are going to devote yourself to: philosophy or constitutional policy or comparative constitutional law. Because I think you intend to go in for either of them. As for me, it would be instructive if next time you pointed out what 'the wavering of your scientific belief' consists in, I wish you informed me about that, maybe I am slightly entitled to know that."[51] The phrase "the news you wrote to me" may have referred to the news about the provisional loss of importance of the general direction of the philosophy of law. At the same time, Somló does not seem to have fully confessed his inclination to private law, otherwise Pikler would have obviously disregarded guessing what the scientific direction Somló took this time was. Beyond that Pikler made Somló openly avow "the wavering of his scientific belief". We can find the possible causes of the vacillation in one of Pikler's next letters. "The doubts concerning whether there are laws and if yes, of what nature, and whether there is a science we deal with are the most inessential from the viewpoint of pursuing a science. The objective cannot be a firm entity systematically and ultimately posited within the completed system of knowledge, but it can be to know more than we knew before. Let me repeat that international law is theoretically the treasury of the rules of the philosophy of law and practically the legal science of the future."[52]

Nevertheless, Somló was maximally satisfied with Heidelberg, as he put it in one of his last letters, "I will always remember staying here with pleasure."[53]

V.

(Blighted) Career Prospects

The literature reviewing the life-course has highlighted the failures of Bódog Somló related to job search. It is widely known that he did not get a job that fulfilled his abilities and ambitions throughout years. His early attempts at the episcopal legal academy in Pécs and at the royal legal academy in Bratislava ended in failure.[54] It is not accidental that one of the main topics of the letters written during the study trip abroad concerned the job search. However, it is less widely known that before the study trip in Germany he had applied for a job to the Calvinist legal academy in Sighet. As soon as he arrived in Leipzig, he informed his parents in his letter of 30th October, 1896 about the developments. He had consulted Pikler about the possible finding a job in Sighet before his study trip. According to his mentor, the position in Sighet would not be useless at all until he acquired the qualification of honorary lecturer. After two weeks, he could still write that he had not received an answer from Sighet.[55] After another week, he received a note from the curator of the legal academy,

[51] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 21st May, 1897. NSzL, MA.

[52] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 22nd June, 1897. NSzL, MA.

[53] *The letter of Bódog Somló to his parents.* Leipzig, 10th July, 1897. NSzL, MA.

[54] Somló first learnt about the expectable failure in Bratislava from the letter of Pikler, who intervened on his behalf at Gyula Wlassics, the Minister of Culture: "I talked to Wlassics in the most cordial manner. He said my reference was of consequence, he inquired about you and if you were Catholic. Nevertheless, judging from the two ways as he replied my request, namely whether to take you into account for the position in Bratislava and whether to consider you in other cases and generally, I am inclined to think that you have hardly any hope to get the position in Bratislava." *The letter of Gyula Pikler to Bódog Somló.* 12th October (1898). NSzL, MA.

[55] *The letter of Bódog Somló to his parents.* Leipzig, 13th November, 1896. NSzL, MA.

which made it clear that he could take up the position if he was Protestant. But not in another case.[56] Soon he received a further letter from the curator of the legal academy, the details of which he transplanted word for word into the letter sent to his parents in Hungarian. This made it unambiguous that since he was a Roman Catholic, according to the rules of the Calvinist convent, he could not take up the position disregarding the intentions of the legal academy. "... despite being enlightened, tolerant and broad-minded, we need to adapt to the rules of our convent...", wrote the curator.[57] It might have occurred to Somló for the first time that in case he does not have another choice, he will take up a position in the capital, at the legal department of Hungarian Railways, the employer of his father.[58]

The issue of religion rose to the surface in other context, as well. Upon the submission of his application to the legal academy in Pécs, Bódog Somló paid a ceremonial visit to the church principal of the legal academy, bishop Sámuel Hetyey. According to his diary, we know that the bishop was rather bewildered when he heard that Somló had pursued studies in the Protestant Heidelberg. "I visited Sámuel Hettyey (sic) in Nádas. He is a right-minded Hungarian man. He expressed his horror at hearing that I had studied in Heidelberg, where I must have been saturated with Protestant spirit."[59] It could well be the case that such bewilderment by the bishop had a role in the failure of the application.

During the months in Heidelberg, his new friend, Viktor Jászi also suggested a position to Somló. He suggested the Calvinist legal academy in Kecskemét to his friend, where there was a vacancy after the retirement of Benő Csilléry. "Recently, I received a letter from Tegze. He wrote that Csilléry had retired on 1st July and the vacancy may be advertised these days. Call an acquaintance at home and ask him to observe the Gazette with attention and to send you the advertisement. As I've heard, the selection will be effected by the church, but this should not refrain you from the submission of an application, in the worst case you will not be selected, but you can never know what kind of conjectures turn up...",

[56] *The letter of Bódog Somló to his parents.* Leipzig, 20th November, 1896. NSzL, MA.

[57] *The letter of Bódog Somló to his parents.* Leipzig, 26th November, 1896. NSzL, MA.

Bódog Somló was born as an Israelite under the name Félix Fleischer. He Hungarianised his surname and first name in 1891 under no. BM. 73866-91 [see Márton Szent-Iványi, *Századunk névváltoztatásai 1800 1893.* (Changes of names in our century 1800 1893), Budapest, 1895, 201.], but for the time being we do not know when he converted to the Roman Catholic religion. In the report of the grammar school in Timisoara of 1890/91, that is, in the year of the final examinations, he appeared as Bódog Fleischer, an Israelite. One of his schoolmates in Zilina, Sándor (later Ernő) Szeghy asked him in one of his letters of 1890, whether the news according to which he had converted to Catholicism and had become a "seminarist" was true. (*Sándor Szeghy's letter to Bódog Somló.* Lucsivna, 30th July, 1890. NSzL, MA.) In his reply, Somló firmly refuted the rumour. "As to your news from Zilina, there isn't a grain of truth in it, and I can't imagine what its grounds could be. The saying goes that there is some truth in every news, but this can't be applied in this case." (*The letter of Bódog Fleischer to a not known recipient.* Nové Zámky, 16th August, 1890. The National Széchenyi Library could not identify the recipient of the letter, Sándor Szeghy, who appears as "Not known" in the catalogue.) Later, the godfather of Bódog Somló could be Hügel, a parson, at least the letter, which he received from the parson with the greeting "My Dear Godson", refers to that. See *The letter of Hügel to Bódog Somló.* Szentpéter, 27th August, 1899. NSzL, MA.

[58] As it is known, Somló worked as an assistant draftsman at the metropolitan directorate of Hungarian Railways for years until his successful application to the legal academy in Oradea.

[59] *Bódog Somló's diary.* A note of 22nd April, 1898. NSzL, MA. Quart. Hung. 3038/1. Quoted by Varga, Cs.: Somló Bódog esete a pécsi jogakadémiával (The Case of Bódog Somló with the Legal Academy of Pécs). *Jogtudományi Közlöny*, 35 (1980) 8, 543.

as Professor Jászi wrote.[60] We do not know whether Somló took action to apply to Kecskemét after his failure in Sighet, but after he had committed himself to Hungarian Railways by that time, this seems improbable.

VI.

The Preparations towards Habilitation

Besides his studies and his job search, Somló had to pay attention to the preparation for his future qualification for the office of a lecturer at a university by enriching his literary workmanship. The period of his peregrination secured adequate circumstances for the work. In 1899, when he submitted his application for the qualification of an honorary lecturer at the university of Cluj, he supported his expertise with three treatises and two book reviews.[61] His first treatise, "The Parliamentary System in Hungarian Law" was published before his trip, in 1896, whereas, his second and third treatises, scilicet, "Regularity in Sociology" and "The Basic Principles of the Philosophy of International Law" were published in 1898. He published the book reviews about the monographies of Ernst Neukamp and Gyula Pikler in Jogtudományi Közlöny in 1897.[62] Upon the express request of Pikler, he wrote the book review about Neukamp's "Einleitung in die Entwicklungsgeschichte der Rechts" at the end of his stay in Leipzig.[63] He undertook the critique of the work of Pikler, "The Origin and Development of Law" during the Heidelberg period.[64] It is very likely that he collected material in Germany for his work "The Basic Principles of the Philosophy of International Law"[65] published on 71 printed pages in July, 1898. His treatise with more modest range, "Regularity in Sociology" was published on 23 pages after the lecture before the Hungarian Economist Society on 7th December, 1898.[66] Judging from these, it seems that his studies abroad and staying abroad in itself encouraged the scientific work of Somló, despite the momentary professional vacillation. It was also during his study trip in Germany that he signed on to be a consultant for the Hungarian Encyclopaedia of Law edited by Dezső Márkus. He was commissioned to write various entries primarily related to the philosophy of law (e.g. "philosophical science", "human rights", "marriage", "natural law").[67] Of course, these entries were completed and published after his return to Hungary. Later, apparently Gyula Mandello requested Somló to contribute to the "Encyclopaedia of Economics: a Repository of Economic Knowledge" edited by Gyula Mandello and Sándor

[60] *The letter of Viktor Jászi to Bódog Somló.* Strasbourg, 13th July, 1897. NSzL, MA. Gyula Tegze (Thegze, Teghze) and Benő Csilléry were professors of the legal academy in Kecskemét.

[61] The report of Dr. Rezső Werner, retired university professor in the subject of the habilitation dissertation of Dr. Bódog Somló.

[62] *Jogtudományi Közlöny*, nos. 10 and 22 of 1897.

[63] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 15th February, 1897 (Date of postmark). NSzL, MA.

[64] *The letter of Gyula Pikler to Bódog Somló.* Budapest, 22nd June, 1897 and Trsztena, 29th July, 1897. NSzL, MA.

[65] The note in his diary of 12th July, 1898 informs about the publication of the volume. NSzL, MA. Quart. Hung. 3038/1.

[66] *Bódog Somló's diary.* Note of 9th December, 1898. NSzL, MA. Quart. Hung. 3038/1.

[67] *The letter of Bódog Somló to his parents.* Heidelberg, 29th May, 1897 and Heidelberg, 24th June, 1897. NSzL, MA.

Halász to be published in three volumes between 1898 and 1901. Somló prepared two entries ("Society" and "Property") for the encyclopaedia.

VII.

The Scenes and Participants of Social Life

Of course, Somló did not spend the months in Germany exclusively with the examination of scientific problems. He made friends and acquaintances, he went out, took part in excursions and usually did exercises. However, the beginning turned out to be wearisome for Somló. Namely, the early letters from Leipzig introduce a lonely, unsociable young man devoted to his studies, who does not socialise with anyone: neither at university, nor anywhere else. The reason for this, he wrote to his parents, "naturally hides in myself". And he continued: "I live an unsociable life like a solitary man of means."[68]

Later, as I referred to that, in Leipzig he made friends with Béla Kreutzer (Kenéz), the future professor of the science of statistics and he hosted his friends from Cluj, Ferenc Knörr and Bálint Kolosváry, the future professor of private law. It was rather in Heidelberg that he made acquaintance with foreign scholarship holders. "The company is quite good and interesting, the representatives of the most varied nations are present", he informed his parents during the first week.[69] At the same time, he made friends with Viktor Jászi, the professor of public law of the Calvinist legal academy in Kecskemét (1868–1915), the brother of Oszkár Jászi, who later had an important role in the life of Somló.[70] "I enjoy the company of the young professor of the legal academy in Kecskemét, who also undertook the study trip as the beneficiary of a state grant. His name is Viktor Jászi and he is a kind and educated man."[71] Nevertheless, it turns out from the schedule of Somló that he socialised mostly with his flatmates in the boarding house in the evening. The company in the boarding house was made up by varied, American, English, Bulgarian, Japanese, Russian and Hungarian students. The chief, as Somló put it, the "Capo" of their friendly circle was a German general, who had travelled widely and was commissioned by the government to lead the archeological work in the region of Heidelberg. He raved about the "Capo", who had travelled widely and visited Hungary, as well, since he had seen more parts of Hungary, than Somló himself had.[72] Ladies also belonged to the company. Two determined ladies arrived at the University of Heidelberg from Eastern-Siberia: one of them studied national economy, the other one literary history. The friendly circle also included an amusing member, Mr. Browne, "a typical and extremely comical English" philologist, who often made his flatmates laugh.[73]

The study trip in Germany was first and foremost important for Bódog Somló from the viewpoint of scientific orientation. Although, he endeavoured to follow the directions of his mentors, primarily of Gyula Pikler, he was in search of the disciplines close to his interest with open spirituality. Though he was not completely satisfied with his studies at least in the case of Leipzig, he could spend precious months in the vicinity of noted professors of

[68] *The letter of Bódog Somló to his parents.* Leipzig, 9th November, 1896. NSzL, MA.

[69] *The letter of Bódog Somló to his parents.* Heidelberg, 5th May, 1897. NSzL, MA.

[70] Litván Gy.: Egy magyar tudós tragikus pályája a század elején [The Tragic Career of a Hungarian Scientist at the Beginning of the Century (Bódog Somló)]. *Valóság*, 16 (1973) 8, 34.

[71] *The letter of Bódog Somló to his parents.* Heidelberg, 7th May, 1897. NSzL, MA.

[72] *The letter of Bódog Somló to his parents.* Heidelberg, 12th June, 1897. NSzL, MA.

[73] *The letter of Bódog Somló to his parents.* Heidelberg, 7th May, 1897. NSzL, MA.

famous universities. Nevertheless, it seems that he adequately made the best of the infrastructure, that is, the seminars and the libraries, of the universities he visited. The period spent in Germany was of crucial importance from the viewpoint of the preparations for habilitation as his publications justify. Furthermore, the peregrination was of high significance from the viewpoint of personal returns as to the life-course, since besides making foreign acquaintances, he owed the friendship of Béla Kenéz and Viktor Jászi to this study trip.

Finally, we hope that becoming acquainted with the detailed history of the German study trip promotes the more complete knowledge of "the outward life-course" of Bódog Somló considered uneventful.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 2, pp. 122–135 (2010)
DOI: 10.1556/AJur.51.2010.2.4

GÁBOR ATTILA TÓTH*

Unequal Protection: Historical Churches and Roma People in the Hungarian Constitutional Jurisprudence

Abstract. Treating people as equals is one of the main aims of constitutional democracies. Numerous examples prove the adverse effects if a state violates the equality principles relating to ethnic minorities and religious groups. Here is a lesson from Hungary. The Hungarian Constitutional Court (hereinafter: HCC) is not engaged in adjudicating concrete 'cases and controversies', but seemingly reviews the constitutionality of laws. The Constitution lays down the fundamental tenets relating to religious groups, churches, ethnic minorities and the principles of equality in general. Thus, the question is how the problems of religions and minorities are reflected in the constitutional case-law.

The main theses of this article are following. First, based on historical facts the HCC provides preferential treatment for so-called historical churches. Second, in cases involving Roma the HCC does not consider the historical facts and social reality thus, the discrimination of Roma does not appear in the jurisprudence. Third, the unequal protection of churches and Roma by the state results in advantages being provided where the constitutional reasons of preferential treatment are absent while the state remains inactive where the promotion of the principles of equality would be most necessary.

Keywords: constitutional interpretation, freedom of religion, equality principle, indirect discrimination, Roma people

Introduction

Hungary has been a constitutional democracy for twenty years. The republic created by the constitutional amendments of 1989 is based upon the acknowledgment of fundamental rights and the rule of law. Hungarian democracy is characterized by the main institutions of constitutionalism: a parliamentary system, a President of the Republic with constrained powers, ombudsmen who guard fundamental rights and the HCC, which reviews the laws for their constitutionality.

Like in other Eastern European countries, the Hungarian form of the judicial protection of the constitution is closer the centralized German model than to the diffuse U. S. judicial review. By that I mean that the HCC is institutionally separated from the ordinary court system and has unique, *erga omnes* constitutional interpretative authority. At the same time, the HCC is more separated from the ordinary judiciary than the German Federal Constitutional Court. The latter may review any governmental action, including judicial decision, administrative decree and legislative act in a constitutional complaint proceeding.[1] The former may only review those individual complaints that state the judicial application of an unconstitutional law in the course of the proceeding. Thus, in Hungary, in a concrete

* Lecturer, Debrecen University, Faculty of Law, H-4028 Debrecen, Kassai út 26.; chief-adviser, Constitutional Court of the Republic of Hungary, H-1015 Budapest, Donáti u. 35–45. For their valuable help and advice, I wish to thank János Kis, Kriszta Kovács, and Balázs D. Tóth. This article is a revised version of a part of the author's recent book, see Tóth, G. A.: *Túl a szövegen. Értekezés a magyar alkotmányról* (*Beyond the Text. An Essay on the Hungarian Constitution*). Budapest, 2009.
Email: tothg@mkab.hu

[1] Kommers, D. P.: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, 2nd ed. 1997, 15.

controversy ending in a judicial decision, only the law applied can be reviewed, not the decision itself. If the HCC concludes that an unconstitutional law has been applied then the procedure may be re-opened. If only the application of the law was unconstitutional in the concrete case then the HCC is powerless. Consequently, Hungarian constitutional review is incomplete. There is no legal remedy in cases where fundamental rights are violated as a result of judicial application and interpretation of the law.[2]

The deficiency of constitutional complaint is not counterbalanced by the abstract nature of constitutional review. Anyone is entitled to bring an action without limitation; there are no deadlines to be observed, nor is the applicant required to show any impact or other legally protected interest (*actio popularis*).[3] The adverse effect of this procedure is that it seems as if Constitutional Court judges appear to be confronting norms with norms. If the lower norm (statute or other law) contradicts the higher norm (the Constitution), the HCC annuls the former. It is up to the discretion of the judges to what extent they present the encroachments of rights and social problems in the course of any constitutional review that is separated from concrete controversies.[4]

But can judges hide behind the articles of law? Law is not exhausted by any catalogue of rules and principles, but an interpretive concept influencing the everyday life of the members of the political community.[5] Law and, especially, constitutional law is a practice of the political community in which the HCC is merely a co-actor, not the only one. Legal authorities vested with interpretive authority (the President of the Republic, ordinary courts, ombudsmen etc.), the petitioners and other legal subjects' not authoritative legal interpretation also form a part of the constitutional interpretation practice.

Thus, the interpreters of the Constitution are participants in a communal practice. The way they examine the text of the Constitution is not independent from space and time, but they possess culturally and historically predetermined pieces of knowledge and premises ("pre-judice").[6] In the course of deciding cases these preconceptions enter into dialogue with the text of the norms. We can say that interpretation is embedded in the everyday life of the political community. On the one hand, it is so because the social environment provides the preconditions of interpretation. On the other hand, interpretation shapes the communal practice. Therefore, the appropriateness of constitutional interpretation depends whether it is in accord with the facts of the political community. And it also depends on what practical

[2] Hence, Georg Brunner's conclusion is well founded: 'The arrangement for a constitutional complaint constitutes the most unsuccessful provision of the Constitutional Court Act.' Brunner, G.: Structure and Proceedings of the Hungarian Constitutional Judiciary. In: Sólyom, L.–Brunner, G.: *Constitutional Judiciary in a New Democracy: the Hungarian Constitutional Court.* Michigan, 2000, 84.

[3] *Ibid.* 81.

[4] The names of the petitioners and the content of the petitions are exceptionally made known to the public. In 2009 the European Court of Human Rights held that there had been a violation of Article 10 of the Convention (freedom of expression and freedom of information), because the Constitutional Court had denied the Hungarian Civil Liberties Union the right to release an MP's petition for abstract review. The MP's petition requested the constitutional review of some recent amendments to the Criminal Code which concerned certain drug-related offenses. See *Társaság a Szabadságjogokért versus Hungary*, App. no. 37374/05., Judgment of 14 April 2009.

[5] Here I follow Dworkin's conception of law as integrity. See Dworkin, R.: *Law's Empire.* Oxford, 1998, 226, 410–413.

[6] Here I refer to Gadamer's hermeneutic conception. See Gadamer, Hans-G.: *Truth and Method.* New York, 1975.

consequences the interpretation have, i.e. how it forms the relations of the political community.

In this analysis I show that experiences drawn from social reality inevitably emerge in the course of the abstract interpretation of the Constitution. The words of Constitution are inseparable from those societal phenomena to which the words refer. Symbolically speaking, the understanding of constitutional rules does not take place in an interpretation laboratory of a scientific institute, but departs from communal practice and in the end contributes to the formation of that communal practice.

I show through the example of two groups how the social environment and constitutional interpretation interacts. One of them is the societal and constitutional perception of various religious groups; the other is that of the Roma as an ethnic minority group. My thesis is that the Hungarian constitutional jurisprudence treats these two social categories differently. It refers to historical and cultural facts in order to safeguard the privileges of churches, especially, historical churches. However, the social problems of Roma that also have historical and cultural roots are disregarded. This double standard in the twenty-year Hungarian practice has resulted in providing preferential treatment for historical churches. Conversely, the HCC's jurisprudence does not react to racial discrimination against Roma people.

Constitutional Principles

The Hungarian Constitution lays down the fundamental tenets relating to churches, ethnic minorities and the principles of equality in general. Since the text comes from 1989 and its models were international human rights instruments and the more recent Western constitutions, it was written in the language of modern constitutionalism.

The Free Exercise Clause of the Constitution reads: 'In the Republic of Hungary everybody has the right to freedom of thought, conscience and religion.' (Article 60 para. 1.) According to the Separation Principle of the Constitution: 'the church shall operate in separation from the state'. (Article 60 para. 3.)

The Constitution forbids discrimination based upon specific traits. 'The Republic of Hungary shall ensure the human rights and civil rights for all persons on its territory without any kind of discrimination, such as on the basis of race, color, gender, language, religion, political and other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever.' (Article 70/A para 1.) Besides the antidiscrimination principle, the Constitution also provides for the principle of preferential treatment: 'The Republic of Hungary shall promote equality of rights for everyone through measures aimed at eliminating the inequality of opportunity.' (Article 70/A para 3.) Moreover, the Constitution explicitly protects minorities: 'The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people' and 'The Republic of Hungary shall provide for the protection of national and ethnic minorities.' (Article 68 paras 1 and 3.)

So, according to the written text of the Constitution, the state is separated from the church; national and ethnic minorities enjoy special protection and it is forbidden to discriminate on the basis of suspect classification such as religion, race, color and ethnic origin. Since the Constitution was written in the language of abstract principles it does not refer explicitly to individual churches[7] or minorities, among them the most populous, the Roma.

[7] Moreover the text of the Constitution refers to 'the church' as if there were only one.

The HCC in its first landmark decisions established that liberty rights, including the right to free exercise of religion and equality emanate from the notion of human dignity. In 1993 the HCC clarified all the relevant notions concerning personal freedom of religion.[8] 'The individual freedom of conscience and religion acknowledges that the person's conviction, and, within this, in a given case, religion, is a part of human dignity, so their freedom is a pre-condition for the free development of personality.'[9]

The requirement of the separation of state and churches and of religious neutrality of the state was also declared in that decision. 'From the principle of separation it follows that the state must not be institutionally attached to churches or any one church; that the state must not identify itself with the teachings of any church; and that the state must not interfere with the internal working of any church, and especially must not take a stance in matters of religious truths. From this (as well as from Article 70/A of the Constitution) it follows that the state must treat churches equally.'[10]

The general principle of equality also reflects the idea of human dignity. 'The prohibition of discrimination means all people must be treated as equal (as persons with equal dignity) by law – i.e. the fundamental right to human dignity may not be impaired, and the criteria for the distribution of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests.'[11]

The HCC connected the requirement of preferential treatment, the so-called 'positive discrimination' to this principle. 'The right to equal personal dignity may occasionally result in entitlements according to which goods and opportunities must be distributed (even qualitatively) equally to everyone. If, however, a social purpose (...) may only be achieved if equality in the narrower sense cannot be realized, then such a positive discrimination shall not be declared unconstitutional. The limitation upon positive discrimination is either the prohibition of discrimination in its broader meaning, i.e. concerning equal dignity, or the protection of the fundamental rights which are positively expressed in the Constitution.'[12]

With a bit of exaggeration we could say that the HCC reads the Hungarian Constitution with the help of the theories of Rawls and Dworkin. The principles of justice are echoed in giving priority to each person's equal right to basic liberties, including liberty of conscience compatible with the similar liberty of others. The relationship between basic liberties and equality of opportunity has been also read through the lens of Rawls.[13] In addition, the HCC's concept concerning the neutrality of the state originates from the notion of equal liberty of conscience.[14] Similarly, the Hungarian constitutional

[8] Decision 4/1993. (II. 12.), ABH 1993, 48. The original versions of the decisions are available at http://www.mkab.hu/hu/frisshat.htm. Some important decisions are in English at http://www.mkab.hu/en/enpage3.htm.

[9] Decision 4/1993. (II. 12.), ABH 1993, 48, 52.

[10] Decision 4/1993. (II. 12.), ABH 1993, 48, 52.

[11] Decision 9/1990. (IV. 25.), ABH 1990, 46, 48.

[12] Decision 9/1990. (IV. 25.), ABH 1990, 48 49.

[13] Rawls, J.: *A Theory of Justice.* Cambridge (Mass.), 1971, 60–61.

[14] *Ibid.* 205–211.

concept of equal human dignity and the treatment as an equal are derived from the Dworkinian egalitarian point of view.[15]

Below I briefly show how the HCC applies these abstract constitutional principles in cases affecting religious groups and Roma people.

Historical Privileges

In the above-mentioned landmark freedom of religion decision, the petitioners simply challenged the constitutionality of an act that provided for returning real estates to certain churches that had been their owners before the communist nationalization.

Besides the neutrality principle, the HCC also emphasized that a number of tasks formerly carried out by the churches (e.g. school education, taking care of the sick, or charity) have become the duties of the state while the churches have also maintained their activity in these domains. This is why 'from the separation principle it does not follow that the state should endorse the negative right to freedom of religion, let alone religious indifference. Nor does the separation of church and state mean that the state must disregard the special characteristics of religion and church in its legislation.' And, also, 'treating the churches equally does not exclude taking the actual social roles of the individual churches into account.'[16]

Hence, according to the interpretation of the HCC, on the one hand formal equality followed from fundamental principles of the Constitution; on the other hand it became possible to treat those churches preferably that had been operating for a long period of time. In the concrete case this resulted in the fact that within the scheme of reprivatization only historical churches were returned their church-related real estates in the course of property compensation. Other institutions were given only partial compensation for their nationalized real estates.

Based upon this precedent the HCC handed down two important decisions in 1993 that pointed in different directions. In one of the decisions the HCC dealt with the conflict between legal rules mirroring religious obligations and alternative social customs. The leaders of the Jewish religious community complained that under the Labor Code one could not work on Sunday in exchange for a different day off. The petitioners requested that Saturday should also count as a work free day. They also considered it discriminatory that only Christian holidays (Easter and Christmas) were recognized by the state as non-working days.[17]

Although the decision anachronistically distinguishes between countries within the 'Jewish-Christian tradition' and 'Islamic countries', the reasoning was not centered on religious grounds. First, the HCC declared that the State 'may not favor any of the religions in an exceptionally exclusive treatment' and 'may not hinder any [...] members of religion in their free exercise of their faith'. Second, the HCC based its decision on the assumption that the greatest holidays of the Christian religions have a secularized and general social character. They are 'red-letter' days not because of their religious content but because of

[15] Dworkin, R.: *Taking Rights Seriously.* Cambridge (Mass.), 1977, 227. László Sólyom, the first president of the HCC acknowledged that Dworkin's conception was imported. Sólyom, L.: The Hungarian Constitutional Court and the Social Change. *Yale Journal of International Law*; 19 (1994) 1, 222, 229.

[16] Decision 4/1993. (II. 12.), ABH 1993, 48, 53.

[17] Decision 10/1993. (II. 27.), ABH 1993, 105.

economic considerations and compliance with the expectations of society. 'The religious and secular elements are strongly mixed in these holidays. (...) Most of the citizens like to spend these days–without identifying themselves with their religious content–with their families, following tradition or with resting. No similar societal traditions are attached to the two biggest Jewish feasts (Ros Hasana and Yom Kippur). In the course of determining holidays as non-working days the legislator was led by traditions and expectations and not by securing preferential treatment for one of the churches.'[18] Based on these considerations, the HCC upheld the validity of the law. Declaring Easter Monday, Christmas Day and Sunday non-working days were declared constitutional.[19]

So this decision did not provide preferential treatment to religions and churches. The constitutional reasoning was tailored to profane traditions, popular customs and to the majority conception of holidays that form the communal practice. Thus, here customs appear in a *weak* sense. The traditional regulation can be upheld since no evidence appeared that would point towards changing the practice. A legislative and social practice that has religious origins but can be justified on a secular ground does not violate the principle of equal dignity.[20]

The decision on the statutory preconditions of founding churches pointed in a different direction. A petitioner challenged the statute that required a church to have at least one hundred members in order to be registered with and recognized by the state as discriminatory. The HCC, in rejecting the claim, emphasized that this objective distinction had no influence on the most important functions of the religious communities – worship, education, and social services. According to the decision, communal exercise of religion can be carried out without church status. Moreover, the HCC's reasoning distinguished not only between churches and religious organizations without church status, but also among churches themselves. 'It is not a constitutional problem that historical churches with large membership through their organization and their co-operation with the State in many areas facilitate the exercise of religion for their members where the assistance of other (often state) institutions is required, such as in health-care or penitentiaries.'[21]

There is a fundamental difference between the two cases' practical perspective. Specifically, the judgment on Saturday and holiday work avoided discriminating between religions, since it attributes secular reason for the law. At the same time, the judgment on church status explicitly and purposively provided preferential treatment for historical churches vis-à-vis other churches, religious groups and communities.[22]

[18] Decision 10/1993. (II. 27.), ABH 1993, 105, 106 107.

[19] For more on the early freedom of religion case-law in Hungary see Paczolay, P.: The Role of Religion in Reconstructing Politics in Hungary. *Cardozo Journal of International and Comparative Law*, 4 (1996) 2, 261. Paczolay argues that the HCC tried to hold a central position between conservative and liberal attacks.

[20] Contrary to this, tradition in the *strong* sense means that tradition is an unconditionally obligatory norm. This type of traditionalism supports maintaining the tradition even if it violates the principles of equality.

[21] Decision 8/1993. (II. 27.), ABH 1993, 99, 100.

[22] András Sajó raises the question why the need arises from time to time from the state's side to act against small churches. He argues that the modern Hungarian Constitution provides for the separation of the state and church, however, this decision treats other countries' (e.g. Austria, Germany) century-old compromises as models. Sajó, A.: A „kisegyház" mint alkotmányjogi képtelenség ("The Small church" as Constitutional Nonsense). *Fundamentum* (1999) 2, 87, 96.

This latter decision became the precedent in the Hungarian case-law. In 1995 the HCC examined the constitutionality of the governmental decree concerning army chaplain service. The decree provides for the free exercise of religion and spiritual care only for members of the four 'historical churches' (Catholic, Calvinist, Lutheran, Jewish). The army chaplain service is operated with the participation of only these churches upon the governmental agreement concluded with them. The HCC came to the conclusion that the privileges of historical churches in the governmental decree are not unconstitutional, but 'refer to the real historical role and social significance of such churches.' Proving their real social significance, the decision's reasoning applied statistical argument. A survey conducted in the Armed Forces showed that only 'the believers of the four churches could be measured at a percental rate'. (The statistics did not show the degree of exercise of religion, but only the formal affiliation with churches.) Besides the data, the HCC tried to give other reasons in order justify unequal treatment among churches. According to the reasoning, believers of other religions may individually exercise their faith in the Army; moreover, if the law in question were changed, other churches could be included in the army chaplain service. I think with such reasoning one could justify the establishment of a state-church.[23]

There was no empirical examination conducted in other cases relating to the significant social role of historical churches. It was sufficient to refer to the 1993 and 1995 precedents in order to justify and extend privileges. Thus, numerous cases shutting up the communist past and laying the foundations for the future ended with an exceptionally (mostly from a financial perspective) favorable outcome for historic churches. As I have already mentioned, within the scheme of reprivatization only historical churches were returned their church-related real estates in the course of property compensation. Following this, the HCC declared it constitutional that churches are exempted from the general statutory ban on acquiring soil.[24] The HCC upheld that obligatory lustration extends, besides state leaders and professional politicians, to persons who carry out 'public opinion forming tasks'. However, contrary to journalists, for example, a decision exempted church leaders from lustration.[25] Practicing clergymen did not have to serve mandatory military service because this so-called 'positive discrimination' ensured the believers' free exercise of religion.[26] Since 1997, in order to fulfill their role emanating from the free exercise of religion, 'positive discrimination' has to be secured for church-run schools and kindergartens as compared with public education institutions run by foundations or associations. According to the decision, only church-run schools have the right to the auxiliary subsidy above the normative state allowance.[27] In 2007 this preferential financial treatment extended to the social, child-protective and welfare activities of the churches in contrast with those humanist

[23] Decision 970/B/1994, ABH 1995, 739, 743. Many criticized this decision. According to János Kis, this judgment would hardly survive the test either of the separation principle or that of the religious neutrality of the state and of the abolition of religious discrimination. Kis, J.: *Constitutional Democracy*. Central European University Press, 2003, 282.

[24] Decision 4/1993. (II. 12.), ABH 1993, 48, 63, 68. Decision 35/1994. (VI. 24.), ABH 1994, 197, 204.

[25] Decision 31/2003. (VI. 4.), ABH 2003, 352, 367. This decision overruled a former one that stated: certain organization of churches and their representatives 'surely take part in forming the public opinion'. Decision 60/1994. (XII. 24.), ABH 1994, 342, 358.

[26] Decision 46/1994. (X. 21.), ABH 1994, 260, 272. Mandatory military service ceased to exist in 2005 by constitutional amendment.

[27] Decision 22/1997. (IV. 25.), ABH 1997, 107, 116.

institutions that are not affiliated with churches.[28] As a result, for example, church-run schools receive more extended state subsidies than not-for-profit schools operated by the Waldorf Foundation. In 2008 the judges, by referring to the Concordat concluded between the Republic of Hungary and the Vatican, demanded that Catholic schools and public education institutions run by the state or municipalities be financed to exactly the same degree.[29]

This inventory shows how far the principle of state neutrality as it appears in the text of the Constitution got in cases interpreting the role of churches. As a matter of fact, we can see an argumentative procedure that shares a common starting- and ending point: the practice of the political community. From the perspective of constitutional interpretation the judges accepted the premise that historical churches have notable social weight, and that they have an outstanding role in the field of spiritual care and, also socially and culturally. At the same time, with their decisions they influenced the communal practice in a way that churches, and especially historical churches, were granted exceptionally favorable conditions for their spiritual and other activities.

The principles of the Constitution demand the separation of church and state and the equal treatment of religious communities. At the same time, the interpretative practice strengthened the old privileges of historical churches. According to the above reasoning these favors do not violate the principle of equal dignity and equal treatment. Moreover, the exceptional treatment of practicing clergymen and financing church-run public education institutions falls within the ambit of constitutionally justifiable preferential treatment.[30]

The Hidden Roma Reality

Now I turn from the category of religious groups to the Roma as an ethnic group. It is well known that in Hungary many hundred thousands of Roma live who have to face social difficulties, prejudice and segregation.[31] Similarly to the historic and social role of churches, this could not be seen in the text of the Constitution. However, if one wants to be informed by the constitutional case-law, it is easy to overlook the fact that a part of the citizens is Roma. This is so since the HCC has not openly addressed the problems affecting Roma. From the first decade of constitutional review it can be reconstructed from one of the decisions regarding compensation that, during the Second World War, similarly to Jews, Roma were also deported.[32] Apart from this there are two procedural orders that can be found in the case-law.

In one of the cases the petitioner argued that in the course of employment she found herself in an unfavorable situation due to the fact that her name refers to her mother's Roma origin. The President of the HCC dismissed her petition on procedural grounds since she did not question a specific legal rule, but only the application of a legal provision in a

[28] Decision 225/B/2000, ABH 2007, 1241.

[29] Decision 99/2008. (VII. 3.), ABH 2008, 844.

[30] Kriszta Kovács argues that the HCC uses the concept of preferential treatment in the wrong way and for the wrong purpose. Kovács, K.: Think Positive, Preferential Treatment in Hungary. *Fundamentum* (2008) 5, 46.

[31] See, for example, the European Commission against Racism and Intolerance's latest report on Hungary. http://www.coe.int/t/dghl/monitoring/ecri/Country-by-Country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf

[32] Decision 1/1995. (II. 8.), ABH 1995, 31, 35.

concrete case. According to the procedural order that dismissed the claim, the law on changing the names 'has no relevant constitutional relationship with the right to work non-discrimination clauses' of the Constitution.[33] Thus, the discriminative nature behind the facially neutral and generally applicable law could not be unveiled.

In the other case, a non-governmental organization protecting minorities, the Otherness Foundation challenged a local government resolution. Its first point provided: the local representative body 'with respect to the future decides that it declares those people *persona non grata* who do not fit in the life of the community, violating and endangering the public security and in the future, with all legal instruments it will make every effort to make these persons to leave the town.' The second point of the contested resolution empowered the notary to examine whether 'there are legal means to prevent' people who behave as outlined earlier 'from moving into the town'. The third point was a similar request also addressed to the notary. According to the HCC, the last two points of the resolution were not normative but individual decisions that 'did not refer to an unconstitutional procedure' and thus the judges had no competence to review them. As to the first point of the local governmental resolution, the judges concluded that it had neither individual, nor normative nature: 'it expresses intent' and 'general will' to solve local social problems and it counts as 'the autonomous and democratic administration of local public affairs'.[34] This decision is similar to the former in declining to decide on the merit of the case based on the fact that challenged provisions do not function as norms. At the same time, the HCC's decision indirectly legitimizes local governmental aspirations with hidden or indirect racism.

In the second decade of constitutional review the number of petitions relating to the discrimination of Roma has risen. At the beginning of the year 2000, two decisions were rendered in significant cases. Mainly non-governmental organizations protecting the human rights of Roma objected that laws did not provide adequate guaranties and did not secure proper procedures 'to cope with discrimination in the Hungarian society and in state institutions.' At that time Hungarian statute law did not demand equal treatment from private organizations acting in the public sphere. There was no efficient legal protection against indirect discrimination, and the conditions for proving discrimination were very difficult to meet. It was therefore almost hopeless to act against racial discrimination in the everyday life.

The decision of the HCC gives a long list of enacted laws against discrimination and concludes that it is not unconstitutional that 'there is no a comprehensive Act dealing with antidiscrimination issues'. Although 'it is conceivable that the fragmented legislation does not provide for certain types of discrimination', the judges had failed to examine these cases.[35] Thus the Parliament finally acknowledged Hungary's obligations concerning the approximation of Hungarian to European law and passed the Act on Equal Treatment and Promotion of Equal Opportunities.

The other case was the overture of the housing decisions. The Parliamentary Ombudsmen for Civil Rights and for the Rights of National and Ethnic Minorities jointly initiated a constitutional interpretation regarding to social problems. To put it simply, as a result of an inadequate institutional system, the homeless freeze to death on the streets of big cities in winter; the so-called 'arbitrary squatters' who are Roma families are moved out

[33] Order 924/I/1996, ABH 1997, 973.

[34] Order 949/B/1997, ABH 1998, 1265.

[35] Decision 45/2000. (XII. 8.), ABH 2000, 344, 347.

by municipalities so that they become hopelessly homeless.[36] According to the judges of the HCC, concrete rights, among them, the right to housing, cannot be derived from Article 70/E of the Constitution that provides for the right to social security. However, the state, in order to protect human life and dignity, 'is obliged to take care of the fundamental conditions of human existence–in the case of homelessness the state is liable to provide for housing if the situation directly endangers human life'.[37] Notwithstanding the petitions, the judges did not deal with the conflict between local governments and arbitrary squatters, who are mainly Roma.

Almost at the same time Parliament declared arbitrary squatting a misdemeanor and facilitated the vacation of arbitrarily squatted flats. The statutory amendments triggered many constitutional petitions, in which non-governmental organizations formulated the view that the new situation 'raises the danger of discrimination on ethnic grounds'. The decision of the HCC replied to this argument by pointing out that 'the situation of all arbitrary squatters is considered equally, independently of his or her ethnic origin'. By referring to their earlier decision, the judges declared: 'the state is obliged to secure the housing of evicted arbitrary squatters if their lives are directly endangered'.[38] The judges, however, refrained from examining the actual situation of Roma. So, based on this reasoning, one could not tell us whether squatting problems are caused by alternative squatters known from Western metropolitan environments or whether they can be attributed to the fact that, similarly to South American *favela*, the number of slums in the country has increased.

The Act and the assenting HCC decision encouraged many local governments. Local government decrees proliferated according to which those who had been formerly arbitrary, *mala fide* or squatters without legal title could not participate in the bid for social rental flats. Here it is important to note that according to former judicial precedents such local governmental decrees were unconstitutional on formal grounds since they contradicted the Act on Flat Rentals. For example, one of the Metropolitan's local governmental (Óbuda-Békásmegyer) decrees was annulled for this reason in 2005.[39]

Nevertheless, there was a radical shift in newer cases. By examining the rules of two big towns, Miskolc and Debrecen, the judges concluded that due to the amendment of statutory regulation the local governments may enact such decrees. That is to say, they may exclude arbitrary squatters and squatters without legal title from competition for social rental flats.[40] At the same time, two important dissenting opinions were handed down. According to one of dissenting opinions, the regulation is discriminative since 'it excludes those people from taking part in the competition (mainly unemployed, unskilled people with their large families) who due to their financial and social situation are coerced to commit unlawful acts and who would otherwise mainly resort to social rental flats'.[41] The other HCC judge also underlined that the only reason for exclusion is a misdemeanor motivated by hardship, while other unlawful acts (e.g. failure to pay local taxes) and even committing grave crimes do not pose an obstacle to bidding for social rental flats.[42] I think

[36] Of course, there are Roma among the homeless and not all squatters are Roma.

[37] Decision 42/2000. (XI. 8.), ABH 2000, 329.

[38] Decision 71/2002. (XII. 17.), ABH 2002, 425, 431.

[39] In this case the petitioner also argued that that regulation discriminates against the Roma population. Decision 4/2005. (II. 25.), ABH 2005, 613.

[40] Decision 1074/B/2004, ABH 2006, 1669. Decision 1075/B/2004, ABH 2006, 1686.

[41] Judge Bihari's dissenting opinion, Decision 1074/B/2004, ABH 2006, 1669, 1681.

[42] Judge Bragyova's dissenting opinion, Decision 1074/B/2004, ABH 2006, 1669, 1683.

these two dissenting opinions came closest to the core of the problem, but the taboo was not broken. For two decades the problems relating to the exclusion and discrimination of Roma has remained hidden.[43]

Playing with Time

I hope in the former two chapters I have managed to prove the role the facts of the political community play. The reasoning is supported by historical references and empirical data when a conclusion preferring traditional churches is required. In Roma cases, however, the reasoning of the judgments does not reflect social reality. At the same time, we can see that discriminative practice behind the norms can be demonstrated. In order to ultimately support this thesis let me recall two cases that, due to their temporal coincidence, make it possible to compare the preferences of the judges. One of them is the constitutional review of the Act on Registered Partnership. The other is related to local government decrees regulating the social allowances of Roma living in deep poverty.

In the last days of 2007 the Hungarian Parliament enacted the Act on Registered Partnership. The HCC formerly on many occasions declared homosexual marriage to be contrary to the Constitution. 'The Constitutional Court points out that both in our culture and law the institution of marriage is traditionally a union of a man and a woman. This union typically is aimed at giving birth to common children and bringing them up in the family, in addition to being the framework for the mutual taking of care and assistance of the partners. (...) The institution of marriage is constitutionally protected by the state also with respect to the fact that it promotes the establishment of families with common children.'[44]

This conventionalist interpretation followed the conception of historical churches, namely, the text of the Constitution only provides that '[t]he Republic of Hungary shall protect the institutions of marriage and the family'. (Article 15.) Thus, the majority of the legislative branch took only very cautious steps towards the equal status of homosexuals. According to the new statute, property and personal rights were attached to registration, but there was no possibility to use the other's name nor for adoption. Besides this, the new rules also enabled heterosexuals to establish registered partnership status. In this way legislators aimed to create the legal framework for partnerships outside of marriage. In this manner they also tried to decrease the legal segregation of homosexuals.

At the time of passing the Act on Registered Partnership, an anti-Roma local governmental movement was initiated. The essence of the Monok-model (named after the first municipality to introduce such measures) is that those receiving social allowances were obliged by local governmental decree to carry out public-interest work, or allowances were

[43] Reproductive rights-related issues, including the decision on sterilization, are noteworthy. The reasoning of the decision is very abstract: 'cases in several European countries and the United States also prove that despite of the regulation based on voluntariness and non-discrimination, numerous abuses may occur in practice'. Decision 43/2005. (XI. 14.), ABH 2005, 535, 540. In reality, similarly to the Slovak and Czech cases, Hungarian Roma women are among the victims. For example, the Committee on the Elimination of Discrimination against Woman held that the State had violated a Hungarian Roma woman's fundamental rights by performing the sterilization surgery without obtaining her informed consent. (CEDAW/C/36/D/4/2004.) See also Body and Soul: Forced Sterilization and Other Assaults on Roma Reproductive Freedom in Slovakia. Center for Reproductive Rights, 2003.

[44] Decision 14/1995. (III. 13.), ABH 1995, 82, 83.

directly revoked from those who were entitled to them. Via these regulations local governments who aimed to displace members of the Roma minority were even willing to violate the Social Act and the Act on Child Protection. In this way, the increasing ill will connected to the economic and political crisis was aimed at the most defenseless minority. They did not receive a proper job and pay–only an allowance. The fact that they performed work publicly (e.g. collecting garbage) did not improve their situation on the labor market; it rather increased prejudices towards them.

Subsequently the Parliament passed the Act establishing the equal status of homosexuals, having considered the changing habits of young heterosexual couples. At the same time, many local governments passed decrees so as to deprive Roma of the material resources of the community and to displace them from settlements. Both legal changes stimulated serious debates and challenged before the HCC. The Act on Registered Partnership was primarily objected by historical churches in the public sphere and immediately several petitions were sent to the HCC. The decrees on the allowances were questioned at the HCC by the Roma Civil Rights Foundation and a Head of Public Administration Office (that supervise the legality of local government decrees). In the former case the regulation to be contrasted with the Constitution has not been declared unconstitutional in any comparable countries. The latter case included norms that were passed explicitly and knowingly with the intention of constitutional violation by local governments.

Now the question is when the HCC rendered decisions and what the court said. The judgment on the Act on Registered Partnerships was passed before the given statute had come into force. The decision declared the whole regulation unconstitutional, and thus it did not come into effect.[45] The statute promoting equality was found to be unconstitutional due to the conventional conception of marriage.[46] In terms of heterosexuals the judges did not accept that the statute does not separate adequately the status of registered partnership from the institution of marriage. Adoption, the right to use the other's name, the waiting period before registration and other differences were proved to be unsatisfactory in protecting the so-called 'essential content' of marriage.[47]

[45] Decision 154/2008. (XII. 17.), ABH 2008, 1203.

[46] The decision refers to the judgment of the German Federal Constitutional Court several times. BVerfG, 1 BvF 1/01, 1 BvF 2/01 vom 17.7.2002. However, the HCC's reasoning is rather similar to the rejected objections of the German petitioners. The German petitioners also tried to prevent the act from coming into force, but the decision was published only after the act had become effective. According to the German petitioners, the act empties the institution of marriage. Contrary to this, the rules formulated in the *ratio decidendi* of the decision provide that the constitutional protection of marriage 'does not hinder the legislator in establishing such rights and obligations for the partnership of homosexuals as are identical or very similar to it'. According to the reasoning, 'the conception of the special protection of marriage which points to the apprehension of such partnerships in their difference to marriage and vesting less rights in them cannot be justified'. (Para 98.) Consequently, the German decision did not provide for the discrimination of registered partners, but approved the act that aimed at equaling the status of homosexuals.

[47] Apart from Hungary, no other state has sought to exclude heterosexuals on constitutional grounds from living in a registered partnership that is more or less similar to marriage. In some places there is a possibility for the registered cohabitation of heterosexuals (e.g. Belgium, the Netherlands, Luxemburg, France, New Zealand, Québec in Canada, Catalonia in Spain etc.). In those countries in which this option is only open to homosexuals besides marriage or as an alternative to it, it is not for constitutional reasons that cohabitation of heterosexuals remains unregistered (e.g. in common law).

As to homosexual couples the judgment implicitly established the category of *separate and unequal*. Even though the decision theoretically acknowledged that the registered partnership of homosexuals is not unconstitutional, it did not approve the reviewed regulation.[48] Apart from the fact that homosexual couples may not get married, when it comes to regulating their registered partnership 'the differences flowing from the nature' of such relationships and marriage must be maintained. This means that in the Hungarian constitutional practice the reasons for equal treatment must be shown, not that there is a compelling interest in unequal treatment.[49]

In the meantime, no decision declaring unconstitutionality has been rendered in the local government cases that further dampened the prospects of Roma.[50] Procrastination resulted in the fact that rather than the unconstitutional local government decrees being modified according to the statutes, Parliament had begun to modify the statutes at the expense of people living in deep poverty.[51] I think it can be inferred from these two cases that choosing the time of interpretation and decision-making also shows the preferences of a court.

Conclusions

The Constitution consists of abstract principles. It separates the state from churches (that have equal status) and it protects ethnic minorities. The judges interpret the abstract norms of the Constitution and laws. However, the words of the Constitution refer to a concrete political community. Adjudication is a form of decision-making on common, public issues. Therefore, constitutional review is closely connected to the practices of the political community.

This is proven by Hungarian case-law relating to historical churches and Roma. The presented cases serve as an example that constitutional law is an interpretative concept. Authoritative constitutional interpretation is triggered by the interpretative initiatives of citizens, not-for-profit organizations, ombudsmen etc. The decisions of the HCC influence the operation of the legislation and other institutions and, accordingly, form the practices of the political community.

[48] After the HCC's ruling, the Parliament passed an altered version of the Act on Registered Partnership. As a result registered same sex partnership has become a legal option in Hungary.

[49] The ECtHR protects homosexual relationships according to Article 8 of the Convention. The state has to prove that the statutory regulation adversely affecting homosexual partners compared with heterosexuals serves a legitimate aim and is justifiable. For example *Karner v. Austria,* App. no. 40016/08., Judgment of 24 July 2003. The family concept of the Convention does not only protect relationships based on marriages; thus the state may not regulate what type of relationship couples adopting a child choose. *Emonet and Others v. Switzerland*, App. no. 39051/03., Judgment of 13 December 2007.

[50] The HCC annulled two local government decrees in the summer of 2009. Both of them made it possible to revoke child-protection allowances if the child does not go to school. Decision 79/2009. (VII. 10.); Decision 80/2009. (VII. 10.). The reason of annulment was that the decrees were contrary to statutory regulation. There was no reference to the Roma minority in the decisions.

[51] Parliament supported the government's 'Road to Work' program that tried to take the wind out of the sails of racist local governmental aspirations. However, by this time many local governments had moved ahead and introduced a so-called 'social card' that limited the utilization of financial allowances.

The choices of the interpreters determine to what extent social reality appears in judgments and to what conclusions it contributes. In the case of army chaplain service we can find the example that judges were oriented in social facts with the help of statistics. The constitutional privileges of historical churches were based on their conventional social role. When changing societal experiences were confronted with the conventions, like the frequency of going to church, the habits of getting married and family relations then the conventions were held to be stronger than reality.

In the practice of other institutions, empirical surveys are an effective method of mapping indirect discrimination and racism.[52] The Hungarian jurisprudence did not resort to such tools, however. Thus, while historical churches became constitutional categories, Roma do not even appear in the decisions.

The different approach to churches and Roma can be traced back to a mistaken conception of equality. The concept "eliminating the inequality of opportunity" in Article 70/A para. 3 of the Constitution explicitly refers to social situations. The text cannot be interpreted without their evaluative analysis. The HCC described the preferential treatment of historical churches as positive discrimination without shedding light on their adverse situation. At the same time, in Roma cases the features of indirect discrimination and preferential treatment were not put forward.

There is a significant distance between the principles and the case-law.[53] The reason is that there is a lack of adequate reflection on social reality. In the case of historical churches the judges apply the concept of preferential treatment, but it is not clear what type of inequality can be found at the starting point. In contrast, in the case of Roma all empirical analysis forewarns of the extraordinary social consequences arising from inequality. In relation to Roma, there is evidently a need for special legislation, since the root of the problems and the nature of hardship is different from other ethnic minorities. Moreover, the situation is becoming more serious. Verbal and physical assaults against Roma are increasing and certain public figures use anti-Roma speech. In line with these trends, indirect discrimination has not decreased, but rather increased in laws and in deciding individual cases. The Hungarian constitutional institutions not only remain color-blind, but simply blind and mute.[54]

[52] For example in Strasbourg in relation to the school segregation of Roma. The ECtHR sums up the earlier practice of applying statistical evidence: *D. H. and Others v. The Czech Republic*, App. no. 57325/00., Judgment of 13 November 2007. para 137, 188. See also Goldston, J. A.: Kelet-európai próbaperek a faji diszkrimináció ellen (Eastern European Test Cases against Racial Discrimination). *Fundamentum* (1997) 2, 130.

[53] Kriszta Kovács shows that the HCC has never declared unconstitutionality based upon suspect classification. It found, for example, in the legal system gender-based discrimination affecting mostly men. Kovács, K.: Think Positive, Preferential Treatment in Hungary. *Fundamentum* (2008) 5, 46, 48.

[54] Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, visited Hungary in October 2009, and 'expressed to the authorities his grave concern about the observed rise of extremism, intolerance and racist manifestations that have targeted, in particular, members of the Roma minority population. Of special concern have been the public use of anti-Roma hate speech by certain public figures and the lack of strong condemnation of and effective measures against a reoccurrence of such incidents.' [Press Release - 762(2009)].

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 2, pp. 136–155 (2010)
DOI: 10.1556/AJur.51.2010.2.5

KATALIN RAFFAI*–SAROLTA SZABÓ**

Selected Issues on Recent Hungarian Private International Law Codification***

Abstract. This article is the shortened version of the national report submitted to International Academy of Comparative Law. It summarizes and describes the present situation of the Hungarian Private International Law by analyzing the Law Decree No. 13 of 1979 on Private International Law (hereafter referred to as Code). The Law Decree is the first legal instrument in the history of the Hungarian PIL which has been modified significantly with the aim of harmonization with European Law since 2004. The major part of the article deals with defining the different aspects of theoretical approach which provides a profound interpretation of Hungarian PIL in scientific terms. On the other hand, the applied scientific approach serves as a guideline for filling legal gaps in the Hungarian PIL Code. In addition to this, the article gives an overview of the Hungarian judicial application of PIL rules emphasizing the eclectic and contradictory character of the jurisdiction in Hungary.

Keywords: Hungarian PIL Code, Hungarian PIL rules, Hungarian jurisprudence, methodology of PIL, qualification, *renvoi*, *ordre public*, mandatory rules, law governing contracts and torts, judicial application

I. Brief History

Although in the 19th century there was no unified private international law (PIL) in Hungary, there existed rules regarding PIL in certain domestic statutes. Bilateral international agreements played an important role, such as the trade agreement concluded with the USA in 1929, and various other agreements on legal assistance.

In the 20th century, up to the end of the Second World War, regulations regarding private international law continued to appear scattered in various different enactments. This accidental and rather chaotic method of legislation on Hungarian private international law made necessary a comprehensive codification of the law on this field.

In 1948, *István Szászy*, professor of private international law, introduced a draft which regulated in great detail both the general and specific questions of PIL. The draft, which was prepared with excellent scientific erudition, reflected the theoretical achievements of the age as well as Hungarian judicial practice. The political changes taking place at the end of the 1940s in Hungary, namely the communist takeover of political power, had a negative impact on the future of the draft. It was declared anti-democratic, reflecting capitalist values, therefore unacceptable. *Professor István Szászy* was forced to stop teaching and had to

* Ph.D. Research Fellow of Private International Law, Pázmány Péter Catholic University, Faculty of Law and Political Sciences, H-1088 Budapest, Szentkirályi u. 28–30.
E-mail: raffai@jak.ppke.hu

** Ph.D. Assistant Professor of Private International Law, Pázmány Péter Catholic University, Faculty of Law and Political Sciences, H-1088 Budapest, Szentkirályi u. 28–30.
E-mail: sarolt@jak.ppke.hu

*** This report was submitted to International Academy of Comparative Law, 18th International Congress of Comparative Law (2010) Topic II. B. Droit International Privé/Private International Law: Les codifications récentes du droit international privé/ Recent private international law codifications.

remain silent for a long time. The question of the codification of Hungarian private international law did not arise for another two decades.

Works of codification were started in 1966 under the conduct of the Legal Institute of the Hungarian Academy of Sciences, and the second draft was completed in 1968. The Ministry of Justice took over the conduct of codification, and by 1970 another draft had been completed. The fourth draft was ready in 1978, accepted in 1979, and made public as Law Decree No. 13 of 1979 on Private International Law (hereinafter referred to as *Code*).

Minor modifications have been made on the Hungarian PIL Code several times. More comprehensive modifications started to take place from the beginning of 2000, primarily with the aim of harmonization with European law. In 2000, sections IX and XI, dealing with jurisdiction and the recognition of foreign judgements, were re-regulated, and they were further modified in 2001, 2002, 2003 and 2004. Hungary has ratified the Convention of 1980 on the law applicable to contractual obligations (hereinafter referred to as *Rome Convention*) in 2006.[1] The last modification took place in accordance with the results of EU unification of private international law. Act No. IX of 2009 is mainly a technical modification with the primary aim of drawing attention to the fact that beside EC Regulation on the law applicable to non-contractual obligations[2] (hereinafter referred to as *Rome II*) and EC Regulation on the law applicable to contractual obligations[3] (hereinafter referred to as *Rome I*) the Hungarian Code can only be applied to a limited extent. The amendments have also introduced a new provision in Section II concerning private individuals; it complemented previous provisions with a further rule regarding the use of name by natural persons.

The structure of the Code is the following: it consists of three big parts and eleven sections. Altogether there are 75 articles dealing with the basic questions of private international law (General and Special Part) as well as with issues regarding jurisdiction and certain procedural questions. Section I, called General Rules, contains provisions concerning the purpose of the law-book and certain basic PIL legal institutions such as qualification, *renvoi*, determination of the content of foreign law, reciprocity, *ordre public* (public policy) clause, and fraudulent connection. The Special Part from Sections II to VIII determines the conflicts rules applicable to persons, law of intellectual property, property law and related rights, obligations, succession, family and labour law. Sections IX to XI contain regulations regarding jurisdiction, procedural law and the recognition and enforcement of foreign judgements. The Code itself is not too long; all the former drafts were longer. Therefore, the regulation of certain questions is rather brief and the definition of certain conflicts law institutions such as incidental question, the definition of international mandatory rules (*lois d'application immédiate*) is missing. These gaps have to be filled by judicial practice, which however does not apply uniform solutions.

The purpose and operation of the Hungarian Code is governed by the Articles 1 and 2. Article 1 states that the Code has a double purpose. First, in cases where elements of foreign private law are involved, it chooses from the conflicting legal systems the one whose substantive law should be applied (substantive law aim). Second, it determines what procedures the court should follow (procedural law aim). An element can be regarded as important foreign element only if it is relevant to the case. If the case contains foreign

[1] Act No. XXVIII of 2006.

[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 199, 31.7.2007, 40–49.

[3] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, 6–16.

elements but they are not relevant to the judgement of the case, or if the case does not contain any foreign elements, the Hungarian Code cannot be applied.[4] The Code emphasises its own subsidiarity when it declares in Article 2 that it "shall not apply to matters governed by international treaty". This provision is in harmony with Hungary's international obligations.

Naturally, the law sources of the European Community enjoy priority to the application of the Code. The priority of community law applies, e.g. to contract and tort law,[5] where the rules of Rome I and Rome II regulations prevail against the regulations of the Hungarian PIL Code. The scope of the Code extends only to cases which are not included in or regulated by these European instruments.

II. General Methodology

1. Legal Certainty and Flexibility

European – and therefore Hungarian – private international law follows the traditional model based on the system developed by *Savigny*. However, certain important modifications and changes in approach make this system more flexible and less certain. Modern European choice-of-law doctrine introduces flexibility in a number of ways, including alternative references, "soft" connecting factors and escape clauses. As a result, legal certainty and flexibility appear together in recent private international law codifications. *Professor Hay* described the second half of the 20th century as one in which "the tension between predictability and flexibility is the hallmark of conflicts law".[6] The resolution of this tension presents a dilemma in the development of private international law in the 21st century as well: How would it be possible to find a proper balance between the two principles?

We should therefore raise the question concerning Hungarian codification as well. How and to what extent do legal certainty and flexibility work together in the Hungarian Code? Is there an appropriate balance between the two doctrines? Unfortunately, the negative answer has not changed in the past ten years. As *Professor Burián* stated earlier: "Despite the contrary wishes of Hungarian commentators, the Hungarian PIL codification has put the overwhelming weight on the guarantee of security and foreseeability, and has neglected flexibility."[7]

[4] The foreign plaintiff is the sole proprietor of a Hungarian Ltd., who is defendant I. The plaintiff has turned to the court because in his/her opinion during the liquidation process the real-estate of the defendant was sold unlawfully to defendants II and III, who are also Hungarian. The Supreme Court stated that concerning the validity of the sales contract the fact that the plaintiff is of foreign nationality is irrelevant, for the sale was concluded between Hungarian parties. Therefore, the application of the Hungarian Code was omitted and the legal dispute was settled based on Hungarian substantive law. (Supreme Court Gf. II. 20. 176/2007/5)

[5] The third regulation is concerned with matters relating to maintenance obligations. Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7, 10.1.2009, 1–79.

[6] See Hay, P.: Flexibility versus predictability and uniformity in choice of law: reflections on current European and United States conflicts law. *Recueil des cours*, 226 (1992), 304.

[7] For the reasons more details, see Burián, L.: Hungarian Private International Law at the End of the 20th Century: Progress or Regress? In: Symeonides, S. (ed.): *Private International Law at the End of the 20th Century: Progress or Regress?* The Hague, 2000, 268.

Regarding specific tools ensuring flexibility, the Hungarian legislator has not made any significant steps forward on the "flexibility scale"[8]. The Hungarian PIL Code does not allow the application of escape clauses in general or specific fields and it does not apply so called malleable approaches or similar formulae either. Divergence from the rigid rules is made possible mainly by the alternative reference rules (in more detail in V). As a result of the 2009 modifications, the main connecting factor in contract law, in the case of questions not included in the scope of the Rome I Regulation, has become the "closest connection". Moreover, the modified Code allows the application of the choice of law in a limited form, concerning name bearing if the person is the citizen of more than one country (see XIII/1). These latter changes are undoubtedly the result of the activities of the European Community in the field of PIL. EU membership has given Hungarian PIL codification a new "impetus" to move towards flexibility: the developing nature of community law has become an important factor in the "quiet evolution"[9].

2. State-Selection and "Conflicts Justice" versus "Content-Oriented Law-Selection" and "Material Justice"

Demand for the enforcement of material justice (material justice deficit) has a central place in works of criticism regarding conflicts law. The line of reasoning goes that it is not permissible to limit private international law to the selection of the applicable law; the material justice of the decision has to be taken into consideration as well.

Instead of delving into the nature of the relationship between the categories listed in the title, we will refer to *Professor Vischer*, who stated that "[t]he aim of traditional bilateral conflict rules is "conflict justice" [*"Kollisionsrechtliche Gerechtigkeit" (Kegel)*] and not primarily the just substantive solution, [...] the substantive result is subjects to control by the *ordre public*".[10] Thus, conflicts justice requires no more than an allocation of legal relationship to those legal systems in which they have their "seat" (*Savigny*). Of necessity, this mechanism pays no attention to the quality of result it produces. Realizing the phenomenon and its negative consequences, in recent years there has been more and more emphasis on the corrective function of material justice in codified private international systems as well. *Professor Symeonides* has aptly described this process as "conflicts justice tempered by material justice".[11]

The Hungarian PIL Code actually is viewed as "the bastion of the classical view",[12] for it consists mainly of traditional conflict-of-law rules (or jurisdiction-selecting rules, as they were referred to by *Cavers*). The resulting blindfold application of conflict rules is traditionally corrected by the *ordre public* exception (ruled by Article 7).[13] The Code

[8] See Symeonides, S. C.: The American choice-of-law revolution in the courts: today and tomorrow. *Recueil des cours,* 298 (2003), 410.

[9] See *ibid.* 407.

[10] Vischer, F.: General course on private international law. *Recueil des cours*, 232 (1993), 93.

[11] Symeonides: *The American choice-of-law revolution... op. cit.* 403–404.

[12] See *ibid.* 400.

[13] The rule that allows both parties in a contract (Hungarian PIL Code Article 24) to select in advance the applicable law is content-oriented rule, but not necessarily result-oriented, and the same can be said about another rule of the Code, which allows both parties to agree to the application of the *lex fori* after the events that gave rise to the dispute (Article 9). In more detail about the theoretical connections, see Symeonides, S. C.: Private International Law at the End of the 20th Century: Progress or Regress? General Report XVth International Congress of Comparative Law. In: Symeonides, S.

contains very few other exceptions – mainly result-oriented rules – which consider the content of conflicting laws as well.[14] The reason for that is that since its coming into force in 1979, there have been no comprehensive, modernizing modifications on the Hungarian PIL Code. As a result, modern approaches to conflicts law such as the application of alternative connecting factors, flexible connecting factors, escape clauses, choice of law etc. appear very seldom, or not at all in the Code.

However a few above mentioned rules may be found in certain articles, such as those on the following subject:[15]

(a) rules favouring the validity of certain juridical acts:
(i) testaments: the article embodying the policy of *favor testamenti* provides that a testament shall be considered formally valid if it conforms to any one of the following five substantive law: the Hungarian law; the *lex personae* of the testator's at either the time of making or the time of death; the law of the testator's domicile or habitual residence at either the time of making or the time of death; the law of the place of making; in the case of immovables, the law of the situs [Article 36 (2)].

(ii) other juridical acts: the article embodying the policy of *favor negotii* provides an alternative-reference rule, a contract is formally valid if it conforms to *lex contractus*; *lex fori*, the law of the place of making or where the intended legal consequences are to take effect. [Article 29 (2)]. (We should note that this rule differs in some aspects from Article 11 of the Rome I Regulation.)

b) rules favouring a certain status:
(i) based on the principle of *favor divortii* there is a unilateral rule in the Code, according to which a marriage can be dissolved under the *lex fori* even if the applicable foreign law does not allow dissolution [Article 41 (a)].

c) rules favouring one party:
(i) choice of law by, or for the benefit of, one party
Pre-dispute choice by one party
Until recently, choice of law was only possible within the field of contracts in Hungarian PIL. However, the 2009 modifications on the Code have changed the situation, for the option of pre-dispute choice by one party has been introduced. The modernization has been made with regard to the decision of the Court of Justice of the European Communities in the *Garcia Avello* case.[16] The new provision concerning name bearing makes it possible that in the case of individuals with dual citizenship (Hungarian and foreign), not only the Hungarian substantive law,[17] but the rules of the relevant foreign country may be applied upon the request of the person in question [Article 10(2)].

(ed.): *Private International Law at the End of the 20th Century: Progress or Regress?* The Hague, 2000, 39.

[14] See also Burián: *op. cit.* 271.

[15] The aspects of classification are in alignment with the division made by *Symeonides*. See Symeonides: Private International Law... In: Symeonides (ed.): *Private International Law... op. cit.* 45–62.

[16] C-148/02. *Carlos Garcia Avello v. Belgian State* [2003] ECR I-11613.

[17] See Article 11

(2) If a person has multiple citizenships, and one of his citizenships is Hungarian, his personal law will be the Hungarian law.

Post-dispute choice by the court

Regarding questions of delictual liability outside of the scope of the Rome II Regulation (in more detail in XII), the Hungarian PIL Code establishes the rule of *lex loci delicti* as the main rule: it is the law prevailing at the place and time of the tortuous act or omission. However paragraph 2, based on the principle of *favor laesi*, provides that "[i]f it is more favourable for the injured party, the law of that state shall apply, in the territory of which the damage occurred" [Article 33(2)]. This rule assigns the choice to the court to be made for the victim's benefit. Sometimes it happens in Hungarian judicial practice that this rule serves as a hidden device for the application of the *lex fori*.[18]

There is a special provision in the Code with regard to the *infringement of personal rights*. This unilateral rule states that "if the Hungarian law is more favourable for the person suffering the injury in respect of the resultant compensation or indemnification, the claims shall be adjudged according to that law" [Article 10(3)].

In addition, a *rule favouring the child* appears. Regarding the status of the child and its family relationship Article 46 provides that "[t]he Hungarian law shall apply to the family legal status of a Hungarian citizen child or a child residing in Hungary, to the family law relationships between him and his parents, as well as to the obligation of maintenance provided for the child, if it is more favourable for the child".

(ii) protecting consumers or employees from the consequences of an adverse choice of law clause: with regard to the fact that these type of contracts are governed by Articles 6 and 8 of the Rome I Regulation, the former, partly different provisions of the Code were abolished with the 2009 modifications.

Based on the above we can conclude that the rules of the Hungarian PIL Code "bind the hands" of the Hungarian judge regarding the question of allowing the court to consider the content of the conflicting laws and make the choice dependent on that content. These restrictions are presently eased by the law sources of the European Union in the field of PIL and by the decisions of the Court of Justice of the European Communities. In the future, fundamental changes should be introduced by the comprehensive modification and modernization of the Code.

3. Unilateral Rules and Rules of Immediate Application

The unilateral conflict norms, similarly to the concept of the statute theory, determine the extent of the application of one's own laws. In other words, a choice-of-law rule is deemed to be unilateral when it defines the scope of application of the domestic law with respect to foreign element cases only, namely it determines the situations in which a fact of private international law is to be governed by the domestic law. By contrast, the complete (multilateral) conflict norms explicitly determine the law applicable in a particular case, irrespective of whether the process of selection leads to the application of domestic or foreign law. The Hungarian PIL Code, accepting *Savigny's* approach, states that in private international law cases the complete (multilateral) conflict rules should be applied.

In accordance with the basic concept of the Code, Hungarian jurisprudence holds that the complete conflict norms are more suitable to fulfil the function of PIL, since in a case of conflict judgement can be made on the basis of the law ensuring the fairest decision. The dominant view in the international legislative practice that the overwhelming majority of

[18] See also Burián: *op. cit.* 265.

choice-of-law rules are made up of multilateral conflict norms and therefore the use of unilateral rules is justified only in a limited area, where the State deems it important to give effect to its legal-political considerations, such as the protection of the weaker party in consumer contracts.

We can seldom find unilateral conflict norms in the Hungarian Code, and the prerequisite for the application of these norms is the presence of a domestic interest. For example, Article 16(2) states: "Hungarian law shall apply in cases where, on behalf of a domestic legal interest, the Hungarian court declares a non-Hungarian national to be dead or missing, or determines the proof of death of such person." Domestic legal interest is involved in the procedure if the legal relations of the missing person in Hungary have to be resolved; for example, if the missing person owns a property in Hungary, and he/she has to be declared legally dead to start the legal process of succession.

There is similar rationale behind Article 50 as well, which prescribes the application of Hungarian law if immediate measures have to be taken in the interest of the custody, support or care of a foreign citizen resident in Hungary. In such case the domestic interest is that the application of Hungarian law ensures fast procedure.

The Code does not specifically deal with the problem of *régles d'application immédiate* and the Hungarian jurisprudence does not seem to be interested in the question either. In my opinion, the reason for that is that in Hungarian PIL the similarities and differences between *règles d'application immédiate* and mandatory rules have not yet been examined from a dogmatic point of view. In most cases, the legal institution is regarded as a sub-branch of *ordre public*. Due to the lack of adequate legal background and legal theory, the practice of its application does not exist either.

4. International Uniformity and Protection of National Interests

The theory of *Savigny*, developed in the middle of the 19th century, is still the cornerstone of the development of European conflicts law regarding its main elements. The equality among domestic laws and the "international uniformity of decisions" (*internationaler Entscheidungseinklang*), which he placed in the centre, still applies. However, the model created by *Savigny* has been further developed, and it is still developing. The differentiation of the connecting factors and the encouragement of efforts aimed at reaching fair decisions have appeared, and there is an increasing emphasis on the enforcement of national interests as well.[19] International uniformity as a laudable and desired goal has remained, but since the second half of the 20th century there has been an increasing demand for the protection of state or national interests, especially in the case of the forum state. Some describe that this is the period when conflicts law has "lost its innocence".[20]

With regard to instruments serving the protection of national interests, the Hungarian jurisprudence and the PIL Code do "not follow the position of promoting national interests directly by choice of law rules or methods".[21] Consequently, such rules as the preference

[19] See Burián, L. Kecskés, L.–Vörös, I.: *Magyar nemzetközi kollíziós magánjog* (Hungarian Private International Law). Budapest, 2005, 74–75.

[20] See Vrellis, S.: Le droit international privé grec à la fin du vingtième siècle: progrès ou recul? In: Symeonides (ed.): *Private International Law... op. cit.* 247.

[21] See Burián: *op. cit.* 266.

given to the forum's or third state's international mandatory rules[22] are not included in the Code. Besides the *ordre public* clause the Code also contains so-called unilateral rules specifically designed to protect forum interests indirectly ("special *ordre public* rules"), e.g. with regard to the dissolution of marriage.[23] According to leading scholars of the subject, this provision of the Code "opens too wide the gate of defence in *ordre public*".[24] The rule which allows the dissolution of marriage even if the conditions required by the applicable foreign law are not satisfied, but according to Hungarian family law they are met, is particularly unreasonable. In this respect, only the part declaring the theoretical possibility of the dissolution of the marriage may be justified, which however could also be concluded from the *ordre public* clause.

Moreover, certain rules of the Hungarian PIL Code indirectly encourage the forum to apply the *lex fori*, thereby promoting the protection of national interests. In Hungarian PIL, the unilateral regulation of *renvoi* (see VIII) or the fact that fraudulent connection is only sanctioned by the Code if it resulted in the application of a foreign law (domestic law has to be applied in case of fraudulent behaviour as well) are regulations promoting a homeward trend, and while their purpose is not the protection of national interest, they can be used as instruments to achieve such a goal as well.[25]

III. Some General Rules

1. Qualification

Article 3 of the Hungarian PIL Code contains explicit provisions on qualification, which is basically subject to the *lex fori*. Accordingly where there is a dispute about the legal qualification of the facts or relationships to be judged is being disputed, the interpretation of the rules and notions of Hungarian law shall be used by the forum. Thus the law in accordance with most legal systems assumes the prevailing view. As a subsidiary rule the Code declares if a legal institution is not known to Hungarian law, or is known but carries a different meaning or different name, then the judge shall qualify it with regard to the foreign law regulating the legal institution [Article 3(2)]. It is not clearly stated by the above article which foreign law to use for qualification, and it is up to the judge to decide. From the aspect of the purpose of qualification however it can be stated that it can only be derived from legal systems in conflict with each other in relation to the facts of the case. According

[22] In contrast with Article 9 of the Rome I Regulation. In Article 3(4) of the Rome I Regulation besides the protection of national or state interests the protection of Community interests appears as well.

[23] Article 41.

The foreign law applicable to the dissolution of marriage shall apply with regard to the following differences:

a) A marriage may be dissolved also if the foreign law excludes the dissolution of marriage, or the conditions of dissolution are not satisfied according to the foreign law but are satisfied according to the Hungarian law.

b) The question of whether marital life has been completely and irreparably ruined shall be considered even is cases where absolute grounds for divorce are present according to the foreign law.

c) The dissolution of marriage may not be based upon culpability.

[24] See Mádl, F. Vékás, L.: *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga* (The Law of Conflicts and Foreign Trade). Budapest, 2004, 421.

[25] Burián: *op. cit.* 266.

to *Professor Burián* on the basis of text interpretation this can be the law of a third country with absolutely no reference to the facts of the case.

According to *Professor Lajos Vékás*[26] the solution based on *lex fori* is unilateral because it starts exclusively from the interpretation of the conflict norm hypothesis while the problem is far more complex than that. Qualification on *lex fori* starts from the principle that conflict norm hypothesis includes all those domestic and foreign legal institutions that are subjects to legal regulation within the substantive law of the forum. *Professor Vékás* suggests breaking with this unilateral and rigid view and instead he proposes to combine the comparative law approach of *Rabel* and the functional interpretation approach of *Kegel*.

In the Hungarian judicial practice *lex fori* is usually applied for qualification.[27]

2. Renvoi

The Hungarian Code partly adopts the *renvoi*. Under Article 4 the scope of the reference must be interpreted in a narrow sense, thus except for reference back, the conflict rules of the applicable foreign law are not to be taken into account in general, but the rules of foreign law directly governing the matter must apply. Hence the Hungarian Code does not recognise a reference to third law because the foreign conflict rules to be applied can be ignored. The Hungarian forum therefore only accepts the *renvoi* on special occasions when it refers back to the Hungarian law. The general rule on *renvoi* is one of compromise, which does not always promote international harmonisation of decisions under the conflict-of-laws; however it vigorously serves the homeward trend.

In the Special Part of the PIL Code Article 21/A embodied in Act No. XXVII of 2004 which contains a provision of the EC directive on financial collateral arrangements[28] excludes reference back considering ownership and other rights *in rem* recorded on deposit accounts or based on dematerialized securities.

Finally, the rules of Rome Convention, Rome I and Rome II also exclude the application of the *renvoi*, accordingly a Hungarian judge cannot apply this legal institution in case of

[26] Mádl Vékás: *op. cit.* 96.

[27] There was a dispute between the parties over the terms of financial compensation of the management contract of a company. The plaintiff, a Slovak citizen and the defendant, a company domiciled in Hungary contracted for employment according to the German law on a tacit understanding, which should have required the application of the "*Dienstvertrag*" rules governed by BGB. This contract type is unknown to the Hungarian law, and above all it was misnamed as service relations. Service relations under Hungarian law mean service relations of professional members of the effective armed forces and services. The dispute in the given case however was between the managing director and the company. The Hungarian court had to take a stand on the issue of legal relationship between the parties. The personal law of the company is the Hungarian law, and under the Hungarian company law if the office-holder is in position without legal relations then the agency contract law of Civil Code must be applied. The parties concerned identically stated that between them a civil law relationship was regulated, therefore the court qualified the relationship between them as civil law relationship according to Hungarian law, and then judged the case according to German substantive law (Supreme Court Pkf. 5. 25.918/2008/2).

[28] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002, Official Journal L 168, 27/06/2002 43–50.

these legal relations. There have been no changes recently in the application of the *renvoi* in the Hungarian judicial practice, it invariably occurs very rarely.[29]

3. Ordre Public and Mandatory Rules

The rules of *ordre public* (public policy) have not changed in the Hungarian legal system in the past decade. The regulation of public policy, in a sense of PIL, can be found in Article 7 of the Code, but Act No. LXXXI of 1994 concerning commercial arbitration (hereinafter referred to as *Arbitration Act*) also contains public policy provisions. Even though the latter is not exactly identical with the concept of public policy as described by PIL, Hungarian judicial practice connects the two. Therefore, we will discuss it in what follows.

The legislator has included in the system of the PIL Code the public policy rules of both private international and procedural law. The public policy clause can be found in the section concerning the disregard of foreign law. Article 7(1) gives a general definition of public policy. It is a general clause, according to which the application of foreign law shall be disregarded where it would violate Hungarian public policy. This definition aims at enforcing the defensive function of the public policy clause. Beyond that, it is the task of judicial practice to fill it with content. The *ordre public* functions as a "shield" against foreign laws, in case the application of which may have a negative impact on Hungarian economic, political or social values. The auxiliary rule of Article 7(2) makes the general clause more precise; the application of foreign law shall not be disregarded solely on the ground that the socio-economic system of a particular foreign state differs from that of Hungary. With that the legislator brings the attention of the forum to the fact that the legal institution cannot be applied with a discriminatory intent.

The PIL Code contains so-called "special public policy rules" related to a given field, which make the elements of public policy more precise for judicial practice in a given field. Such rules are the rules regarding divorce in Article 41a), b), and c); or the consideration of the rules of substantive law, which are the mandatory prerequisites for child adoption based on Article 43(4).[30]

[29] a) A Hungarian male citizen emigrated to France and there he deceased as a French citizen. He left behind some property back in Hungary on intestacy and without direct lineal descendants. His Hungarian citizen siblings lay claim for the estate. The Hungarian notary applied Article 36 of the Code which states that inheritance relations are subject to the personal law of the deceased person that is the citizenship of the devisor. This in our case is the French law but in case of inheritance of immovable the French private international law enacts according to the situs of the immovable *(lex rei sitae)*. The Hungarian forum accepted the *renvoi* and applied the Hungarian substantive law of succession. See Burián–Kecskés–Vörös: *op. cit.* 19–24.

b) A Hungarian married couple emigrated from Hungary to Switzerland in 1956, where they acquired Swiss citizenship and later they moved back to Hungary. Under Article 39 of the Hungarian PIL Code: "The personal and property relations of the spouses [...] shall be governed by the common personal law of the spouses at the time of lawsuit." This could be the law of their common citizenship, the Swiss law, but the Swiss private international law rule in such a case determines the law of their common domicile (Art. 54 of IPRG), which could be found in Hungary. Therefore the judge accepted the reference back and applied the Hungarian substantive law. See Mádl–Vékás: *op. cit.* 107.

[30] Former special *ordre public* rules in the area of torts, provided that Hungarian court "shall not establish liability for conduct that is not unlawful under Hungarian law", and "shall not impose legal consequences not known to Hungarian law", were repealed in 2009. This amendment of the Code is welcome because Hungarian scholars sharply criticized these strict and one-sided regulations.

According to Article 41, the law applicable in cases of divorce should be determined based on the following three criteria:

a) A marriage may be dissolved even if its dissolution is excluded by the foreign law, or if the conditions of divorce are absent according to the foreign law but are present according to Hungarian law.

b) The question of whether marital life has been completely and irreparably ruined[31] shall be considered even is cases where absolute grounds for divorce are present according to the foreign law.

c) A marriage shall not be dissolved on the ground of fault.

According to the general opinion of leading Hungarian scholars, with this rule the legislator gave too much room for public policy intervention, for, opposed to the general *ordre public* rule, in this case close domestic connection is not a prerequisite. Due to the flexible nature of the public policy clause, the connection of the case to the legal system to be protected is one of the prerequisites for its applicability.

There is also a special *ordre public* rule related to adoption. According to Article 43(4), adoption may not be permitted or approved by the guardianship authority except when it satisfies the requirements of Hungarian law. For example, it is determined by Hungarian family law that only married couples are allowed to adopt in common a child. People living with their partner or in a registered partnership do not have the right to do so. The purpose behind this legal policy is to ensure that the child will be reared in a complete family as well as the creation of a family bond between the child and the adoptive parents. This imperative norm serves the interests of the child and embodies the social and moral values of Hungarian society. The PIL Code makes it more emphatic with a special public policy rule.

The Hungarian international procedural law is characterized by a complex, multi-channel law source, in which the source of law for the judge in a particular case is precisely determined.[32] In Hungarian law, the procedural rules of *ordre public* may be found in Section 11 of the Code as the primary reason for the recognition of foreign judgements. The Hungarian judge always has to take into consideration whether the impact of the recognition and enforcement of the foreign judgement contravenes the fundamental values of the Hungarian legal system such as the basic constitutional principles.

The Hungarian Arbitration Act regulates public policy problems in the field of setting aside of an arbitral award. According to the Hungarian rules this process, with reference to the violation of *ordre public*, may be initiated against a domestic arbitral award. This possibility and the fact that in the rigid system of setting aside of an award causes *ordre public* is a flexible and malleable legal institution had a significant impact on the development of Hungarian judicial practice. The vast majority of the judgements related to

---

As *Ferenc Mádl* and *László Burián* pointed out, the application of these rules are unreasonable in cases when both the party responsible for the damage and the injured party are foreigners from the same country and Hungary is only the place where the damage has occurred. In that case, according to *Burián*, the application of the law of his/her country would be more favourable for the injured party. See Mádl-Vékás: *op. cit.* 368–370, and Burián Kecskés Vörös: *op. cit.* 239.

[31] Namely this requirement is a cogent rule in Hungarian family law, thus the court always has to examine it in a divorce case.

[32] The Brussels Agreement, the Brussels I and II rules give directives concerning procedural law in *ordre public*, and these rules enjoy priority to domestic law.

the application of public policy were born within the framework of a setting aside proceeding. While there is very little practice of the application of public policy rule in PIL, during setting aside proceedings references are most often made to the violation of public policy. The reason for that is to be found in the nature of the arbitration proceeding: it has only one instance. The indefinability of the content of the concept of *ordre public* further increases the chances for setting aside of an arbitration award, thereby offering the defeated party a last chance to escape the enforcement of the judgement.

Several Hungarian decisions were made in the latter issue. With a few exceptions, references to the violation of *ordre public* were unfounded. All in all, during the examination of the violation of *ordre public* the starting point is always the same, i.e. the theoretical foundations of PIL. This approach has resulted in an interesting situation. Namely, that Hungarian judicial practice does not differentiate between the concepts of PIL and international commercial public policy. These judgements have contributed to a great extent to the development of the contextual outline of Hungarian public policy. They never define directly the contextual components of public policy. Rather, they start out from a negative approach and state which elements do not belong to the narrowly interpreted domain of *ordre public*.[33]

The separation and interpretation of mandatory rules and public policy has not yet happened in Hungarian PIL. The Hungarian regulations do not contain specific reference to the field of mandatory rules. Jurisprudence usually regards mandatory rules as a positive component of public policy, but does not state specifically what requirements a given norm has to meet in order to gain an absolutely mandatory application. This is a question to which the answer will have to be found in the future. No judgement has been made concerning the application of imperative norms so far.

[33] In the following, there is a brief summary about a controversial decision, in which the Supreme Court has declared for the first time that an arbitral award violates Hungarian public policy. The decision was based on an arbitral award of arbitration in which the court rejected the suit of the plaintiff and based on the 32 billion HUF in dispute forced him/her to pay 290 million HUF in legal costs. The arbitral tribunal arrived at this amount in accordance with the requirements of proportionality adjusted to the amount in dispute. The defeated party filed a suit of setting aside of this award at the court, in which he/she found injurious the high legal costs and stated that it violates the values of Hungarian society, therefore it violates the *ordre public*. At the first instance the court found this reference unfounded and stated that even though the amount is unusually high, the arbitral tribunal arrived at the amount in accordance with the laws in force; therefore it does not violate the foundations of economic and social order. Consequently, the award does not violate Hungarian public policy. The plaintiff appealed to the Supreme Court against the final verdict, claiming that the exceedingly high legal costs placed a disproportional burden on the defeated party and violated the value system of society. The Supreme Court found that even though the stipulated amount was in accordance with the law, it could limit the party in his/her right to turn to the court and deprive him/her of essential financial resources. It might also violate the value system of society, and if it remained in force, it would have a negative impact on Hungarian judicial practice. (Supreme Court Gfv. VI. 30.450/2002.)

The decision caused a lot of professional debate. Many people questioned whether the amount of legal costs constitutes part of *ordre public*. It was also in question whether it can restrict the party in his/her right to turn to the court, for it was a firm with considerable capital strength. The most heated debate was about the question of whether a judgement made in accordance with the laws in force can violate public policy.

IV. Law Governing Contracts

The freedom of party autonomy in choosing the applicable law to international contracts had already been accepted in Hungarian judicial practice before the birth of the PIL Code. The Code adopts the choice of law possible as the primary connecting factor of the law governing contracts. The laconic provision constructed in 1979[34] was supplemented with a few additions in 2009. According to the new provision: "A contract shall be governed by the law chosen by the parties at the time of contracting or later to the whole or a part only of the contract. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." (Article 25). The Code, similarly to the Rome I Regulation, mentions primarily the express choice of law and defines the implied choice of law as well. In this last point, however, there is a difference from the definition in the Rome I Regulation. The second sentence in Article 3(1) of the Rome I Regulation is the following: "The choice shall be [...] clearly demonstrated by the terms of the contract or the circumstances of the case." In the Code it goes as follows: "[...] demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case."[35] In this latter version implied and hypothetical choices of law can be hardly differentiated from each other, while only the former should be permitted.[36]

Regarding the time of choosing a law, it provides the parties the choice of law at the time of contracting as well as after concluding the contract ("at later"). According to the Code, the first time for the choice of law is the time of contracting, but it is also possible for the parties to select the applicable law before concluding the contract, for example within the framework agreement. Regarding the closing time for the choice of law, the beginning of the legal dispute[37] or the end of the evidentiary procedure at first instance[38] are considered in Hungarian legal literature as the theoretical limits. Hungarian judicial practice, as opposed to theoretical positions, permits the choice of law any time until delivering the judgement, even in procedure at the second instance (we should add that in these cases it has always meant the selection of the Hungarian law).[39] Similarly to Article 3(2) of the Rome I Regulation, it should have been settled in the Hungarian PIL Code that the subsequent choice of law, or the changing of the law originally selected shall not prejudice the formal validity of the contract or adversely affect the rights of third parties.[40]

Depeçage: Even though the partitioning of a contract, or choosing several laws at the same time (*depeçage*) was possible based on the Hungarian PIL Code, it was the Rome Convention's entering force that finally clarified the situation.

[34] Article 24.

The law chosen by the parties at time of contracting or later shall be applied to their contract.

[35] It should be noted that the text is the result of the inaccurate translation of the Rome I Regulation.

[36] See Vékás, L.: A nemzetközi magánjogi törvény módosításáról (On the Modification of the Act on Private International Law). *Magyar Jog*, 6 (2009), 322.

[37] *Ibid.*

[38] See Burián–Kecskés–Vörös: *op. cit.* 205.

[39] Supreme Court of Hungary Pf.III.20 895/1992.; Supreme Court of Hungary Pf.VI.22 046/1993.; Supreme Court of Hungary Pf.III.20 998/1995. See Mádl–Vékás: *op. cit.* 348.

[40] The legislator should have been made a provision concerning the question of the validity of the choice of law clause and the enforcement of the cogent rules of the law applicable in the absence of the choice of law against the rules of the chosen law (similarly to Article 3(5) and Article 3(3) of the Rome I Regulation).

The Rome Convention and Rome I Article 3(1) leave to the parties the complete or partial choice of law. The introduction of these rules removed the ambiguity that had been present before in the Hungarian regulation. Because the former rule of the Code regulated in one sentence the choice of law (Article 24), which, besides stating that the parties can choose a law either at the time of contracting or at a later time, contained no further provisions. From this regulation Hungarian jurisprudence[41] concluded that if the Code does not prohibit the partition of the contract, then the parties are free to apply this practice. The same interpretation can be concluded through analogy from Article 30 as well. This Article states: "The governing law of contracts extends to all elements of the contractual relationship [...] and, unless otherwise agreed by the parties or otherwise mandated by this Law-Decree, to any agreement securing the contract (mortgage, suretyship, etc.) as well as to any setoff, assignment and assumption of claims related to the contract." Interpreting this rule, the parties have the right to agree to the application of several laws to their contract, but the same result can be reached by the simultaneous application of different articles of the Code as well. The latest modification of the Code affects this issue, because in the new Article 25 the *depeçage* is expressed: "The law chosen to either the whole or the part of the contract by the parties [...] shall be applied."

Limitations of party-autonomy: The Code has no specific provisions concerning the laws that may be chosen; therefore the choice of law is theoretically unlimited. It is even possible to choose a law which has no relationship of any kind with either the contract or the parties. In this respect, however, the choice of law clauses are interpreted strictly in Hungarian judicial practice.[42] Taking into consideration the further limitations of the choice of law, the Hungarian PIL Code does not specify any other devices besides the *ordre public* clause. In other words, it has no provisions concerning the enforcement of the imperative rules of the forum or a third state, and does not set any limitation similar to the Article 3(3) of the Rome I Regulation in case of contract where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen.

Priority of protective law: These restrictions usually refer to contracts in which one party is perceived to be systematically in a weaker position, most importantly consumer contracts, employment contracts and insurance contracts. In the member states of the European Union these limitations are expressly laid down in the Rome I Regulation, therefore the 2009 modification repealed the relevant rules of the Code.

Finally, as we have mentioned above, it is the result of the decision made by the Court of Justice of the European Communities in the case of *Garcia Avello*[43] that the Hungarian PIL allows the application of the choice of law rule not only in contract law, but on name

[41] *Ibid.* 203.

[42] For example, it "generally" chooses the Austrian law in legal disputes resulting from loan contracts, it does not extend its scope to the collateral contract securing the loan. (Supreme Court of Hungary Pf.I.25.615/2002/11.) In another case the court stated that regarding the choice of law the Code allows "only the selection of the law (legal system) of an explicitly chosen country". (Metropolitan Court of Appeal Pf.6.20.577/2005/4.) (Thus the forum did not accept the clause "the rules of the Hungarian Civil Code" as an appropriate choice of law on the grounds that it was the choice of a rule, not the choice of a country's law.)

[43] C-148/02. *Carlos Garcia Avello v. Belgian State* [2003] ECR I-11613.

bearing as well. According to Article 10(2), name bearing is governed by the *lex personae* of the individual, but in case of a request made by the individual involved, at the registration of the name of birth the law of that country shall be applied which the individual is a citizen of as well.

In preliminary it can be stated that jurisdiction alone is not a connecting factor in conflicts law. The jurisdiction of the court of a state does not necessarily mean that the substantive law of the given state should be applied. The function of PIL rules is overtly to make it possible for the forum not to use its own law. The rules of jurisdiction do not have a direct impact on the applicable substantive law, and it is true the other way round as well; the fact whether the applicable law is a domestic or a foreign one does not have any impact on the existence of jurisdiction. Consequently, the existence of jurisdiction and the choice of law are two separate issues. Although, the "*qui eligit iudicem eligit ius*" (if you choose a judge, you choose a law) is an old proposition in PIL, this principle does not generally apply in modern PIL. (We should note, however, that the picture is made more subtle by the preamble (recital 12) of the Rome I Regulation, according to which an exclusive choice of forum clause "should be one of the factors to be taken into account in considering whether a choice of law has been clearly demonstrated".)

In the judgement of international contracts by a Hungarian court, there is a separation between jurisdiction and the selection of the applicable law. The freedom of party autonomy can extend to the choice of the forum as well as to the choice of law. In Hungarian judicial practice these clauses in general, either choice of law clauses or choice of forum clauses, are interpreted rather strictly,[44] but the appropriately phrased or unambiguous clauses, including the arbitration clauses, are treated in the same way.

In sum, we can say that with the EU Regulation coming into force the contract law rules of the Hungarian PIL Code play only a complementary role. Therefore, the demand of the modification of the "old" provisions of the Code was entirely justified. According to the new general rule of the Code, in the absence of the choice of law, the contract should be governed by the law of the country with which it is most closely connected (Article 28). Regarding questions which are not within the scope of the Rome I Regulation, for example the contract of inheritance, marriage settlement, or the scope of the rights of the representative, the trust, the Code contains no specific provisions (which can be a source of problems related to qualification).

Some "old" rules of exception however have remained in the Code, which are the following:

– The law of that state shall apply to contracts concluded on exchanges, at tender negotiations or auctions, in the territory of which the exchange is or the tender negotiation or auction is conducted. [Article 26(1)];

– A contract of association shall be adjudged according to the law of the state, in the territory of which the company pursues its activities. The personal law of the legal entity shall apply to a contract of association founding a legal entity. [Article 26(2)];

– The law governing at the place of performance shall apply to the existence and extent of obligations based upon securities. [Article 27(1)];

[44] For example, the "jurisdiction of Brussels or courts of Brussels" clause was not acceptable, for only "the courts of a state or a certain court" should be selected. (Metropolitan Court of Appeal 14.Gf.41.315/2003.)

– The emergence, devolution, termination and enforcement of contractual rights and obligations based upon bonds issued on the basis of a public loan shall be adjudged according the issuer's personal law. [Article 27(2)];

– If a security provides the right of disposal over goods, the provisions of this Law-Decree relating to real rights shall apply to the real right effects. [Article 27(3)];

– If a security embodies membership rights, the emergence, devolution, termination and enforcement of the rights and obligations based upon the security shall be adjudged according to the personal law of the legal entity. [Article 27(4)].[45]

To sum up, regarding the selection of the law applicable to contracts (similarly to the rules of delictual liability) it can be stated that at the modification of the Hungarian PIL Code the legislator failed to exploit the opportunity provided for the modernization of the old rules.[46] Therefore, Hungarian courts will remain responsible for the task of harmonizing the Rome I Regulation with the Code until a comprehensive codification is finally made.

V. Law Governing Torts

In Volume 2 of his work *Private International Law Ernst Rabel* refers to the *lex loci delicti commissi*, developed by canonists and statutests, as a generally accepted principle in torts law. However, significant changes had taken place in the field by the end of the 20th century – beginning of the 21st century. There was a shift in emphasis from the tort-feasor to the injured party, and from injurious activity and personal liability the focus shifted to compensation.[47] This "revolution" (or dethronement), as it was referred to by *Ehrenzweig*, led to the overthrow of the exclusiveness of the *lex loci delicti commissi*.[48] Conflicts law reacted to the above process in various ways: with the application of general clauses, the development of connecting factors differentiated for special delictions and the "loosening up" of traditional connecting factors with rules of exception.[49]

The 2009 modification of the Hungarian PIL Code has had an impact on the rules of the law applicable to questions of delictual liability. According to Act No. IX of 2009, with the modifications the legislator was aiming at the integration of the Rome II Regulation into Hungarian law and the harmonization of domestic regulation with the conflicts regulations of the EU. Therefore, Article 32 of the Code declares the priority of the Rome II Regulation. (Hungarian scholars do not think it should be explicitly stated due to the nature of the law source and to the fact that at the upcoming introduction of new private international law regulations the Code will have to be modified.[50])

[45] Judicial practice regarding the above mentioned remaining rules is unknown.

[46] Vékás: *op. cit.* 322.

[47] Mádl–Vékás: *op. cit.* 363.

[48] See Ehrenzweig, A. A.: A Counter-Revolution in Conflicts Law? From Beale to Cavers. *Harvard Law Review*, 80 (1966), 377.

[49] Burián Kecskés–Vörös: *op. cit.* 232 234.

[50] This problem appears in contract law as well (Article 24). Hungarian scholars agree that Article 2 stating the subsidiary character of the Code (according to which "This Law-Decree shall not apply in matters which are regulated by international conventions.") should have been complemented, which as a result would have declared the priority of the regulation as well. This would have given a guidance regarding general questions governed both by the regulations and the Code, such as *renvoi* and *ordre public*. See Vékás: *op. cit.* 322.

The rules of Rome II Regulation and the preservation of the old provisions of the Code resulted in the creation of a two-channel system,[51] which became a source of particular difficulties for the courts. At the determination of the law applicable to torts the Code, in spite of the criticism coming from leading scholars,[52] retained the connecting factor of *lex loci delicti commissi* (Article 33(1),[53] while the Rome II Regulation follows the connecting factor of *lex loci damni*. The law of the state on whose territory the damage occurred remained in the form of *favor laesi* in the Hungarian Code; in other words, if its application is more favourable for the injured party [Article 33(2)].[54] Therefore, this provision gives the judge a chance to select the proper applicable law in the so called cross-border tort cases, i.e. torts in which the injurious conduct occurred in one country and the injury in another country. The rule of "more favourable law" referred to in the Code cannot be applied selectively, only to certain claims.[55] For example, the application of one Hungarian provision of the non-material damages instead of the otherwise applicable German law on damages for pain and suffering (*Schmerzensgeld*) is not possible on grounds that it is more favourable for the injured party.[56] The Hungarian Supreme Court has rejected the application of *dépaçage*, in contrast with an earlier court decision at a lower forum.[57] The other problem occurring in judicial practice is related to the localization of the place where the damage occurred. In the above-mentioned case the forum regarded the place of indirect consequences as the place of the injurious activity. According to the facts of the case, Hungarian citizens suffered a traffic accident in Germany as a result of a German citizen's breaking the law; therefore, both the *lex loci delicti commissi*, and the *lex loci damni* in a narrow sense lead to the application of the German law. However, the court interpreted the latter connecting factor in a broader sense and opted for the application of the law of the place of the financial consequences of the injurious activity (which in most cases leads to the habitual residence of the injured party); in other words, the court considered the "more favourable nature" of the application of the Hungarian law.

Following these two general provisions, the Hungarian PIL Code declares two rules of exception. First, if it is justified by the identical social and legal environment the tort-feasor and the injured party domiciled in the same state, then the law of this state should be applied.[58] At this point there is a difference between the Code and the Rome II Regulation:

[51] During the construction of Act No. IX of 2009 the legislator, instead of filling the gaps in the Decree and harmonizing the two (European and domestic) regimes, only followed the principle of *lex minimae* and repealed the provisions governed by the Decree or deemed unnecessary for other reasons. See *ibid.* at 324.

[52] See e.g. *ibid.*; Burián, L.: A deliktuális felelősség a magyar nemzetközi magánjogban (Torts in Hungarian Private International Law). *Jogtudományi Közlöny*, 3 (1990), 143 168.

[53] Article 33.

(1) Unless otherwise mandated by this Law-Decree, liability for non-contractual damage shall be subject to the law prevailing at the time and place of the tortuous act or omission.

[54] Article 33.

(2) If it is more favourable for the injured party, the law of that state shall apply, in the territory of which the damage occurred.

[55] Supreme Court of Hungary Pf.III.25.783/2002/5.

[56] As the court states: "Certain concepts or legal institutions cannot be interpreted alone, taken out of context". *Ibid.*

[57] Metropolitan Court 4. P. 87.230/1981. See Mádl–Vékás: *op. cit.* 391.

[58] Article 33.

(3) If the tort-feasor and the injured party are domicile in the same state, the applicable law shall be of the state concerned.

while the former prescribes the connection of the common domicile, the latter prescribes the connection of the common habitual residence [Article 4(2)], which is more accepted today. Second, in case of tortuous act or omission occurred on a registered vessel or aircraft, *lex bandi* should be applied.[59]

Finally, the Code contains two supplementary-interpretational rules. On one hand, if, under the law of the place of the tortuous act or omission, liability is subject to fault, the existence of culpability may be determined either by the *lex personae* of the tort-feasor, or by the *lex loci delicti commissi*.[60] On the other hand, whether the tortuous conduct consisted in violation of traffic or other safety regulations, it shall be determined according to the law of the place of the tortuous conduct.[61] (We should note that Article 17 of the Rome II Regulation says the same concerning the issue, therefore the provision of the Hungarian Code will not be applied in the future.) Finally, as opposed to the Rome II Regulation [Article 4(3)], the Code does not allow the application of escape clauses which would give place to judicial discretion and thereby ensure flexibility.

A means of "loosening up" the *lex loci delicti* is the choice of law rule, a theory originating from *Raape* and later further developed by *Kropholler* and *Lorenz*. The Hungarian PIL Code, contrary to the modern solution under the Rome II Regulation (Article 14), does not adopt the choice of law rule, even though the party autonomy has been accepted by the Hungarian courts in the field of contractual relations since the beginning of the 20th century. The integration of the choice of law rule among the rules of conflict governing non-contractual relationships has not happened in spite of specific proposals made by scholars.[62] As a sole possibility, Hungarian PIL allows in the general provisions for the parties to request, by mutual agreement, the disregard of the applicable foreign law (Article 9); then the *lex fori* becomes the law applicable to the private international law dispute. However, the meaning of the expression "by mutual agreement" is vague and its judicial interpretation is by no means clear. In the case of a traffic accident caused in Romania by a Hungarian to a Slovakian citizen, the Supreme Court applied the Hungarian law instead of the Romanian law (despite the *lex loci delicti commissi*, *lex loci damni* referred to by the plaintiff in his appeal), stating that with their implicit conduct the parties requested the disregard of the applicable foreign (Romanian) law, for both the complaint of the plaintiff and the pleading of the defendant were based on the Hungarian Civil Code.[63]

There is an important difference between the Rome II Regulation and the Hungarian PIL Code. While the first contains a number of special rules, the latter does not provide separate choice-of-law rules for different types of torts, such as products liability, and environmental torts. We should note, however, that the Code does have provisions concerning the applicable law in case of the infringement of personal rights, although not in

[59] Article 34 (2). This rule is in fact a variety of the *lex loci delicti commissi*.

[60] Article 33 (4).

[61] Article 34 (1).

[62] Burián, L.: *Die Möglichkeiten der Rechtswahl im ungarischen IPR im Bereich des Deliktsrechts, des Erbrechts des Ehegüterrechts und des Arbeitsrechts*. Budapest, 1987; Burián: *A deliktuális felelősség... op. cit.* 143–168.

[63] *Raffai* sees the reasoning as the appearance of the homeward trend, and criticizes it saying that the disregard by mutual agreement can only be an explicit declaration. See Burián–Kecskés–Vörös: *op. cit.* 353. The recognition of the disregard by mutual agreement based on implicit conduct (basically reference to Hungarian law in the procedure) appears in other legal relations (e.g. succession) as well. (Supreme Court of Hungary Pfv.I/a.20.879/2001/5.)

the field of delictual liability. The Hungarian PIL Code calls for the application of the law of the place and the time of the injury, but the principle of "more favourable law" appears here as well, meaning that if the Hungarian substantive law is more favourable for the injured party concerning compensation or indemnification, then that is the law which the judge should apply. We must add that the Rome II Regulation and the Hungarian PIL Code regulate the selection of the law applicable to the violation of intellectual property rights in the same way.

In sum, the above-discussed dilemmas reveal that although the conflict rules of the Code on torts have only a subordinate role due to the Rome II Regulations in force, the Hungarian legislator should have already accomplished the harmonization and modernization of the conflict rules constructed in 1979, thereby avoiding the difficulties arising from the application of the two-channel conflicts law.

VI. The Hungarian Judicial Application of PIL Rules

In short, the answer to the question of how the Code is applied in the Hungarian judicial practice is the following: it is characterized by contradictions. First of all, as a starting point for our research, we have found that only a few number of verdicts in the field of PIL have been published in recent years. On the other hand, it is a fact that the number of PIL cases to be settled by the court tends to rise. The analysis of the Hungarian judicial practice can be approached from two different aspects:

1. How are the provisions of the Code applied?
In case of certain general PIL instruments, such as the application of the rules of qualification, no real problem arises because courts usually follow the principle of *lex fori* (see Chapter IX). On the other hand, in case of other instruments, for example, concerning the present eclectic practice of the *ordre public,* there is no real agreement even on the issue of what elements the Hungarian public policy should include. Another neuralgic point of the judicial practice is the determination of the content of foreign law, which is the overt responsibility of the court, but sometimes they fail to do it. It may result in the unnecessary lengthening of legal procedures,[64] or it may lead to a situation when the parties according to Article 9 ask for the disregard of foreign law by mutual agreement, and consequently the Hungarian law is applied instead. In connection with the above-mentioned Article 9 courts sometimes do not make a difference between the choice of law and the disregard of foreign law, but place an equal sign between them.[65]

2. How are the legal gaps filled?
In order to present a typical example of filling gaps, let us mention the judicial practice in connection with the consideration of incidental question. Despite the fact that the issue of incidental question is not settled in the Code, there is agreement in the judicial practice in this matter. According to general practice, it is considered independently, i.e. based on the principle of *lex fori*.[66]

[64] In 2004 in the Karalyos and Huber v. Hungary case (75116/01) the European Court of Human Rights dismissed Hungary in connection with it.

[65] Supreme Court Pf. VI. 21323/1996.

[66] Supreme Court Pf. II. 20.992/1992.

To sum up, the Hungarian judicial application represents a mixed scene in terms of practice. It is the task of jurisprudence to draw attention to the shortcomings as well as to provide adequate and appropriate theoretical solutions for the arising problems. In 2003 a professional discussion started between the representatives of jurisprudence and judicial practice. To serve the harmonization of legal theory and practice, every year a PIL conference is organized by Hungarian law faculties on different issues of Hungarian private international law.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 2, pp. 157–161 (2010)
DOI: 10.1556/AJur.51.2010.2.6

KALEIDOSCOPE

MÓNIKA GANCZER*

European Round of Manfred Lachs Space Law Moot Court Competition, 29–30 April 2010, Győr

The European Regional Round of Manfred Lachs Space Moot Court Competition was held at Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences in Győr, Hungary from 29 to 30 April 2010. The European Centre for Space Law (ECSL), together with the International Institute of Space Law (IISL), organises each year the European Regional Round of the Manfred Lachs Space Law Moot Court Competition. This year, the Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences hosted and the Hungarian Branch of International Law Association supported the organizing. The European Regional Round has been held annually since 1993, with teams participating from all parts of Europe.

The Space Law Moot Court Competition began in 1992, when the U.S. members of the International Institute of Space Law invited the George Washington University and the American University each to send two teams to participate in a moot court competition in conjunction with the International Astronautical Congress. In 2003, the European Regional Round was created, and after the death of Judge Manfred Lachs,[1] former President of the International Court of Justice (and former Judge of the competition) the competition was renamed in his honour and memory. In 2000, the Asia-Pacific Regional Round was created

* Assistant lecturer, Széchenyi István University Faculty of Law and Political Sciences, H-9026 Győr, Egyetem tér 1.
E-mail: ganczermonika@yahoo.com

[1] Manfred H. Lachs (April 21, 1914 Stanisławów, Austria-Hungary [now Ivano-Frankovsk, Ukraine] January 14, 1993, The Hague, Netherland) was a Polish lawyer and diplomat who profoundly influenced the development of international law. He attended the Krakow Jagiellonian University where he earned a doctorate in Laws (1937). After his studies, he started working for the Consular Academy of Vienna and afterwards in the London School of Economics before the outbreak of World War II. Lachs was drafted in the army and throughout his military service he was advisor to the Polish government. Before his career turned toward international laws, he filled many judiciary posts in the Polish government such as Poland's Foreign Affairs director of the Department of treaties and legal jurisdiction between 1947 and 1960 then prime minister's special advisor between 1960 and 1967. During the Paris Peace conference of 1946, Lachs stood for his country as a delegate. He became a professor of international law at the University of Warsaw in 1952 and served as a member of the Polish delegation of the General Assembly of the United Nations. Afterwards, he became a judge on the International Court of Justice in 1967 and eventually became one of the longest-serving judges there, working until 1993. During his stay as a judge to the International Court, he presided the Court from 1973 to 1976. He wrote *The Law of Outer Space: An Experience in Contemporary Law Making* in 1972, which contributed to the development of the law of outer space. After his death, the Manfred Lachs Space Law Moot Court Competition was named in his honour.

and, by 2008, over 50 law schools now participate in the Manfred Lachs Space Law Moot Court Competition each year.

In August 2009, as each year, selected scholars of space law had produced the moot problem that was released to universities and posted on the website of the Manfred Lachs Space Law Moot Court Competition. Law schools in each region then registered for the Regional Rounds. To participate in the competition, 2 to 3 committed law students interested in expanding their knowledge of international law and gain valuable international mooting experience were needed. Participating groups have submitted written memorials for both the Applicant and the Respondent on the moot problem in February. Regional Rounds are usually held between March and May, with the Asia-Pacific Regional Round usually held in Sydney, Australia, the North America Regional Round in Washington, D.C., and the European Regional Round hosted in various cities.

Other Regional Rounds have already been organized at the beginning of April. The 2010 North American Regional Round was held on 10 April 2010 at the Georgetown University Law Center, Washington, D.C. Each year, the American Association of IISL Members organises the North American Regional Round of the Manfred Lachs Space Law Moot Court Competition. Competitors were from the United States and Canada and the top two teams were George Washington University and Georgetown University. The George Washington University won the final round and was also awarded the Best Brief Award, although Georgetown won the F. Kenneth Schwetje Best Oralist Award. The Asia Pacific Regional Rounds have always been the largest region in the competition. The Indian Space Research Organisation (ISRO) funded the annual Indian National Funding Rounds in India to assist teams to compete in the Asia Pacific Regional Round each year. This year the Indian Domestic Funding Round was held in Bangalore, India on 19–21 February. The West Bengal National University of Juridical Sciences, Kolkata defeated the home team National Law School of India University, Bangalore in the finals, but National Law School of India University bagged the best memorial prize. The 2010 Asia Pacific Regional Rounds were held in Sydney, Australia between 13 and 17 April. Finalists were the teams of the National University of Singapore and the National Law School of India University, Bangalore, India. The National University of Singapore won the final round in close contest and obtained the Alexis Goh Memorial Trophy.

The European Round was opened by Prof. Sergio Marchisio, Chairman of the European Space Agency European Centre for Space Law and Dr. Gábor Sulyok, Vice-dean for academic affairs of Széchenyi István University Deák Ferenc Faculty of Law and Political Sciences.

The 2010 moot problem is the case concerning Suborbital Tourism, Definition of Outer Space and Liability (Aspirantia v. Republica),[2] revolving around the edge of space, liability and rescue commitment of states. The jurisdiction of the International Court of Justice comprises by Special Agreement of the two states, jointly notified to the Court according to Article 36(1) of the Statute. In the Special Agreement the Parties agreed the following facts.

The space tourism company Startours is incorporated in Aspirantia because of two reasons: the favourable tax climate for start-up companies, and the fact that it has no national space licensing regulations governing private or commercial space flights. Startours

[2] The 2010 Moot Problem can be downloaded from <http://www.spacemoot.org/acrobat/prob2010.pdf>.

has developed an experimental passenger spacecraft *Starflight-1* that is designed to take off from a specially-adapted and refurbished carrier-aircraft flying high above the high seas. The private charter airline whose aircraft is used for this purpose is owned and controlled by private citizens of Zerbica. Startours offers suborbital flights to an altitude of 112 km. During the maiden flight of *Starflight-1* after separation from the carrier aircraft, *Starflight-1* successfully blasted off and, after having reached an altitude of 93 km, returned to Earth using its wings for stabilisation. However, on its descent from that altitude it was struck by a piece of metal, loss of cabin pressure and the immediate death of the two of the three passengers and the co-pilot. All of the victims wore the pressurised suits, but they had taken off his headgear. The captain had insufficient authority to compel them to put their helmets back on, but him and the remaining female passenger did not remove their headgear. Consequently, the captain and the remaining passenger survived, though seriously injured, and landed in Aspirantia. The Minister of Aspirantia announced his plans to draft national space legislation to regulate space activities, with particular attention to the problem of space debris.

In the meantime, Startours began an investigation and found a metal capsule with the inscription "father" and a serial number, came from a separate launch that took place on the same day by Stationride Corporation, a private company licensed by Kingdom of Republica. Stationride operates flights to a permanent national space station orbiting the Earth at 350 km above mean sea level. Stationride, which uses *Stationferry* to carry scientists and supplies to the Republican space station, obtained permission from the Government of Republica to offer rides to private individuals, even an extra-vehicular space walk can be arranged. Stationrider recently contracted with Ashes Corporation, a funeral services company incorporated in Republica, to carry a small container containing capsules each filled with 5 grams of human ashes, to be placed into low earth orbit. Although environmentalists, astronomers and space scientists in Republica have protested against this way of using and polluting orbital space, the Republican Space Agency saw no reason to forbid this launch and did not inform other nations about this payload and its destination. Its reasoning was that the low "graveyard orbit" used for this purpose guaranteed that the container with the capsules would not interfere with any active space objects in orbit and would, through atmospheric drag, fall back to earth within 15 years and disintegrate in the atmosphere, causing no harm to the Earth or pose a risk to orbital space activities. Timothy L. Ash was onboard *Stationferry* and he had made extra payments for an extra-vehicular spacewalk. With permission from the captain of the *Stationferry,* Alfons Linke to whom Mr. Ash paid a handsome amount of money, Mr. Ash hid one of the cremain capsules in his spacesuit that contained the ashes of his father-in-law that he intended to personally release into space, which impacted on *Starflight-1*. Startours began a lawsuit against Stationrider under the *Space Activities Act* and against the Republican Space Agency under administrative law in the Federal Court of Republica, claiming full compensation from both, jointly and severally, for the destruction of *Starflight-1* and the death and injuries to the crew and flight participants onboard.

In the meantime, a return flight of the *Stationferry* from the Republican space station to the Earth suffered a malfunction during its descent through the atmosphere and the spacecraft was forced to declare an emergency and land the spacecraft at the nearest aerodrome with a long enough runway, which turned out to be an air force base in Aspirantia. As a safety precaution, the *Stationferry* released the fuel into a large lake that Captain Linke mistook for the ocean and landed safely. The fuel caused serious environmental damage to some protected natural habitats of rare animals, with cleanup costs. It was revealed that Captain Linke was piloting the spacecraft and Dr. François Vienet, the Director-General of

the Republican Space Agency, was onboard as a private space flight participant. As a result of the domestic and international media attention surrounding the accident of *Starflight-1*, the Government of Aspirantia arrested Dr. Vienet and Captain Linke on charges of manslaughter of the victims onboard *Starflight-1* and breaches of the environmental laws of Aspirantia but released the *Stationferry* and all other crew and passengers onboard to the Government of Republica. Significant costs were incurred by the Aspirantian Government in relation to the care and repatriation of the remaining crew and passengers of *Stationferry* and the return of the spacecraft.

Federal Court of Republica dismissed the claims against both defendants on the basis that: (i) the Republican Space Agency has fulfilled its obligations as the licensing authority for the Government of Republica and cannot be blamed for any subsequent behaviour on the part of Stationrider; and (ii) after hearing testimony from an independent aerospace engineer, the Court accepted his evidence that the technical specifications of *Starflight-1* and its carrier-aircraft showed that *Starflight-1* was not sufficiently powerful or advanced to ever reach an altitude of 100 km.

The two countries agreed to submit their dispute to the International Court of Justice to decide the following questions: (i) whether Republica is responsible for the acts and omissions of Stationrider and is liable for the loss and damage suffered by Aspirantia in relation to the loss of *Starflight-1* or Aspirantia acted unlawfully in arresting and charging Captain Linke and Dr. Vienet and must withdraw the charges against them and return them immediately to Republica; (ii) whether Republica is liable to pay the cleanup, recovery and return costs incurred by Aspirantia as a result of the emergency landing by *Stationferry*; or Republica is not liable for the damage sustained by *Starflight-1*; and (iii) whether Aspirantia acted lawfully in arresting and charging Captain Linke and Dr. Vienet or Republica is not liable to pay Aspirantia for cleanup, recovery and return costs of the *Stationferry*, its passengers and its crew.

The nine competitor teams of the European oral pleadings arrived from the United Kingdom, Germany, Poland, Italy, The Netherlands, Russia representing the University of Silesia, Katowice; University of Cologne, Köln; The Honourable Society of Inner Temple, London; University of Genoa; Leiden University; University of Aberdeen Law School; University of Lueneburg; John Paul II Catholic University of Lublin and the Law Faculty of the Peoples' Friendship, Moscow. Teams contented in 9 preliminary rounds as agents of the Applicant and the Respondent state on 29 April. After totalizing the scores of memorials and oral pleading scores of the teams, Prof. Sergio Marchisio announced the finalists, and the coin toss decided that the University of Cologne (Ms. Lisa Kûpers, Mr. Erik Pellander and Mr. Martin Reynders) as Applicant and the Leiden University (Ms. Sotiria Tsoukala, Mr. Christopher Johnson and Ms. Ana Cristina Rosa) as Respondent should compete in final round.

The Final Round was held on 30 April. The team of University of Cologne has won the European Round, defeating Leiden University. The team of University of Cologne was contest the World Finals to be held in October 2010 in Prague, Czech Republic.

The winner of each region will gather for the 19th World Finals Finals of the Manfred Lachs Space Law Moot Court Competition between 27 September and 1 October, held in conjunction with the International Astronautical Congress and the International Institute of Space Law Colloquium on the Law of Outer Space in Prague, Czech Republic. Participants of the competition are encouraged to attend the International Astronautical Congress, especially as there are several policy and law sessions each year that may be of interest. The world semi-final will be held on 28 September 2010, with the world final, to be judged by three sitting members of the International Court of Justice, to be held on 30 September

2010. The two teams with lower-ranked memorial scores, as determined by an independent judging panel of scholars, will compete in a semi-final. The following prizes are awarded at the world finals each year: Manfred Lachs Trophy (awarded to the winning team in the world final); Eilene M. Galloway Award (awarded to the team with the best combined score for their memorials); Sterns and Tennen Award (awarded to the best individual oralist in the world final); Lee Love Award (awarded to the members of the winning team in the world final).

INSTRUCTIONS FOR AUTHORS

Acta Juridica Hungarica publishes original research papers, review articles, book reviews and announcements in the field of legal sciences. Papers are accepted on the understanding that they have not been published or submitted for publication elsewhere in English, French, German or Spanish. The Editors will consider for publication manuscripts by contributors from any state. All articles will be subjected to a review procedure. A copy of the Publishing Agreement will be sent to authors of papers accepted for publication. Manuscripts will be proceeded only after receiving the signed copy of the agreement.

Authors are requested to submit manuscripts to the Editor as an attachment by e-mail in MS Word file to lamm@jog.mta.hu. A printout must also be sent to *Prof. Vanda Lamm,* Editorial Office of Acta Juridica Hungarica, Országház u. 30, P.O. Box 25, H–1250 Budapest, Hungary.

Manuscripts should normally range from 4,000 to 10,000 words. A 200-word *abstract* and 5–6 *keywords* should be supplied. A submission of less than 4,000 words may be considered for the *Kaleidoscope* section.

Manuscripts should be written in clear, concise, and grammatically correct English. The printout should be typed double-spaced on one side of the paper, with wide margins. The order should be as follows: author, title, abstract, keywords. Authors should submit their current affiliation(s) and the mailing address, e-mail address and fax number must also be given in a footnote.

Authors are responsible for the accuracy of their citations.

Footnotes should be consecutively numbered and should appear at the bottom of the page.

References to books should include the facts of publication (city and date). References to articles appearing in journals should include the volume number of the journal, the year of publication (in parentheses), and the page numbers of the article; the names of journals should be italicized and spelled out in full. Subsequent references to books, articles may be shortened, as illustrated below (*Ibid.;* Smith: *op. cit.* 18–23; or Smith: Civil Law... *op. cit.* 34–42). When citing a non-English source, please cite the original title (or a transcribed version, if the language does not use the Roman alphabet) and a translation in brackets.

Tables should have a title and should be self-explanatory. They should be mentioned in the text, numbered consecutively with Arabic numerals.

New subject collections available

Akadémiai Kiadó is offering new, minor and more adaptable collections in Arts & Antiques, Health Science, Hungary & Beyond, HiCited, Linguistics & Literature, and Social Studies with significant pricing discounts. Subscribers of any collection can pick an additional title from the Plus collection for free; its fee is included in the price of the subscribed pack.

2010

Akadémiai Journals Collection ■ **Social Studies**

Acta Juridica Hungarica
Acta Oeconomica
European Journal of Mental Health
Journal of Evolutionary Psychology
Learning & Perception
Society and Economy

Akadémiai Journals Collection ■ **Plus**

Acta Geodaetica et Geophysica Hungarica
Central European Geology
Nanopages
Pollack Periodica
Studia Scientiarum Mathematicarum Hungarica

Additional details about the prices and conditions can be found at www.akademiaikiado.hu/collections

AKADÉMIAI KIADÓ

VANDA LAMM, editor-in-chief
Corresponding member of the
Hungarian Academy of Sciences
Professor of International Law
Széchenyi István University (Győr)
Director, Institute for Legal Studies, HAS
Member and Vice-President
Institut de Droit International
Research fields:
public international law, nuclear law

ISSN 1216-2574

constitutional law ■ administrative law ■ human rights ■ legal philosophy ■ European law ■ civil law ■ penal law, public and private international law ■ labour law

Volume 51 ▪ Number 3 ▪ September 2010

Editor-in-Chief ▪ VANDA LAMM

FOUNDED IN 1959

Acta Juridica Hungarica

Hungarian Journal of Legal Studies

WWW.AKADEMIAI.COM

AKADÉMIAI KIADÓ

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica publishes original papers on legal sciences with special emphasis on Hungarian jurisprudence, legislation and legal literature. The journal accepts articles from every field of legal sciences. The editors encourage contributions from outside Hungary, with the aim of covering legal sciences in the whole of Central and Eastern Europe. The articles should be written in English.

■

Abstracted/indexed in

Information Technology and the Law, International Bibliographies IBZ and IBR, Worldwide Political Science Abstracts, SCOPUS.

■

Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA
P.O. Box 25, H-1250 Budapest, Hungary
Phone: (+36 1) 355 7384
Fax: (+36 1) 375 7858

■

Subscription price

for Volume 51 (2010) in 4 issues EUR 304+ VAT (for North America: USD 424) including online access and normal postage; airmail delivery EUR 20 (USD 28).

■

Publisher and distributor

AKADÉMIAI KIADÓ
Scientific, Technical, Medical Business Unit
P.O. Box 245, H-1519 Budapest, Hungary
Phone: (+36 1) 464 8222
Fax: (+36 1) 464 8221
E-mail: journals@akkrt.hu
www.akademiai.com; www.akademiaikiado.hu

■

ISSN 1216-2574

AJur 51 (2010) 3

Printed in Hungary

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Volume 51, Number 3, September 2010

AKADÉMIAI KIADÓ
MEMBER OF WOLTERS KLUWER GROUP

Published by the financial support of the
Committee on Publishing Scientific Books and Periodicals,
Hungarian Academy of Sciences

Cover design: xfer grafikai műhely

CONTENTS

STUDIES

KALEIDOSCOPE

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 3, pp. 163–186 (2010)
DOI: 10.1556/AJur.51.2010.3.1

CHUN HUNG LIN*

A Comparative Study of Investment Regimes in ASEAN Economies

Abstract. For a long period, Southeast Asian economies have been export-oriented, mostly to Europe and North America. To earn foreign exchanges and speed their economic growth, ASEAN countries have moved to combine foreign and national capital to promote indigenous industrial development and native economic growth. For this purpose, ASEAN countries have set up enormous foreign investment incentives to attract foreign capital and enacted related foreign investment regulations many times to catch more foreign investors' eyes. However, the dissimilar economic developmental levels and the different political backgrounds, ASEAN countries have varied investment environment and regulations. Since both the formation of ASEAN and ASEAN members themselves are more focused on attracting foreign investment, one may ask what differences of foreign investment environment and regulations ASEAN member states have? The article hopes to analyze ASEAN member's investment environment and selected members' investment regulations in order to examine the interactions between national developmental demands and foreign investment regulations through a comparative study of ASEAN member states' laws on foreign investment.

Keywords: foreign direct investment, ASEAN, developing economies, investment incentives, investment guarantee

I. Establishment and Goals of ASEAN–Attracting more Foreign Investment?

Historically, Southeast Asia is a region rooted in cultural, ethnic, geographic and developmental diversity but generally transformed into a united bloc. Due to western imperialist invasions in the 19th century, regional conflicts such as territorial disputes and national unification aggravated distrust between neighbors and prolonged fragmentation of Southeast Asia.[1] The common experiences in this region were colonialism in 19th century and hegemonic encounter during the Cold War period. Because at that time the region was badly divided by ideological conflict and war, the emergence of a shared sense of security was extremely slow and difficult. Internal insurgencies and economic hardship forced Southeast Asian countries to waste their resources on defense and to rely on external powers for security and aid. Those factors restricted the opportunity to create a regional identity throughout the region. Guided by the U.S., a number of security arrangements were

* S.J.D., LL.M., LL.B., Visiting Scholar, Centre for Commercial Law Studies, Queen Mary, University of London (United Kingdom); Associate Professor, Feng Chia University Graduate Institute of Financial and Economic Law (Taiwan); Member, Arizona Bar (USA).
E-mail: jasonlin626@yahoo.com.tu

[1] The Sabah dispute between Malaysia and the Philippines led to the early demise in 1962 of the Association of Southeast Asia, which these two countries formed with Thailand just one year earlier. Diplomatic ties between Kuala Lumpur and Manila were severed between 1962 and 1966. There was the Confrontation between Indonesia and Malaysia; the separation of Singapore from Malaysia in August 1965; the escalating war in Vietnam and the Cultural Revolution in China where Chinese leaders openly espoused a policy to export revolutions to Southeast Asia. See Acharya, A.: *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order.* London, 2001.

gradually formed during the Cold War period, and the Association of Southeast Asian Nations (ASEAN) was also formed under such an atmosphere.[2] Most of the organizations created during the 1950s and 1960s were subject to a number of limitations including geographic, temporal, functional, and ideological ones. Even so, currently there are several potential advantages for future cooperation in this region. Firstly, there are billions of hard-working people constructing their nations after independence. It has also been fuelled by an "extraordinary growth in inputs like labor and capital rather than by gains in efficiency."[3] Furthermore, Southeast Asian economies have been export-oriented from the 1950s onwards.[4] They exported mostly to Europe and the U.S. but intra-Asian trade has always been relatively less dynamic.

The ASEAN was established with the signing of the "Bangkok Declaration" on 8 August 1967 in Bangkok, Thailand. The five original members were Indonesia, Malaysia, Singapore, Thailand and the Philippines. Brunei joined ASEAN in January 1984. Following with Vietnam's admittance, Laos, Myanmer, and Cambodia have become the new members of ASEAN sooner or later. The Bangkok Declaration united ASEAN members in a joint effort to promote economic cooperation and the welfare of the people in the region. The Declaration set up guidelines for ASEAN's activities and defined the aims of the organization. Under the Declaration, the ASEAN countries came together with three main objectives. First, ASEAN plans to promote economic, social and cultural cooperation in this region. Second, it strives to safeguard the political and economic stability in this region. Third, it aims to serve as a forum for the resolution of inter-regional differences. Within ASEAN, internal affairs between member states have emphasized economic, social, cultural, and security cooperation,[5] especially the progress in economic integration.

Indeed, except the security reason, the ASEAN had intended to increase the organization's international leverage and the region's economic prosperity at the beginning. When the world's economic structure moves toward regional economic cooperation such as the successful formations of the "European Union" (EU) and "North America Free Trade Area" (NAFTA), the future development of ASEAN had been deeply influenced by such a tend of regional economic integration. First, Southeast Asian countries feared becoming outsiders in a world increasingly divided into trading blocs and further sensed the need to create a fallback position, should the Uruguay Round collapse.[6] In addition, the ASEAN nations whose legitimacy depended heavily upon the high economic growth rates delivered to their electorate created the ASEAN Free Trade Area (AFTA) in the hope that it would bring in increased foreign investments to support the high growth rates.[7] Lastly, the ASEAN

[2] Romano, C. P. R.: Can You Hear Me Now? The Case For Extending The International Judicial Network. Symposium: Anti-Competitive Behavior and International Law. *Chicago Journal of International Law,* 10 (2009) 1, 233–267.

[3] Dale, R.: Debunking Myths of Modern Asia. *International Herald Tribune,* Nov. 4, 1994.

[4] Tan, G.: ASEAN Economic Development and Cooperation. Singapore, 2000, 6, 7–34.

[5] The ASEAN Declaration states that the aims and purposes of the Association are: (1) to accelerate economic growth, social progress and cultural development in the region and (2) to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries in the region and adherence to the principles of the United Nations Charter. See ASEAN Declaration signed in Bangkok, 8 August 1967.

[6] Tan, L. H.: Will ASEAN economic integration progress beyond a free trade area? *International and Comparative Law Quarterly,* 53 (2004) 4, 935–967.

[7] *Ibid.*

members worried that their markets might begin to look less attractive to foreign investors due to the rise of neighbours, P. R. China and India.[8] This reasoning opened to the thinking that led of creation of AFTA by the leading members of ASEAN. Although ASEAN countries were hesitant at the beginning, they have since adopted the "Asia-Pacific Economic Cooperation" (APEC) cause as their own and made major progress for liberalization and facilitation for many years.[9] The most remarkable accomplishment in ASEAN economic cooperation was the creation of the AFTA scheme similar to NAFTA. AFTA is an agreement by the ASEAN member states concerning local manufacturing in the region and designed to lower intra-regional tariffs and put country-of-origin regulations in place.[10] The main reason for formation of AFTA is not to promote internal trade and investment within its members; rather, to group a strong block for international competitiveness and attract foreign investors.

Since the ASEAN leaders were keen on seeking economic gains from foreign investors, it seems that the future cooperation of ASEAN is more focused on attracting investment from within and from outside of ASEAN members, instead of internal trading. In October 2003, the ASEAN leaders gave impetus to the original thought by signing the Bali Concord II to realize the vision of an ASEAN common market by 2020.[11] These efforts are designed to facilitate the flow of goods within ASEAN so as to further AFTA's goals of deeper regional integration and attracting more investment from extra-regional sources. Although its position is one of the most successful examples of regional integration in the Asia-Pacific area, there is no doubt that ASEAN still has to deal with integration difficulties relating to developmental gaps between well-developed and less-developed members, in particular Cambodia, Laos, Myanmar and Vietnam. Acknowledging the need to narrow the developmental divide among member states, ASEAN leaders had reached an agreement to create an ASEAN Community by 2020, known as the Bali Concorde II, made up of three components including the ASEAN Political-Security Community, the ASEAN Socio-Cultural Community and the ASEAN Economic Community (AEC) under ASEAN Sectoral Ministerial Bodies.[12] It is believed that the Bali Concord II appears to map out a different course for ASEAN economic cooperation, namely deeper integration under regionalism.

[8] Haas, D. A.: Out of Others Shadows: ASEAN Moves toward Greater Regional Cooperation in the Face of the EC and NAFTA. *American University Journal of International Law and Policy*, 9 (1994) 3, 809.

[9] Rennie, J.: Competition Provisions in Free Trade Agreements: Unique Responses to Bilateral Needs or Derivative Developments in International Competition Policy? *International Trade Law and Regulation*, 15 (2009) 2, 57–71.

[10] See Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January 1992, available on http://www.aseansec.org/12375.htm (last visited on May 27, 2010)

[11] Sucharitkul, S.: Report on the Second China–ASEAN Expo. 18–21 October 2005, Nanning, Guangxi, China. *Chinese Journal of International Law*, 5 (2006) 2, 397.

[12] At the 11th ASEAN Leaders' Summit in December 2005, it was agreed to put forward the goal of realizing an ASEAN Economic Community by 2015. The establishment of ASEAN Economic Community (AEC) is spearheading ASEAN regional integration. The AEC is envisioned to create a single market and production base characterized by a free flow of goods, services, investment, capital and skilled labor by 2020. See Habito, C. F.–Aldaba, F. T.–Templo, O. M.: *An Assessment Study on the Progress of ASEAN Regional Integration: The Ha-Noi Plan of Action toward ASEAN Vision 2020.* REPSF Project No. 03/006b, by Ateneo Center for Economic Research and Development, Manila, the Philippines, Oct. 2004.

The ASEAN leaders are also aware that failure to integrate the diverse markets of ASEAN will mean the group will lose investment and economic opportunities to regional competitors such as P. R. China and India. Not only forming a strong trading bloc, ASEAN member states have adopted a series of measures to catch more foreign investors' eyes. For example, most ASEAN countries such as Singapore, Malaysia, Indonesia, the Philippines, Vietnam, and Thailand have enacted foreign investment laws or concluded investment guarantee agreements with main investor countries. These legislations provide legal protection for bilateral trade investments and ensure foreign investors' interests in those countries. Since both the formation of ASEAN and ASEAN members themselves are more focused on attracting foreign investment, strongly influenced by the establishments of the WTO, EU, and NAFTA, one may ask what differences of foreign investment environment and regulations ASEAN members have? In addition, ASEAN member states face different developmental situations, are their investment regulations similar with each other under a united structure of ASEAN? Or they have designed or adopted different investment measures to fit their national economic goals? This article hopes to analyze those questions from ASEAN member's investment environment and selected members' investment regulations and to examine the relationship between developmental demands and related regulations through a comparative study of ASEAN members' investment regulations.

II. Economic and Investment Environment within ASEAN's Members

For making the comparative study more efficiently, the author had divided the ten member states into three categories including developing economies, small economies and less developed economies depending on their economic developmental levels. Meanwhile, the small economies comprise Singapore and Brunei which are the richest and most advanced countries in this region. The less developed economies are so-called "CLMV" countries, named after the first letter in the following countries including Cambodia, Laos, Myanmar, and Vietnam. Those four countries are the poorest and least developed countries in the region. The rest of the member states all belong to developing economies according to database of International Monetary Fund (IMF) and United Nations (UN).[13]

1. Developing Economies–Four Original Members

a) Kingdom of Thailand

Thailand's economy has undergone dramatic changes over the last 25 years. The country has developed from an agricultural economy based on a narrow range of commodity-export into a newly industrialized country while agriculture still plays an extremely important role in Thailand's economy.[14] More than half of the population depends on the cultivation of

[13] The IMF uses a flexible classification system that considers "(1) per capita income level, (2) export diversification–so oil exporters that have high per capita GDP would not make the advanced classification because around 70% of its exports are oil, and (3) degree of integration into the global financial system." See IMF: *World Economic and Financial Surveys*. World Economic Outlook, Database–WEO Groups and Aggregates Information. Oct. 2009.

[14] Since the 1980s, Thailand's annual economic growth rate has averaged over 9% in real terms. See Central Intelligence Agency: *CIA World Factbook: Thailand*. Feb. 8, 2007, available on https://www.cia.gov/library/publications/the-world-factbook/geos/th.html (last visited on May 28, 2010).

rice for their livelihood.[15] Although the growth of the manufacturing and service sectors has reduced the dominance of agriculture, Thailand retains the leading position of rice exporters in the world. Textiles are the largest export item in Thailand. Thailand's major trading partners include Japan, the U.S., EU, Taiwan, and Singapore. Tourism is Thailand's single largest source of foreign exchange.[16] Thailand joined the establishment of ASEAN and has developed increasingly close ties with other ASEAN members in economic, trade, political, and cultural cooperation. The major foreign policy of Thailand is to support regional stability for ASEAN's interests and to stress a security relationship with the U.S. and other Western countries. Because manufacturing and related infrastructure have developed remarkably in recent years, Thailand attracts more foreign investments than other ASEAN countries. Besides, the Thai government always maintains favorable policies and a strong willingness to greet foreign investments. The major investors are Japan, the U.S., Taiwan, and Singapore. In order to reduce urban and rural citizens' income differentials, the government has tried to encourage the decentralization of economic activities out of Bangkok and also has provided more attractive investment incentives outside of Bangkok.

b) Malaysia

Since 1987, Malaysia has experienced remarkable economic growth averaging between 8% and 9% per year.[17] Malaysia is the world's leading producer of rubber, palm oil, tropical timber, and tin. The major products of Malaysia include electronic components, electronic goods, and textiles and apparel. Malaysia also is one of the largest exporters of semiconductor devices in the world.[18] This country holds abundant natural resources, well-educated workforce, a well-developed infrastructure, and a stable political environment to attract foreign investors. However, because this country is heavily dependant on foreign capital, the economy remains vulnerable to external strikes.[19] Therefore, industrial countries' economic depressions could cause severe repercussions to this country. Malaysia is a founding member of ASEAN and views regional cooperation, especially the relations with its Southeast Asia neighbors, as the most important foreign policy. The Former Prime Minister Mahathir had espoused the "Look East" policy, which emphasized the traditional Asian valuations and viewed Japan and Asia's Newly Industrialization Countries (NIC) as the economic developmental model. Malaysia still maintains traditionally close relations with the Western countries, especially with the British Commonwealth countries.[20]

[15] Pupphavesa, W.: *Globalization and social development in Thailand.* CAS Discussion paper, (2002) 39, paper presented at the Conference on Globalisation and Social Development: Perspectives from Asia and Europe Antwerp, 15–16 April 2002.

[16] *Ibid.*, the major tourists are from Japan, Taiwan and USA.

[17] Manufacturing is the Malaysian economy's largest sector, accounting for an estimated over 40% of GDP after 2000. See Mahbot, S.: *The Malaysian Economy: Challenges and Prospects in Asian Strategy and Leadership Institute, Malaysia Today: Towards the New Millennium.* London, 1997.

[18] Ariff, M.: The Malaysian Economic Experience and Its Relevance for the OIC Member Countries. *Islamic Economic Studies,* 6 (1998) 1, 2–40.

[19] *Ibid.*

[20] Mendl, W.: *Japan's Asia Policy: Regional Security and Global Interests.* London, 1997.

c) Republic of Indonesia

Indonesia is the world's largest archipelagic country, and has abundant natural resources, most of which remain undeveloped. The main exports of Indonesia are timber, petroleum products, and rubber. The agriculture sector still plays the major role in the economy and also employs about half of the population. The economy of Indonesia has been transformed during the past thirty years.[21] Before the 1960s, the economy suffered from serious inflation, and foreign exchange reserves were almost depleted. But changes in economic policies, rising foreign aids and investments, and the huge revenues from petroleum exports in 1970s till 1990s; all let Indonesia's economic growth become steady and brought the inflation under control.[22] Indonesia's major trading partners include Japan, the U.S., and the Asian NIC. Japan is the largest foreign aid lender and the biggest direct investor of this country.[23] Indonesia has made vigorous efforts to deregulate its economy and to attract foreign investment. Because of Indonesian government deregulation and encouragement of the foreign investments to move Indonesia's economy forward, the government recognizes the importance of foreign investments and foreign capitals to sustain Indonesia's economic growth. Foreign investments in Indonesia tripled during the period between 1990s and 2000s. The investments help this country's economy which has averaged growth of over 7% per year for the last decade. Economic indicators also show foreign investments continuing to increase with a remarkable rate.[24]

d) Republic of the Philippines

The Philippines is an archipelago country and located along the southeastern rim of Asia forming a land chain between the Pacific Ocean in the east and the South China Sea in the west. The Philippines principal exports include textiles, minerals, farm products, and electrical equipment, and imports are commodities, capital goods and petroleum products.[25] Major partners of the Philippines are the U.S., Japan, Taiwan and ASEAN countries. However, drought and power supply problems hamper production, while inadequate revenues prevent government pump priming. After adopting a more liberal economic policy followed by a gradually stable regime, rapid economic growth of the Philippines is expected.[26] Muslim separatists in the southern Philippines are still threatening to stall peace negotiations and abort a nascent economic recovery in the area.[27] As to foreign investment,

[21] Haseman, J. B.–Lachica, E.: The U.S.–Indonesia Security Relationship: The Next Steps. *USA–Indonesia Society Publications,* Jan. 2009, 55–87.

[22] Iwan, J.–Azis, I. J.: *Development and Sustainable Future: The Environmental Dimension of Indonesia's Socio-Economic Progress.* Paper presented at the International Conference on Sustainable Future of the Global System, United Nations University, Tokyo, May 24–28, 2000.

[23] *Ibid.*

[24] *Ibid.*

[25] The Philippines is the world's largest producer and exporter of coconuts. Agriculture accounts for over 22% of the GDP and industrial production of goods account for over 28%. See Balisacan, A.–Hill, H.: *The Philippine Economy: Development, Policies, and Challenges.* New York, 2003, 402–496.

[26] The currency speculation that hit the Philippines peso during July 1997 could result in some slowdown in GDP growth. See Balisacan, A.–Hill, H.: *The Dynamics of Regional Development: the Philippines in East Asia.* Cheltenham, 2007, 13–47.

[27] *Ibid.*

the Philippine government has taken different steps in recent years to attract foreign investment. These include foreign exchange liberalization and foreign ownership's relaxation for enterprises which have no investment incentives. Besides, specific economic zone plans like the Subic Bay project have provided more favorable incentives than other areas to attract foreign investments.

2. Small and Rich Economies–Singapore and Brunei

a) Republic of Singapore–As One of "Four Asian Tigers"

Singapore, as one of NICs, has the most advantage economic background over other ASEAN members including its abundant capital and advanced techniques. This small island become an independent country in 1965, and assumed full sovereignty over its territory.[28] Singapore does not have significant natural resources except its deep water harbor. However, it has an excellent geographical location with a well-developed infrastructure and communications system, political stability as well as a well-disciplined manpower. Singapore is a major transshipment hub, a global warehousing and distribution center in the Asia-Pacific area. It poses the leading position of financial and commercial activities in Southeast Asia area. There are many international companies including banks, insurance, shipping, transportation, communication, and services to set up operational headquarters or branches in Singapore. Traditionally, Singapore has adopted a free trade policy. The trade policies and regulations of Singapore are kept very liberal, with non-tariff barriers imposed to protect domestic industries.[29] There are minimum trade restrictions and regulations. As to foreign investment, Singapore also remains high-level attraction to foreign investors with its liberal foreign investment policies and economic growth potential. The investment incentives in Singapore aim to develop this country into an international commercial center, air and sea cargo center, as well as the regional operational headquarters for multinational enterprises and major exporter services. Foreign investors often use Singapore as their operational center to provide management services for their subsidiaries and associated companies or their branches in other Asia countries.

b) Negara Brunei Darussalam–Small and Rich Petroleum-Export Center

Brunei is located on the northern coast of Borneo Island, and is almost completely surrounded by Malaysia. The economy of Brunei is for the most part supported by exports of crude oil and natural gas, with revenues from the petroleum sector accounting for more than 50% of GDP.[30] The major customers for Brunei's petroleum products are including Japan, S. Korea, Taiwan, Singapore, and the U.S. The major suppliers of imports are Singapore, Japan, and the U.S.[31] Most of Brunei's food had to be imported. Agriculture and fisheries are among the industrial sectors which the government has selected for highest

[28] Singapore's port is one of the busiest ports in the world. See McDougall, D.: *Asia Pacific in World Politics.* Boulder (CO), 2007, 201–230.

[29] Over ninety percent of all imports enter into this country free from tariffs and other border measures. See Lin, Ch. H.: Critical Assessment of Taiwan's Trade and Investment Relationship with ASEAN Countries in the Past, Present & Future. *Miskolc Journal of International Law,* 7 (2010) 1, 61–82.

[30] Saunders, G.: *A History of Brunei.* London, 1994, 8–37.

[31] See Lin: *op. cit.*

priority in its efforts to diversify the economy.[32] Owning huge fortunes and the wealthy life, Brunei owns one of the finest social welfare policies in the world, providing all medical services and subsidizing food and housing to its civilians. The government of Brunei also actively encourages foreign investments. New enterprises which meet certain criteria can receive "pioneer" status, exempting profits from income tax for up to five years. There is no personal income tax or capital gains tax. Besides, there are no specific restrictions of foreign equity ownership, but local participation, both shared capital and management, is strongly encouraged. Owning companies in Brunei has to be incorporated locally or registered as a branch of a foreign company and must be registered with the Registrar of Companies. Brunei has joined ASEAN in 1984 and gives its ASEAN membership the highest priority in its foreign relations.[33]

3. Less-Developed Economies–CLMV Countries

a) Socialist Republic of Vietnam

In 1975, North Vietnam and South Vietnam unified and established a new country, "Socialist Republic of Vietnam."[34] Under prolonged wartime and huge military expenditures, Vietnam suffered a shortage of agricultural productions, and insufficient consumer goods. Badly deteriorated living conditions made the government attempt to start a new direction and trend into the international capitalistic system. Since the 1980s, the government adopted "New Economic Policy" and "Doi Moi" to restructure its society and economy.[35] Vietnam has made significant progress in recent years moving away from the planned economic model and toward a more effective market-oriented economic system. In addition, the scope for private sector activity has been expanded, primarily through de-collectivization of the agricultural sector and introduction of laws giving legal recognition to private business. Despite such positive indicators, the country's economic turnaround remains tenuous. Nearly three-quarters of export earnings are generated by only two commodities, rice and crude oil. Vietnam is heavily dependent upon exports such as coffee, tea, and rubber for the success of its future economic development. Since 1986, Vietnam has attempted to open and run its economy by a more rational manner, and adjusted its international relations to reflect the evolving international economic and political situation in Southeast Asia.[36] After withdrawal of its troops from Cambodia in 1989, Vietnam hopes to use the leverage for improved relations with ASEAN, the U.S., and Western countries.[37] In 1995, Vietnam became the seventh member of ASEAN and has stepped up its speed to attract foreign investments from industrial countries and to regularize relations with the global economic

[32] Statistics had showed that per capita of GDP in Brunei is $8,800 and is the highest among the third world countries. See Central Intelligence Agency: *CIA World Factbook: Brunei* (2009). Available on www.cia.gov/library/publications/the-world-factbook/geos/bx.html (last visited on May 28, 2010).

[33] See Lin: *op. cit.*

[34] McMahon, R.–Paterson, Th.: *Major Problems in the History of the Vietnam War: Documents and Essays*. 4th ed., USA, 2007, 5–18.

[35] Yamaoka, K.: The Feasibility of Cuban Market Economy: A Comparison with Vietnam. *Institute of Developing Economies Discussion Papers*, (2009) 189, 2–33.

[36] *Ibid.*

[37] See McMahon–Paterson: *op. cit.*

system.[38] Vietnam' resumption of diplomatic ties with the U.S. and getting its membership of ASEAN have reinforced Vietnam's economic development and made it become an ideal investment area.

b) Lao People's Democratic Republic

Laos is a landlocked country between Vietnam and Thailand. It is one of the poorest countries in the world with a grossly primitive economic infrastructure, and a largely uneducated workforce.[39] It has very limited railroads, a rudimentary road system, poor external and internal telecommunications, and electricity available only in a few areas.[40] Laos has had a communist centrally planned economy. However, the Lao government began to realize that their economic policies were inappropriate, and started some economic reforms with decentralizing control, encouraging private enterprises, and privatizing public enterprises. Laos also had signed related agreements with the World Bank and IMF in 1989 committing to turn itself into extending and deepening the economic reforms.[41] Traditionally, Laos had maintained close ties with Vietnam formalized in friendship and cooperation treaties. In recent years, however, Laos has started to reduce its dependence on Vietnam and to improve its relations with other countries especially P. R. China, Thailand, France, Japan, and the U.S.[42] Among those countries, Laos particularly has well-developed relations with Thailand, Laos' principal route of access to the sea and its primary trading partner. In July 1997, Laos has been admitted by ASEAN and became a formal member.[43] In recent years, the Lao government had enacted a more liberal foreign investment code to attract more foreign capital. However, the poor infrastructure and low-level technical skills still cannot attract foreign investors. In the foreseeable future, the economy of Laos will continue to depend on foreign aids as well as other international funds and sources.

c) Kingdom of Cambodia

The economy of Cambodia remains essentially rural, with the population largely living in the countryside and heavily dependent on subsistence agriculture. Economic recovery is still unexpected because of the continued political unrest and factional hostilities. Since 1994, the government of Cambodia had been open for business with a liberal new investment law offering foreign enterprises some of the most attractive incentives within Southeast Asian countries, including tax holiday for up to eight years, exemption from withholding

[38] See Lin: *op. cit.*

[39] *Ibid.*

[40] Agriculture still makes up the largest sector in Lao's economy, employing 85% of the population and producing 62% of the national income recently. See Central Intelligence Agency: *CIA World Factbook: Laos (2009)*. Available on https://www.cia.gov/library/publications/the-world-factbook/geos/la.html (last visited on May 29, 2010).

[41] Cuyvers, L.–De Lombaerde, P.–Verherstraeten, S.: From AFTA towards an ASEAN Economic Community and Beyond. *Centre for ASEAN Studies Discussion paper*, Jan. (2005) 46.

[42] Sheldon, W. S.: China, Vietnam, and ASEAN: The Politics of Polarization. *Asian Survey*, 19 (1979) 12, 1171–1188.

[43] See Lin: *op. cit.*

tax on dividends, and no nationalization and price control, etc.[44] With rich natural resources and abundant labor, Cambodia offers foreign investors many opportunities for producing or processing the wide variety of local products and consumer goods. Cambodia's low-cost labor, cheap land, and most advantageous investment incentives in Southeast Asia indeed attract many foreign investors' interests. However, Cambodia's political instability is a natural drawback for foreign investors.[45] Due to its long internal armed conflicts, the United Nations was given a mandate to enforce a ceasefire, and deal with refugees and disarmament known as the United Nations Transitional Authority in Cambodia (UNTAC) for a comprehensive peace settlement in October 1991.[46] However, another civil war between Hun Sen and Prince Ranariddh broke out in July 1997, and ASEAN countries delayed the admittance of Cambodia.[47] The civil war and delay of joining ASEAN in 1997 will seriously damage the fragile economy. In recent years, reconstruction efforts have progressed and led to some political stability under the form of a multiparty democracy under a constitutional monarchy. Since then, various international aid organizations had begun crop diversification programs to encourage farmers to grow other crops. Due to the support of foreign investment and tourism development, the recovery of Cambodia's economy has been steadily grown.

d) Myanmar Union

Burma had changed its official name into Myanmar in 1989 after the State Law and Order Restoration Council (SLORC) decided that the old name implied the dominance of Burmese, and the Burmese are just one of the many ethnic groups in the country.[48] Myanmar had suffered internal strife from a smorgasbord of dictators, rebels and guerrillas and most Western countries think it was synonymous with the suppression of democracy and the use of slave labor. Currently, the government of Myanmar is a military regime, led by the SLORC, which allowed a democratic election for a new government in 1990; however, the winner, National League for Democracy, was not permitted to take the reins of government.[49] Myanmar is a poor Asian country and the economy of this country is heavily dependent on the agricultural sector that generates about 40% of GDP and provides employment for 65% of the workforce.[50] The country is also unable to achieve any substantial improvement in export earnings due to falling prices for many major commodity exports. Myanmar had been heavily isolated from international economic forces and had been trying to encourage foreign investment. Myanmar is now cementing economic bonds with ASEAN, which

[44] Leakhena, Ch.: Tax Incentives in Cambodia: Regional Cross-Country Overview. *Journal Study Modern Society and Culture,* 37 (2006), 307–324.

[45] See Lin: *op. cit.*; since 1999, liberalization progress was made on economic reforms and economic growth resumed at 5.0% in recent terms. Also see Cambodia/Taiwan Investors-2: Attractive Incentives. *Dow Jones Asian Equities Report,* 26 Mar. 1997.

[46] *Ibid.*

[47] Vittal, N.: Piecing the Peace in Cambodia: Return of Politics. *Economic and Political Weekly,* 35 (2000) 15, 1283.

[48] Seekins, D. M.: The State and Statism in Burma (Myanmar). Meio University, *The Newsletter,* 52 (2009), 38.

[49] Guyot, J. F.–Badgley, J.: Myanmar in 1989: Tatmadaw V. *Asian Survey*, 30 (1990) 2, 187–195.

[50] See Central Intelligence Agency: *CIA World Factbook: Burma (2009).* Available on https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html (last visited on May 29, 2010)

believes constructive engagement is a better form of diplomacy than sanctions.[51] Myanmar's relations with ASEAN had steadily improved since 1995 and officially become a member state of ASEAN in 1997.[52] ASEAN countries, especially Thailand and Singapore, had invested heavily in Myanmar. Myanmar and P. R. China have a traditionally intimate relationship. P. R. China also is the major arms and weapons supplier for the Myanmar regime.[53]

III. Regulations of Investment in Selected ASEAN Countries

As mentioned above, there are ten current member states within ASEAN. For making the comparative study more efficiently, the author had selected five member states into the comparative list. The selection criterion would be focus on the relationship between the economic developmental level and openness of foreign investment regulations, as well as the national demand and governmental attitude toward foreign investment, etc. Because the small economies, mainly Singapore and Brunei which are the richest and most advanced countries in this region, the author had deleted those two states from the comparative list. On the other hand, the less developed economies, especially Myanmar and Laos still adopt hostile measures against foreign investors and their developmental levels still far behind those developing economies in the region; therefore, the author only selected Vietnam from CLMV countries into the comparative list. There are five member states left on the comparative list including Thailand, Malaysia, Indonesia, the Philippines, and Vietnam.

1. Investment Promotion Laws of Thailand

a) Board of Investment and Industrial Estate Authority

The Investment Promotion Law of Thailand was amended in 1977 and follows the same general form of the first Investment Promotion Law enacted in 1963.[54] Both foreign and domestic investors may apply for incentives under this law. Most investment incentives and measures are administrated by the Board of Investment. The Board of Investment imposes ceilings on alien ownership, on a case-by-case basis, for most projects awarded promotional privileges. Conditions may be imposed on promoted projects including minimum capital investment, minimum Thai share participation, requirements to use local raw materials, nationality and number of employees, training of labor, and distribution, designation and quality of products, etc. Except for the Board of Investment, the Industrial Estate Authority of Thailand is authorized by the Industrial Estate Authority Act 1979 to establish and operate industrial estates.[55] It has authority to issue industrial operation permits as well as to provide other permits and facilities within its industrial estates. The Industrial Estate can be divided into four zones including general industrial estate, export processing zone, commercial

[51] Maung, M.: *Totalitarianism in Burma: Prospects for Economic Development.* New York, 1992; also see Wakeman, C.–Tin, S. S.: *No Time for Dreams: Living in Burma under Military Rule.* Lanham (MD), 2009, 25–47.

[52] Ba, A. D.: China and ASEAN: Renavigating Relations for a 21st-Century Asia. *Asian Survey*, 43 (2003) 4, 622–647.

[53] *Ibid.*

[54] Cusick, M.–de Mesa, S.: *The Asian Investment Law Directory.* Hong Kong, 1995.

[55] See Industrial Estate Authority Of Thailand Act B.E. 2522 (1979) Bhumibol Adulyadej, Rex., Given on 19th March B.E. 2522.

zone, and residential zone. Doing business in an export processing zone, there are incentives including exemption from import duty and VAT on imported machinery, equipment and materials under the Board of Investment Promotion Act.[56]

b) Choice of Investment Vehicle and Licensing

Foreign Investors can carry on business in Thailand through sole proprietorships, partnerships, private limited companies or public limited ones. In addition, joint ventures, branches of foreign corporations, representative offices and regional offices may be utilized. The most popular form of business organization is the private limited company. Foreign investors have to comply with the general business laws like domestic investors. In additional, there is no general licensing requirement for foreign investors in Thailand. The proper approach for foreign investors is to obtain a description of the proposed project and identify all applicable policies, laws and regulations. In some areas such as most manufacturing business, there are no restrictions for alien investments.[57]

c) Investment Incentives

To encourage alien companies investing in the remote provinces, the Board of Investment divided the whole Thailand into three zones. Those remote provinces that are far away from the capital-Bangkok enjoy special incentives. The three zones and related investment incentives are described as following.[58]

Zone 1 (Bangkok and five surrounding provinces)

Zone 2 (10 adjacent provinces to Zone 1)

- Exemption from payment of corporate income taxes for a period of from three to seven years.
- Reduction of 50% or up to exemption in import duties on imported machinery.
- Reduction of up to 90% of import duties on imported raw materials for a renewable one-year period.
- Exclusion of dividends from taxable income of shareholders.
- The right to own land and bring alien technicians and managers on the business.

Zone 3 (Other provinces as well as Laem Chabang and Map Ta Phud industrial estates)

- Corporate income tax holiday is eight years; after eight years, it will still enjoy a reduction of 50% for five years.
  Import duty on machinery is exempted.
- Import duty on raw materials used for domestic sales is reduced by 75% for 5 years, renewable annually.
- Import duty for priority activities is exempted.
- Greater than 49% foreign ownership may be allowed for manufacturing projects for the domestic market.

[56] Ratprasatporn, P.: *The Challenges of Foreign Investment In Thailand.* See www.tillekeandgibbins.com/publications/pdf/challenges_for_foreign_investment.pdf (last visited on May 29, 2010).

[57] *Ibid.*

[58] Nikomborirak, D.: *An Assessment of the Investment Regime: Thailand Country Report.* Paper submitted to the International Institute for Sustainable Development (IISD) by Thailand Development Research Institute, Mar. 31, 2004.

Meanwhile, it does not mean that alien companies corresponding with the requirements can enjoy those investment incentives. The Board of Investment controls the final decision of providing the incentives on a case-by-case basis.

d) Alien Business Law, Land Ownership and Foreign Exchange Controls

The Alien Business Law controls three broad categories of business. Categories A and B are closed to aliens, while Category C businesses are open to aliens subject to conditions. It still remains some businesses which do not fall within any of the three categories and are open to alien investments. Besides, there are restrictions on the percentage of alien ownership of commercial banks, finance companies, commercial fishing craft, commercial transportation, commodity export, mining and other enterprises under various laws, government policies, and trade association regulations.[59] In connection with seeking promotion by the Board of Investment, Thai participation will generally be recommended. Moreover, the Land Code of Thailand was amended to allow aliens to own up to 40% of the units in a condominium in 1992. For industrial purposes, a company promoted by the Board of Investment or Industrial Estate Authority may be granted the right to own land. Alien enterprises may lease immovable property and a registered lease of up to 30 years duration provides secure tenure.[60] As to foreign exchange, the Bank of Thailand has announced a number of relaxations of exchange controls since June 1990. The repatriate capital and profits were discretionary and have been increased in recent years. Presently, commercial banks are authorized to process most applications to purchase foreign currency. Foreign currency accounts may be established abroad and in Thailand.[61]

2. Promotion of Investments Act of Malaysia

a) Foreign Equity Distribution

Malaysian government emphasizes that indigenous Malaysians should be allotted a specified percentage of the equity. However, this requirement will be relaxed in favor of investments geared toward production of goods for export wholly or substantially.[62] In general, foreign equity participation in manufacturing projects is subject to the following guidelines:

- Projects that export 80% or more of production are not subject to any equity conditions.
- Projects not falling within the above category may have foreign equity participation of up to 79%, provided at least 51% of products are exported; and depending on

[59] *Ibid.*

[60] Land ownership in Thailand may be individual or shared with other Thais. Any Thai national may purchase land in the Kingdom. Land issues are governed primarily by the Land Code B.E. 2497 (A.D. 1954); Land Reform for Agriculture Act B.E. 2518 (A.D. 1975); Land Development Act B.E. 2543 (A.D. 2000); City Planning Act B.E. 2518 (A.D. 1975); Condominium Act B.E. 2522 (A.D. 1979), (No. 2) B.E. 2534 (A.D. 1991), (No. 3) B.E. 2542 (A.D. 1999), and (No. 4) B.E. 2551 (A.D. 2008); and Rules Relating to Land Allocation B.E. 2535 (A.D. 1992). Land regulations are determined by the Ministry of Interior.

[61] See supra note Nikomborirak 2004.

[62] Edwards, C.: East Asia and Industrial Policy in Malaysia: Lessons for Africa. In: Stein, H. (ed.): *Asian Industrialization and Africa: Studies in Policy Alternatives to Structural Adjustment*. New York, 1995, 245–255.

various factors such as size of the investment, technology involved value-added, utilization of local raw materials and spin-off effects.
- Projects exporting between 20% and 50% of production will generally be allowed between 30% and 51% foreign equity participation, while those exporting less than 20% of production are allowed only a maximum of 30% foreign equity participation.

b) Investment Incentives

Under the Promotion of Investments Act of 1986 and the Income Tax Act of 1967, various incentives are given including:

- Exemption from custom tax of raw materials and some machinery to the companies of which 100% production will be exported or whose production is principally for the domestic market.
- Exemption from income tax to new industrial enterprises for five years.
- Pioneer status, investment tax allowance and reinvestment allowance incentives.
- Double deduction for promotion of exports and incentive building allowance.
- Research and development and training incentives.
- Setting the operational headquarters incentives and the industrial adjustment incentives.[63]

c) Licensing, Foreign Exchange Controls and Land Ownership

A license is required of investors intending to engage in manufacturing activities.[64] The license is to be issued by the Licensing Office, the Ministry of International Trade and Industry (MITI). Malaysia's 1975 Industrial Coordination Act (ICA) governs manufacturing activities. Under the ICA, manufacturing companies with shareholders' funds of 2.5 million ringgit or more or engaging 75 or more full-time employees must apply for a license.[65] For foreign exchange, Bank Negara Malaysia (BNM), Malaysia's governmental bank, is responsible for exchange controls and in charge of supervision of Malaysia's banking system. For foreign investors, the BNM is liberal in regard to foreign exchange inflows and outflows.[66] Capital and profits can be freely repatriated when the remittances do not exceed a specified amount. Additionally, under the land code of Malaysia, foreign investors are not allowed to purchase lands that belong to Malaysian indigenous-reserved ones. However, most foreign investors own the lease rights to utilize lands.

d) Double Taxation Relief and Investment Guarantees

For attracting more foreign investment, the Malaysian government has signed double taxation relief agreements with many countries around Asia, Europe and the American. The government of Malaysia also has signed the Investment Guarantee Agreement with many

[63] See supra note Cusick-Mesa 1995.

[64] APEC: *Guide to the Investment Regime of the APEC Member Economies*. APEC Publications, Singapore, 1998.

[65] Thanadsillapakul, L.: *The Investment Regime in ASEAN Countries*. The Thai Law Forum, 2004. Available on http://asialaw.tripod.com/articles/lawaninvestment10.html (last visited on May 28, 2010)

[66] Sharma, S. D.: The Malaysian Capital Control Regime of 1998: Implementation, Effectiveness, and Lessons. *Asian Perspective*, 27 (2003) 1, 77–108.

countries including Austria, Canada, France, Germany, Italy, Taiwan, United States, United Kingdom (UK), and most ASEAN members.[67] Under the Investment Guarantee Agreement, foreign investors will be protected and provided with the following:

- Protection against nationalization and expropriation.
- Prompt and adequate compensation should the investment be nationalized or expropriated.
- Free outflow of capital, profits and other fees.
- Settlement of Investment disputes under the Convention on the Settlement of Investment Disputes, ratified by Malaysia in 1966.

3. Foreign Investment Law of Indonesia

a) Choice of Investment Vehicle and Foreign Equity

The Foreign Investment Law of Indonesia was amended in 1970 and controls most foreign investment in this country. This Law had been supplemented by numerous government regulations, the most recent of which was issued in June 1994 and is known as the "June Package."[68] The "June Package" fell in line with the government's promise to further deregulate foreign investment. There are two different ways for foreign investors to make equity investments in Indonesia's companies: 1. Establishment of an Indonesia limited liability company under the Foreign Investment Law. 2. Establishment of certain types of Indonesian limited liability financial companies under regulations issued by the Department of Finance.[69] There are other types of investment that do not fall under the Foreign Investment Law and these investments are regulated by various government departments. As a general rule, all business sectors are open for foreign investment unless specifically prohibited. The government publishes a Negative Investment List (DNI) to specify the business areas where foreign investment is prohibited, restricted or conditioned.[70] The restricted sectors include ports, public electricity industries, public transportation, nuclear power generation, drinking water, and media. Under the "June Package," a foreign investor may now form a PMA company (the Indonesian acronym for foreign capital investment) with 100% foreign equity with no minimum capital investment requirements. However, there is the requirement that some divestment take place within 15 years.[71] Although a foreign investor may own up to 100% in a PMA company, certain sectors of the economy exclusive of the DNI list are open only to PMA companies possessing at least 5% Indonesian equity. A PMA company may purchase shares in a domestic investment law company (PMDN) or a company which is neither a PMA nor PMDN company.[72] However, to invest

[67] *Ibid.*

[68] See supra note Thanadsillapakul 2004.

[69] Thomsen, S.: Southeast Asia: the Role of Foreign Direct Investment Policies in Development. OECD Publications, *Working Papers on International Investment*, (1999) 1.

[70] Maarif, S.: *Competition Law and Policy in Indonesia*. Paper presented to ASEAN Competition Law Project, Competition Law and Policy in Indonesia, Mar. 28, 2001, Jakarta, Indonesia.

[71] Adiningsih, S.–Murti, L.–Rahutami, A. I.–Wijaya, A. S.: *Sustainable Development Impacts of Investment Incentives: A Case Study of the Chemical Industry in Indonesia*. International Institute for Sustainable Development (IISD), Center for Asia Pacific Studies, Gadjah Mada University, Indonesia. Winnipeg, Manitoba Canada, 2009, 10–26.

[72] WTO Secretariat: *Trade Policy Review Mechanism Indonesia*. Report by the Government, C/RM/G/52, Nov. 1, 1994.

directly in these types of companies, the PMA Company must have at least 5% total equity. Even though the status of the acquired companies does not change, these acquired companies still may not engage in activities on the DNI list.

b) Investment Incentives

According to the Foreign Investment Law, the government of Indonesia provides a series of investment incentives.[73] These include that reductions or exemptions are granted from import duties and value added taxes for certain imports related to investment.

- Exemption on import duties for the approved projects and businesses.
- Reduction of 50% on import duties for support and auxiliary equipment.
- Exemption on import duties for consumable materials around one year's operations and raw materials around two year's production.
- Exemption on import duties in personal effects for expatriate personal, excluding liquor, tobacco and so on.

c) Licensing, Foreign Exchange Controls and Land Ownership

The foreign investment license granted by the Indonesia Capital Investment Coordinating Board (BKPM) is for a period of 30 years from the date of commencement of commercial production.[74] This term may be extended at the discretion of the government. On the other hand, under the FIL, the government guarantees the foreign exchange for the free remittance includes:

- Dividends proportional to foreign ownership
- Proceeds from the sale of shares to Indonesia nationals
- foreign loan payments including principal and interest
- Compensation in the case of nationalization
- Repatriation of invested capital in case of liquidation

In Indonesia, aliens do not have the right to land ownership but have the lease right. However, the government approves alien joint-venture enterprises owning the construction rights of land in term of between 20 and 30 years.[75] This term may be extended by government approval.

4. Foreign Investment Act of the Philippines

a) Foreign Equity Distribution

Under the Omnibus Investment Code, enacted in 1987, foreign ownership of enterprises was generally limited to forty percent.[76] However, in 1991, the Foreign Investment Act liberalized the entry of foreign investments into the Philippines. Under the 1991 investment code, there are no restrictions on the extent of foreign ownership of export enterprises (sixty percent of the production of which will be exported), or domestic market enterprises

[73] See: Adiningsih–Lestari–Rahutami–Wijaya: *op. cit.*

[74] *Ibid.*

[75] Manasan, R. G.: A Review of Investment Incentives in ASEAN Countries. *Philippine Institute for Development Studies Working Papers*, (1998) 27, 23–45.

[76] *Ibid.*

(enterprises whose production is intended principally for the domestic market).[77] In addition, up to 100% foreign ownership was allowed in areas of activities determined to be "pioneer enterprises" under the Investment Priorities Plan, subject to constitutional or statutory limitations. A 100% foreign equity is generally allowed, unless the enterprise is included in the Foreign Investment Negative List.[78] Moreover, foreign investors who invest in more than 40% of the equity of a Philippine corporation or a partnership must secure prior approval of the Securities and Exchange Commission.

b) Investment Incentives

Under the Investment Code, a wide range of benefits, fiscal, and non-fiscal, are granted to investors engaged in activities considered as "pioneer," or those which sixty percent of the production of which is exported.[79] It includes:

- Income tax holidays from four to six years.
- Preferential customs duty of 3% on imported capital equipment.
- Tax credit for taxes and duties on raw materials.
- Double deduction for labor expense.

Besides, the Export Development Act of 1994 entitles exporters to the following incentives:

- Duty free importation of machinery and equipment and accompanying spare parts until 1997.
- Exemption from deposit of duties at the time of the opening of the letter of credit covering imports.
- Tax credits for increase in current year export revenue within 30 days from export.
- Tax credits for imported ingredients and raw materials for five years.

c) Foreign Exchange Controls and Land Ownership

By the relaxation of the foreign exchange regulations, foreign exchange is freely sold and purchased outside the banking system. As to the capital repatriation and remittance of dividends and profits, foreign investors still have to show proof of inward remittance which must be registered with the Central Bank of the Philippines.[80] Only the citizens of the Philippines or the corporations at least sixty percent of the capital stock of which is owned by the Philippines nationals can own land.[81] The foreign investor is allowed to lease commercial lands up to seventy years, provided that the leased area will be used only for the purposes of the investment.

[77] Kajiwara, H.: The Effects of Trade and Foreign Investment Liberalization Policy on Productivity in the Philippines. *The Developing Economies*, 32 (1994) 4, 492–507.

[78] *Ibid.*

[79] *Ibid.*

[80] Romeo, A.: *Doing Business in the Philippines*. BDO Global Coordination B.V., 4th ed., May 2009, 13–15.

[81] *Ibid.*, 6–12.

d) Double Taxation Relief and Investment Guarantee

The Philippines has double taxation relief agreements with Australia, Canada, France, Germany, Indonesia, Japan, Malaysia, Singapore, Thailand, the U.K., the U.S., and so on.[82] These treaties generally allow the foreign investor to claim a credit for taxes paid to the Philippines government for income earned in the Philippines. The Philippines also has become a full member of the Multilateral Investment Guarantee Agency wherein foreign investments entered through this agency are now insured against risk associated with host government restrictions on currency conversion and transfer, expropriation law, revolution or civil disturbance.

5. Foreign Investment Law of Vietnam

a) State Committee for Cooperation and Investment (SCCI)

For most foreign businesses, the most important agency is the State Committee for Cooperation and Investment (SCCI), which has been established by the Vietnamese government to be a "one-stop shop" for investors.[83] The SCCI approves all applications for foreign investment and supervises the administration of the Foreign Investment Law (FIL). The Vietnam government relaxed restrictions on foreign investment in 1994, allowing overseas investors to hold a 100% share in their companies.

b) Choice of Investment Vehicle

The FIL allows foreign investors to invest in any sector of the Vietnamese economy, but encourages foreign investment in areas which are labor-intensive; generate exports and which utilize Vietnam's raw materials.[84] It also encourages infrastructural development and projects that can earn foreign exchange, like oil exploitation and tourism.[85] Under FIL, it provides four most important forms of foreign investment including:

- The "Joint Venture Company"
- The "Business Cooperation Contract"
- The "Enterprise with 100% Foreign – Owned Capital"
- The "Build – Operate Transfer" Project

Foreign investment projects are now categorized into two groups. Projects that are deemed strategic or vital to national interests are classified as "Group A" projects and are subject to the approval of the prime minister based on the recommendations of the SCCI

[82] *Ibid.*, 16–42.

[83] Trankiem, L.–Ahmed, Z. U.–Jevons, C.–Kiang, T. A.: Doing Business in Vietnam: Implications for International Investors. *Journal of Transnational Management Development*, 5 (2000) 4, 3–24.

[84] Jenkins, R.: Globalization, FDI and Employment in Viet-Nam. *Transnational Corporations*, 15 (2006) 1, 115–142.

[85] Schaumburg-Muller, H.: Rise and Fall of Foreign Direct Investment in Vietnam and Its Impact on Local Manufacturing Upgrading. *European Journal of Development Research*, 15 (2003) 2, 44–66.

and various concerned ministries. All other projects that do not fall within "Group A" category are considered "Group B" projects and are subject to the approval of the chairman of the SCCI.[86]

c) Taxation

The FIL Implementing Regulations specify that foreign investment enterprises will be subject to profits tax at a rate of 25% unless they fall with in specific categories which allow for lower tax rates of 20%, 15%, and 10% for investments.[87] Enterprises will also be eligible for consideration for tax holidays, with the length of the tax holiday depending on the tax rate which applies to the enterprise. Belonging to advanced technology, export-oriented, natural resource exploitation, and heavy industries or infrastructure projects may be applied to lower tax rates and better tax incentives. The Ministry of Finance has issued guidelines to clarify the concessions and the period of time for which they will be available for different types of projects.[88] Basically, investment in undeveloped areas and in priority industries will enjoy larger concessions for longer periods.

d) Import, Export and Foreign Exchange Controls

Foreign enterprises to business cooperation contracts are usually allowed to import equipment and materials related to the investment project. Foreign enterprises may also be exempted from import duties where the imported goods form part of the capital contribution to the enterprise or where raw materials, spare parts and accessories are imported for production of goods for export. Additionally, enterprises with foreign capital are required to deposit all foreign and Vietnamese funds with a government approved bank. All receipts and expenditure of the enterprises must be made through these accounts. The FIL provides that foreign investors have the right to transfer currency abroad when the currency belongs to the share of profit, the principal and interest on any loan, and any payment for provision of technology or services, etc.[89]

e) Property Control and Export Processing Zones

Under the revised Vietnamese Land Law, the land is state owned. Vietnamese organizations and citizens may be granted the right to use land, or may rent the right to use land. Foreigners are not permitted to hold the right to use land, but may rent the right to use land, the maximum duration of the lease being determined by the duration of their investment.[90] In most land use agreements, the rental fee for land use is revised every five years. With the

[86] Meske, W.–Thinh, D. D.: *Vietnam's Research and Development System in the 1990s–Structural and Functional Change*. Research project presented for the Volkswagen Foundation Transformation of Economic, Political and Social Systems, Discussion Paper P 00-401, Berlin Wissenschaftszentrum, Germany, 2000.

[87] Phap, Q. D.: Tax Policy on Foreign Direct Investment in Vietnam and Some Recommendations for Their Amendments and Additions. *Hai-Ha Nguyen Law Office Newsletter*, Oct. 1, 2007.

[88] Tam, L. M.: Reforming Vietnam's Banking System: Learning from Singapore's Model. *Visiting Researchers Series 5*, ISEAS Publications, Singapore, 2000.

[89] See supra note Trankiem–Ahmed–Jevons–Kiang, 2000.

[90] An, D. V.: Foreign Direct Investment in Vietnam–Current Situation and Prospects. *Hai-Ha Nguyen Law Office Newsletter*, Oct. 1, 2007.

growth of the Vietnamese economy, land rental costs will rise sharply over the next decade. Moreover, the FIL Implementing Regulations make provision for the establishment of Export Processing Zones (EPZs) which are geared to export-oriented light industry or services.[91] Enterprises established in these zones enjoyed lower profit tax rates (10% to 15%) as well as other incentives, such as higher quality infrastructure and no import or export duties. All transactions in EPZs have to be carried out in foreign currency, ensuring that the majority of production is exported.[92]

III. Comparative Investment Environment and Regulations among Selected ASEAN Countries

Generally speaking, a country that had more foreign investments or enjoyed higher economic development often sets up more complicated investment regulations or higher-standards to apply investment incentives. Those countries like Thailand and Malaysia have gradually amended related foreign investment regulations to heighten incentives standards or canceled foreign investment incentives. Those countries that need more foreign capitals such as Indonesia and the Philippines still provide favorable investment incentives to foreign investors. As to those countries that start to develop their economies like Vietnam and Cambodia, they often own the most liberal and favorable investment regulations to attract foreign investment.

1. Favorable Investment Conditions of Intra-ASEAN

Thailand possesses many excellent advantages including rich natural resources, well-educated labor, stable social and political order, as well as excellent international relations with other countries. Thailand also has engaged in wide-range economic cooperation with its neighbors like Mekong developmental plan, the North and South growth triangle plan and so on. Thailand has an ideal investment environment for foreign investors and also attracts more foreign investments than other ASEAN countries. When foreign investments make Thai economy enjoy a high-level growth, Thai governmental departments has started to choose foreign investment projects that can benefit its national development and promote native technical level. Thus the Thai government gradually has canceled related investment incentives for labor-intensive industries. The Thai government has led its economic developmental direction to raise native industrial competitiveness and lower foreign investment's influence. In recent years, to balance the differences between urban and rural areas, the Thai government now provides more favorable investment incentives to foreign industries that are located out of Bangkok. However, the poor infrastructure, transportation, and communication in remote areas still can not raise foreign investors' interests.

Since 1980s, Malaysia has transformed itself from a raw materials export-oriented economy into a manufacturing one. It is because Malaysia endeavors to attract foreign investments, liberalizing market restrictions, and privatizing national enterprises. Malaysian government stresses raising indigenous economic conditions and set up related measures to

[91] Dinh, A.: *A Review on Kuchiki's Flowchart Approach to Industrial Cluster Policy Canon Effect in Hanoi Vietnam*. Research paper presented to Hitosubashi University, School of International and Public Policy (IPP), August 2007.

[92] *Ibid.*

protect indigenous industries. From 1980 to 1990, most foreign investment in Malaysia concentrated on export-oriented and labor-intensive industries to earn foreign exchange. Following the positive economic development in the 1990s, Malaysia faces an insufficiency of labor and land as well as rising industrial capital. In addition, under rapid economic growth and enormous foreign investments, the Malaysian government gradually has canceled related investment incentives for labor-intensive industries and only provided investment incentives to high-tech industries.

Because traditional historical experiences taught Indonesia to keep a suitable distance from foreign enterprises, the Indonesian government has adopted a changeable foreign investment policy. One hand they hope that foreign capital can assist indigenous industries and native economic development; but the other hand they are afraid that foreign enterprises will control most Indonesian economic sectors. Thus Indonesian government adopted a two-sided foreign investment policy that is to greet foreign capital on one side but to limit foreign equity and investment categories on the other side. Indonesia attempts to combine native and foreign capital to promote national economic development. Due to its huge domestic market, well-planned specific industrial zones, and gradually liberal investment regulations, Indonesia indeed draws many foreign investments. However, under strong competitiveness from P. R. China and Vietnam in recent years, the total foreign investment sum decreased in Indonesia.

Among ASEAN countries, the Philippines had lower-priced labour than other countries. However, the political instability and deteriorating public order are fatal defects for its economic development. In addition, foreign investments mostly focus on basic infrastructure industries and these products still pour into the Philippines' domestic market. This kind of foreign investment neither promotes foreign exchange earnings nor raises native technical levels. Thus foreign industries in the Philippines form strong competitions for domestic industries and cannot provide any substantial assistance to the Philippines' economic development. Unlike Thailand and Malaysia, the government of the Philippines cannot utilize foreign investments to improve native economic development instead of seriously threat to indigenous industries. That is why the Philippines economy still remains on a low-developed level and cannot grow remarkably. Under the worse economic order, the Philippine government now has started to design a series of more liberal and favorable economic plans and investment regulations to attract different kinds of foreign investments. The Subic Bay developmental plan particularly draws many foreign investors' interests.

Although Vietnam still insists on a socialistic economic developmental model, it has adopted a more liberal policy to improve the worsening economy and approach a market-oriented economic system in recent years. Meanwhile, due to the failure of socialistic economic plans and the lack of former Soviet Union's assistance, Vietnam is eager to gain more foreign capital to resolve its economic problems. To attract foreign investments, Vietnam has established the most favorable investment incentives and regulations to pull foreign capital. After joining ASEAN and normalization with the U.S., enormous foreign investments poured into Vietnam. Since 1992, Vietnam has enjoyed a high economic growth of 7%~8% per year. However, the poor infrastructure and transportation, as well as the wicked administrative efficiency are still Vietnam's defectives.

2. Belief of Comparative Investment Regulations among Selected ASEAN Countries

To maintain stable economic growth, ASEAN countries have amended related foreign investment regulations many times to conform to their industrial demands as well as attract more foreign investments. However, the dissimilar economic developmental levels and the

different political backgrounds, ASEAN countries also have varied investment regulations. Among those five selected ASEAN member states, Thailand and Malaysia have more complicated and strict investment regulations. It is because both of them have had numerous foreign investments, and they restrict those foreign investments that cannot bring any benefit or promote native technical levels. On the other hand, Indonesia and the Philippines still need more foreign capital and higher techniques, so they have willingness to provide more favorable investment incentives to foreign investors. As to Vietnam, it has planned to attract more and more foreign investments and to improve its economy in recent years; therefore, it owns the best preferential treatment for foreign investors.

a) Foreign Equity Distribution

Among those five selected ASEAN member states, only Vietnam does not set up any restrictions in the approval of 100% foreign ownership enterprises. Thailand and Malaysia regulate industries that export 80% or more of production and may not be subject to any equity conditions. Meanwhile, Malaysia requires indigenous Malaysian equity that should be 30% or more. In Indonesia, the approval of a 100% foreign equity enterprise must export 100% of production and locate in specified economic zones or applied investment sum is over US$ 50 million. In the Philippines, 100% foreign ownership is allowed in areas of activities determined to be "pioneer enterprises" approved by BOI or that is over 60% export-production. In Vietnam, the government allows 100% foreign equity and encourages aliens to invest in any sector of Vietnam's economy.

b) Import Duty Incentives

Basically, most ASEAN countries provide an exemption or reduction of import duties on imported raw materials or machinery. In Thailand, the government had emphasized the balance between rural and urban economic development and provides more favorable incentives to industries that are outside of Bangkok. In Malaysia, the incentives are dependent on whether this industry belongs to an export-oriented one or not. In Indonesia, the government can reduce or exempt from import duties approved investment projects or support and auxiliary equipment. In Vietnam, foreign enterprises are exempted from import duties where the imported goods form part of the capital contribution to enterprises or where raw materials, spare parts and accessories are imported for production of goods for export.

c) Corporate Income Tax Incentives

To attract more foreign investments, ASEAN countries all provide corporate income tax holiday between 2 and 8 years. In Thailand, the government emphasizes the balance between rural and urban areas and provides longer taxes holiday to industries that are outside of Bangkok. In Malaysia, in order to enjoy longer tax holiday must be enterprises that have to hire over 500 full-time employees or the capital expenditure is over US$ 25 million. The Philippines gives longer taxes holidays to "pioneer enterprises" approved by BOI.

d) Foreign Exchange Controls

In most ASEAN countries, capital and profits can freely be repatriated when the remittances do not violate related requirements and regulations. In Thailand and Malaysia, the governmental banks control but allow foreign currency remittances. In Indonesia, the government guarantees related foreign exchange for free remittances. In the Philippines,

aliens have to prove remittances registered by its governmental bank. In Vietnam, foreign investors have to pay five to ten percent income tax that is dependent on the total sum of remittances.

e) Land and Immovable Property Ownership

Most ASEAN countries generally provide aliens the lease rights to use land and immovable property; however, they restrict alien land and immovable property ownership. In Thailand, a company may be granted the ownership of land and immovable property by BOI or the Industrial Estate Authority for industrial purposes. In Malaysia, aliens generally have lease rights to use land but restrict their ownership. In Indonesia, the government approves alien joint-venture companies to own the lease rights. In the Philippines, a corporation, at least 60% of the capital stock of which is owned by Philippine nationals can own land. Vietnam is a socialist country and all lands of Vietnam are state-owned.

As a whole, Thailand has attracted considerable foreign investments in recent years. Under this circumstance, its investment incentives gradually have been reduced and many restrictions had been added in contrast with other ASEAN countries. Due to remarkably economic growth and enormous foreign investments, Thailand has gradually canceled investment incentives for labor-intensive industries. However, because the Thai government hopes to balance rural and urban area's economic development, enterprises that are outside of Bangkok can still enjoy very favorable incentives. Malaysia hopes to transform itself into a developed country in 2020 and needs more direct foreign investments to achieve this goal. Therefore, the Malaysian government still plots a series of investment incentives especially providing the most preferential treatment for high-tech industries. In Indonesia, the government attempts to pull more foreign investment to assist indigenous industrial development. Indonesian government thus provides a lot of favorable incentives including relaxing foreign equity, lengthening lease terms to use immovable property, simplifying investment approval process, and improving related infrastructure. The government of the Philippines has already designed "Subic Bay" as an economic specific zone and a free port, as well as drafted related investment regulations to provide foreign investors with more incentives. Whether the Subic Bay transformational developmental plans succeed or not, it will directly impact on the economy in the Philippines. Vietnam furnishes foreign investors with more favorable investment incentives than other ASEAN countries. Besides, Vietnam's government encourages foreign investments in areas that are labor-intensive, generate exports and those utilize raw materials. Compared with Thailand and Malaysia, Vietnam is different from them and strongly encourages labor-intensive industries. If the foreign investor is under the category of labor-intensive, it is Vietnam that provides the most preferential treatments than the other selected countries and will be the best choice. However, if the foreign investor is under the category of capital-intensive or technical-oriented industries, the poor infrastructure and the insufficient transportation and communication systems in Vietnam will decrease investors' interests. Reviewing these different foreign investment regulations, the author considered that there are definitely different economic developmental levels and demands among ASEAN countries.

IV. Conclusion

ASEAN countries are moving combine foreign and national capital to promote indigenous industrial development and native economic growth. Those foreign economic policies are all guided by governmental departments to achieve "economic dependent development." ASEAN countries set up enormous foreign investment incentives to attract foreign capital. Most ASEAN countries also have learned Japan and Asian NICs' developmental experiences and economic models to establish their economic policies. ASEAN countries also encourage export-oriented industries to earn foreign exchanges and speed their economic growth. ASEAN countries offer different investment incentives based on investment projects and industrial categories. It is because ASEAN countries always exert their economic policies and regulations to direct their industrial development. ASEAN countries restrict aliens to invest in areas of public utilities or native security industries including drinking water, electricity, telecommunications, transportation, nuclear power, and media enterprises. Only investing in export-oriented industries, most ASEAN countries approve enterprises of 100% foreign ownership and provide the most favorable incentives.

Generally speaking, one country's foreign investment regulations can express the degree of dependence on foreign investment. Thailand and Malaysia attract more foreign investment than other ASEAN countries. They gradually have canceled or reduced foreign investment incentives for labor-intensive industries. The governmental departments no longer encourage labor-intensive industries and try to attract high-tech industries to invest in their countries. It shows that Thailand and Malaysia own higher-level and self-appointed economic structures. On the contrary, Indonesia and the Philippines still demand more foreign capitals to promote their industrial growth. They have the willingness to provide more preferential policies to draw foreign investments than Thailand and Malaysia. In other words, Indonesia and the Philippines need foreign capital and investments deeper than Thailand and Malaysia. As to Vietnam, it had provided the best investment incentives to alien businesses. The Vietnamese government particularly encourages labor-intensive industries and those that utilize their raw materials. From those countries' investment regulations and related information, it could be found that lower-level developing countries demand more foreign capital to promote their industrial growth and provide more favorable investment incentives to attract foreign investments. On the other hand, higher-level developing countries want to retake their economic independent rights and have more restrictions in investment incentives. That is why many traditional industries have moved from Thailand to other countries and this is also why the Philippines and Vietnam tended to guarantee and give the most preferential incentives to foreign investors.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 3, pp. 187–197 (2010)
DOI: 10.1556/AJur.51.2010.3.2

ILJA RICHARD PAVONE*

Italian Experiences in Combating Hate Crimes and Hate Speech in Light of Recent Violence by and Against Roma**

Abstract. This paper provides an overview of national efforts to combat racism, xenophobia and intolerance in the italian legal framework. It looks specifically at Law n. 94/2009 on public security and its compliance with European and international legal standards. Specifically, the study is devoted to the key issue of the different treatment of Roma and Sinti in Italy due to their legal status.

Keywods: xenophobia; racism; human rights; Roma; Sinti; Law n. 94/2009 on public security; European law; international law

1. Introduction

Public opinion regarding the presence of immigrants in the country has recently been fed with media reports on atrocious crimes committed by foreigners, exacerbating feelings of insecurity, fear, and even xenophobia among Italians.[1] Recently, Italy registered several episodes of xenophobia and racism: in January 2010 a racist attack on African migrant workers in the Southern region of Calabria by local gangs brought to the surface the Italian society tensions that had been simmering for some time. It's an issue of strict actuality because Italy has one of the fastest growing immigrant populations in Europe, with immigrants now reaching about 7 percent of the population.[2]

The EU Special Barometer of July 2009 reported that Italy scored some of the lowest results among the EU member States, as regards "the level of comfort with person from different ethnic origin as a neighbour and especially as regards the comfort with Roma neighbour".

Another special country-based survey of the same EU institution reported a higher than the EU average (76% and 62% respectively) percentage of interviewees in Italy who thought that discrimination on the basis of ethnic origin was "very or fairly widespread".

Apart the issue of racial discrimination and xenophobia against immigrants, there is the problem of Roma and Sinti in Italy.[3] Usually known as Gypsies (a misnomer, derived

* Researcher of International Law, Institute for International Legal Studies, Italian National Research Council, *www.isgi.cnr.it.*
E-mail: ilja.pavone@isgi.cnr.it

** This paper was presented at the Conference organized by the Hungarian Academy of Science on "Current Issues regarding Xenophobia and Intolerance", held on 13 November 2009 in Budapest.

[1] See Beutin, R. et al.: Reassessing the Link between Public Perception and Migration Policy. *European Journal of Migration and Law*, 9 (2007) 4, 389–418.

[2] See Caritas Europe: Annual Activity Report Edition, 2009.

[3] In this paper we will use the term Roma and Sinti–instead of "nomads" as these people are often quoted in italian documents–in line with UN and OSCE language. The terms "Roma" and "Sinti" are authentic proper names meaning "person". Those of eastern European descent are called "Roma" and those of central European origin are referred to as "Sinti". On the other hand, the foreign term "gypsy" is regarded by most minority members as discriminatory. For further reading see Fraser,

from an early legend about Egyptian origins) defy the conventional definition of a population: they have no nation-state, speak different languages, belong to many religions and comprise a mosaic of socially and culturally divergent groups separated by strict rules of endogamy.

Their total amount is 150,000. They include (i) Italian citizens, as well as citizens of both (ii) EU and (iii) non-EU countries. Groups of Roma and Sinti migrated to Italy during different periods, beginning in the 14th century. In the 1980s and 1990s, the conflicts in the former Yugoslavia caused Roma to flee to other countries, including Italy. In the 1990s and the first decade of this century, a large number of Roma arrived from the States of Central and Eastern Europe. The most recent influx of Roma and Sinti communities has come mainly from Romania: these movements intensified since Romania joined the EU in 2007.[4]

In the Italian legislation, nomads are not considered as a minority group and their legal status differs: after Romania's accession to the EU in January 2007, the Romanian Roma became EU citizens and gained the right to free movement within the European Union, while Roma from Western Balkans are non-EU nationals. Many of them have no documents providing their identity or places of origin rendering them *de facto* stateless (with particular negative consequences for children). They are technically subject to Italian immigration legislation.[5]

Although they do not have a large presence in Italy, Romanian Roma migrants have attracted considerable public attention and negative media coverage, due to growing prejudice and the link between Roma and Sinti migrants, criminality and threats to public security. In November 2007, the murder of an Italian woman, by a Romanian Roma, was highly publicized on the Italian media and let to a series of attacks on Roma, culminating in a mob burning down a Roma settlement in Ponticelli (in the suburbs of Naples) in May 2008 after a young Roma woman living in the settlement was accused of kidnapping a baby from a local couple. The Italian government responded to these events introducing a number of measures affecting specifically the Roma and Sinti population in Italy.

2. The Italian response to violence committed by Roma

Since May 2008, a number of government decisions have been issued concerning the Roma and Sinti communities, or "nomads", as they are commonly referred to in Italy. The Prime Minister issued a decree declaring a "state of emergency" in relation to settlements of

---

A. M.: *The Gypsies.* Oxford, 1995; Hancock, I.: Gypsy History in Germany and Neighbouring Lands: A Chronology Leading to the Holocaust and Beyond. In Crowe, D. M.–Kolsti, J. (eds): *The Gypsies of Eastern Europe.* Armonk (NY), 1991; Kalaydjieva, L. et al.: A newly discovered founder population: the Roma/Gypsies. *Bioessays,* 27 (2005) 10, 1084–1094; Liegeois, J. P.: *Roma/Gypsies: A European Minority.* London, 1995.

[4] See Ban, C.: Economic Transnationalism and its Ambiguities: The Case of Romanian Migration to Italy. *International Migration,* September 2009.

[5] The Committee on the Elimination of Racial Discrimination (CERD), after examining the periodical report submitted by Italy according to Art. 9 of the UN Convention on the Elimination of all Forms of Racial Discrimination of 1965, *warned the Italian institutions that they must recognise the Roma as an official minority and adopt policies aimed at addressing their needs.* The CERD "recalling its general recommendation N° 27 on discrimination against Roma, recommends that the State Party adopt and implement a comprehensive national policy as well as legislation regarding Roma and Sinti with a view to recognizing them as a national minority and protecting and promoting their languages and culture" (para. 12).

"nomad" communities in some regions[6] (measure based on Law n. 225/1992 which deals with emergency situations arising from severe natural disasters[7]) and three "ordinances" introducing special and exceptional measures concerning "nomad settlements" in the some regions. The state of emergency lasted until 31 May 2009. Following this decree, the prime minister issued on 30 May 2008 three 'ordinances' introducing special and exceptional measures concerning 'nomad settlements' in the regions of Campania, Lazio and Lombardia and which appointed the prefects of Rome, Milan and Naples as 'delegated commissioners' with powers to carry out 'all the interventions needed to overcome the state of emergency' in relation to Roma and Sinti settlements in those regions.[8] Their specific powers include the monitoring of formal and informal camps, identification and census of the people, including minors, who are present there, the expulsion and removal of persons with irregular status, measures aimed at clearing "camps for nomads" and evicting their inhabitants; as well as the opening of new "camps for nomads".

The government stated that the Ordinances were adopted in order to speed up the administrative procedures, including agreements to build new camps as well as to identify the due additional economic resources from within the State's Budget, in order to grant *ad hoc* reception measures, build new structures and improve those already existing. The Ordinances also entail specific support measures to promote the integration of people in the settlements through comprehensive projects having an integrated nature aimed at facilitating the school enrolment and the search for employment.

Following the issuing of the ordinances, the authorities initiated a census including the collection and use of personal data of nomads (fingerprints of minors).[9] These measures were justified as being necessary to provide support to individuals in camps and to prevent further degradation of their living conditions, as well as to identify people involved in criminal activities. With regard to minors involved in begging and stealing, the stated aim was to identify them and those forcing them into criminal activities. Once such data are collected, the plan was to dismantle criminal networks, put a stop to exploitation of children, assist children with their school registration, and provide them with adequate health care. Harsh criticisms to these policies adopted and implemented by the Italian Government have

[6] Italy, Decree of the President of the Council of Ministers (21/05/2008). "Dichiarazione dello stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio delle regioni Campania, Lazio e Lombardia" [Decree of the President of the Council of Ministers of 21 May 2008. Declaration of a state of emergency in relation to settlements of nomad communities in the territory of the regions of Campania, Lazio and Lombardia]. Published in the *Official Gazette* No 122 of 26 May 2009.

[7] Law no. 225 of 24 February 1992, "Institution of the National service of the civil protection".

[8] 'Disposizioni urgenti di protezione civile per fronteggiare lo stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio della regione Lazio, della regione Lombardia e della regione Campania' [*Urgent provisions of civil protection in order to face the state of emergency in relation to settlements of nomad communities for the regions of Campania*] (Ordinance No. 3678).

[9] The special Commissioners are allowed to derogate from a number of laws concerning a wide spectrum of issues affecting constitutional prerogatives, for instance the right to be informed when subjected to administrative procedures such as photographing, fingerprinting or the gathering of anthropometric data.

been made at European level.[10] In particular, some scholars argued a violation of Article 6 paragraph 1 of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[11] which states: "Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, *may not be processed automatically unless domestic law provides appropriate safeguards*. The same shall apply to personal data relating to criminal convictions." The Ordinances would not provide the "appropriate safeguards" requested by the Framework Convention.

On 17 July 2008, the Ministry of Interior issued specific guidelines concerning the application of the orders on "emergency" concerning nomads'camps. The aim of these guidelines is to end the situation of degradation and make conditions liveable for those Roma and Sinti communities living in authorized or illegal settlements by providing humanitarian assistance, improving their access to health care, education and social assistance (with particular emphasis to children and schooling).

The Police conducted forced evictions and dismantling of several illegal camps that caused high rates of criminality in the surrounding areas. The Major of Rome, in accordance with the Plan for Nomads issued in 2009 (relocation of many camps realized by settling the people concerned into "authorized villages"[12]) proceeded on 15 February 2010 to the definitive closure of the Nomad Camp Casilino 900.

3. The Italian Legal Framework

The principle of non-discrimination is one of the main pillars of the Italian Constitution (Art. 3) upon which the domestic legislative system is based and enforced, particularly by the domestic Courts.[13] The presence of this article in the Constitution gives equality and

[10] Office for Democratic Institution and Human Rights, High Commissioner on National Minorities, Assessment of the human rights situation of Roma and Sinti in Italy, Report of fact-finding mission to Milan, Naples and Rome on 20–26 July 2008, 7.

[11] CETS No.: 108. The Convention was opened for signature in Strasbourg on 28 January 1981 and entered into force on 1 October 1985. Italy ratified the Convention with Law 21 febbraio 1989, n. 98, published in the Official Gazzette *n. 066 SUPPL.ORD. of 20 March 1989.*

[12] Vitale, T.: Politique des évictions. Une approche pragmatique. In: Cantelli, F.–Pattaroni, L.–Roca, M.–Stavo-Debauge, J. (sous la direction de): *Sensibilités pragmatiques. Enquêter sur l'action publique.* Bruxelles, 2009, 71–92.

[13] The principle of equality and non-discrimination is included in all human rights treaties and declarations. Non-discrimination is both a human right of its own and a constitutive element of all human rights. Non-discrimination rules are to be found at international, supranational (EU) and national level. The United Nations (UN), which was created in the aftermath of the horrors of racism, fascism and National Socialism, has since its very beginning placed the battle against discrimination in the forefront of its human rights activities. Indeed, one of the purposes of the UN, as they are enunciated in the UN Charter, is to promote and encourage the respect for human rights and fundamental freedoms for all "without distinction as to race, sex, language, or religion". By now, the principle of non-discrimination has undoubtedly acquired the status of a fundamental rule of international human rights law. It has been expressly included in most international human rights documents and is implicitly embedded in almost all individual human rights provisions, which are usually worded in universal language, such as "everyone has the right to education" or "no one shall be subjected to arbitrary arrest, detention or exile". It is widely held that the principle of non-discrimination is a principle of customary international law and, at least as regards discrimination on

non-discrimination principles the status of paramount values. Moreover Art. 3 provides a benchmark against which subsequent national and regional laws and regulations can be evaluated when the suspicion of discriminatory provisions exists. In this field, the action of judges is important, as on the basis of this national legislation has to be interpreted and can even be declared unconstitutional and disapplied.

The Criminal Code of Italy contains provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing. In particular, Section 3(1)(b) of Law 654/1975, as amended by Section 3 of the Law 205/1993 (which defines racial discrimination as both a crime in itself and as an aggravating factor in other criminal acts) introduces a general aggravating circumstance for all offences committed with a view to discrimination on racial, ethnic, national or religious ground or in order to help organizations with such purposes.

The Italian legal framework against racial discrimination has been reinforced by Legislative Decree No. 215 of 9 July 2003 which foreseen the creation of the National Office Against Racial Discrimination (UNAR). UNAR was established by Decree of the President of Council of Ministers (PCM) of 11 December 2003,[14] in accordance with Art. 13 of Council Directive 2000/43/EC enshrining the principle of equal treatment of all people regardless of their race or ethnic origin.[15]

UNAR carries out in an autonomous and independent way activity of promotion against any form of racism and intolerance. In particular, it provides judicial assistance, it carries out inquiries and it disseminates informations and knowledge on this topic. UNAR promoted the establishment of Agreement Protocols with lawyers' associations available to offer pro-bono juridical assistance to alleged victims of racial or ethnic discrimination.

Very important in this context is the adoption of Law n. 101 of 6 June 2008 which provides for an explicit shift of the burden of proof from the complainant to the respondent (in civil and administrative law) in cases of "prima facie discrimination".

4. Law n. 94/2009 on Public Security

Recently, Law N° 94 of 15 July 2009 titled "Regulations about public security", presents considerable amendments in matters concerning immigration.[16] The most important amendment is the introduction of the new crime of "illegal entry and sojourn in the territory of the State" (Article 1, subpara. 16), entrusted to the competence of the Justice of Peace, which punishes the behaviour of a foreigner who enters or remains in the State, infringing

---

the basis of sex, race and ethnic origin, that it also has a status of *jus cogens*. See Fredman, S.: *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford, 2008, 175–180; Janis, M. W.: *International Law*. New York, 2009, 65–67.

[14] Italy / Decreto del Presidente del Consiglio dei Ministri (11.12.2003).

[15] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin–June, 29th 2000. O.J. L 180, 19 July 2000, 22–26. Article 19 of the Consolidated Version of the Treaty on the Functioning of the European Union, as amended in Lisbon, provides: "Without prejudice to the provisions of this treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[16] Published in the Official Journal (*Gazzetta Ufficiale*) no. 170, on 24 July 2009.

the regulations of the consolidating legislation on immigration and Law N° 68/2007 (regarding short-term stays) with a fine.[17]

The offence is accompanied by a series of additional sanctions: expulsion, discontinuance of the crime once the "irregular" foreigner is outside Italian territory, the possibility of expelling the "illegal immigrant" even when there is no authorisation. The legal measures contained in this Law with other laws approved by the Italian Government and Parliament in 2008, becomes part of a whole "Security Package", that is, a group of provisions addressing security concerns and issues with a variety of different legal means. In particular, the provisions of Law no. 94 affect several laws already in effect, amending–among others–the Criminal Code, the Code of Criminal Procedure, the Highway Code, the Immigration Law. Adoption of Law no. 94/2009 represents a comprehensive legal action based on the necessity to deal with relevant–and quite heterogeneous–social issues, furthering protection for the weakest members of society–women and children–the fight against illegal immigration. The Law was supported by 157 votes in favour and 124 against and it was particularly opposed by left-wing parties within the Parliament and heavily criticized by the legal doctrine and the public opinion, due to its alleged discriminatory and racial contents.[18]

Among the most important rules introduced by Law no. 94/2009, are worth noting, at the outset, some legal measures against illegal immigrants in the Italian territory whose *rationale* would lie in the enhancement of the fight against illegal immigration. The most relevant measure has been the introduction in the Italian Criminal Code of a provision making illegal immigration a crime. Indeed, Art. 1, s.16, lett. *a)* of Law no. 94/2009 amended Art. 10 *bis* of Legislative Decree 286/1998 (Immigration Law), qualifying as a penal offence–punished with a fine from 5000 to 10 000 Euros–the entrance and stay in the State territory of a foreign national, performed in violation of the Italian Immigration Law's provisions on lawful entry and stay requirements. This provision is the most criticized of the whole Law and the Italian Constitutional Court has been already called upon to judge on its constitutionality. Indeed, as of today the Tribunals of Pescara, Torino, Bologna, Agrigento and Trento have challenged the Law before the Constitutional Court claiming a contrast with Art. 10 Cost.–affirming that International Law principles are recognized in the Italian legal system,–since International Law provides that illegal entrance in a State must be subject to administrative sanctions and not criminal ones; with Art. 3 Const.–the equality clause, implying also a principle of reasonableness of the State action–, since Law no. 94/2009 would lack any legal justification, in light of the fact that in the Italian legal system Criminal sanctions must be used only as *extrema ratio*; as far as the equality principle is concerned, the Law would also introduce an unreasonable difference between the treatment of illegal immigrants and of those already living in Italy; with Art. 2 Const., which establishes that Italy must guarantee fundamental human rights.

The newly introduced Art. 61, s.1, num. 11*bis* of the Italian Criminal Code (introduced by Art. 1, s.1, Law no. 94 and applicable to all crimes in the Criminal Code) provides that a sentence will be increased in case a crime is committed by an illegal immigrant on the

[17] For a comment on this Law, see Hammarberg, T.: It is wrong to criminalize migration. *European Journal of Migration and Law*, 11 (2009) 4, 383–385.

[18] For an analysis of the reasons of the outcomes of the Italian mechanisms of immigration controls see Finotelli, C.–Sciortino, G.: The Importance of Being Southern: The Making of Policies of Immigration Control in Italy. *European Journal of Migration and Law*, 11 (2009) 2, 119–138.

Italian soil. This rule applies only with regard to extra EU citizen and stateless people. Other restrictive regulations are provided for those foreigners who want to get married in Italy: indeed, the original formulation of Art. 116 of the Italian Civil Code, titled "Marriage with a foreigner within the State", requested that the foreigner, who wanted to get married in Italy–irrespective of getting married with an Italian citizen or a foreign national–had to show to the Italian public officer for the registry and marriage office, that no legal obstacles to the marriage were present, and that all other documents and requirements requested also to Italian citizens were present (e.g. publication of the banns). The new text of Art. 116 of the Civil Code, as modified by Art. 1 s.15 of Law no. 94/2009, obliges a foreigner who wants to get married in Italy to both show that no legal obstacles are present, and to provide for a certification demonstrating the legitimacy of his/her presence in the national territory. Moreover, foreign and stateless spouses, applying for Italian citizenship, must show presence on the Italian territory for a period of at least 2 years (by way of difference with the six months' residence period formerly required) after the marriage. Citizenship will be granted only if the marriage is still valid and the couple is not separated. More restrictive regulations has been set out for special crimes directly affecting a natural person and in particular those affecting women and children. Among the most relevant, it is worth citing the provision qualifying as a crime (and no longer as a mere "offence") the employment of children for begging, and punishing it with a three years' imprisonment.

The conviction for this crime, as well as the one for crimes of enslavement, female genital mutilation or sexual assault committed by a parent or by the legal curator, brings with it the automatic loss and the perpetual disqualification from guardianship. The purpose of these provisions is to enhance children's protection (in particular Roma and Sinti minors) and answer the increasing social concern deriving from crimes committed in schools. The means chosen to answer these concerns are the increase of punishment, provided mainly with the introduction of a common aggravating circumstance (Art. 61, s.1, n. 11*ter* of the Italian Criminal Code), applicable to those committing a crime against a minor near or inside schools or other educational institutions. The same aggravating circumstance applies also for group sexual assault crimes committed near a school against an adult.

5. Compliance of Italy with Human Rights Standards

Italy is a party to the following international treaties that prohibit racial and ethnic discrimination and set standards for the treatment of aliens, refugees and asylum seekers: the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the International Convention on the Rights of Children (CRC) and the Convention relating to the Status of Refugees ("1951 Refugee Convention").

Italy is not a party to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), the European Convention on Nationality and the United Nations 1964 Convention on the Reduction of Statelessness, the three key instruments that protect the rights of migrants and stateless persons.

The CMW, adopted by the UN General Assembly with resolution 45/158 of 18 December 1990 and in force since 1 July 2003, points out that "the human problems involved in migration are even more serious in the case of irregular migration" (Preamble). It therefore encourages "appropriate action... in order to prevent and eliminate clandestine

movements and trafficking in migrant workers" (ib.). It is worth noting that the measures it deems should be taken, within the jurisdiction of each State concerned, are not directed to irregular migrants, but to those who cause the phenomenon. It in fact calls for "appropriate measures against the dissemination of misleading information relating to emigration and immigration" and the imposition of "effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation" (Art. 68). It instead urges signatories to assure the protection of the fundamental human rights of irregular migrants (Preamble). Indeed, it affirms that "every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law" (Art. 24) and that appropriate measures should be taken "to ensure that migrant workers are not deprived of any rights ... by reason of any irregularity in their stay or employment".[19]

The new Italian law, on the contrary, has tightened the norms related to the irregular status of foreigners, and has transformed irregular migration into a criminal offence instead of the administrative breach that it used to be. This change has significant repercussions in the concrete life of the migrant and his family. To start with, it will be difficult for the irregular migrant to find lodging, since whoever rents an apartment to people in his condition runs the risk of imprisonment. It will be difficult if not impossible for him to send remittances back home through money transfer services, since this requires the presentation of a regular permit to stay in the country. This is a serious concern for the welfare of the families who have stayed behind in the home country and also deprives their countries of origin of that income that their poor economies badly need. Law n. 94 does not seem to be "family-friendly". Since all legal acts regarding the civil status requires the presentation of a regular permit to stay, an irregular migrant cannot be registered as a parent of a child who may even have a legal status in Italy. The child will therefore have to be identified as one with unknown parent.

At regional level, Italy is also a party to the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR)[20] and the European Social Charter, whose

[19] For an overview on the implementation of the Convention see Abimourched, R.–Martin, S.: Migrant Rights: International Law and National Action. *International Migration,* 47 (2009) 5, 115–138.

[20] The European Court of Human Rights has recently developed its jurisprudence related to racial discrimination in highly significant ways. The Court has rightly been applauded for abandoning its requirement that racial discrimination be proved "beyond reasonable doubt" and for endorsing the concept of indirect discrimination, allowing it, in the last five years, to begin to find states from "Eastern Europe" in violation of the Convention for having discriminated against especially Roma applicants. While welcome, these new developments should not detract from the need to continue asking difficult questions, including the following: why has it taken decades for the Court to start finding a violation of Article 14 on grounds of race? Why are cases, such as *Menson v. United Kingdom* concerning the slow reaction of the police in investigating the lethal attack of a black man, not found admissible? Can we expect the Court, created in a region which largely built itself upon colonialism, to generate mechanisms fit to tackle racism? In the past, judges themselves have provided the most virulent critique of the Court's inability to tackle racism. Migrants still remain to benefit from their progressive stance in relation to Article 14 claims based on grounds of race. See Dembour, M.-B.: Still Silencing the Racism Suffered by Migrants. The Limits of Current Developments under Article 14 ECHR. *European Journal of Migration and Law*, 11 (2009) 3, 221–234.

preamble establishes the principle of non-discrimination and whose Art. 19 sets out obligations for the equal treatment of migrant workers.

At European level, Chapter III of the EU Charter on Human Rights (included in the Lisbon Treaty, entered into force on 1 December 2009) is devoted entirely to equality. Italy is likewise bound by European Union Directives, in particular European Union Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the "Racial Equality Directive") and European Union Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of European Union Member States (the "Freedom of Movement Directive").[21]

The Directive sets out common standards and procedures in the Member States for returning irregularly staying third country nationals (the Returns Directive). While its impact in terms of harmonising national legal frameworks can be questioned, from the Member States' point of view the agreed standards will underpin their common efforts at removing a higher number of irregular immigrants. From the point of view of immigrants, it will mean longer pre-removal detention periods and a ban on re-entering legally the Union's territory for the foreseeable future.[22]

The Emergency Measures, described above in paragraph 2, according to some scholars, have led directly to the impermissible discriminatory treatment of Roma and Sinti by: (a) defining the very presence of the Roma and Sinti (called 'Nomadi' in the Emergency Measures) as grounds for a state of emergency, creating an intimidating, hostile, degrading environment; (b) directly discriminating against Roma and Sinti by mandating a compulsory census on the basis of their accommodation in camps for nomads created by the government; (c) allowing the creation of an ethnic database of Roma and Sinti without adequate safeguards; (d) allowing unlawful searches of the homes of Roma and Sinti; and (e) permitting destruction of Roma and Sinti settlements and effective evictions without provision for adequate alternate housing.[23]

As part of the Emergency Measures, the Italian government has conducted an official census of Roma and Sinti, which has included a collection of fingerprints, photographs, information on ethnic background and religion, and other personal data. This ethnicity-specific census is in direct violation of ICCPR Art. 17 (guaranteeing the right to respect for family life), as well as ICCPR Art. 26 (the right to non-discrimination). Documentation carried out by non-governmental organizations indicate that many Roma and Sinti felt coerced into complying with this census, either because they felt they did not have any other choice, or because police and NGO census takers provided false information about the nature and purpose of the census to Roma and Sinti living in the camps.

[21] For an overview of EU migration and non-discrimination policy see Peers, S.: Key Legislative Developments on Migration in the European Union. *European Journal of Migration and Law*, 9 (2007) 4, 451–456.

[22] See Baldaccini, A.: The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive. *European Journal of Migration and Law*, 11 (2009) 1, 1–17; Acosta, D.: The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive). *European Journal of Migration and Law*, 11 (2009) 1, 19–39.

[23] See e.g.: Discrimination against Roma in Italy worries UN rights experts. UN press release, <http://www.un.org/apps/news/story.asp?NewsID=27373&Cr=Human>

There are documented cases in which both Italian and non-Italian Roma and Sinti were subjected to the census under explicitly forceful and intimidating circumstances. For example, in the semiformal Camp Tor di Quinto-Baiardo and the formal Camp Tor de Cenci in Rome, where part of the census was conducted in July 2008, officials were reportedly aggressive and violent toward residents, including searching residents' homes using dogs and without a court order. The Italian government has not made clear what it will do with the sensitive information, including fingerprints and information on minors, collected in the database. In the course of implementation of the Emergency Measures, Roma and Sinti communities were subjected to unlawful searches. A number of their settlements were destroyed without advance notice, consultation, or respect for due process of law. The authorities have carried out evictions without providing assurances of adequate alternative accommodations. Several such raids took place in Milan and Turin in 2007. These forced evictions without remedy are in direct violation of Articles 2 and 17 of the ICCPR as well as Art. 11 of the ICESCR.

6. Conclusions

Building equal opportunities for Roma and Sinti minorities requires the establishment of human living conditions. National governments must make clear their political will and support for the promotion of these minorities through the implementation of adequate infrastructure projects. The United Nations and other institutions, such as the European Union, must also make a considerable contribution to such programmes. Members of the minority and their own organizations should be included, from the planning to the implementation of an infrastructure for such projects, to a far greater extent than has thus far been the case. Only if we systematically resist racism and discrimination will majority and minority groups be able to coexist peacefully, with equal rights in all countries of the world.

Certainly, States have the right to control their borders and make sure that it is not a porous entry for criminals, who may also take advantage of the misery and desperate conditions of would-be immigrants. However, justice and solidarity are not antonyms, they come hand in hand, just like public security and welcome. National common good, in any case, has to be considered in the context of the universal common good.

As seen in previous paragraphs, Roma and Sinti contribute to create an atmosphere of insecurity among citizens living in the suburbs of cities like Rome, Milan and Naples. As such, States have a duty to take effective measures to guarantee public security of their citizens. National counter-crime strategies should, above all, seek to prevent acts of violence, robberies, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law.

While the complexity and magnitude of the challenges facing States and others in their efforts to balance public security issues and human rights can be significant, international human rights law is flexible enough to address them effectively. Effective public security measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction. At the outset, it is important to highlight that the vast majority of counter-crime measures are adopted on the basis of ordinary legislation. In a limited set of exceptional national circumstances, some restrictions on the enjoyment of certain human

rights may be permissible.[24] These challenges are not insurmountable. States can effectively meet their obligations under international law by using the flexibilities built into the international human rights law framework. Human rights law allows for limitations on certain rights and, in a very limited set of exceptional circumstances, for derogations from certain human rights provisions. These two types of restrictions are specifically conceived to provide States with the necessary flexibility to deal with exceptional circumstances, while at the same time–provided a number of conditions are fulfilled–complying with their obligations under international human rights law.

[24] See, Human Rights Committee, general comment N° 31, para. 6, and Siracusa Principles on the limitation and derogation of provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex).

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 3, pp. 198–213 (2010)
DOI: 10.1556/AJur.51.2010.3.3

TAMÁS NÓTÁRI*

Law on Stage–Forensic Tactics in the Trial of Marcus Caelius Rufus

Abstract. The present paper intends to highlight some aspects of Cicero's speech in defence of Marcus Caelius Rufus on 4 April 56 BC on the first day of the Ludi Megalenses. In 56 BC, as a result of peculiar coincidence of political and private relations, Cicero was given the opportunity to deal a heavy blow on Clodius and Clodia in his Pro Caelio, whom he mocked in the trial with murderous humour using the means of Roman theatre, and, thus, arranged a peculiar theatre performance during the Megalensia, which anyway served as the time of the Ludi scaenici. After outlining the circumstances of the lawsuit (I.) and the background of the Bona Dea case that sowed the seeds of the conflict between Cicero and the gens Clodia (II.) in our paper we intend to analyse the rhetoric situation provided by the Ludi Megalenses and genially exploited by Cicero (III.) and the orator's tactics applied in the speech in defence of Caelius (IV.).

Keywords: lex Plautia de vi, quaestio de vi, Pro Caelio, forensic tactics

I. In April 56 BC, the then twenty-five-year old[1] M. Caelius before the *quaestio de vi* was charged by L. Sempronius Atratinus as main prosecutor, and L. Herennius Balbus and P. Clodius as *subscriptores*. The defendant himself made a statement of the defence. Furthermore, M. Licinius Crassus Dives and–taking the floor in line with his habit as the last one[2]–Cicero acted as counsel for the defence. The charge was made presumably on the grounds of the *lex Plautia de vi* (65/4),[3] which had been drafted based on Cicero's account of events against infamous citizens who raised riot, and who besieged the senate with weapons, used violence against a magistrate, and attacked the State.[4] From among the acts Caelius was charged with, the first three, which were expounded in more details in the statement of the defence made by Caelius and Crassus, are known to us only from Cicero's summary.[5]

* PhD, Research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30; Associate Professor, Reformed University 'Károli Gáspár', Faculty of Legal and Political Sciences, Department of Roman Law, H-1042 Budapest, Viola u. 2–4. E-mailes: notari@jog.mta.hu, tamasnotari@yahoo.de

[1] Cf. Plinius, *Natralis historia* 7, 165; Heinze, R.: Ciceros Rede pro Caelio. *Hermes*, 60 (1925), 193–258, 194; Stroh, W.: *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden*. Stuttgart, 1975, 243.

[2] Cicero: *Brutus* 190; *Orator* 130; Quintilianus: *Institutio oratoria* 4, 2, 27.

[3] About the *lex Plautia* see Rotondi, G.: *Leges publicae populi Romani*. Hildesheim, 1966, 377; Costa, E.: *Cicerone giureconsulto, I–II*. Milano, 1927. II. 91; Kunkel, W.: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*. München, 1962, 123; Münzer, F.: *Römische Adelsparteien und Adelsfamilien*. Stuttgart, 1920, 200; Classen, C. J.: Ciceros Rede für Caelius. In: Temporini, H.–Haase, W. (Hrsg.): *Aufstieg und Niedergang der römischen Welt, I. 3.* Berlin–New York, 1973, 60–94, 63; Mommsen, Th.: *Römisches Strafrecht*. Leipzig, 1899, 564.

[4] Cicero: *Pro Caelio* 1.

[5] *Ibid.* 23. *Itaque illam partem causae facile patior graviter et ornate a M. Crasso peroratam de seditionibus Neapolitanis, de Alexandrinorum pulsatione Puteolana, de bonis Pallae.*

Cicero kept for himself the expounding of the assassination against the Alexandrine philosopher Dio.[6] The counts of the indictment are connected in some form with the legates of Alexandria who intended to protest before the senate against Ptolemaios XII having been put back to the throne of Egypt by Rome (concerning the second and fourth counts of the indictment this can be established at first glance).[7] The legates led by Dio arrived to Rome in 57, but king Ptolemaios supported by Pompeius made every effort to thwart the audience before the senate.[8] The charge claimed that Caelius had been involved in these acts of Ptolemaios and Pompeius from the outset. The *pulsatio Puteolana* was probably an attack made against the legates of Alexandria immediately after they had arrived to Puteoli; it cannot be ruled out that the *seditiones Neapolitanae* are connected with that in some form or other. If the legates heading from Naples on Via Appia to Rome used protection by a magistrate, then it can be deservedly called *seditio* using the proper Roman *terminus technicus* since it denotes defiance against the power of the state.[9] We cannot either prove or disclaim the relation of the *bona Pallae* with the legates of Alexandria.[10] In this respect, it is necessary to refer to the view that asserts that the present lawsuit can be considered dispute at law of primarily political nature; so, it was meant to attack Pompeius, Ptolemaios's patron, and Cicero's task was to deprive the case of any implication of current politics.[11] Contrary to this, the following points can be offered for deliberation: the prosecutors were motivated basically by private rather than political motifs.[12]

In particular, the fact that in February 56 on count of *ambitus* Caelius accused at the time of the lawsuit seventeen-year old L. Sempronius Atratinus's[13] blood father, L. Calpurnius Bestia,[14] who was acquitted from the charge of election bribery, since he was defended by Cicero; he wanted him to be summoned again due to *ambitus*.[15] This second accusation was prevented by Atratinus by charging him with *vis*; consequently, Heinze claims that political considerations in this lawsuit constituted the means rather than the aim.[16] Pompeius's popularity reached its bottom;[17] thus, for the prosecutors it was actually advantageous to be able to attack Caelius as Pompeius's adherent. In this respect, Cicero himself, as a matter of fact, tried to mitigate the political edge of dispute at law. (Pompeius's name does not occur on a single occasion in the *Pro Caelio.*)[18] In addition to specific counts of the indictment Cicero touches several issues that do not actually belong to the scope of the charge:

[6] *Ibid.* 23, 51–55.

[7] About Ptolemaios see Volkmann, H.: Ptolemaios. (XII.) In: *Paulys Realencyclopädie der classischen Alterthumswissenschaft, XXIII. 2.* Stuttgart–München, 1959, 1748–1755.

[8] Cf. Dio Cassius 39, 13; Cicero: *De haruspicum responso* 34; Strabo: *Geographica* 17, 7, 96.

[9] Mommsen: *op. cit.* 532.

[10] Stroh: *op. cit.* 245.

[11] Pacitti, G.: Cicerone al processo di M. Celio Rufo. In: *Atti I. Congresso internationale di Studi Ciceroniani, II.* Roma, 1961, 67–79.

[12] Cf. Cicero: *Pro Caelio* 56.

[13] About Atratinus see Münzer, F.: L. Sempronius. In: *Paulys Realencyclopädie der classischen Alterthumswissenschaft, II. A 2.* Stuttgart–München, 1923, 1366–1368.

[14] About him see Münzer, F.: Aus dem Leben des M. Caelius Rufus. *Hermes*, 44 (1909), 135–142.

[15] Cicero: *Pro Caelio* 16, 56, 78.

[16] Heinze: *op. cit.* 197; Classen: *op. cit.* 67, 93.

[17] Cf. Cicero: *Pro Caelio* 78. *Epistulae ad Quintum fratrem* 2, 6, 6.

[18] Stroh: *op. cit.* 246.

specifically, the alleged attempt by Caelius to murder Clodia, Metellus Celer's widow.[19] He handles the attempt to poison Clodia in a somewhat separated form, but from a remark[20] it comes out clearly that this element plays a material part in the chain of the demonstration of evidence. Consequently, Caelius had obtained money from Clodia to be able to hire Dio's murderers,[21] and if later on he wanted to poison Clodia, from whom the money came form, then, its aim was to get rid of the woman who later on learned of the assassination.[22]

II. The development of the hostile relation between Cicero and P. Clodius as well as his elder sister, Clodia cannot be understood without being aware of Cicero's testimony made in the so-called Bona Dea trial and the causes that made him do that. It was at the beginning of December 62 when highborn women of Rome, including the *virginesVestales*, celebrated the festival of Bona Dea at the house of the *pontifex maximus*, Caesar. The name of Bona Dea is direct translation of the Greek Agathē Theos, who became generally known as a healing goddess;[23] based on the inscription referring to her[24] and the representations from Attica we are discussing here a figure of Hygeia.[25] This ritual was held in Rome at the house of a *magistratus cum imperio*, and only the *matronae* of the ruling class and Vesta priestesses were allowed to take part in it.[26] The festivity was led by the wife of the *magistratus*, so, Bona Dea did not have a priestess of her own.[27] With respect to the present case, it is of special importance that each male being, be it human or animal, was strictly excluded from the ritual. No exact picture regarding each detail is provided by historical sources[28] on what happened during this night; the following, however, can be established with acceptable certainty: Clodius somehow found his way into the house (Plutarch claims that he found the door open and that is how he entered). He pretended to be disguised as a woman with a Harp[29] but the assertion made by Plutarch and Appianos that disguising was greatly facilitated by him not being compelled yet to shave in those days is false; they simply forget about the fact that at the time of the Bona Dea scandal Clodius was already twenty-nine/thirty years old. Dio Cassius claims that his purpose was to seduce Caesar's wife, Pompeia (which did happen as Dio Cassius asserts), but that is not certain at all. Anyway, the ritual was led by Caesar's mother: Aurelia and not by Pompeia.[30] The disturbed festivity was later repeated by Vesta priestesses *(instauratio)*.[31]

[19] Costa: *op. cit.* II. 93.

[20] Cicero: *Pro Caelio* 56.

[21] *Ibid.* 52.

[22] Stroh: *op. cit.* 249.

[23] Macrobius: *Saturanalia* I, 12, 25.

[24] Corpus Inscriptionum Latinarum VI. 72.

[25] Latte, K.: *Römische Religionsgeschichte.* München, 1967, 228.

[26] Cicero: *Epistulae ad Atticum* 1, 13, 3; *De haruspicum responso* 37; Plutarchus: *Cicero* 19; Dio Cassius 37, 35, 4; 37, 45, 1.

[27] Latte: *op. cit.* 230.

[28] Vell. 2, 45, 1; Plutarchus: *Cicero* 28; *Caesar* 9; Suetonius: *Divus Iulius* 6, 2; Appianus: *Bella civilia* 2, 14, 52; Dio Cassius 37, 45; Livius: *Periochae* 103.

[29] Cicero: *De haruspicum responso* 44; Plutarchus: *Cicero* 28, 2; *Caesar* 10, 1; Iuvenalis: *Saturae* 6, 337.

[30] Suetonius: *Divus Iulius* 74, 2.

[31] Cicero: *Epistulae ad Atticum* 1, 13, 3.

In the senate the Bona Dea scandal was first put forth by Q. Cornificius, and the body referred it to the Vesta priestesses and the *pontifices*, who held a session under the chairmanship of the *pontifex maximus*, Caesar.[32] In addition to Caesar, this body included one more member who played a part in the later trial: L. Cornelius Lentulus Niger, who fulfilled the dignity of the *flamen Martialis*.[33] The senate received a report stating that the disturbance of the Bona Dea ritual was deemed *nefas*. After this report, albeit, before the trial, Caesar divorced his wife and announced that he would not be willing to appear in court as a witness–thereby reassuring Clodius that there had been no break in the friendship they had entertained.[34] The senate accepted the report, and resolved to set up a special venue of jurisdiction in order for it to investigate the *incestum* committed by Clodius.[35] The members of the court of justice were not elected from *album iudicum* by drawing lots–as it was customary in the *quaestiones*–instead, the chairing *praetor* selected the participants from specific persons, which enhanced the suspicion that the judges must have been prejudiced against Clodius right from the first.[36] For this reason, Fufius Calenus *tribunus plebis* vetoed the charge submitted by M. Piso.[37] The matter was delivered to the public, from among Clodius's opponents three persons–Cato, Favonius and Hortensius–took firm action quite resolutely. Then, the senate was convened again, and having put down Fufius Calenus's resistance they decided to proceed in the form originally planned–it was this fact on which Cicero informed Atticus on 13th February.[38] At the next session of the senate Fufius made two proposals: first, regarding the point that the trial on Clodius's case should be held; secondly, that the judges should be appointed by drawing lots.[39] The first proposal was accepted, the second one was dismissed,[40] the senate entrusted Fufius to submit the charge to the public. Cicero claims this happened, because Hortensius and his circle were fully certain that Clodius would be sentenced by any court.[41] Accordingly, the formal accusation was made approx. before 15th March, 61. Of the lawsuit itself rather few facts are known to us; the charge was expounded by three persons, three Cornelii Lentuli: L. Cornelius Lentulus Crus, L. Lentulus Cornelius Lentulus Niger *(flamen Martialis)* and Cn. Cornelius Marcellinus.[42]

Against the charge Clodius intended to prove the alibi that on the day of the Bona Dea ritual he had been in Interamna and not in Rome. To refute this alibi several *matronae* participating in the Bona Dea festivity acted as witnesses, including Caesar's mother, Aurelia and Caesar's elder sister, Iulia. Similarly, Cicero made a testimony pleading that on

[32] Macrobius: *Saturnalia* 3, 13, 11.

[33] Baldson, J. P. V. D.: Fabula Clodiana. *Historia*, 15 (1966), 65–73, 67.

[34] Cicero: *Epistulae ad Atticum* 1, 13, 3; Plutarchus: *Caesar* 10, 8–10; Suetonius: *Divus Iulius* 6, 2. 74, 2; Appianus: *Bella civilia* 2, 14, 52; Dio Cassius 37, 45.

[35] Cicero: *Epistulae ad Atticum* 1, 13, 3.

[36] Balsdon: *op. cit.* 69.

[37] Cicero: *Paradoxa Stoicorum* 4, 32.

[38] Cicero: *Epistulae ad Atticum* 1, 14, 5.

[39] Tatum, W. J.: Cicero and the Bona Dea Scandal. *Classical Philology*, 85 (1990), 202–208, 206.

[40] Baldson: *op. cit.* 70.

[41] Cicero: *Att.* 1, 16, 2. 4–5; Spielvogel, J.: Clodius P. Pulcher–eine politische Ausnahmeerscheinung der späten Republik? *Hermes*, 125 (1997), 56–74, 60.

[42] Baldson: *op. cit.* 71.

the day of the ritual Clodius visited him in Rome–certain sources[43] claim this visit was paid three hours before the scandal (i.e., late at night), other interpretations[44] assert it took place during the *salutatio* in the morning. Eventually, Clodius was acquitted; several causes of such outcome of the lawsuit can be made probable: it cannot be ruled out that the members of the court were bribed, the money presumably was provided by Crassus (each member of the jury must have been given three-four hundred thousand *sestertii*)–both Catulus[45], and Cicero referred to this possibility.[46] Besides possible bribery, the jury's fear might have also arisen, and there might have been doubt to what extent Aurelia was able to recognise Clodius exactly.[47] Since the decision in the lawsuit was not adopted as Cicero had desired, and through his testimony he had made Clodius his deathly enemy, which resulted in a tragic turn in his later career–exile, it is worth highlighting the motifs that had made Cicero take such firm action in the lawsuit. Cicero himself emphasised unselfish and purely moral reasons of his procedure,[48] however, his first account of the disturbance of the ritual written to Atticus was not free from certain cynical overtone.[49] He describes the action taken against Clodius as one of the (subsequent) steps in the combat against Catilina, and alleged to have discovered connections between the Catilina's plot in 63 and the elements that supported Clodius in the Bona Dea trial.[50] This explanation, however, does not seem satisfactory to the extent that Clodius had been–as we shall see–a long-time personal enemy of Catilina, and he personally had not taken part in the plot.[51]

Plutarch[52] identifies the following reasons for Cicero making a testimony incriminating Clodius in the Bona Dea trial. Cicero had been induced by his wife, Terentia to take this step, whose hatred was aimed not so much at Clodius but at his elder sister, Clodia due to the point that Clodia had purportedly wanted Cicero to divorce Terentia, and marry her, Clodia. Through Cicero's testimony Terentia wanted to deteriorate the relation so that this step could not be taken, and Cicero wanted to clear himself of the suspicion. Plutarch himself mentions this possibility merely as talk of the town, and mostly it is in accordance with that that researchers of the modern age have refused this version.[53] In spite of that, it is worth casting an investigating glance at this explanation, too. Plutarch dates Clodia's intention regarding Cicero to the year 61. The chronology indicated by Plutarch is sometimes quite uncertain, but the event he gives an account of often constitutes a historical fact in spite of the erroneous determination of the point of time.[54] The story appears in a more realistic light if we attempt to place it in the year 63 in stead of 61. After making a survey of

[43] Cicero: *Epistulae ad Atticum* 1, 16, 2; 2, 1, 5.

[44] Quintilianus: *Institutio oratoria* 4, 2, 88.

[45] Dio Cassius 37, 46, 3.

[46] Cicero: *Epistulae ad Atticum* 1, 16, 5.

[47] Balsdon: *op. cit.* 72.

[48] Cicero: *Epistulae ad Atticum* 1, 18, 2.

[49] *Ibid.* 1, 12, 3.

[50] *Ibid.* 1, 14, 5.

[51] Epstein, D. F.: Cicero's Testimony at the Bona Dea Trial. *Classical Philology*, 80 (1986), 229–235, 230.

[52] Plutarchus: *Cicero* 29, 2–3.

[53] Baldson: *op. cit.* 72; Weinstock, I.: Terentia. (95.) In: *Paulys Realencyclopädie der classischen Alterthumswissenschaft, IV. A.* Stuttgart–München, 1934, 710–716, 711.

[54] Dorey, A. T.: Cicero, Clodia, and the pro Caelio. In: *Greece and Rome*, II/5 (1958), 175–180, 179.

the political marriages entered into and planned around this time,[55] the marriage entered into between Clodia and Metellus Celer can be dated to the end of 63.[56] Through that Metellus Celer got in the circles of the *optimates*, and became the son-in-law of Pompeius's opponent, Lucullus. It cannot be excluded that the party of the *optimates* knowingly attempted to alienate his key supporters from Pompeius. In 63, Cicero having taken steps against the *populares* became a man of political significance in the eyes of the *optimates*–it is possible to imagine that it was at that time when they tried to attain that Cicero should divorce Terentia and marry Clodia. And if after that the politically promising marriage to be entered into with Cicero was not accomplished, then they were satisfied with Metellus Celer. Cicero probably did not want to violate his marriage for certain temporary political advantages, and did not consider the marriage practice usually accepted in the circles of the notables of Rome a political trump card.[57] Yet, even if we do not accept this hypothesis, Plutarch's thought that Cicero had been induced by Terentia to stand as witness against Clodius does not seem groundless if a former clash between the two families is taken into consideration.[58]

The hatred between Terentia and Clodius comes from 73 when Clodius charged Catilina with *incestum* committed against Fabia. Fabia was a *virgo Vestalis* and Terentia's half-sister. Owing to Catulus's help, Catilina was acquitted; yet, the case highly damaged Fabia, and thereby Terentia's family. There are some loci available to us on the case: so, for example, Sallustius mentions *incestum* as a fact,[59] and a reference to it is also available in Cicero.[60] Presumably, the Bona Dea ritual held in 63 at the house of the *consul* at that time led by Terentia gave a push to Cicero to take action against Catilina since the participants of the Catilina's plot had already been arrested in Rome though, Cicero had not made a decision on their fate yet. The *matronae* celebrating the Bona Dea festival saw the altar bursting into flames, which qualified a *prodigium*, and it was interpreted by the *virgines Vestales* and Terentia taking part in the festival as a need for Cicero to take firm action against the conspirators in order to restore *pax deorum*.[61] The priestesses and Terentia must have been inflamed also by Fabia having been put to shame through Catilina making mockery of her reputation.[62] The attempt at providing the interpretation claiming that disgracing the Bona Dea festival in 62 might have been Clodius's political response to Cicero using the festival in 63 in order to influence him[63] does not seem well-grounded.[64] First, because Clodius did not belong to Catilina's adherents; secondly, because it is hard to presume that he had had such a conscious political concept.

Both the hypothesis of the jealousy due to the presumed plan of the marriage to be entered into with Clodia and the fact of the hatred felt because of Fabia having been shamed

[55] Cf. Plutarchus: *Cato min.* 30; *Pompeius* 44.

[56] Cf. Cicero: *Epistulae ad familiares* 5, 2, 6.

[57] Dorey: *op. cit.* 179.

[58] Epstein: *op. cit.* 232.

[59] Sallustius: *De coniuratione Catilinae* 15, 1.

[60] Cicero: *In toga candida* 82.

[61] Plutarchus: *Cicero* 20, 1–3.

[62] Weinstock: *op. cit.* 711.

[63] Benner, H.: *Die Politik des P. Clodius Pulcher.* Stuttgart, 1987, 37; Will, W.: *Der römische Mob.* Darmstadt, 1991, 48; Moreau, Ph.: *Clodiana Religio. Un procès politique en 61 av. J-C.* Paris, 1982, 15.

[64] Spielvogel: *op. cit.* 59.

by Catilina and Clodius clearly indicates that Terentia produced highly great influence on Cicero with respect to the testimony to be made against Clodius. Clodius also wanted to shift the responsibility of Cicero's action to Terentia; at least, in 58 as *tribunus plebis* he deluded Cicero[65] that he should not flee from Rome–just to enjoy his revenge all the more.[66] Albeit, Caesar offered Cicero the position of a *legatus* so that he could leave Rome; it has not been clarified whether this had happened before Clodius was elected *tribunus*[67] or took place after that.[68] However, although being aware of the danger, he did not leave.[69] The consequences not foreseen either by Cicero or Terentia are widely known. In 58, Clodius was elected *tribunus plebis*; to this end, he had had to be adopted by a plebeian family, which was implemented with the consent of Caesar as *pontifex maximus*, and he submitted the following bill: anyone who had caused any Roman citizen to be executed without court proceedings should be outlawed. This law (which was enacted with retroactive force!) was targeted at Cicero personally, who had caused Catilina's five accomplices executed in Tullianum during the Catilina's plot without court proceedings but with the approval of the senate.[70] Cicero went into exile and on the site of his villa on the Palatine ravaged to dust Clodius had a temple erected for goddess Libertas. As Imre Trencsényi-Waldapfel remarks: "In the history of the world, it was not the first and not the last act of abusing the name of liberty but certainly it was one of the most repulsive ones."[71] Since neither Cicero nor Terentia[72] were able to foresee the fatal consequences of the testimony made in the Bona Dea trial that occurred in 58. It cannot be considered inconsistent for them to proceed in the action at law in 61 making an attempt to obtain redress through Fabia for the injury suffered by the whole family in 73.

III. After having given a brief account of the historical/political situation and the stages of the hostile relation between Cicero and the *gens Clodia*, we should turn our attention to the rhetoric situation developed by the circumstances and to the point how Cicero handles it. De Saint-Denis calls the *Pro Caelio* the wittiest of Cicero's orations,[73] which results to a great extent from the date when the speech was delivered (on 4th April), from the maximum exploitation of the somewhat contradictory situation provided by the first day of the *Ludi Megalenses* through the tools of humour.[74] *Ludi Megalenses* (4–10 April) was the festivity of Magna Mater (Kybelē), whose cult was borrowed and introduced in Rome in 205/4 immediately before the end of the second Punic war on the grounds of the instruction of the

[65] Plutarchus: *Cicero* 30, 1–3.

[66] Epstein: *op. cit.* 234.

[67] Cicero: *Epistulae ad Atticum* 2, 18, 3. 19, 5.

[68] Dio Cassius 38, 15, 2.

[69] Cicero: *De provinciis consularibus* 41–42.

[70] Uttschenko, I. L.: *Cicero*. Berlin, 1978, 121; Trencsényi-Waldapfel, I.: *Cicero*. Budapest, 1959, 43.

[71] Trencsényi-Waldapfel: *op. cit.* 43.

[72] Cf. Cicero: *Pro Caelio* 50; *Epistulae ad Atticum* 14, 2, 2.

[73] Saint Denis, E. de: Le plus spirituel des discours cicéroniens: le Pro Caelio. In: *Essais sur le rire et le sourire des Latins*. Paris, 1965, 129–144.

[74] Salzman, M. R.: Cicero, the Megalenses and the defense of Caelius. *American Journal of Philology*, 103 (1982), 299–304, 301.

libri Sibyllini.[75] At that time, they turned to the seat of the cult,[76] in the present case, to Attalos, king of Pergamon, who handed over the black stone representing the goddess, and equipped a ship for carrying it to Rome.[77] Another tradition has it that the stone was taken to Rome directly from Pessinus.[78] The goddess was brought to Rome with ritual ceremony, the senate entrusted Scipio Nasica to receive the Magna Mater. Certain sources assert that in order to prove her innocence the Vesta priestess Quinta Claudia herself set the boat–transporting the stone, stuck on the sand bank of Tiberis–to sail.[79] In her temple on the Palatinus Claudia also had a statue,[80] this temple was completed in 191, and it was at that time when the *Megalensia* and the staged plays *(ludi scaenici)* held on this occasion were introduced. In the ritual of the *Ludi Megalenses*–just like in the entire Roman cult of Kybelē–no part was given to the raging *gallus* dance recalling Attis's self-mutilation.[81] On the other hand, archaeological find proves the appearance of the Attis cult simultaneously with the cult of Magna Mater for during the archaeological excavations on the Palatine Hill in 1950/1 small statues representing Attis were found in the cell of the Kybelē temple from the layer from the 2nd c. BC. This unambiguously refutes the standpoint which claims that Kybelē's cult had been borrowed and introduced in Rome without Attis's cult[82] as this seemed doubtful merely on the grounds of philological findings.[83]

As it has already been mentioned, theatre performances were held on the *Megalensia* right from the outset. Apart from stressing the two members of the *gens Claudia* being directly affected in the trial and the contrast between Clodia and Quinta Claudia,[84] another link between the *Megalensia* and the history of the family existed. Clodius disturbed the festival of Magna Mater on several occasions. He caused the second scandal on 8th, 9th or 10th April, 56,[85] when accompanied by armed slaves he attacked and occupied the theatre where the performance was being held.[86] Thus, this happened a few days after *Pro Caelio* was delivered. However, those who listened to the oration might have thought and most certainly did think of the first incident since in 58 Clodius was involved in an action against the Kybelē sanctuary in Pessinus[87] when Brogitarus, who supported Clodius's gang with money, obtained the Kybelē priest dignity (accompanied by royal title) in Pessinus with Clodius's assistance, through having expelled the legitimate fulfiller of this office and broke

[75] Latte: *op. cit.* 258.

[76] Schmidt, E.: Kulturübertragungen. *Religionsgeschichtiche Versuche und Vorarbeiten*, VIII/2. 1909. 1–30.

[77] Livius: *Ab urbe condita* 29, 10, 4. 14, 5; Ovidius: *Fasti* 4, 255; Silanus: *Punica* 17, 1; Appianus: *Hannibalica* 233.

[78] Cicero: *De haruspicum responso* 27; Livius: *Ab urbe condita* 29, 10, 7; Strabo: *Geographica* 12, 567; Ammianus Marcellinus 22, 9, 5.

[79] Suetonius: *Tiberius* 2, 3; Lactantius: *Divinae institutiones* 2, 7, 12.

[80] Tacitus: *Annales* 4, 64.

[81] Latte: *op. cit.* 260.

[82] Altheim, F.: *Römische Religionsgeschichte, I–III.* Baden-Baden, 1951–1953. II. 51.

[83] Graillot, H.: *Le culte de Cybèle.* Paris, 1912, 101.

[84] Cicero: *Pro Caelio* 34.

[85] Salzman: *op. cit.* 303.

[86] Cicero: *De harispicum responso* 21–29.

[87] *Ibid.* 27.

up the cult.[88] This way, the *gens Clodia* was closely linked to the *Megalensia* both in terms of history and current political issues.

IV. At the beginning of the speech Cicero as it were expresses his regret that it is a pity that judges are not granted any rest even on holidays,[89] and cannot watch the theatre performance just being held. So, the *orator* is going to stage his own theatre performance, comedy for them, and puts Clodia[90] defined as the source of the charge in the centre. By doing that he is not trying to make the defendant appear a nice person to the judges, instead, he drives the attention to the opponent's motive force, *opes meretriciae*,[91] and it is absolutely not doubtful to those listening to the speech whom the term *meretrix* covers. The chief witness of the charge of attempted murder of Dio, the Roman merry widow, Clodia Metelli known from her licentious way of life. Before responding to the actual charges *(de vi)*, he deems it is important to reply to the invented defamation made to the detriment of Caelius.[92]

From the part regarding *vita ante acta*[93] the following key charges can be discerned. Caelius had violated *pietas* and *fides*, had not paid due respect to his father[94], and had not acted properly concerning Calpurnius Bestia either when he had caused him to be summoned.[95] The charge of *luxuria*,[96] which he reproached both Herennius and Clodius Caelius for,[97] and dissolute life in young age.[98] Remarks of political nature: friendly relation to Sergius Catilina,[99] alleged participation in the conspiracy,[100] the crime of *ambitus*,[101] and attack against a *senator* in the election of the *pontifex*.[102] The grouping of the charges may be discretional but their order mostly follows Caelius's course of life.[103] The third part[104] discusses the assassination against Dio; the accusation supports this by Clodia's statement claiming that Caelius had obtained money from her in order to bribe Lucceius's slaves, and then tried to get rid of her as an incriminating witness.[105]

Cicero expounds these two statements made by Clodia as independent charges,[106] he refutes the charges of *aurum*[107] and *venenum*[108] separately.[109] It is one of Cicero's clearly

[88] *Ibid.* 28.
[89] Cicero: *Pro Caelio* 1.
[90] *Ibid.* 2.
[91] *Ibid.* 1.
[92] *Ibid.* 3.
[93] *Ibid.* 3–22.
[94] *Ibid.* 4. 18.
[95] *Ibid.* 26.
[96] *Ibid.* 4. 17.
[97] *Ibid.* 27.
[98] *Ibid.* 6–14.
[99] *Ibid.* 10–14.
[100] *Ibid.* 15.
[101] *Ibid.* 16.
[102] *Ibid.* 19.
[103] Heinze: *op. cit.* 214.
[104] *Ibid.* 51. 69.
[105] *Ibid.* 63.
[106] *Ibid.* 51.
[107] *Ibid.* 51.
[108] *Ibid.* 56.
[109] Stroh: *op. cit.* 260.

perceptible objectives to alleviate the political overtones of the trial as much as possible, among others it is for this reason that he does not focus on the attack against Dio. *Crimen veneni* is properly known, presumably other persons' testimonies were available to support Clodia on the issue that Caelius had attempted to hand over poison to Clodia's slaves. Quite interestingly, during the entire oration Cicero does not provide any other version instead of this story; he is satisfied with making the inconsistencies in the opponent's pleading ridiculous, and emphasising that *corpus delicti* is not available to them. Although thereby he does not fully dispel suspicion regarding Caelius but at least he can take this detail out of its original context.[110]

Several material questions arise in the middle part of the speech.[111] After having covered the paragraphs *de vita*, or *de moribus*, the *orator* drives the attention to the actual counts of the indictment. With a few sentences he briefly presents the assassination against Dio. He refers to the point that king Ptolemaios was the author the murder, who used Asicius having been acquitted in the meantime as a tool–for this reason, even the shadow of suspicion could not be cast on Caelius.[112] After that, he suddenly returns to the objections made against Caelius's conduct of life *(deliciarum obiurgatio)*.[113] With respect to minor licentiousness he takes a liberal position believing that youth has the right to sow their wild oats as long as they do not cause any serious harm by that,[114] and in more serious cases he asks the judges to distinguish the subject *(res)* from the defendant *(reus)*; that is, to notice that the objections raised concern young people of the period in general and not specifically Caelius.[115] Then, he passes on to a definite *crimen luxuriae*: the money obtained from Clodia allows the deduction of a quite intimate relationship, which ended with a bitter split.[116] Instead of the continuation, logical at first sight (on the one hand, he might deny the existence of this love affair; on the other hand, he could fully doubt the authenticity of the two *crimena* due to its sudden break), Cicero chooses to follow another track: in what follows[117] he doubts the authenticity of Clodia's testimony on the grounds that as a left and jealous mistress she is not able to judge Caelius without bias. Thereby he anticipates the subject *de vi* that belongs to the *argumentatio*;[118] through that *vis* and *luxuria* change turning into each other in paragraphs 23–50:[119] *vis*,[120] *luxuria*,[121] *vis*,[122] *luxuria*,[123] *vis*.[124]

This point is highlighted by an excellent observation made by Heinze when he asserts that the construction of the charge is primarily and exclusively based on Clodia's testimony So, it could not ruin its authenticity by presenting Clodia as Caelius's left mistress,

[110] *Ibid.* 261.
[111] Cicero: *Pro Caelio* 23–50.
[112] *Ibid.* 24.
[113] *Ibid.* 27.
[114] *Ibid.* 28.
[115] *Ibid.* 29–30.
[116] *Ibid.* 31.
[117] *Ibid.* 32–36.
[118] *Ibid.* 51–69.
[119] Stroh: *op. cit.* 266.
[120] Cicero: *Pro Caelio* 23–24.
[121] *Ibid.* 25–31.
[122] *Ibid.* 32–36.
[123] *Ibid.* 37–50.
[124] *Ibid.* 51.

consequently, it was only Cicero who could bring up this relation in the lawsuit.[125] Thus, he defended Caelius against an accusation (since the liaison with Clodia is far from being so general as *amores* and *libidines* referred to) that had not been made against him.[126] The whole thing seems all the more appropriate as there is no single point in the entire *Pro Caelio* where Cicero presumed that the love relation between Clodia and Caelius is a fact known to the general public listening to the case. At several places he keeps mentioning certain generally spread rumours regarding the sexual life of each of the persons separately but never concerning the affair between them. So, it is Cicero who reduces Clodia's and Caelius's licentious conduct of life engaged by both of them individually to a common denominator and invents connection between them.[127]

The situation would have been exploited by a counsel for the defence less genial than Cicero as follows. First, he would decrease the significance of *crimen luxuriae*, and would point out the highly general nature of the charges and the right of youth to engage in free and easy way of life. Secondly, he would cast doubt on Clodia's authenticity–which is perhaps not so difficult since in 56 satirical poems on incestuous relation maintained with her brother Clodius had been rather widespread among the people[128]–and thereby he would question whether the Roman court could grant great authenticity to the testimony of the *meretrix*. This *orator*, as we have said, less genial than Cicero would face the following difficulties. How can he measure by two measures; that is: why is he so forbearing regarding Caelius's lascivious conduct of life and why so strict regarding the same in case of Clodia? (It is a fact that whereas Caelius is merely a young man, Clodia is a *consul*'s widow but the oration could possibly become inauthentic through this duality.) Even if Clodia–exactly due to her conduct of life–were not a witness considered too authentic, this would by no means give reason for her to lie. And on the whole why would she have been up to make a false testimony against Caelius?[129]

It is a brilliant construction by which Cicero takes the sting out of possible objections. How would the case look like if Clodia had been Caelius's lover? The edge of moral aversions against Caelius is actually eliminated by the fact that it is not possible to commit *adulterium* with a kind of woman like Clodia since she is ranked among *amores meretricii*. And thereby the question regarding the reason for Clodia's testimony is solved at one blow: the left lover is thirsting for revenge, and it is for this reason that she makes a false testimony; subsequently, it cannot be evaluated. On the other hand, at first sight, Cicero does not have too extensive background at his disposal to build the love relation between Caelius and Clodia: both of them live on the Palatinus, and it is not really their ascetic conduct of life that they are notable for. Cicero, however, finds one more point: the charge claims that Clodia had given money to Caelius, who later wanted to poison Clodia *(aurum et venenum)*. According to Cicero's construction, which seems quite obvious, all this had taken place because of a highly intimate relationship and a quite stormy break. However, it is still hard to solve the dilemma: the claims made in the charge are either true and then Caelius is guilty in the assassination against Dio; or, if they are not true, then the Caelius-Clodia *liaison* cannot be developed. Thus, Cicero must acquit the defendant *(luxuria)*, and

[125] Heinze: *op. cit.* 228.
[126] *Ibid.* 245.
[127] Stroh: *op. cit.* 272.
[128] Cicero: *Ad Quintum fratrem* 2, 3, 2.
[129] Stroh: *op. cit.* 274.

must make Clodia's testimony inauthentic *(vis)*. If the relation between the two of them had been widely known, then Cicero would have had to place the point on *luxuria* in the part of *de vita ac moribus*, and the attack against Clodia in the part of *crimen de vi*. This way, however, he deals with Clodia's authenticity under the points of *crimina auri et veneni*, and builds and manipulates the Clodia-Caelius relation.[130]

Now, let us look at how Cicero creates this relation. At the beginning of the speech[131] he does not name Clodia yet, he refers to *opes meretriciae* only, which properly and excitingly rhymes with *intolerabilis libido* and *nimis acerbum odium*.[132] When he mentions Caelius's moving to the Palatinus he formulates more clearly.[133] Here, Cicero uses the well-known Medea motif, which has already arisen a few times during the lawsuit since Atratinus called Caelius *pulchellus Iason*, and referred to the story of the golden fleece regarding the hired gold,[134] and Caelius called Atratinus *Pelia cincinnatus*.[135] And he continues to develop the thought.[136] He refers the motif of money and poison *(duo sunt autem crimina, auri et veneni)* to the scope of subject of *luxuria*, and intends to draw conclusions from that regarding the relation between Clodia and Caelius. Yet, if he uttered this *expressis verbis*, then he would acknowledge that the charges are true.[137]

Cicero repeats the opponent's charges with an *ut dicitur* phrase but he lets them appear real and true–more properly he suspends the response to be given to them–as long as they fit in with his aims.[138] It is here where he conjures up Appius Claudius Caecus *(prosopopoiia)* from the underworld–which is no way a tool that belongs to *genus grande*[139] in the present case[140] but a trick full of comic circumstances[141]–in order to be able to compare ancient Roman virtues to Clodia's conduct of life. Seemingly, this does not serve defence since the ancestor conjured up is convinced of the justice of the charge of *aurum et venenum*.[142] However, the old *censor* 's speech now unambiguously feeds the fact of the relation between Clodia and Caelius and Clodia's corruptness into the judges' head.[143]

It is after this that the *reprehensio testis* may be implemented with respect to Clodia, which presents Clodia as a jealous, left lover, and proves that Caelius is not an *adulter*, that is, adulterer, but only an *amator*, that is, a lover. In accordance with the above cast (first, Cicero and then Appius Claudius Caecus spoke), here again the *orator* himself and then

[130] *Ibid.* 275.

[131] Cicero: *Pro Caelio* 1 sqq.

[132] *Ibid.* 2.

[133] *Ibid.* 18. *Quo loco possum dicere id quod vir clarissimus, M. Crassus, cum de adventu regis Ptolemaei quereretur, paulo aute dixit: 'utinam ne in nemore Pelio...' ac longius mihi quidem contextere hoc carmen liceret: 'nam numquam era errans' hanc molestiam nobis exhiberet 'Medea animo aegro, amore saevo saucia...'.*

[134] Münzer: *op. cit.* 136.

[135] Quintilianus: *Institutio oratoria* 1, 5, 61.

[136] Cicero: *Pro Caelio* 18. *Hanc Palatinam Medeam migrationemque hanc adulescenti causam sive malorum omnium sive potius sermonum fuisse.*

[137] Stroh: *op. cit.* 278.

[138] Cicero: *Pro Caelio* 30–32.

[139] Quintilianus: *Institutio oratoria* 12, 10, 61.

[140] Geffcken, K.: *Comedy in the pro Caelio*. Leiden, 1973, 18.

[141] Cf. Cicero: *Pro Caelio* 33.

[142] *Ibid.* 33–34.

[143] Stroh: *op. cit.* 282.

Clodius Pulcher pleads; thereby Cicero shifts the burden of proof mostly to the two persons summoned. Cicero's tactic here becomes much clearer: if the charge of poison and gold is true, then Clodia was Caelius's lover; if she was his lover, then her testimony is useless, so the charge of poison and gold is not proved. Thus, the charge of poison and gold, which has been so summed up by Cicero in order for him to create a *liaison*, now becomes needless; therefore, it should be concealed, and that without being noticed, so that the judges should not remember on what premises their conclusions were based on.[144] The *crimina auri et veneni* are merged with *crimen luxuriae*, and in the rest of the speech they are referred to as such. In the speech put into Clodius's mouth it is now considered a fact that Clodia is Caelius's mistress–whereas Appius Claudius deduced this only from various signs of suspicion.[145] The level the two actors are informed corresponds to the listeners' seeming level of knowledge. Clodius details the love affair rather loosely–and thereby Cicero dealt a deathly blow on Clodia's confession.[146]

In the editing of paragraphs 30–36 of the *Pro Caelio* we can see several threads running side by side. In terms of content: hypothetical deduction from gold and poison on the affair and split (here the speaker is Cicero),[147] the actual (now not hypothetical) conclusion, Appius Claudius Caecus is the speaker,[148] hypothetical conclusion from the affair and from the split on the inauthenticity of Clodia's testimony (here the speaker is Cicero),[149] actual conclusion drawn by Clodius.[150] In terms of the real aim of the demonstration of evidence: proving the existence of the affair,[151] ruining Clodia's authenticity.[152] In terms of the facts to be seemingly proved: acquitting Caelius from *crimen luxuriae*;[153] ruining Clodia's authenticity.[154] After that he frees Caelius from characterisation as an *adulter* since he has proved that Clodia is living a life not worthy of a Roman *matrona*; accordingly, it is not possible to commit *adulterium* with such a woman, a *meretrix*. Although in the points concerning the above[155] Cicero does not mention Clodia by name, and the formulation of the evaluation is somewhat hypothetical, later he states that Clodia is living *meretricio more*.[156] By this response the orator replies to the thoughts of the two types of fathers involved in the proceedings. However, both fathers agree[157] that young people have always been permitted to engage in a certain libidinous conduct, and this libertine conduct might include affairs maintained with the kind of women like Clodia, which belongs to the scope of *amores meretricii*.[158]

In presenting the liaison with Clodia Cicero uses the rhetoric tools of humour and irony on several occasions. So it seems appropriate to review what role humour and irony

[144] Cicero: *Pro Caelio* 35.
[145] *Ibid.* 36.
[146] Stroh: *op. cit.* 284.
[147] Cicero: *Pro Caelio* 30–32.
[148] *Ibid.* 33–34.
[149] *Ibid.* 35.
[150] *Ibid.* 36.
[151] *Ibid.* 30–34.
[152] *Ibid.* 35–36.
[153] *Ibid.* 30–31.
[154] *Ibid.* 32–36.
[155] *Ibid.* 38. 49.
[156] *Ibid.* 57.
[157] *Ibid.* 37.
[158] Stroh: *op. cit.* 289.

as orator's tool played in the theory of Antique elocution, in particular, especially in the *Corpus Ciceronianum*. The usefulness of fun, *geloion* was first discussed by Gorgias, who claimed that the opponent's seriousness should be contrasted by fun and his mock by seriousness in order to destroy its impact,[159] as it is quoted by Aristotle, too.[160] It is at this point where Aristotle refers to the fact that in the *Poetica* he has already expounded how many types of *geloion* there are; but the part of the *Poetica* where he discussed comedy has been lost. He adds that a part of that suits free men, and another part does not; therefore, the *orator* should use the former ones.[161] The fact that several Greek authors have dealt with the issue of humour is mentioned in Cicero's works.[162] These Greek writings, however, have not been preserved to us. Quintilian can see fundamental difference between the two greatest figures of Antique eloquence, Demosthenes and Cicero in terms of wit and humour: whereas Demosthenes lacked high spirits, Cicero could not keep within bounds in witticism.[163] In the *Orator*[164] Cicero touches on, in his work *De oratore* gives and exhaustive exposition[165] on the issues of wit, jokes and humour. As sources he used his own practice, collections of Roman jokes[166] and peripatetic writings.[167] His scrivener, Tiro published a thesaurus of examples summed up in three books on this subject.

Cicero starts the treatise by making the statement that jokes and humour are quite often very useful,[168] then, he goes on by saying that he himself has seen that in lawsuits lots of things can be achieved through witticism.[169] Cicero looks for answers to five questions regarding laughing. What is laughter? Where does it come from? Should the orator want to create jollity? How far may he go? What types of *ridiculum* are there?[170] One of the actors of the dialogue C. Iulius Caesar Strabo claims that the first question does not belong to the subject;[171] he answers the second one by citing Aristotle asserting that *ridiculum* should be applied in the field determined by the attributes: ugly and grotesque.[172] To the third question the answer is clearly yes.[173] To the fourth question he replies as follows: the *orator* shall not make fun of either special turpitude or grave misfortune[174]; similarly, a person favoured and respected by the public shall not become the target of scorn.[175] The prime law is thus moderation.[176] From the answer given to the fifth question we learn that one of the types of

[159] Gorgias: *fragmenta* 82b; 12d–k.

[160] Aristoteles: *Rhetorica* 3, 1419b.

[161] *Ibid.* 3, 1419b.

[162] Cicero: *De oratore* 2, 217; Quintilianus: *Institutio oratoria* 6, 3, 5; Barwick, K.: *Das rednerische Bildungsideal Ciceros*. Berlin, 1963, 73.

[163] Quintilianus: *Institutio oratoria* 6, 3, 1–3; Cicero: *Orator* 26. 90.

[164] Cicero: *Orator* 87.

[165] Cicero: De oratore 2, 216–289.

[166] *Ibid.* 2, 271.

[167] About this topic see Arndt, E.: *De ridiculi doctrina*. Diss. Bonn, 1904.

[168] Cicero: *De oratore* 2, 216.

[169] *Ibid.* 2, 219.

[170] *Ibid.* 2, 235.

[171] *Ibid.* 2, 235.

[172] *Ibid.* 2, 236. On the Aristotelian theory of comedy see Cooper, L.: *An Aristotelian Theory of Comedy*. New York, 1922.

[173] Cicero: *De oratore* 2, 236.

[174] *Ibid.* 2, 237.

[175] *Ibid.* 2, 237.

[176] *Ibid.* 2, 238; Quintilianus: *Institutio oratoria* 6, 3, 28–31.

jokes is created by the thing itself, the other one by the formulation.[177] After that, he identifies the sources of *ridiculum* the orator may draw on[178] and of those he shall not.[179] Laughter is most often evoked, for example in jokes, by the orator saying something that nobody expects; in this case we are laughing at our own error.[180] In defining the idea of the *perfectus orator* Cicero identifies three kinds of style–simple, medium and sublime–and he notes that, albeit, some persons are excellent in specific types of style, very few have mastered all of them.[181] In *Orator* Cicero provides theoretical foundations for all the three kinds of style, however, he points out that, in addition to its other attributes (avoiding prose rhythm and complex sentence, dropping *hiatus*, *munditia* and *elegantia*, moderation in applying both ornament and word and thought figures), the most characteristic trait of simple style is witticism and sharp tongue. When using them the *orator* is to make sure that he should not cause irreparable harms, should thrust stings only into his enemies, should do that with moderation and ceaselessly, and he should not hurt all of them and not in any way. He calls this the purest Atticism, although in this respect none of the recent Atticists have reached any special elegance.[182]

Several essential elements of Roman comedy have been highlighted by Segal, who claims that as a perfect opposition to Roman everyday life ruled by *negotium* and *industria* appears the so-called Plautian day, where the key attributes are *ludus* and *voluptas*.[183] During the period when theatre plays were performed, activity on the *forum* discontinued *(Ludi Romani, Ludi Apollinares, Ludi plebei, Ludi Megalenses)*, so, a kind of exemption from *gravitas* that permeates the entire Roman life entered into force. In comedies, each player step out of the world of their everyday life: young people do not obey their father, *matronae* do not follow their husband's will, and slaves brief their masters without being punished. Education is sometimes aimed at the outsider, who will be integrated in society if he accepts criticism, whereas he will be definitely cast out as the hindrance of the play if he continues to be an outsider.[184] The persons injured by Plautus's humour are often the *milites gloriosi* and the Cato Maior kind conservatives, puritan figures. In the works of Terentius the opposition between strict fathers and jolly sons is a highly favoured motif (fathers mostly "improve" and start to tolerate their son's conduct of life).[185] In the *Pro Caelio*,[186] in the *syncresis* of the two father types Cicero quotes the words of two fathers from the comedies of Caecilius and Terentius. The former one is severe and tough, the latter one is well-intentioned and forbearing, it is not by chance that the quotation comes from Micio's speech in *Adelphoe*.[187] The words of the two fathers can be to some extent linked to the two actors conjured up in the previous paragraphs, Appius Claudius Caecus and P. Clodius Pulcher, and create an impressive parallel with the relation between Cicero and his

[177] Cicero: *De oratore* 2, 240.
[178] *Ibid.* 2, 269. 280. 289.
[179] *Ibid.* 2, 251.
[180] *Ibid.* 2, 255.
[181] Cicero: *Orator* 20.
[182] *Ibid.* 89.
[183] Segal, E.: *Roman Laughter*. Cambridge, 1968, 42.
[184] Frye, N.: *Anatomy of Criticism*. New York, 1969, 163.
[185] Segal: *op. cit.* 70.
[186] Cicero: *Pro Caelio* 37–38.
[187] Terentius: *Adelphoe* 120–121.

intellectual/spiritual son, Caelius, which is a definite opposite of the relation between Clodia and her younger brother/husband, Clodius.[188]

In Clodia's characterisation the orator quotes Ennius's tragedy entitled *Medea exul*, and uses the lines with tragic tone for producing the comic impact.[189] That is how Caelius becomes Iason, his move to the neighbourhood of Clodia-Medea a mythical journey, and the left merry widow a sorceress.[190] Later he presents the adventure of handing over the jar, not so much in the spirit of comedy, more as kind of *mimus*.[191] In this kind of plays (and this is highly significant in the characterisation of Clodia as *meretrix*) prostitutes entered the stage.[192] The *comedia dell' arte* kind of *mimus* not having a definite story was far from being a form of entertainment to improve morals, it often produced the impact expressed in *risus mimicus* through its obscenity. Adultery and attempted poisoning constituted the cornerstone of its subject matter; accordingly, Cicero describes what has happened in the bath as *obscenissima fabula*.[193] He presents the events aimed at handing over and obtaining the *pyxis* as *muliebre bellum*, in the course of which Clodia becomes *imperatrix* and her men *provincia* hiding in the wooden horse of Troy.[194] Clodia's characterisation as a *meretrix*[195] constitutes a perfect contrast with the image of the obedient and ethical *matrona* who safeguards the purity of home. Clodia's whole appearance and behaviour fits in with a *meretrix*, and not with a *mater familias*,[196] but her *familiaris* are her slaves and the bath master,[197] and regarding this point Cicero refers to the nickname *quadrantaria* twice.[198] Plutarch claims this title has been stuck to her because she would be given one *quadrans* by her lovers as payment,[199] and he calls Caelius by the name *Quadrantaria Clytaemnestra*.[200] Caelius is attacked by *opibus meretriciis*[201] assisted by prostitutes; so, Clodia leads her army as a kind of *miles gloriosa*.[202]

Summary

In Cicero's career there were several more triumphant points and ones that formed history to a greater extent, yet–as it might have become apparent from some of the references made here–there were few moments when as an orator he was able to present such a gleaming theatre play and genially constructed composition to the judges as on the *Megalensia* in the year 56. The speech did not fail to reach its result: Caelius was, as a matter of fact, acquitted; and the lawsuit offered a great occasion for Cicero to take revenge–even if just in part and merely verbally–for the roguery committed repeatedly by Clodius and Clodia against him.

[188] Geffcken: *op. cit.* 23.
[189] Cf. Quintilianus: *Institutio oratoria* 8, 6, 53.
[190] Geffcken: *op. cit.* 15.
[191] Cicero: *Pro Caelio* 61–69.
[192] Lactantius: *Divinae institutiones* 1, 20, 10.
[193] Cicero: *Pro Caelio* 69.
[194] Geffcken: *op. cit.* 25.
[195] Cicero: *Pro Caelio* 49.
[196] *Ibid.* 32. 57.
[197] *Ibid.* 62.
[198] *Ibid.* 62. 69.
[199] Plutarchus: *Cicero* 29.
[200] Quintilianus: *Institutio oratoria* 8, 6, 53.
[201] Cicero: *Pro Caelio* 1.
[202] Geffcken: *op. cit.* 38.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 3, pp. 214–222 (2010)
DOI: 10.1556/AJur.51.2010.3.4

ZOLTÁN SZATHMÁRY*

Deviances of Information Society

About Harassment and Cyber-stalking

Abstract. The fact of harassment is a remarkable step in the complex protection of private sphere, but due to its novelty it is still difficult to adopt in practice. Among the most typical behaviours of harassment, the Criminal Code itself names the commitment through telecommunication tools that–referring to the title–means harassment through internet as an infocommunication system. The modern, digital communication facilities enable an informal communication among participants that hides reality. The single ways of communication (e-mail, chat) only have written basis, other sensors of cognition, perception do not play any role. As a result of the lack of social controll, one of the most significant hurdles of aggression, the social distress does not exist. Therefore some emotions (anger, jealousy) or aggression can be directed straight towards the target of the harassor. The internet can be a tool as well that the principal can use in order to gather personal information about the victim to make the subsequent harassment easier. These circumstances provide different opportunities to the harassor, therefore it is worth to deal detailed with this way of commitment. The suggestions and highlights of the study aim to eliminate the difficulties of law interpretation, to define the enforceable concept of private life, and to enable the possible realisation of the facts.

Keywords: cyber-crime, cyber-stalking, deviance, harassment, infocommunication, internet, privacy, stalking

Introduction

The purpose of this study is to introduce the legal regulation of a long-standing phenomenon in a special regard to harassment enabled by infocommunication instruments. The new state of affairs of the Criminal Code, the junctures of delinquency stated in paragraphs 176/A. § (1) and (2) came into effect on 1 January 2008 and 2 February 2009. The action[1] defined in paragraph 176/A. § (1) has never been punished by any criminal act of the Hungarian legal system, the law enforcement practice of interpretation has not been developed yet, therefore its common usage has created several problems, of which I am trying to demonstrate a few.

I. Generally about Haressment and "Stalking"

As per the place, springs and target of action–legally prohibited persecutive behaviours have several different classifications. Accordingly, we can talk about harassment at work or harassment based on sexual, ethnical or personal intentions. Concerning this study, harassment based on personal intention is the most relevant–the so-called "stalking"[2]–when

* Prosecutor trainee, Miskolc Municipal Prosecutor's Office; PhD-student, University of Pécs, Faculty of Law.
E-mail: szathmary.zoltan@gmail.com

[1] Contrarily, section (2) has raised a conduct previously punished as offence to delinquency level.

[2] Stalking is an English expression, its Hungarian meaning is: in hunting terms chasing and tiring out the wild.

the principal, mostly according to the commonly used expression "harassment", does molest his/her victim for a longer time, permanently or frequently.

In those typically western states where the social danger of this conduct has been recognized earlier, several definitions have been created to define the persecutive behaviours called *stalking*. Beáta Korinek–summarizing the legal and academic concept of harassment emerging in the legal system of the USA–defines the following: *stalking is such a phenomenon where the harassor affects a certain person with his/her behaviour in a way that he/she evokes fear and distress by threathening this person.*[3] According to another deifinition *stalking* should be interpreted as a wilful, persistent threat or following that intents to a certain person and when the physical and psychical intact and safety of the aggrieved party gets in danger.[4]

Principals of harassment can have different motivations; the following groups are typically worth to emphasize: a) *rejected partners*, those who are unlikely to accept the end of a former relationship; b) *those searching for nearness of others*, principals being intent on building intimate relationships, those in their otherwise desolated private life only have some kind of contact with their victim; c) *non-compatible suitors*, those who typically aspire only a one-night coition with the aggrieved; d) *offended principals*, those who would like to take vengeance on for their earlier real or fictional grievances; e) *deliberate predators*, those who collect information about their victim typically before commiting sexual violation.[5]

Private sphere and the sanctity of private life are social values protected by the state of affairs. Since in the Hungarian legal literature no reasources are available to provide adequate help for the law enforcer in interpreting the facts of harassment, I have taken the concepts of a related field of law, namely data protection as a basis in order to understand the concept of private sphere and private life. András Jóri–referring to the research of Ferdinand D. Schoemann and Alan Westin–expounds it as a situation where *"accessing the individual, with all related information, intimate facts, thoughts and body, is limited."*[6] Private sphere could mean the general freedom of action for the individual within the system of relations among the "individual" and "others".[7] According to László Majtényi *"protection of personal privacy primarily meant the protection of the individual's private life that usually covered the protection of private and family life, physical and psychical integrity, protection of honour, positive reputation and against exhibiting any fact of private life, protection of personal identity and against observation, protection of verbal communication..."*[8] The concept of private sphere–with other words *privacy*–can visibly have several approaches; the expression has got newer and wider meaning parallel with the increasing emergence of the individual's autonomy.

According to what has been stated in decree No. 56/1994 (10 November) of the Constitutional Court *"the right to dignity of the human being is one of the definitions of the*

[3] Korinek, B.: A stalking. In: Korinek, L.–Kőhalmi, L.–Herke, Cs. (ed.): *Emlékkönyv Irk Albert egyetemi tanár születésének 120. évfordulójára* (Book in honour of the 120. anniversary of university professor Albert Irk). Pécs, 118.

[4] Voß, H.-G. W.–Hoffmann, J.: Zur Phänomenologie und Psychologie des Stalking; Polizei und Wissenschaft 2002. Introduction. Cited by: Korinek, B.: *Ibid.* 119.

[5] Korinek, B.: *Ibid.* 123–124. The author refers to the researches of Paul Mullen.

[6] Jóri, A.: *Adatvédelmi kézikönyv* (Data Protecion Handbook). Budapest, 2005, 12.

[7] *Ibid.* 15. The author refers to the thoughts of László Sólyom.

[8] Majtényi, L.: *Az információs szabadságjogok* (The information liberties). Budapest, 2006, 68.

so-called "general personality right", i.e. „ancestor law" of personality rights, that in the modern constitutions and in the practice of constitutional courts appears named as the "right to the free emergence of personality", the "right to the freedom of autonomy", "general freedom of action" or "the right to private sphere" [8/1990. (23 April) decree AB]. The constitution does not mention "the right to private sphere" as a concrete, subjective basic right, however the right to the freedom of private life is definitely a basic right that serves the protection of invidivual's autonomy and originates from the congenital dignity of the human being...".

Concepts of the system of private sphere and private life could include several interpretation levels, therefore considering the legal state of affairs of harassment and the aim of the legislator, I find the broad interpretation of this concept appropriate. Private sphere, private life covers the single person, the connection system of the person's family or household and the wider, freely chosen social network. In case of accepting the three-level system of private sphere, the conducts violating the private sphere also affect through one of the above-listed system elements, layers.

As the legal subject of harassment is a right connected to the dignity of human being and to the respect of private sphere, therefore the law enforcer has placed it among the delinquencies against dignity of human being within the Criminal Code. In consideration of its personal nature it is a delinquency that is to be prosecuted for private proposal.

II. Perpetrative conducts of harassment

The act defines the persecutive actions of pharagraph (1) under the common name "disturbance", in everyday life most frequently occurring affair of these is when the principal frequently aims to establish relationships-through a telecommunication tool[9] or personally. No relationship needs to be established, any effort intent to it is sufficient, i.e. any person who frequently and disturbingly rings the telephone of the aggrieved and then hangs up or aims to establish relationship with him/her using different network applications (Msn, Skype) commits harassment. The arbitrariness of interventional intention means that it dispenses with any legal authorization or any approval of the aggrieved. Further premise of facts is the purpose and that the disturbance happens frequently or persistently.[10]

Principal of harassment defined in section (2) point a) is the person who "in order to evoke fear threatens another person or his/her relative with commiting any personal violence or indictable offence causing public danger". Before 1 January 2008, the principal of this action could be amenable for offence of dangerous threat.[11] The act has raised point a) of the fact of offence to delinquency level and compared to harassment stated in section (1) punishes it more seriously, with up to 2 years of imprisonment, communal work or penalty. According to paragraph 138 of the Criminal Code, threatening is prospecting of a serious disadvantage that can raise drastic fear in the threatened person. This phrase of harassment

[9] Besides telephone calls, sending text messages, e-mails and voice messages can also be mentioned here.

[10] Complex DVD Jogtár commentary to § 176/A of the Criminal Code.

[11] Before the 1 January 2008, according to § 151 of Act LXIX/1999 perilous threatening was committed by the person "who a) seriously threatens another person in order to evoke fear of committing such crime that is intended against the life, corporal integrity or health of the threatened person or his/her relative b) seriously threatens another person to evoke fear of widely publicizing facts, that are capable for defamation of the threatened person or his/her relative."

also premises the intention that the principal threatens the aggrieved party or his/her relative in order to develop fear in this person. Threat has to be qualified, only threatening with personal violence or indictable offence causing public danger is to be punished. So this paragraph does not concretely define which behaviours are to be considered as threat but point a) of section (9) in § 261 of the Criminal Code can be of assistance to us since in relations to terror action it lists what is reckoned among personal violence, offence causing public danger or weapon-related delinquency.[12]

Harassment defined in point b) section (2) is commited by the person who *"aims to suggest that an action occurs that threatens or violates the life, physical integrity or health of the aggrieved party or any (of) his/her relatives."* The new definition was introduced by the already mentioned Act LXXIX/2008 effective from 1 January 2009. The perpetrative behaviour of this definiton of harassment is a sort of veiled threat. In case of concrete threat, the principal is amenable (to law) according to section (2) point a). It is difficult to define the expression "aim to suggest" since suggestion can include all behaviours that make the aggrieved party believe that a non-occuring event has a real possibility to occur. Therefore it means a pretending behaviour that refers to the inchoation of an event either by the principal or another person, or to its occurrence independent from any person. Cases of adapting facts are expected to be highly influenced by practice of law enforcers adjusting them to the behaviours of real-life, which is worrying because behaviours that the legislator wishes to punish can not be clearly selected.

Harassment is a subsidiary delinquency. Determination of phrase stated in section (1) is only possible if through certain behaviour–i.e. in case of formal aggregation–no more serious delinquency has been commited at the same time. However–as per the commentaries–the act only refers to the alternative nature of harassment stated in section (2). Of course, realization of formal aggregation is possible.

III. Cyber-stalking

Among the most typical behaviours of harassment, the Criminal Code itself also names the commitment through telecommunication tools that–referring to the chapter–means harassment through internet as an infocommunication system. Internet and mobile technology create two basic cases–considering the relationship between the principal and his/her victim. On one hand access from a distance–i.e. his ability to reach his/her victim wherever he/she is; on the other hand permanent access–irrespectively of the location of his/her victim. Therefore it is worth to deal a bit more detailed with this way of commitment.

[12] Cases of personal violence, offence causing public danger or weapon-related delinquency are homicide [§ 166. section (1) and (2)], battery [§ 170. section (1) to (5)], wilful endangering committed in the exercises of their activity [§ 171. section (3)], violation of personal freedom (§ 175), kidnapping (§ 175/A), criminal offence on security of traffic [§ 184. section (1) and (2)], endangering of railway, aerial or aquatic traffic [§ 185. (1) and (2)], violance against official person (§ 229), violence against a person performing public task (§ 230), violence against a supporter of an official person (§ 231), violence against internationally protected person (§ 232), causation of public danger [§ 259. section (1) to (3)], disturbance of public service facility [§ 260. section (1) and (2)], get mastery over aerial, railway, or aquatic public road transport or trucking vehicle (§ 262), misuse of blasting agents or explosives (§ 263), misuse of firearms or ammunition [§ 263/A. section (1) to (3)], smuggling of weapons (§ 263/B), misuse of radioactive substances [§ 264. section (1) to (3)], misuse of weapon prohibited by international agreement [§ 264/C. (1) to (3)], crime committed against infocommunication system and data (§ 300/C) , damaging (§ 324) and robbery (§ 321).

The communication facilities provided by the internet enable an informal communication among participants that hides the reality. Its speciality is that the single ways of communication (e-mail, chat) only have written basis, other sensors of cognition, perception do not play any role. All these circumstances provide different opportunities to the harassor. As a result of the lack of social controll, one of the most significant hurdles of aggression, the social distress does not exist. Therefore on one hand some feelings, emotions, desire (anger, jealousy, bitterness, thurst for possession and control) or aggression can be directed straight towards the target of the harassor; on the other hand with the possibility of the emergence of different fantasies, the victim can become the focus of the harasser's imagination.[13]

J. Reid Meloy also believes that the internet can play a role in the course of harassment in many ways. However his thoughts are only theoretic in many cases, these possibilities should also be taken into account in a few sentences. In the first case, the internet is a tool that the principal can use in order to gather personal information about the victim to make the subsequent harassment easier.[14] An attribute of the trend marked as *web 2.0*[15] of the internet-usage is that the users build communities–such as iwiw, myvip, facebook and other services–when the users provide data–in most cases unconsidered. All this can be considered as an informational goldmine for a stalker during preparation. In the second case the internet is a medium or communication channel, through which the principal threatens his/her victim and communicates his/her desire, feelings to him/her. In the third case Meloy attributes a big role to the psychical role of astonishment since electronic messages can be send anytime to anyone, the message can exist timeless until the victim discovers it that depending on the timing can make the target person to feel that his/her harassor is in his/her near anywhere, anytime.[16] Anonymity increases the subjection of the victim for the reason that he/she is not aware of who his/her harrasor is, therefore will suspect anyone in his/her environment.

According to Bran Nicol one of the characteristics of our modern culture is that the motivators of persecutive behaviours become examples to follow. Under this Nicol means the following: accepted and supported is the conviction that from one hand we gather information about anyone, even foreigners and build intimate relationship with them; on the other hand the opposite of this is that we share even our most secret desire with everyone.[17] We live in a world where the border between the individual and others has dangerously obliterated therefore harassment itself has occurred as a sympthom and unavoidable product of our culture.[18] Permanently attracting attention and the constant desire to belong to celebrities both indicate that our conception about privacy has changed. The surrounding digital culture pushes us into a constant, accepted harassment. The internet itself plays such a transmitting role, through which on one hand harassment is possible as a result of the action of the victims or by using the data published by themselves; or on the other hand

[13] Meloy, J. R.: The Psychology of Stalking. In: Meloy, J. R. (ed.): *The Psychology of Stalking Clinical and Forensic Perspectives.* London, 1998, 11.

[14] *Ibid.* 10.

[15] The expression web 2.0 is a collective noun for such second generation internet services that are based on communities, so the users create content together or share each other's information. Contrarily, in earlier services–generation 1 and 1.5–the content was maintained by the service provider. http://hu.wikipedia.org/wiki/Web_2

[16] Meloy: *Ibid.* 12.

[17] Nicol, B.: *Stalking.* London, 2006, 8.

[18] *Ibid.* 8.

through the persecutive "services" mentioned by Nicol as examples. Nicol mentions examples of websites like CelebFanMail.com or Gawker Stalker[19] that informs us about the e-mail address and actual place of residence of nearly any celebrity based on the information published by the "everyday" people who spot them. In addition, a speciality of the functioning of the internet is that the anonymity provided is only illusory. Numerous traces arose in course of the services employed by the users that can be gathered by experts; the popularity of phising nowadays is beyond doubt.

Within this chapter it is worth to mention a few words about the agreement that was signed in February 2009 by 17 larger internet companies in contribution with the Committee of the European Union in order to strengthen the security of users under 18 of social network websites. Parties of the agreement plan to roll back such undesired phenomenons like online harassment with the following tools: a) placing an easy to use "notification of misuse" button on the user interface, that is suitable to notify with a single click that the behaviour of another user is undesirable, b) personal data of users under 18 are not public by default, c) personal data of the users are not searchable the search engines, d) functions serving the protection of privacy are visible and easily accessable all the time, e) registration of users under 13 must be encumbered. However all these actions presume the sensitivity and awareness of users regarding personal data; this is not confirmed by the perceptible trends in Hungary–that for the lack of Hungarian expressions can only be described with new foreign keywords like cyberbullying, sexting. Cyberbullying is such a rude joke or teasing when members of age groups of 13–17 years disfigure each other on different platforms. In possession of a camera mobile phone any accident or unpleasant incident–irrespectively where it happened–can be watched by crowds on one of the popular websites already the same evening. Sexting is a phenomenon when young users publish pornographic, erotic or similar photos of themselves on social network websites. These two trends refer to the disappearance of private sphere, while cyberbullying is the ignorance of someone else's private sphere, and sexting means the complete opening of the user's own private sphere.

IV. Remarks

1. To paragraph 176/A section (1) of the Criminal Code

Section (1) of paragraph 176/A in the Criminal Code can only be commited with direct intent. The aim is to threaten others or to arbitrarily encroach on someone else's private life, everyday life. It is difficult to interpret the same behaviour as aim and perpetration within the same state of affairs–when the principal with the aim to arbitrarily encroach on someone else's private or everyday life, arbitrarily encroaches on someone else's private or everyday life, e.g. disturbs someone else–therefore the defence of the principal can easily be successful as it explains the disturbing behaviour with unintentional but still likely and possible reasons.[20] For this reason I think a redefining of legal wording would be more appropriate to the effect that–by dispensing the aim–it makes perpetration with indirect

[19] *Ibid.* 9.

[20] It's hard to deny the–not unprecedented–defence of the suspected which states that the aim of the suspected was to prepare for thievery by getting information through frequent overnight telephone calls whether the aggrieved was at home. According to the fact that preparation for thievery is not to be punished, and for lack of aim harassment defined in section (1) is not facts-like, the prosecutor has to decide on the abolition of the investigation during the phase of investigation.

intent also punishable. Proof is nearly impossible, when the principal–that is often in a bad relationship with the aggrieved–in order to retrieve their previous disagreements or financial arguments, or to interprete its anger or attraction to the aggrieved, aims to build such a relationship, that although results in the disturbance of the aggrieved but its aim is not the legally defined aim.

Because of the uncertainty of the concept of private life, the case when the suspected person disturbs the aggrieved through his/her relatives needs to be interpreted.[21] According to the broad approach of (the concept of) private sphere, arbitrary encroachment can hurt the individual's right to the undisturbed everyday life through all the three system elements mentioned. According to the commentary of the act that also underpins the above, "the following behaviours can be considered persecutive: the persistent twenty-four-hour–even anonymous–phone calls at home and at work; the often offending, obbroprious or threatening messages left on the answering mashine or sent by e-mail or SMS; frequent attendance in front of the victim's flat, workplace, etc.; shadowing the victim to public places. *This can include the close relatives and friends of the victim.*"[22]

The concept of "disturbance" is a subjective expression that–besides the opinion of the aggrieved–requires assessment of the law enforcers. László Korinek's thoughts about sexual harassment are sound since he is stating that it is difficult to do empirical research in this subject because the perpetrative behaviours–especially the sensitivity of the aggrieved parties or individuals are reasonably different. The problem is that it has to be decided by the law enforcers–in an individualized and consistent way–which impacts experienced as disturbance are to be considered as disturbance.

Qualification of the case when the harassor disturbs the aggrieved exclusively through an infocommunication system, e.g. by sending e-mails or text messages, has not been clarified either. The question in this case is that if the aggrieved had the possibility to keep out the impact of the principal and does not take an advantage on it, is a criminal sanction necessary to be applied as an ultima ratio.[23] The Criminal Code does require certain precautions from the aggrieved party in other cases, too–and only guarantees criminal law protection in case of their existence. An example for this is the state of affair stated in section (1) § 300/C of the Criminal Code, i.e. unauthorized access to an infocommunication system that can only be commited by bypassing the arrangement ensuring the security of the system. Meloy also disputes that the principal could be amenable to law only based on online harassment; he believes that in a persecutive state of affairs online conducts can only be subconducts of harassment.[24]

2. To point a) of paragraph 176/A. § (2) of Criminal Code

Repeal of point a) section (1) of § 151 in the Offence Act and shifting it to section (2) of § 176/A of the Criminal Code that the place of act coming into effect meant that dangerous threathens commited before the 1st January 2008 could not be punished from the 1st January 2008 on. According to § 4 of Act LXIX/1999 *"actions has to be judged based on the laws*

[21] In cases when the relatives of the aggrieved are indirectly inclined to actions that does not harm their own privacy, but harms the privacy of the aggrieved.

[22] Complex DVD Jogtár commentrary to § 176/A of the Criminal Code.

[23] An example for this is the case when a love-letter sending admiring user can be disabled by the aggrieved with a single button click on the socal networking site called iwiw.

[24] Meloy: *Ibid.* 11.

being in force at the time of commitment. If–according to the laws being in force at the time of judgement–the action is not considered illegal or is to be punished lighter, the new law has to be applied." Retrospective adaptation of section (2) of § 176/A of the Criminal Code is also impossible due to § 2 of the Criminal Code therefore a gap of law enforcing has arisen that makes the intention of legislator to punish the persecutive and threatening behaviours more strictly impossible.

The commitment mostly happens in a verbal environment; its tools are words and phrases that can mediate different contents depending on culture and degree of education. In some subcultures accepted practice of cursing is often naturally accompanies the communication among those belonging to the community. However it names violence against persons, it cannot be considered as a dangerous action or a serious threat for the society under all circumstances only because of its common nature. Such cursings are the expressions referring to torture of others by variable traditional methods. The metacommunicative way of threatening–e.g. showing a cutting finger move in front of the neck or playing funeral march on the phone–also needs interpretation.

The new state of affairs tie down large resources of the detective authorities, their proof is rather difficult. The reason for difficulties among others is that usually there is no impartial witness avalible besides the aggrieved and the suspected parties or e.g. in case of harassments commited via telephone, the call list acquired from the operator does not include the conversation itself, only the time and length of the calls.

V. Investigation of Harassment and its Control

In case of harassment commited through a telecommunication tool, according to the data storage obligation regulated by § 159/A of Act C/2003 about electronic communications, the call lists of the aggrieved and the suspected parties have to be acquired through request from the communications operators in order to prove the fact of communication. Having the call list, both the suspected and the aggrieved party has to declare the content of phone calls made on certain days at certain times since besides getting informed about all external circumstances of action this is the way to conclude to the aim of the principal. On the other hand, the parties often know each other, and in many cases the aim of the defendant to communicate is not against the will of the aggrieved but because of the nature of the existing contractual relationship, relation or arguement between them. For example, in ordet to keep in touch with the common child, the defendant as ex-husband can often call the aggrieved–if this really aims to keep and maintain the relationship with the child and not to encroach into the life of the aggrieved. Only in case of communications beyond the above aim and of late-time phone calls can we talk about the phrase of harassment defined in section (1) but understandably it cannot be identified based on the number of phone calls.

Phone calls, text messages documented and written by the aggrieved that are no longer available electronically, in their original form must be handled under protest; but the number of communications can be determined based on the call lists. Evidences–carried by these data that are mostly stored in infocommunication systems–can be considered durable and in order to secure them and to keep them authentic Act XIX/1998 about prosecution also specifies certain procedures, e.g. inspection and search of premises. For the sake of the unequivocal proof we should not only accept the statements of the aggrieved regarding the content of the communication since in this case text messages are the basis of the aim of arbitrary encroachment. Often unintelligible and unrealistic is the action of aggrieved parties when they delete these messages that are obvious and direct evidences and then report an offence.

In case of harassment commited by using mobile phone–since the phone is the instrument of commitment–the proposal to confiscate the device owned by the aggrieved party according to point a) section (1) § 77 of the Criminal Code can seem a negligible sanction but because of legal regulation it cannot be ignored either.

When analysing the behaviour of the principal, the possible influence of the victim has to be estimated and according to what has been outlined above the motivations of deviancies of information society should also be considered. The aggrieved who publishes several erotic photos of himself/herself on a popular social network website and therefore opens his/her private sphere to almost everyone–according to the rules of rational thinking–has to face the fact that with his/her behaviour as an "instigator" he/she almost authorizes the other users to aim to build an intimate relationship with him/her by entering his/her private sphere. In certain cases all these can be considered as mitigating circumstances.

Summary

The fact of harassment is a remarkable step in the complex protection of private sphere, but due to its novelty it is still difficult to adopt in practice. The law enforcers are facing a big challenge when they have to fill words like private life or everyday lifestyle with appropriate meanings that decisively determine the adaptability of the facts, or when the actual intention of the principal has to be resolved based on the evidences available. Therefore the suggestions and highlights of this study aim to eliminate the difficulties of law interpretation, to define the enforceable concept of private life, to enable the possible realisation of the facts and to widen the aggravating circumstances.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 3, pp. 223–230 (2010)
DOI: 10.1556/AJur.51.2010.3.5

ZDENĚK KOUDELKA*

Changes in the Position of the Public Prosecutor's Office in the Czech Republic

Since the transformation of the Prosecution into the Public Prosecutor's Office in Bohemia, Moravia and Silesia (Czech Republic), it has been discussed whether the current model is correct and what both the internal relations between the individual levels of the Public Prosecutor's Office hierarchy and the external relations of the Public Prosecutor's Office as a system with other supreme administrative bodies should be like. Supporters of various models can find foreign examples of these models because the patterns of functioning of the Public Prosecutor's Offices in various European countries are different.

Basically, it is possible to specify several prototypal countries and rank them starting with the one where the Public Prosecutor's Office has the closest connection to the Ministry of Justice and ending with a system characterized by a total separation of these two bodies:

1. *Poland* – Public prosecution is not mentioned in the Polish Constitution at all. The Law on Public Prosecution was changed in the year 2010 and the separated function of the Prosecutor General was established.[1] Prosecutor General is appointed for six years by the President of the republic, the proposal comes from both the Prosecution Land Council and the Justice Land Council. The appointment is not a subject to contrasignation.[2] The Prosecutor General cannot be appointed repeatedly. Both Land Prosecutor for Civil Prosecution who is appointed by the Prime Minister on the proposal of the Prosecutor General and the Supreme Military Prosecutor are subordinated to the Prosecutor General.
   In the period 1990–2010 the Prosecution was subordinated to the Ministry of Justice and the Minister performed the function of the Prosecutor General at the same time.[3] This American model was applied also during the Second Polish Republic 1919–1939, when the Minister of Justice performed the function of the Prosecutor General at the same time.
2. *Ireland* – the Supreme Prosecutor is not personally linked to the Government. The Supreme Prosecutor is not a member of the Government. However, he or she is defined as the Government's adviser. He or she is appointed by the President on the proposal of the Prime Minister and is obliged to resign on the Prime Minister's

* Deputy Prosecutor General of the Czech Republic. Masaryk University, Faculty of Law. E-mail: koudelka@law.muni.cz

[1] On 31 March 2010 Andrzej Seremet took the office of the Prosecutor General.

[2] It is a controversial matter because the decisions of the President of the republic are subject to contrasignation on the basis of a common law. A change of the Constitution is being considered–it should be directly mentioned in the Constitution that the President of the republic appoints the Prosecutor General without the need of the contrasignation of the Prime Minister.

[3] Kudrna, J.–Banaszkiewicz, B.: Postavení prokuratury v právním řádu Polské republiky (Position of the Public Prosecutors's Office in the Polish Legal System). *Státní zastupitelství*, (2008) 11–12.

request. If he or she does not step down, the President recalls him on the proposal of the Prime Minister.[4]

3. *Austria* – the Public Prosecutor's Office is a part of the Ministry of Justice department. There is a Supreme Public Prosecutor's Office in Austria with the Supreme Prosecutor at its head. However, the Supreme Prosecutor's Office operates only within the framework of the Supreme Court and is not a part of the common hierarchical system together with the lower High Land Prosecutor's Offices, which are directly subordinated–as well as the Supreme Prosecutor's Office–to the Ministry of Justice. The Minister is superior both in terms of administration and in terms of competence. This model had been applied in our country since the middle of the 19th century until 1952. The Public Prosecution has been ranked to the judiciary since 2008[5] by the Amendment to the Constitution. Nevertheless, the administration of the public prosecution has not changed.
4. *Czech Republic (Bohemia, Moravia and Silesia)* – there is a system of the Public Prosecutor's Office with the Supreme Prosecutor at its head who is appointed by the Government. Relations of superiority and subordination exist between the hierarchical levels, particularly between two immediately subsequent levels and with respect to superior levels in the areas specified by law. The whole system is a part of the Ministry of Justice department, while the Ministry is not superior to the Public Prosecutor's Office in terms of competence but it is superior in the matters of administration, especially budgetary administration.
5. *Slovakia* – the Prosecution is an independent system of administrative bodies with the Prosecutor General at its head who is appointed by the President on the proposal of the Parliament. The Prosecution has a separate chapter of the state budget. This model had been applied in Bohemia, Moravia and Silesia since 1953 until 1993.
6. *Hungary* – the Prosecution is an independent system of administrative bodies and it is not subordinate to the Government, as in Slovakia. However, the Constitution provides for the accountability of the Prosecutor General to the Parliament, by which he or she is also elected.[6]
7. *France, Italy* – the Public Prosecutor's Office is a part of the judicial authority.

It is necessary to emphasize that, from the perspective of the current understanding of a material liberal democratic state, a good administration of public matters, which also concerns the Public Prosecution, is determined by the political regime of the state rather than by the legal characteristics of the individual bodies of public authority. It cannot be denied that the Public Prosecution participated on the commission of judicial crimes in our

[4] Art. 30 of the Constitution of Ireland. Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské unie* (Constitutions of the EU Member States). 1st ed., Praha, 1997, 170.

[5] Judiciary itself is ranked as Part B together with Part A (Administration) to the Catch III of the Constitution which is called Executive Power. Art. 90a of the Constitution of the Republic of Austria from the 10. 11. 1920 in the statutory text of the Constitutional Law No. 2/2008 BGBl.

[6] Art. 52 para. 2 of the Constitution of the Republic of Hungary of 1949. Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské uni* (Constitutions of the EU Member States). 2nd ed., Praha, 2005, 168.; Halasz, I.: Postavenie generálnej prokuratúry v maďarskom ústavnom systéme po roku 1989 (Position of the General Prosecutor in Hungarian Legal System after 1989). *Státní zastupitelství*, (2008) 11–12.

country in the period between 1948 and 1952, while its legal definition originated in the relatively liberal and legally consistent Austrian state of second half of the 19th century and continued to be in force in the democratic first Czechoslovak Republic (1918–1938). On the contrary, the Public Prosecution established according to the Soviet model by the statutes adopted during the period of the worst totality in 1952 managed to function in an organizationally unchanged form after the end of totality within the framework of the democratic state in Bohemia, Moravia and Silesia until 1993 and continues to function in Slovakia or Hungary until today. The outcome of the activity of a state administration body, including the Public Prosecution, is not primarily determined by its legal and organizational regulation but instead by the essence of the regime of the State; whether it is a democracy, totality, dictatorship or even despotism.

However, if we think about possible changes in the legal regulation of the position of the Public Prosecutor's Office in Bohemia, Moravia and Silesia, we can identify three basic areas of change: one of them is formal–constitutional regulation, and two of them are budgetary and personal administration.

Constitutional Regulation

The present constitutional regulation in the Czech Republic is very brief and is limited to one article within the chapter dealing with the executive power in the section regulating the Government.[7] The Constitution provides–without a possibility of the legislator to change it–that the Public Prosecutor's Office:

1. is a part of the executive power and has to have a relationship with the government. However, this relationship is not further specified.
2. represents the Public Prosecution before the criminal courts.

All other areas of regulation are entrusted only to a statute by the Constitution, including the possibility to extend the competence of the Public Prosecutor's Office on non-criminal issues as well, which is actually realized under the current legal regulation.

There is a requirement to extend the constitutional regulation of the Public Prosecution, e.g. according to the Slovakian model. However, briefness of the Constitution can be an advantage for any institution if the Constitution enables the desired situation to be accomplished by an ordinary statute, as in the Czech Republic. Almost all changes of the regulation of the Public Prosecutor's Office can be realized through amendments of statutes without a necessity to amend the Constitution. The Constitution only provides for the criminal competence of the Public Prosecution in criminal proceedings. Although this can seem obvious, for example the Slovak Constitution paradoxically does not provide for such a competence of the Public Prosecution.[8] The absolutely dominant activity of the Slovak Public Prosecution in criminal proceedings is provided for only by a statute. Theoretically, the law could withdraw the criminal competence of the Slovak Public Prosecution and entrust it to a newly established Public Prosecutor's Office. The Slovak Public Prosecution which is provided for in the Constitution could therefore be deprived of its competence by a statute and be left with a minor competence to protect the rights of the people and the State without any further specification of measures available to realize its authority. It would become another Public Defender of Rights (Ombudsman) as it would protest against unlawful actions without a capability to provide a remedy for the unlawfulness as it would

[7] Art. 80 of the Constitution of the Bohemia, Moravia and Silesia No. 1/1993 Coll.

[8] Art. 149 of the Constitution of the Slovak Republic No 460/1992 Coll.

only be left with a limited entitlement of the Slovak Prosecutor General to file a petition to the Constitutional Court in Košice[9] e.g. regarding the unlawfulness of generally binding regulations of local self-administration.

Briefness and comprehensibility of the legal language are good qualities of the Czech Constitution. If all the so-called reasonable requirements for amendments of the Constitution (referendum, Supreme Audit Office, local self-administration) were summarized, the Constitution would be extended to the enormous size of the Portuguese Constitution.[10] Moreover, enforcing amendments of the Constitution is always very difficult. Not only the qualified three-fifth majority of all Members of the Chamber of Deputies and the present Senators is required, but the Senate also cannot be outvoted and it is moreover not bound by the 30-day period for discussing the proposal as it is with regard to ordinary statutes. An amendment of the Constitution can therefore easily "fall under the table" without being formally dismissed. This can happen if the Senate does not discuss the proposal until the election of Members of the Chamber of Deputies take place. Due to the principle of discontinuity in the legislative process,[11] all the draft laws, including constitutional laws, which had not been discussed until the election of the Members of the Chamber of Deputies have taken place, cannot be discussed in the newly elected Chamber of Deputies. This is also the case with the draft laws returned from the Senate or the laws vetoed by the President of the Republic. The veto of the President or the Senate thus becomes absolute.[12]

Also the statistics shows that everyone who proposes a constitutional amendment asks for its non-acceptance. During the term of office of the Chamber of Deputies from 2002 until 2006, eighteen proposals of constitutional laws have been filed while only three of them have been accepted; two concerning the change of borders with Austria and Germany and one concerning the referendum on the accession of the Czech Republic to the European Union.[13] During the term of office of the Chamber of Deputies from 2006 until 2009, 11 proposals of the constitutional amendments have been filed while none of them has been accepted.[14] This reflects a stability of the Constitution, which is positive. It can be concluded that if it is possible to achieve a certain objective by a statute, it is necessary to do it in this way and not by extending the Constitution. It can be compared to a situation when someone climbs up to the fifth floor while the door is open with the functioning stairs behind it which he or she could use to get to the fifth floor more easily. If we make another comparison with Slovakia concerning the Public Defender of Rights (Ombudsman), whose position is even regulated together with the Prosecution in Slovakia in the common Chapter 8 of the Constitution, we can see that there is no difference in the content of competence between

[9] Art. 130 para. 1 let e) of the Constitution of the Slovak Republic.

[10] The Constitution of the Bohemia, Moravia and Silesia has 115 articles. The Constitution of the Republic of Portugal of 2nd April 1976 has 298 articles.

[11] Sec. 121 para. 1 of the Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies.

[12] Filip, J.: *Vybrané kapitoly ke studiu Ústavního práva* (Selected chapters. Study of the Constitutional Law). 2nd ed., Brno, 2001, 283.

[13] Prints of the Chamber of Deputies 4th term of office Nos 20, 50, 81, 90, 95, 115, 172, 192, 208, 249, 349, 485, 513, 609, 914, 937, 980, 1130, prints Nos 50, 249, 609 have been accepted.

[14] Prints of the Chamber of Deputies 5th term of office Nos 16, 42, 134, 146, 169, 192, 332, 381, 524, 747 and 795. Also constitutional law about referendum to particular questions has not been accepted–Prints of the Chamber of Deputies Nos 147, 477, 490. Only the constitutional law No. 195/2009 Coll. about shortening of 5th term of office of the Chamber of Deputies has been accepted.

the Slovak Ombudsman, whose position is regulated by the Constitution, and the Ombudsman in the Czech Republic (Bohemia, Moravia and Silesia), whose position is regulated by a statute only. No constitutional amendments are necessary for changes in the position of the Public Prosecutor's Office. The present Constitution allows to establish the Public Prosecutor's Office which is identical with the Minister of Justice as in Poland, but also to establish the Public Prosecutor's Office which is independent of the Government to a great extend as in Slovakia.

Concerning the extend of the constitutional regulation, all constitutions are generally very brief and usually, in contrast to the Czech Constitution, contain provisions on the appointment of the Prosecutor General into office while the appointment of other Public Prosecutors as well as other organizational issues are left to be regulated by statutes.[15] This is the case of the Slovak Constitution which regulates the Public Prosecution together with the Ombudsperson in Chapter 8,[16] but there are only three articles not subdivided into paragraphs which actually deal with the Prosecution. The text of the one article of the Czech Constitution which deals with the Public Prosecutor's Office, which is however subdivided into two paragraphs, is not much shorter. Moreover, the Slovak regulation actually contains only a provision on the appointment of the Prosecutor General by the President. As regards the content of the constitutional regulation, the Slovak Constitution regulates, if something at all, only a small part of the personal administration concerning the appointment of the chief of the Public Prosecution. Concerning the budgetary administration, constitutions do not regulate this issue.

Budgetary Administration

Money makes the world go round but it is not polite to talk about it on solemn occasions. From this point of view, it does not come as a surprise that the constitutions which regulate the basics of the functioning of the State do not mention money very often, with the exception of the state budget procedure. Only a minority of constitutions contains more detailed provisions dealing with financing of the State. Above all, they regulate the relationship between the State and local self-administrative units.[17] Constitutions do not regulate the budgetary administration of the Public Prosecution; its regulation is left to statutes. The Public Prosecution as a system of state organs always draws its resources from the state budget which is passed by the Parliament. It is crucial whether the Prosecution has a separate chapter of the state budget or whether it is included in the chapter of the Ministry of Justice. Whatever the personal administration of the Prosecution is, the budgetary autonomy strengthens the position of the Public Prosecution in all models and its absence weakens it on the contrary.

[15] A sole exception is the Art. 51 Sec. 2 of the Constitution of the Republic of Hungary of 1949 which even establishes the supervision of the Public Prosecutor's Office over the service of a sentence on the constitutional level. See Klokočka, V.–Wagnerová, E.: *ibid.* 168.

[16] Moreover, since the Chapter 8 of the Constitution of Slovak Republic No. 460/1992 Coll. came into force until the establishment of the Public Defender of Rights by the Constitutional Act No. 90/2001 Coll., the whole chapter dealt solely with the Prosecution.

[17] Chapter 10 of the Organic Law of the Federal Republic of Germany of 23 May 1949 which, compared to a standard constitutional regulation, regulates the public finances in great detail, is an exception in this regard. In: Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské unie* (Constitutions of the EU Member States). 1st ed., Praha, 1997, 273–279.

A separate chapter of the state budget for the Public Prosecution allows for a better satisfaction of the needs of the system with regard to a deeper understanding of its problems and prevents the transferring of the saved money outside the system. It actually removes the well-known pressure on spending everything as the savings would otherwise be transferred to satisfy other needs than those of the Public Prosecution. Moreover, a separate chapter of the state budget for the Public Prosecution fulfills the principle of subsidiarity preferred by the European Union[18] which provides that the public authority including the administration shall, if possible, be performed on the level which is concerned. This is usually presented within the framework of local administration[19] but the principle can be applied to the public administration as a whole including the administration of individual government departments.

As the proverb says, let every man praise the bridge he goes over. It is possible that the Public Prosecutor's Office will tend to be more open to the views of the Minister who decides over financing of its needs. This is one of the reasons why it is preferable to introduce an autonomous budgetary administration of the Public Prosecutor's Office through a separate chapter of the state budget. However, administrative autonomy is connected with responsibility for the entrusted financial resources. In that case, the Public Prosecutor's Office would have to perform all the duties of an administrator of a chapter of the state budget and its management would be controlled like the management of other state organs who are administrators of chapters of the state budget, including the supervision of the Supreme Audit Office. The Public Prosecutor's Office would also have to defend its requirements against both the Minister of Finance and the Government when the state budget is being drafted as well as during the subsequent budget procedure in the Parliament. Currently, the Constitutional Court is the only judicial organ which has a separate chapter of the state budget although the number of employees of the Constitutional Court is by far smaller than the number of employees of the system of the Public Prosecutor's Office. The Office of the Public Defender of Rights or the Office for the Protection of Competition, which are also much smaller, have separate budgetary chapters as well because the importance of a certain budgetary autonomy is accented in these areas, too.

When introducing the budgetary autonomy it is either possible to establish a single chapter of the state budget under the administration of the Supreme Prosecutor's Office or to establish three chapters with a separate chapter for the Supreme Prosecutor's Office and two other chapters for the High Prosecutor's Offices, a part of which would be the budgetary

[18] Art. 3b of the Treaty on European Union and Protocol on the Application of the Principles of Subsidiarity and Proportionality as amended by the Treaty of Lisbon. See Novotná, M.: Princip subsidiarity v právu Evropských společenství (Principle of Subsidiarity in the EC Law). *Právník*, (1995) 3. and Marcou, G.: New Tendencies of Local Government Development in Europe. In: Bennett, R. J.: *Local Government in the New Europe*. London, 1993.

[19] Art. 4 para. 3 of the European Charter of Local Self-Government No. 181/1999 Coll. determines that the administration of public affairs shall be above all entrusted to the administrative bodies which are closest to the citizens while admitting the responsibility of other subject has to correspond with the scope and character of the task as well as with the requirements of effectiveness and economic efficiency. Slovakia has made a reservation to provide for a non-biding effect of this article because of the strong Hungarian minority in the south of Slovakia. See Kadečka, S.: Svobodná normotvorba obcí 1 (Free legislation of the local communities). *Moderní obec,* (2000) 9, 35. and Kadečka, S.: *Právo obcí a krajů v České republice* (Law of the municipals and districts in the Czech Republic). Praha, 2003, 8–9.

administration of the subordinated Regional and District Prosecutor's Offices. There is a historical analogy as there was a separate administration of the Supreme Prosecutor's Office and the High Land Prosecutor's Offices (one for Bohemia and one for Moravia and Silesia), to which the Regional Prosecutor's Office was subordinated, during the monarchy and Czechoslovakia although the Supreme and High Provincial Prosecutor's Offices did not have separate chapters of the state budget as they were–independently on one another–connected to the budget of the Ministry of Justice. This was repeated, already with separate chapters of the state budget, in the period from 1969 until 1992 when there was a separate administration of the General Prosecutions of the Republics and their subordinated Public Prosecutions which existed in parallel with the Prosecution General of Czechoslovakia.

Personal Administration

A majority of constitutions do not deal with the appointment of lower-level Public Prosecutors and leave this issue to be regulated by ordinary statutes. Prosecutors are appointed to their functions either by the Minister of Justice or by the Prosecutor General. As regards the Prosecutor General, constitutions often contain regulation of his appointment to function. He or she is usually appointed by the Head of State on the proposal of the relevant body. Appointment of the Prosecutor General by the Head of State corresponds to the appointment of other chiefs of supreme bodies in the European countries.[20] Such bodies are usually the Government (the Prime Minister), the Parliament or other body. Even though the subject that makes the proposal differs, the rule for appointing the Prosecutor General provides that an agreement of two subjects is required which ensures greater agreement on the appointment of a particular person. Because the process of removing from office is analogical to the process of appointing, unless it is provided for otherwise, it also ensures greater independence of the appointed person on the appointer as an agreement of a minimum of two subjects is required also with regard to dismissal.

As regards the Czech regulation, a change in the appointment of the Supreme Prosecutor is possible. Currently, the Supreme Prosecutor is appointed by the Government on the proposal of the Minister of Justice.[21] Although these are two subjects as well, they are politically close. A possible change could provide for the appointment of the Supreme Prosecutor by the President on the proposal of the Government. The appointment would be subject to countersignature by the Prime Minister.[22] It is clear, even without an explicit regulation, that the proposal within the Government would be made by the Minister of Justice as a chief of the representing–even though not the governing–department of justice. It is unusual for the Czech statutes to provide explicitly that if the government has a certain right to make proposals, it has to do so on the basis of a proposal of a particular Minister. It is a custom that the suggestion regarding the Government's proposal is made by the Minister

[20] The Hungarian Prosecutor General, who is appointed by the National Assembly on the proposal of the President, is an exception. Art. 52 Section 1 of the Constitution of the Republic of Hungary of 1949 which even provides for a supervision of the Prosecutor's Office over the service of a sentence on the constitutional level. Klokočka, V.–Wagnerová, E.: *Ústavy států Evropské unie* (Constitutions of the EU Member States). 2nd ed., Praha, 2005, 168.

[21] Sec. 9 of the Public Prosecutor's Office Act, No. 283/1993 Coll.

[22] Art. 63 paras 2 and 3 of the Constitution of Bohemia, Moravia and Silesia.

of the department which is concerned, however, it is not explicitly regulated in the statutes.[23] When the law provides that the decision of the President of the Czech Republic is conditioned by the proposal of the Government, there is no provision regarding the Government being bound by the proposal of a particular Minister.

Of course it is possible to involve the Chamber of Deputies into the system of appointing as well. However, the experience shows that the appointment to positions which are appointed by the Chamber of Deputies become subject to bargaining between political parties and a part of a political trade-off. So we will elect you the Supreme Prosecutor if you elect our candidates into the Czech Television Council etc. Moreover, the experience has already shown that the Chamber of Deputies is sometimes not able to elect the successor, as in the case of the President and the Vice-President of the Supreme Audit Office.[24] However, even if the Chamber of Deputies was involved in the appointment process, the Government cannot be excluded from it, even though it is only in the position of a proposer, because the Public Prosecutor's Office is subsumed under the Government within the framework of the executive power in the Czech Republic. It is also not possible, under the current model of personal and budgetary administration of the Public Prosecutor's Office by the Ministry of Justice, that the Minister of Justice would not have an opportunity to at least express his or her opinion regarding the appointment of the Supreme Prosecutor. From a long-term perspective, the mutual permanent conflictual relationship between the Minister of Justice and the Supreme Prosecutor, as it was between the Minister Pavel Němec and the Supreme Prosecutor Marie Benešová in the period from 2004 to 2005, is not sustainable. Such a conflict does not lead to a good administration of the Public Prosecutor's Office. The most suitable solution within the framework of the present constitutional regulation is to make a change in the personal administration of the Public Prosecutor's Office so that the Supreme Prosecutor is appointed by the President of the Czech Republic on the proposal of the Government. Two subjects should also be involved into the appointment procedure of other chief Prosecutors. Preferably, they should be from the Public Prosecutor's Office, i.e. the District Prosecutor would be appointed on the proposal of the Regional Prosecutor. The Regional Prosecutor would be appointed by the Supreme Prosecutor on the proposal of the High Prosecutor and the High Prosecutor would be appointed by the Supreme Prosecutor with the consent of the Minister of Justice or by the President of the Czech Republic with the countersignature of the Prime Minister on the proposal of the Supreme Prosecutor. The President of the Czech Republic appoints not only the Presidents of the Supreme Court and the Supreme Administrative Court but also the Presidents of the High Courts[25] (in Prague for Bohemia and in Olomouc for Moravia and Silesia).

[23] For example the President appoints the Chief of the General Staff on the proposal of the Government without being explicitly provided, that it is the Minister of Defense, who initiates the proposal in the government; it is a legal custom. Sec. 7 para. 4 of the Armed Forces Act No. 219/1999 Sb.

[24] The President, Lubor Voleník, died on 19 June 2003 and his successor, František Dohnal, was appointed by the President only on 4 November 2005 on the proposal of the Chamber of Deputies of 26 October 2005. The Vice-president, Dušan Tešnar, resigned on 10 September 2007 while the Chamber of Deputies elected the candidate on his position, Miloslav Kala, only on 30 October 2008 and he was appointed by President of the Republic on 13 November 2008.

[25] Art. 62 let f) of the Constitution of Bohemia, Moravia and Silesia. Sec. 13 para. 2 of the Administrative Justice Code No. 150/2002 Coll. Sec. 103 para. 1 of the Courts of Justice and Judges Act No. 6/2002 Coll.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 3, pp. 231–244 (2010)
DOI: 10.1556/AJur.51.2010.3.6

MÁRIA BORDÁS*

The Efficiency of State Property Management and Public Money Utilization[1]

Introduction

In past decades the question of efficiency has been a central issue in public law literature. The current public policy rhetoric also greatly emphasizes the importance of an efficient state and of efficient public administration. But do we actually know what expectations efficiency makes towards organizations in the public sphere?

Efficiency, as an abstract concept, is of American roots and carries various meanings. Business enterprises are usually considered efficient when they manage to achieve the largest output with the smallest input, then being the most profitable. In public administration efficiency is not defined in terms of profitability, but of accomplishing the goals set.

American literature considers public administration as efficient when it manages to drain the least resources from economy, which is a fundamental condition for market mechanisms to be implemented to their fullest. The American approach deeply believes in the omnipotence of the market and thus sees a close correlation between market institutions and economic efficiency.

Beyond the realization of market mechanisms, however, the influence of public administration exerts on economic processes through economic policy, competition supervision, regulations, etc. is neither ancillary. Even in the most liberal economies, the state tends to extensively interfere into economic processes to avert market failure. Yet, in return, the state also has to live up to wide ranging efficiency expectations, such as expert government, a high standard of legal regulations, the application of business principles, the managerial approach, the absence of red tape in law application, low administrative burdens, etc.

A question arising with respect to our theme is what relationship is there between the utilization of public money, the management of state property, or collectively termed: administering public wealth and economic efficiency.

There is general consensus in public administration literature regarding the state being justified to intervene in economic processes in order to eliminate market failures. As far as state property is concerned, no such expressed market failures may arise, since the most benefit that maintaining public utility companies and public services in state ownership offers is the provision of better access to public services. Similarly, the utilization of public money is also in the service of an economic cause, namely facilitating that the state, through an efficient utilization of resources drained from the economy, may be able to discharge its responsibilities at the lowest cost while meeting the highest standards.

* Associate Professor, Corvinus University Budapest, Faculty of Public Administration.
E-mail: maria.bordas@t-online.hu

[1] Habilitation lecture held at the Faculty of Law of the University of Pécs on 24 February 2010.

An overview of the current practice of developed market economies clearly demonstrates that there is still no consensus regarding what the optimal ratio of state property is, what regulations ought to govern the management of public money, or in other words which state assets are to be retained in state ownership, and which, along what guidelines and what procedures are to be privatized, furthermore what institutions would be best suited to enforce efficiency requirements when utilizing public money. It is no accident that even European Community Law has no provisions on state ownership, and as regards public money it also tends to rather focus on budget indicators.

1. The History of Administering Public Wealth

In the course of history there have been various reasons for establishing state wealth, and even the guiding principles for administering it have been rather diverse.

In Antiquity and in the Middle Ages no public wealth in its current form existed yet, even though Roman Law did already recognize the Caesar's public wealth, which was, as regards both its legal status and management, clearly distinguished in the treasury from the Caesar's private wealth.

In Europe the separation of the monarch's private wealth from public wealth only ensued at the end of the 18th century. The monarch's wealth was then managed, controlled and supervised by organs distinctly detached from one another and by persons personally designated for the task by the monarch. The legal regulation for administering the monarch's wealth had not yet been created, and neither had the management of its various types, land property, the regalia, and tax based revenues been set apart yet.

1.1. The Issues of State Ownership Efficiency

Ever since the economic system of capitalism evolved, the American and European models have taken different courses of development. In America no state ownership developed, whereas in Europe, the scope of state ownership was continually widened.

On the European continent the state's entrepreneurial wealth, in addition to treasury wealth, evolved in the age of liberal capitalism. In America the state had not run any business enterprises, which even in England could not be considered prevalent.

Liberal capitalism developed a new type of state ownership in Europe as a result of the appearance of infrastructural public services. Early on infrastructural public services, such as postal and telegram services, the railway, due to their high level of capital demand, by all means, needed state subsidies, which on the European Continent finally led to the state operation and the state ownership of public services. Hence, the creation of state property on Continental Europe in the public service sector was closely related to the acknowledgement of the *state's caretaking function.*

In Continental Europe, infrastructural public services were operated in state monopoly, and it was a matter of debate whether public utilities, mostly affixed to some form of public wealth, ought to be state-operated or rather economic activities operated by private enterprises as well. The state, out of economic considerations, e.g. due to mass demand, would sometimes give public services into concession.

The central issue, however, was not yet related to whether state-owned public works or public service concessions were more efficient, but whether the *public service ought to be governed by public law or private law regulations,* and whether *the concession agreement ought to contain public or private law elements.* The broadening of the scope of public

service concessions was, however, a tacit acknowledgement of the conviction that business enterprises operated at higher efficiency.

In England no clear distinction was drawn between public and private law, for it was public corporations, bodies independent of public administration organs that controlled state-owned public services. Certain efficiency requirements could already be traced in the operation of public corporations, since public utilities were consciously withdrawn from the control of the rigid and red-tape dominated public administration, as public utilities were increasingly regarded as self-governing bodies requiring a large degree of independence in reaching their business decisions.

The state in America facilitated the creation of infrastructural public services by subsidizing privately owned public utility companies. Privately owned land was only expropriated to allow the state to grant land to railway construction companies. The US Constitution, rather early on, already at the end of the 19th century, would afford the federal government authority to extensively regulate economic activities with public significance, yet it still did not create a constitutional basis for nationalization, which therefore never became common practice. In America, thus, no state ownership of land, public utilities, and entrepreneurial wealth evolved.

Economic ideology in America has ever since the beginnings been of the viewpoint that state property is *inevitably of low efficiency in both the business and the public sectors.* All this is closely related to the traditions of decentralized US public administration and the American approach averse to centralized governance. Infrastructural public services have since the very beginnings been privately owned business enterprises, which received exclusive rights from the state, and which, due to the public nature of service provision and the absence of market competition were subjected to state *regulation.*

The communist economic system triggered the most drastic changes in state ownership. In the full nationalization of privately owned entrepreneurial wealth, war communism saw an instrument of centralizing assets. Yet, when the forthcoming collapse of the economy resulting from having eliminated market institutions could no longer be denied, the communist economic management was forced to compromise. In order to ensure economic efficiency, it returned small entrepreneurial property to private ownership and created collective ownership in agriculture. In the plan command economy state companies attained a certain level of economic independence through the application of the system of independent accounting.

The economic ideology of communism saw *in the exclusive state ownership of entrepreneurial wealth a chance to create an increasingly productive economic system.* Yet, as it soon became apparent, the profitability of state enterprises was in reality by no means related to their economic performance. Factors, such as planning and political bargain mechanisms were to replace the economic judgment earlier exercised by the market.

Reforms to the communist economic system aimed at a greater economic independence of state companies, which they hoped to achieve *through a looser control exercised by public administration,* in order to, in turn, also increase the company's efficiency.

These reforms turned out to be furthest reaching in Hungary. The 1968 reform created a system of economic regulators, which differently from the plan command system, did not directly determine the economic activity of state companies, but centrally developed an incentive system. The organizational-legal reform of 1984 withdrew the competence of exercising property rights from public administration bodies that controlled state companies, and conferred them onto the self-governing bodies of companies. However, a self-governing body composed of company employees had no ownership interests, nor any managerial

experience or approach. Neither could a state company organized and managed in a unified manner operate as a business enterprise.

Therefore, Hungarian reforms aiming at reforming economic control did not manage to establish an interest-directed system that could have brought about significant changes in economic efficiency, which proved that in the absence of market institutions, e.g. economic associations, market competition, the dominance of private property, the efficient operation of state companies was illusory.

In the first half of the 20th century various categories of public wealth were distinguished in Europe. The state's private wealth, as a private enterprise, was to be responsible for the state's revenue-making activity. Treasury wealth used to be connected to the public responsibilities of infrastructural public services, such as roads, public utilities, networks, or to the activity of state organizations, public buildings and institutions. Assets in public use constituted part of treasury wealth, e.g. natural assets, like rivers, lakes, the seaside, or artificially created assets, like parks and public areas.

At the beginning of the 20th century in each one of the European states a *process of nationalization* commenced, increasing the state's entrepreneurial wealth and state ownership related to public services. The increasing ratio of state wealth was closely related to this process, whereby the state, in order to resolve market difficulties, would intensively interfere with economic processes. Public utility wealth attached to public services was nationalized so as to achieve and maintain tighter state control over public services.

Nationalization would continue following the Second World War, too, especially in the United Kingdom, where the British Labour Party forming the government in 1945 nationalized the majority of industrial and infrastructural public services. As a result of the nationalization the ratio of state property in the public sector grew to over 70 per cent, and in the industry to over 30 per cent. Following the Second World War the application of the Keynesian economic policy became widespread in Western European countries, where *state property was an instrument in the hands of the welfare policy.* At the time, the nationalization of public services served as a safeguard for ensuring access to public services, the scope of which was further extended by welfare institutions.

From the 1980s onwards the neoliberal economic policy would also bring about a significant change in state ownership.

In the US, neoliberalism subjected public services to *market mechanisms,* believing that the removal of the limitations on entering the market as well as market competition would result in a higher efficiency functioning of public services, than public administration regulations had guaranteed them when they were still considered to be natural monopolies. The issue of ownership was not a matter of debate in the US, since infrastructural public services functioned as business enterprises, whereas local public services–such as rubbish collection, the maintenance of public areas–were not linked to assets available for privatization.

In contrast, in the 1980s economic efficiency was not expected to be achieved by market competition in Europe, but by *privatising* state-owned companies. Profit-orientation was believed to lead to more efficient functioning than state ownership had done, since the state must, by its nature, be a poor manager. In the 1980s in most Western European countries the state's entrepreneurial wealth was sold through privatisation. The United Kingdom was at the vanguard of this movement, where privatisation was not constrained by law, and where even the majority of the infrastructural public utility companies changed hands. In most countries on the Continent state ownership was protected by constitutional and legal regulations against the state's privatising ambitions, and privatisation tended to take the form of concession.

Consequently, however, privatization, either through the sale of state wealth, or through granting the right of use, proved to be insufficient to provide a solution to the question of efficiency on its own, as long as *monopoly positions* were maintained. Furthermore, profit-orientation would often lead to higher priced public services, than state ownership had done, for in the latter case the state, for political reasons, had more stake in taking consumer interests into account as well.

Neither did the competition sector's tools modelled for competition supervision prove adequate to resolve the monopoly positions of the public sector, since competition supervision organs, in the absence of market prices, were not fitted to establish, whether the service fee was high or not, and were neither authorized, nor equipped to screen public utility companies.

The state did neither manage to fully enforce the efficient operation of public service companies through concession contracts. Despite the fact that the entitlement to concession is granted through tendering, and concession agreements may ensure the state the rights of pricing and quality control, a concession agreement can only difficultly be adjusted and amended to adapt to changes of the economy.

After about a decade's delay, the European Union did eventually adopt the practice of liberalization common in the USA, and even made a policy statement that public services could not be efficiently performed when provided by state-owned, monopolized public utility companies. Community Law therefore *extended the rules of competition law* to public services, and forbade EU member states to ensure a monopoly status to public service companies. The removal of the limitations on entry to the market and establishing market competition have obliged the owner or user of a public works company or network within a given public service provision branch to allow access to any enterprise joining the market.

Neither in the competition sector, nor in the public service sector does Community Law regulate the ratio of state ownership. Maintaining the state ownership of public utility companies and networks has no relevance, since any one enterprise is eligible to entering the market, and to having access to public service provision. In other words, in the European Union *emphasis has shifted from the choice between public or private ownership to market competition* with a view to achieve efficiency.

1.2. Forms of Public Money Management

In Europe, towards the end of the 19th century, so as to combat corruption, the system of state accounting was established, with detailed legal regulations to govern budget management and supervisory institutions. Lawful and regular operation was then the main guiding principle for utilizing budget resources. Cash-flow oriented accounting supervision was suitable to enforce proper revenue and expense regulations.

It was only in the 1980s, owing to neoliberalism in America that the issue arose of *what efficiency the state could display when performing its functions beyond simply complying with the regulations*, in other words, whether the money incurred for delivering a task was proportionate to the size of the task and what efficiency state organs could perform when discharging their responsibilities.

American neoliberalism, which aimed at draining fewer resources from the economy and to correspondingly reduce budget expenses, developed the system of *New Public Management* which described more efficient methods for discharging state functions, i.e. with lower costs and a larger output. A smaller and cheaper state spending less public money can also be achieved by making the operation of public administration itself more efficient.

This has twofold implications: the more efficient discharge of public administration duties on the one hand, and the more efficient functioning of public administration bodies on the other.

New Public Management finds *business principles* the appropriate means to achieve higher efficiency in performing public functions. Thus, it confers the responsibility of discharging the duties of a public administration body onto business enterprises. These state functions–as opposed to public services–cannot be discharged in a competitive environment, therefore market competition is replaced by tendering, meant to guarantee that the most competitive enterprise win the right of deliverance. The business enterprise performing a thus 'outsourced' state function is expected to enforce a customer-centred approach, and through its profit-orientation to achieve an optimum of expenses.

There are numerous dissenting opinions as regards where the boundaries of the outsourcing of state functions can be drawn, whether only the functional activities complementary to the operation of public administration bodies, or whether also fundamental public functions can be subjected to business principles. Today there are numerous examples of the latter, as well: in many instances business enterprises operate prisons, implement court decisions, carry out food safety management and tax collection.

According to a vision *of developing cooperation between the public and private sectors* certain state responsibilities ought to be discharged jointly by public administration bodies and business enterprises, in the course of which cooperation they could mutually count with the other's advantages. This arrangement has been successfully applied in completing state investments. Public Private Partnership (PPP) investments offer the state access to financial resources, while allow business enterprises access to orders placed by the state. A novel feature of the PPP construction, in comparison to concession, is that the investment is completed jointly by state organs and business enterprises, often in the framework of a business association. The risks of the investment are born by the business enterprise, in exchange for which it is entitled to utilize the facility created by the investment, or may require to be paid a lease by the state.

With respect to outsourcing and PPP investments, it is actually the *contract* concluded by the state and a business enterprise that will determine whether the application of business principles will indeed lead to higher efficiency. Considering that the compulsory content of these contracts–unlike in the case of concession agreements–is not specified by civil law, a lot depends on to what extent state bodies can assert state interests during business negotiations. The danger of corruption is also increased, since state supervisory bodies can only exercise posterior supervision of these contracts, while having to scrutinize business decisions. It is not accidental that the European Union has developed the practice of concluding PPP investment contracts along principles and model contracts, which already offer the state guidance on how to conclude the contract while seeking the most efficient solution. Another EU expectation is that once the contract has been signed an independent court of auditors should supervise its implementation according to well-determined principles, so as to ensure the efficient use of public money.

New Public Management has proposed the direct application of *management principles* even in the operation of public administration bodies to assure a more efficient utilization of public money. Such principles are, for example: a performance and quality oriented budget, the application of democratic leadership methods, providing incentive to public employees and measuring their performance. Public administration responsibilities are now discharged in accordance with the public policy approach in most developed countries. Public policy is in other words the implementation of public administration responsibilities, e.g. economy

development, or combating social problems along managerial principles, taking account of the given political and cultural conditions. *The public policy approach* nevertheless does focus on efficiency, and develops the relevant methods for achieving it, such as determining strategic goals, precisely defining the task, working out alternative solutions, and finally assessing the execution of the decision according to performance and efficiency.

There were no limitations on applying New Public Management in the American public administration system, for it has since the very beginnings applied the principles of company management, has not laid great emphasis on differences between public and private administration, and has not found legal regulations essential for the operation of public administration. The application of a public policy which lays a great emphasis on managerial principles inevitably provides sufficient incentive, even in the absence of legal obligations, to public administration bodies, hence no special legal regulations are needed to be in place.

Contrarily, in public administration systems on the European Continent, where the traditions of centralized and legally regulated public administration have evolved, the application of business principles created a challenge. It was not clear how business principles could be applicable. The values of the Weberian model of public administration tend to lay emphasis on legality and serving the public interest rather than on efficiency. Many find the business approach contrary to Weberian values, since they identify business principles with the profit aspirations of business enterprises.[2]

In the Weberian model public administration is legally overregulated, and the greatest expectation towards public administration bodies is that the norms pertaining to the competences, functions and procedures of the body should be fully complied with. The traditional instruments used by European public administration are controlling, direction, supervision, monitoring, individual decision making, normative direction, which tools, due to legal regulation, have attained a level of extreme sophistication. *The legal regulation of public administration has thus not much in common with efficiency requirements,* apart from wanting to regulate those, too. All this, of course, does not mean that legal regulations would be contrary to efficiency considerations, or that they would make them superfluous. In Western-European states management principles have in many instances been successfully applied in public administration.[3]

Public money can neither be adequately utilized without the most fundamental principles being regulated by the constitution and laws, nor without parliament exercising its supervisory function. New expectations for the efficient utilization of public money have been formulated, too, the enforcement of which can suitably be ensured by legal regulations. Such are *transparency, publicity, and accountability* in the utilization of public money. These requirements can be fulfilled by legal regulations establishing institutions. An independent supervisory body's competences ought also to be extended to the supervision of efficiency. Their traditional supervisory function ought to be transformed into a

[2] Lőrincz, L.: A kormányzás modernizációja (The Modernization of Governance). *Új Magyar Közigazgatás,* (2006) 11, 650–652.

[3] Hajnal, Gy.: Hatékonyság és teljesítmény az Európai Unió országainak közigazgatásában (Efficiency and Performance in the Public Administration of European Union Countries). In: Lőrincz, L. (ed.): *Közigazgatás az Európai Unió tagállamaiban. Összehasonlító közigazgatás* (Public Administration in the Member States of the European Union. Comparative public administration). Budapest, 2006, 469–475.

consultative relationship aiming at cooperation. The outcome of supervision must be publicized and the legal consequences of abuses be determined.

Many people are apprehensive of applying business principles in public administration, partly, because facts have clearly shown that this approach has not anywhere yet resulted in a cheaper state, since the size of public administration has thereby not been reduced. Nor do they find the elaboration of methods which could objectively measure efficiency feasible.[4]

Others would make the discharge of public administration responsibilities cheaper and more efficient by e-government alongside deregulating legal regulations. Nowadays the expenses of the discharge of public administration functions would incur for the national economy are quantifiable, and if they largely exceed the acceptable limit the wastefulness of public administration in spending public money cannot be denied. If, however, public administration bodies were burdened with less red tape, i.e. did not unnecessarily have to issue permissions, supervise processes or keep records, or could do so more simply and more cheaply, through electronic means, the size of public administration could also be reduced.

The efficiency of utilizing public money is also greatly endangered by corruption, which often results in manifold costs incurred by state investments, orders placed by the state, or a loss of wealth through privatization. Surveys conducted by international organizations stress that there is a strong correlation between corruption, the level of an economy's development and the extent of democratic functioning, as well as the strength of the non-governmental sector. The European Union has even laid down rules regarding what kind of an institutional system ought to be established.

2. The Management of State Property, the Efficiency of Public Money Utilization in Hungary

2.1. State Property and Privatization

By the end of the 1980s state and cooperative property had ceased to be of an exclusive nature. In the so-called second economy–in the market of small enterprises–and also within the framework of state companies and cooperative farms, various kinds of enterprises developed, in spite of which development, however, state and cooperative ownership remained prevalent.

The process of privatization started in 1989, when self-governing state companies that had been granted the right of ownership were authorized to decide about their own transformation and privatization. From 1991 onwards privatization was drawn under tight state control, and was implemented by privatization organizations under government direction.

Hungarian privatization is not easy to assess as regards efficiency, since hardly any reliable data and analyses are available. The only figures so far publicized are based on the surveys of the Hungarian Court of Auditors, in accordance with which the loss of state wealth constituted 40%, out of which the loss of value amounted to 10%, and the loss through corruption to 30%.

[4] Lőrincz, L.: A kormányzás modernizációja. *op. cit.* 645–646, and Lőrincz, L.: Közigazgatási reformok: mítoszok és realitás (Public Administration Reforms: Myths and Reality). *Közigazgatási Szemle*, 1 (2007) 2–3, 54–55.

There are counter arguments claiming that the wealth of state companies was not assessable at the beginning of the 1990s for various reasons. On the one hand, the accounting was not carried out in line with market economy requirements, on the other, there was oversupply in the market of communist countries, and furthermore, the loss of wealth would anyhow, regardless of privatization, have taken place owing to unfavorable processes in the world economy. References are also made to the small number of corruption cases that were revealed.[5]

Surveys conducted by the Court of Auditors go against the above claim, purporting that privatization in Hungary was *one of the main areas of state corruption.*

Undeniably no legal remedy could be sought against privatization decisions. In the early stage of spontaneous privatization this was due to the fact that it was the self-governing companies, the practitioners of ownership rights that decided about privatization, whereas, later on ownership rights were conferred onto the State Privatization Agency under government control and later on to the state agency, APV Rt. (APV Shareholding Company).

There was, in fact, no control available by seeking legal remedy against privatization decisions at the time of spontaneous privatization, since self-governing companies, as those entitled to exercise ownership rights decided about privatization, and later on ownership rights were conferred onto the State Privatization Agency and then to the State Privatization and Asset Management Agency, APV Shareholding Company.

Therefore, no external supervisory organs were in place to oversee the operation of privatization organizations. Not the economic rationality, but only the accounting aspects of privatization decisions were at that time subjected to the scrutiny of the State Privatization and Asset Management Agency. Parliamentary committees were, by nature, unsuitable to rule on complex business matters. Additionally, the supervisory committee in the State Privatization and Asset Management Agency, APV Rt. was also constituted of members delegated by political parties.

Hence, it is not surprising that even though from early on privatization processes have been overshadowed by corruption, *only few corruption cases have been publicly disclosed.*

Since the beginnings of the 1990s attempts have been made at *reforming privatization* in order to ensure the property acquisition of Hungarian small and medium sized enterprises. Such attempts included the introduction of 'use privatization', the legal regulation of privatization techniques and economic priorities, or the separation of state wealth retained long term in state ownership, the management of which was entrusted first to AP Rt. (AP Shareholding Company or State Privatization Agency), and then to APV Shareholding Company or the State Privatization and Asset Management Agency). The privatization of the public service sector was then fundamentally implemented in accordance with the Concession Act, which ensured the right of use to those entitled to concession instead of selling state property.

Even despite the reforms executed, no privatization organization, made up of experts, functioning independently of the government was established, which would have been overseen by external supervisory organs, exercising in merit supervision to ensure economic rationality and legality. Thus, privatization was implemented along *political* and not efficiency considerations.

[5] Mihályi, P.: *A magyar privatizáció enciklopédiája 1989–1997* (The Chronicle of Hungarian Privatization: 1989–1997). Budapest, 1988, 397–398.

In some people's opinion it is questionable whether even a mention of the economic efficiency of privatization could be made, since at the beginning of the 1990s most emphasis was laid on establishing the institutions of market economy, and thus privatization had to, by all means, in the shortest possible period of time be performed, even though there was no privatization strategy in place, and state companies were bound to be sold at a loss.[6]

Expectations towards privatization are not easy to distinguish from political considerations and from the issue of economic rationality.

As regards the ratio of wealth remaining in state ownership, in one opinion, the practice of liberal economies, restricting the scope of state ownership to treasury wealth is alien from Hungarian traditions, whereas in another opinion, the state is by nature a poor manager, implying that the entrepreneurial wealth of the state should be privatized. These viewpoints tend to be dependent on party affiliation.

The privatization of the energy sector did not take place through concession at the beginning of the 1990s, but through the sale of public utility wealth to foreign investors.

This seems to prove the assumption that if the state sells its strategically important assets, it will not be in the position to assert the *interests of the national economy* as well as it ought to. Energy prices will become a constant political issue, and although it is hard to decide whether they are low or high compared to world market prices, it is nevertheless a tell-tale sign that despite a European Commission recommendation, in Hungary no independent, elected, financially autonomous price-regulating body, having the authority of in merit supervision, operating according to a transparent and clear procedural system has yet been established. The Hungarian Energy office–which cannot be claimed to be independent of the government, moreover, it is indeed a government agency–has only the right of proposal regarding pricing, actual decisions are made by the Minister of Economy. Earlier pricing issues in the energy sector were decided in the framework of background bargaining between the government and the privatized public utility company, then a confidential matter, although later on stipulated by a government decree.

However, the state did manage to abolish the right of motorway operation, even if only by compensation, when it was not functioning successfully as a public service, and did manage to conclude a new agreement.

The theory of the *state being a poor manager* is also proved by the corruption cases connected to transport companies and the postal services which are even now in state and local government ownership.

The debate on whether state or private ownership is more beneficial with respect to infrastructural public services will soon be history as a result of market liberalization.

Political considerations have clearly replaced the aspects of economic efficiency, when privatization took place in order to increase budget revenues or to assist the wealth acquisition of political circles favoured by the government. If our starting point is that privatization is only justifiable when state wealth is operated better by a business enterprise, we must conclude that the privatization solutions were contrary to these objectives. No reliable figures exist regarding what the ratio of those is who became beneficiaries of privatization due to their political affiliation.

[6] Sárközy, T.: *A korai privatizációtól a késői vagyontörvényig. Az állami tulajdon jogának fejlődése* (From Early Privatization to the Late Asset Act–The development of the Right of State Ownership). Budapest, 2009, 73.

It is clearly a matter of economic policy and not a matter of economic efficiency whether it is foreign or domestic enterprises that ought to be favoured by privatization. One argument is that in the absence of Hungarian entrepreneurs with a strong capital, the involvement of foreign capital and management know-how was greatly needed at the beginning of the 1990s, whereas a counter argument is that this strengthened the tendencies of globalization contrary to the interests of the national economy.

In the course of privatization the requirement of economic efficiency was set against the requirement of *justice.*

One standpoint held that according to the principle of justice everyone should receive an equal share from the state wealth. The principle of justice justified the rejection of voucher privatization as the main type of privatization, claiming that it would split state wealth and could be used for speculation purposes. In its stead, schemes, which offered some kind of discount to individuals and small enterprises purchasing state wealth were introduced.

With respect to re-privatization a conflict of the following three principles: efficiency, justice and constitutionality also arose. According to the standpoint that emphasized efficiency considerations, re-privatization means an outpour of revenues from the budget without adequate performance in exchange, therefore it is economically unreasonable. It was later on proved that the re-privatization of arable land also worsened economic efficiency, since in the absence of capital no operable family-run farms could develop, thus also contributing to the decline of agriculture. The law interpretation by the constitutional court–which could theoretically have overwritten other considerations–could eventually not lead to precise and consistent legal decisions, rather looked for legal solutions suitable for a political compromise.

The Constitution makes a legally assessable statement as regards state ownership, claiming that the scope of exclusive state property is specified by law. Consequently, it is simple majority laws that govern state ownership, which can be amended any time at a government party's or government initiative. Hence, *privatization,* has *no constitutional limitations* beyond the binding limitation dictated by laws.

In the past twenty years the ratio of state wealth has decreased not only as regards the state's entrepreneurial wealth, but also its treasury wealth. At the beginning of the 1990s numerous public services were non-negotiable, such as agricultural land. Earlier on, the Act establishing the Hungarian State Holding Company grouped the majority of assets falling under the National Land Fund's authority among the state's entrepreneurial wealth, thereby making them open to privatization. The scope of strategically important assets was also immensely reduced to its third within twenty years.

2.2. The Management of Public Money and the Efficiency of the Economy

It is common knowledge that in Hungary the state drains many resources from the economy in the form of public burdens, though it is also true that the burdens of the underground economy and of multinational companies are largely compensated by state subsidy. At the same time public administration is huge, red tape dominated and of low efficiency. Instead of implementing efficiency oriented reforms, the methods used for achieving efficiency in public administration have so far only been attempts to abolish certain public administration organizations and to apply *administrative methods*, redundancies and hiring freezes.

The application of managerial principles is still entirely absent in the operation of public administration. Public administration is *legally overregulated,* while legal regulations

fundamentally focus on the operational, competence, and procedural rules of public administration bodies, whereas the requirements of efficiency play no role. Additionally, the administrational culture is also of a low standard.

State functions are also performed at a *low standard* by public administration.

The infrastructural public services still run under the authority of the state, are of poor standard, whereas the public utility companies in state and local government ownership utilize public money in a wasteful manner. In recent years, there have obviously been concrete aspirations to restrict the scope of transport company services, while increasing the fee of these services. Neither has there been a solution found for the efficiency issues of health service financing. Only administrative measures have been taken to reduce the number of beds, to close down hospitals and restrict the scope of services. At the same time, as regards the increase of affixes, sufficient action has been taken to extend them to everyone and to collect them efficiently.

On the basis of all this, however, the image of a state-owned public service model seems to be unfolding combining *neoliberal principles that encourage self-care with a high level of the public burdens of welfare states,* clearly showing that the state can only utilize public money at very low efficiency.

While the state discharges its responsibilities, it extensively applies business principles, but in most cases not successfully.

State investments are known to incur the manifold of the real costs, or are completed in areas that have no justification with respect to economic rationality.

The outsourcing of the professional responsibilities of public administration organs is often abused to utilize public money for private purposes by concluding feigned contracts.

The same purpose is served by using public foundations and public benefit companies to discharge state responsibilities. Financing in these cases is based on individual decisions, and as the investigations of the Hungarian State Audit Office have established, often no in-merit performance is delivered in exchange.

Frequently the environment in which development resources are utilized does neither enhance efficiency. Regions with an elected body, equipped with political and decision making authority, determined in accordance with Community Law cannot be created due to the two-thirds majority legislation requirement. In their place centrally directed development councils are in operation, having no real authority. Although no reliable data are available, there is a high level of likelihood that instead of efficiency requirements party political considerations matter most in utilizing development resources.

There are several reasons, why public money is spent at such low efficiency.

- A decisive factor is probably the standard of legal regulations. There is no unified legal regulation in place for involving business enterprises in discharging state responsibilities.

The Concession Act provides for the rules, concession tenders and the conclusion of concession contracts in a detailed manner. The public procurement act, although it is also thoroughly detailed, contains numerous and substantial legal gaps, making it possible for a pre-selected applicant to become the winner, or simply to avoid the public procurement procedure. Legal regulations for most of the recently completed PPP investments, and for outsourcing public administration responsibilities are totally missing, or to be more precise it is provisions of the civil code governing the conclusion of contracts in general that are in place.

The presence of legal regulations itself does not directly imply that there ought to be a close connection between legal regulations with detailed stipulations for guaranteeing an efficient utilization of public money, since *even the most sophisticated statutory provisions can be evaded, if the legal environment and culture has a long standing tradition of not respecting laws, but rather evading them.*

- According to international surveys, the extent of state corruption in Hungary already constitutes a serious obstacle to economic growth. Its main areas are privatization, orders placed by the state and development resources. Corruption typically takes place in the highest levels of politics and of public administration, within the framework of confidential relationships. This is largely facilitated by the political spoils system which increasingly penetrates the public administration personnel, thus the acquisition of public administration positions is a means of deepening contacts based upon corruption.

Corruption based on confidential relationships is hard to uncover, since the methods of leaving the person who discloses the corruption case unpunished, or disclosing the case with an anonymous report cannot be applied here. Therefore most probably the cases that have so far been revealed might well just be the tip of the iceberg.

The political elite has apparently no interest in creating a system of anti-corruption institutions and has not even established one yet.

- The requirement of accountability has neither been set.

The State Audit Office has not only been delegated the power of legality supervision by the Constitution, but the requirements of 'justifiability, necessity, expedience and efficiency' are also listed among efficiency considerations. Even though the State Audit Office fully complies with its duties, its publicized reports also submitted to Parliament are left *without any legal or factual consequence.* Deciding whether state investments incurring the manifold of the real costs, or PPP contracts containing detrimental conditions for the state are actually the outcome of unprofessional performance or of corruption does not fall under the purview of the State Audit Office, but rather under courts' jurisdiction in criminal proceedings. Yet only in one instance so far has a State Audit Office report resulted in initiating a criminal lawsuit.

Accountability is rendered difficult by laws, such as the glass pocket act, which yet again does not attach any legal consequence to wealth declarations not in harmony with lawful incomes. Neither do party financing regulations clearly define costs incurable for election campaigns, making it impossible for the State Audit Office to compare campaign costs with money allocated from the budget.

Apart from the State Audit Office there is no other organ responsible for supervising public money which could be regarded *independent.* It is not accidental that the Government Supervisory Office has so far not been able to detect an abuse to be disclosed in the operation of government organs. The Parliament's ad hoc committees, as regards their organizations and composition, are not suitable for this purpose either. The same applies to the institution of the state secretary for public money management as well.

The judicial system, too, ought to play an important role in sanctioning abuses of public money utilization. Facts, however, show that the *judicial system is not up to meeting this requirement.* State corruption cases often last even ten years long with the eventual judgments totally defying the sense of justice. Often is the charge dropped despite obvious evidence, or no criminal proceeding is initiated in cases publicized by the State Audit Office

and the media, even though the judicial bodies are ex officio obliged to launch these proceedings. In state corruption cases, judicial bodies no longer examine entanglements of leading politicians and senior public administration officials, not even when there is sufficient evidence, or when they nevertheless do, there is a strong likelihood of political revenge.

In summary it can be stated that:

- In the public service sector the significance of the management of state property has largely decreased as a result of liberalization processes. The debate regarding whether state or private ownership was more efficient has lost its significance, since market competition seems to solve the question of efficiency.
- The American approach, New Public Management, has worked out the most varied methods for utilizing public money. Applying managerial principles has never been alien to American public administration based on business principles. In the Weberian model in Europe–despite the diverse traditions of public administration– the business approach is in many respects realizable.
- In Hungary, it is strongly debatable whether efficiency requirements were indeed considered and met during the privatization of the state wealth, or else in what way they should have been. There is no constitutional limitation on the privatization of state wealth, therefore, the scope of state wealth has been drastically reduced.
- No institutional system ensuring the efficient utilization of public money has yet been established. Consequently, business principles have not been successfully applied, and state corruption has gained ground. Public administration is overregulated and managerial principles are totally absent.

INSTRUCTIONS FOR AUTHORS

Acta Juridica Hungarica publishes original research papers, review articles, book reviews and announcements in the field of legal sciences. Papers are accepted on the understanding that they have not been published or submitted for publication elsewhere in English, French, German or Spanish. The Editors will consider for publication manuscripts by contributors from any state. All articles will be subjected to a review procedure. A copy of the Publishing Agreement will be sent to authors of papers accepted for publication. Manuscripts will be proceeded only after receiving the signed copy of the agreement.

Authors are requested to submit manuscripts to the Editor as an attachment by e-mail in MS Word file to lamm@jog.mta.hu. A printout must also be sent to *Prof. Vanda Lamm,* Editorial Office of Acta Juridica Hungarica, Országház u. 30, P.O. Box 25, H–1250 Budapest, Hungary.

Manuscripts should normally range from 4,000 to 10,000 words. A 200-word *abstract* and 5–6 *keywords* should be supplied. A submission of less than 4,000 words may be considered for the *Kaleidoscope* section.

Manuscripts should be written in clear, concise, and grammatically correct English. The printout should be typed double-spaced on one side of the paper, with wide margins. The order should be as follows: author, title, abstract, keywords. Authors should submit their current affiliation(s) and the mailing address, e-mail address and fax number must also be given in a footnote.

Authors are responsible for the accuracy of their citations.

Footnotes should be consecutively numbered and should appear at the bottom of the page.

References to books should include the facts of publication (city and date). References to articles appearing in journals should include the volume number of the journal, the year of publication (in parentheses), and the page numbers of the article; the names of journals should be italicized and spelled out in full. Subsequent references to books, articles may be shortened, as illustrated below (*Ibid.;* Smith: *op. cit.* 18–23; or Smith: Civil Law... *op. cit.* 34–42). When citing a non-English source, please cite the original title (or a transcribed version, if the language does not use the Roman alphabet) and a translation in brackets.

Tables should have a title and should be self-explanatory. They should be mentioned in the text, numbered consecutively with Arabic numerals.

New subject collections available

2010

Akadémiai Kiadó is offering new, minor and more adaptable collections in Arts & Antiques, Health Science, Hungary & Beyond, HiCited, Linguistics & Literature, and Social Studies with significant pricing discounts. Subscribers of any collection can pick an additional title from the Plus collection for free; its fee is included in the price of the subscribed pack.

Akadémiai Journals Collection ■ **Social Studies**

Acta Juridica Hungarica
Acta Oeconomica
European Journal of Mental Health
Journal of Evolutionary Psychology
Learning & Perception
Society and Economy

Akadémiai Journals Collection ■ **Plus**

Acta Geodaetica et Geophysica Hungarica
Central European Geology
Nanopages
Pollack Periodica
Studia Scientiarum Mathematicarum Hungarica

Additional details about the prices and conditions can be found at www.akademiaikiado.hu/collections

AKADÉMIAI KIADÓ

VANDA LAMM, editor-in-chief
Corresponding member of the Hungarian Academy of Sciences
Professor of International Law Széchenyi István University (Győr)
Director, Institute for Legal Studies, HAS
Member and Vice-President Institut de Droit International
Research fields: public international law, nuclear law

Our online journals are available at our MetaPress-hosted website: www.akademiai.com. As an added benefit to subscribers, you can now access the electronic version of every printed article along with exciting enhancements that include:

- Subscription
- Free trials to many publications
- Pay-per-view purchasing of individual articles
- Enhanced search capabilities such as full-text and abstract searching
- ActiveSearch (resubmits specified searches and delivers notifications when relevant articles are found)
- E-mail alerting of new issues by title or subject
- Custom links to your favourite titles

ISSN 1216-2574

2010

WWW.AKADEMIAI.COM

constitutional law ■ administrative law ■ human rights ■ legal philosophy ■ European law ■ civil law ■ penal law, public and private international law ■ labour law

Volume 51 ▪ Number 4 ▪ December 2010

Editor-in-Chief ▪ VANDA LAMM

FOUNDED IN 1959

Acta Juridica Hungarica

Hungarian Journal of Legal Studies

WWW.AKADEMIAI.COM

1828

AKADÉMIAI KIADÓ

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Acta Juridica Hungarica publishes original papers on legal sciences with special emphasis on Hungarian jurisprudence, legislation and legal literature. The journal accepts articles from every field of legal sciences. The editors encourage contributions from outside Hungary, with the aim of covering legal sciences in the whole of Central and Eastern Europe. The articles should be written in English.

■

Abstracted/indexed in

Information Technology and the Law, International Bibliographies IBZ and IBR, Worldwide Political Science Abstracts, SCOPUS.

■

Manuscripts and editorial correspondence should be addressed to

ACTA JURIDICA HUNGARICA
P.O. Box 25, H-1250 Budapest, Hungary
Phone: (+36 1) 355 7384
Fax: (+36 1) 375 7858

■

Subscription price

for Volume 51 (2010) in 4 issues EUR 304+ VAT (for North America: USD 424) including online access and normal postage; airmail delivery EUR 20 (USD 28).

■

Publisher and distributor

AKADÉMIAI KIADÓ
Scientific, Technical, Medical Business Unit
P.O. Box 245, H-1519 Budapest, Hungary
Phone: (+36 1) 464 8222
Fax: (+36 1) 464 8221
E-mail: journals@akkrt.hu
www.akademiai.com; www.akademiaikiado.hu

■

ISSN 1216-2574

AJur 51 (2010) 4

Printed in Hungary

Acta Juridica Hungarica

HUNGARIAN JOURNAL OF LEGAL STUDIES

Volume 51, Number 4, December 2010

AKADÉMIAI KIADÓ
MEMBER OF WOLTERS KLUWER GROUP

Published by the financial support of the
Committee on Publishing Scientific Books and Periodicals,
Hungarian Academy of Sciences

Cover design: xfer grafikai műhely

CONTENTS

STUDIES

BOOK REVIEW

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 4, pp. 245–252 (2010)
DOI: 10.1556/AJur.51.2010.4.1

HANS-JOACHIM HEINTZE*

Limits of the Freedom of Speech: Propaganda Advocating Racism and Hatred Clear Obligations of European States

Abstract. The prohibition of "advocacy of national, racial or religious hatred" by modern international law demonstrates more than any other provision concerning mass media a response effected by the horrors of National Socialism. It is primarily conceived of a special duty by States to take preventive measures to enforce the principle of non-discrimination and the right to life. This provision seems nowadays of special importance all over Europe. After the revolutions in former communist countries in the 1990s the democratic governments and movements are searching for new approaches to guarantee individual freedom, peace and social justice. Freedom of expression plays a decisive role in these conditions. People have eagerly embraced this freedom, so long withheld from them, and are using it to express their democratic aspirations. At the same time, this newly won freedom of expression has being misused to disseminate fascism and racial hatred. In the Balkans terrible crimes against humanity were committed. "Ethnic cleansing" was one of the results of this misuse of the freedom of expression. But also in post WW II democracies–like in Germany–one can find books and papers with racist und neo-fascist propaganda, sometime distributed by international networks. The attempt of the German government to prohibit the right-wing "National Party of Germany" (NPD) shows that the politics try to undertake some action against neo-fascist activities and propaganda. This paper examines the legal basis for international prohibitions against media content advocating war, racism and fascism and shows the ways in which democratic countries have handled (or failed to handle) this thorny issue.

Keywords: civil law notary, notary public, civil law codification, Civil Code, civil procedure law, register, payment order, non-litigious proceeding, deed

The international legal standard

The United Nations Charter prohibits the threat or use of force and establishes universal respect for and observance of human rights. These principles have their application in the field of communication in three binding instruments of international law that prohibit warmongering, racist and genocidal media content. The 1948 Convention of the Prevention and Punishment of the Crime of Genocide makes punishable direct and public incitement to commit genocide. The 1966 International Covenant on Civil and Political Rights prohibits propaganda and advocacy of national, racial or religious hatred. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination makes punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race. At the European level also the European Convention on Human Rights is of relevance if media as used to infringe human rights. If mass media incite racial discrimination then they violate Article 17 of the convention which prohibits any activity aimed at the destruction of any of the rights set forth in the convention. Even if an international agreement does not contain an express obligation of member States to enact legislation, it is implicit in all human rights

* Scientific Researcher, Dr. habil., Institute for International Law of Peace and Armed Conflict, Ruhr-University Bochum, D-44801 Bochum, Universitätsstraße 150.
E-mail: Hans-Joachim.Heintze@rub.de

conventions that the States internal legal order must secure the rights expressed in those international law agreements.

Who is included under these prohibitions? *States themselves, including* ***state-controlled or state-financed*** *mass media* (for example, government broadcasting stations) are forbidden from disseminating war or racial propaganda. *Private media* are also included in this ban. The argument heard often is that international law does not apply to private media firms. However, Article 26 of the 1969 Vienna Convention on the Law of Treaties emphasizes that states have general obligations in the sphere of international law which they cannot evade by pointing to domestic laws. The manner in which international law is enforced on private media is a matter of a state's sovereign decision-making; the point is that these measures must be promulgated. Private media must comply with the laws of the state in which they operate. If international law prohibits propaganda for racism, the state has an obligation to regulate the private media in this regard.

It is a well-accepted rule of international law that the only barriers to private dissemination of information across borders which States are responsible for ensuring under international law is the prohibition on incitement of violence against foreign States, genocide, and racist propaganda.

Prohibition of hatred propaganda versus freedom of opinion?

In the 1940s, these prohibitions were objects of considerable international debate. States party to the 1948 Genocide Convention had no reservations about making direct and public incitement to commit genocide punishable by law. But during the drafting of the 1948 Universal Declaration of Human Rights (UDHR), most delegates supported the US "free flow" position, that all ideas, regardless of their content, should be freely disseminated. The majority voted against including a clause prohibiting propaganda for racial hatred in Article 19 of the Universal Declaration of Human Rights. This famous article states:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interferences and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Despite this formulation, we must keep in mind that Article 19 does not guarantee absolute freedom of opinion and expression. All freedoms guaranteed by the UDHR are qualified by Article 29, which declares that freedoms necessarily carry with them a duty toward the community. Article 29 para. 3 asserts explicitly: "These rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations."

In the 1960s, during the drafting of the 1966 International Covenant on Civil and Political Rights (ICCPR), the West once again insisted that the "free flow" doctrine meant that freedom of expression should also guarantee propaganda for racism. Article 19 of the ICCPR restates the UDHR formulation:

> "1. Everyone shall have the right to hold opinions without interference.
> 2. Everyone shall have the right to freedom of **expression-,** this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

But the majority of states agreed that there were certain kinds of information content that should be absolutely forbidden. Article 20 of the ICCPR declares:

> "1. Any propaganda for war shall be prohibited by law.
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

Even Article 19(3) of the ICCPR goes on to qualify the rights to freedom of expression and opinion:

> "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as provided by law and are necessary: (a) for respect of the right or reputations of others: (b) for the protection of national security or of public order, or of public health or morals."

Thus, both the UDHR and the ICCPR demonstrate the incontrovertible link between freedom and responsibility. Freedom of expression goes hand in hand with a ban on certain communication contents. While the UDHR is implicit, the ICCPR is explicit–with one complication. Article 20(2) of the ICCPR implies that a *casual relationship must be established between media advocacy of racial hatred and actual carrying out of violent acts.* This leaves the clause open to varying interpretations since it is not always easy to provide evidence of this causal connection.

Sometimes the connection is unmistakable. Under present international law, German media of the time between 1933 and 1945 could have been punished for incitement to racial hatred. After World War II, the Nuremberg Tribunal tried, convicted and executed Journalist Julius Streicher, editor of the anti-semitic *Der Stürmer* newspaper. He was accused of "crimes against humanity" under the 1945 Charter of the International Military Tribunal. The Nuremberg judges interpreted "crimes against humanity" to include Propaganda and incitement to genocide. Based on a content analysis of articles from *Der Stürmer,* the judges found that causal connection and determined that Streicher had aroused the German people to active persecution of the Jewish people.

Another binding international legal instrument does not have the complicating factor of the ICCPR. The 1965 International Convention of the Elimination of All Forms of Racial Discrimination (Anti-Racism Convention) contains a sweeping ban on dissemination of any racist ideas, with no causal connection demanded. It also categorically outlaws all racist and neo-fascist organisations. In Article 4 of the Anti-Racism Convention, states party

> "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and **undertake to** adopt immediate and positive measures designed to eradicate all incitement to, or arts of, such discrimination and, to this end, *with due regard to the principles embodied in the Universal Declaration of Human Rights and Article 5 of this Convention* [Emphasis added] ... inter alia:
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.
(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

During the drafting of the Anti-Racism Convention, the question arose among the Western delegations: does not freedom of expression guarantee freedom even for the most abhorrent statements of racial hatred? In the end, Article 4 was included only on the condition that the additional "due regard clause" proposed by the US be accepted as well. Scholars summarize the prevailing thinking on this:

> "The format of Article 4, which focuses primarily on protecting persons from racial discrimination, implies that in cases of conflict the balance between competing freedoms should be struck in favour of persons' rights to freedom from racial discrimination."[1]

To conclude, then, these conventions enshrine in binding treaties basic indisputable principles of international law. The ICCPR and the Anti-Racism Convention, binding for more than 160 States, ban any form of racist propaganda. The Genocide Convention forbids direct and public incitement to commit genocide.

The implementation of the obligations differs

These principles enjoy near-universal respect. In today's political environment, no politician or governmental leader would dare to oppose these principles. Yet the actual implementation and the enforcement of these enshrined principles has been irregular at best.

How do the various states parties to these conventions implement the bans in domestic law?

As previously mentioned, most western states opposed these prohibitions in the first place. Even after the conventions were adopted by the UN General Assembly, a variety of adherence patterns has become evident, particularly in regard to "reservations" and "statements of interpretation". In general, international law allows a state to make reservations to a treaty that is to exclude or modify the legal effect of certain provisions of the treaty in their national application in that state. Reservations to treaties must receive the consent of other signatories. In contrast, statements of interpretation–deriving from the principles that contracting states should themselves interpret the convention which they conclude with one another–do not require such consent.

Let us now examine how different countries have enforced, or failed to enforce, the prohibitions against war, racial and genocide Propaganda.

The United States hesitated a very long time to ratify and implement international UN-human rights conventions. For years, the US Senate rejected human rights treaties on the grounds that they diminish basic rights guaranteed under the US Constitution: violate states' rights; promote world government; subject citizens to trial abroad; threaten their form of

[1] Mahalic, D.–Mahalic, J. G.: The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. *Human Rights Quarterly,* 9 (1987) 1, 89.

government, infringe on domestic **jurisdiction-, and** increase international involvement. In 1988 the United States ratified and enacted into national law the Genocide Convention Implementation Act. After that it became illegal under US law for any group or individual to "directly and publicly incite another" to violate the 1948 Genocide Convention.

This is the only international human rights norm with media consequences to be incorporated into US law. There has been endless discussion in the United States about legal limits on the mass media. We sometimes hear views that "there can be no 'free speech' or 'balanced news' unless those who advocate racism and apartheid and, yes, war are also free to speak".[2]

At the centre of the discussion is the question of how to reconcile the law with freedom of opinion and expression. The argument goes that the First Amendment supersedes any international legal restriction, even for such worthy goals as prohibiting racism and war. As a consequence, the American Civil Liberties Union even defends the First Amendment rights of such groups as the Ku Klux Klan, whose views are prohibited from media discourse in scores of countries. Consequently, President Carter signed ICCPR and the Anti-Racism Convention in 1978 and submitted them to the Senate for ratification with many reservations, among them one concerning rights to free speech. During the ratification procedure the Senate declared the following reservation:

> "That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."

Other countries have not been so hesitant. The Federal Republic of Germany (FRG) ratified both conventions without reservation. In contrast, Belgium has ratified and implemented both but has presented statements of interpretation concerning both articles. The United Kingdom is an illustrative example of these tensions between freedom and responsibility. The UK made a reservation to Article 20 of the ICCPR. Nothing in the UK law forbids propaganda for war as such. To this extent, the law falls short of the requirements, as many members of the Human Rights Committee have pointed out during dialogues on the UK's periodic reports. The standard response was always that this propaganda is not a problem in the UK and that any problems which arise might be expected to be dealt with under the law of sedition or the Public Order Act 1986.

Britain made not a reservation but a "statement of interpretation" on Article 4 of the Anti-Racism Convention, namely, that further legislation would only be passed in Great Britain if compatible with other rights – especially the right to freedom of opinion and expression. Why the UK did this is difficult to discern since the statement is in principle merely a repetition of the "due regard clause" of that Article 4 itself. Therefore several members of the Committee on the Elimination of Racial Discrimination (CERD), the organ of the parties to the Anti-Racism Convention, rejected the claim.

The British case in the CERD revealed two things. First, British ratification and implementation of the Anti-Racism Convention did not necessarily mean the United Kingdom had overcome its original opposition to the prohibition of racist propaganda.

[2] *New York Times,* 27 Nov. 1978, A35.

Second, the case made the CERD adopt a clear position concerning the obligations of Article 4.

In 1972, the CERD adopted General Recommendation 1, which determined that a number of states parties had not passed any Legislation in accordance with the provisions of Article 4 of the Anti-Racism Convention. States were called upon to bring their domestic laws in line with the Convention. Already in 1980, after analyzing over 100 states' reports over 16 years, CERD reported that there were still some states parties who had failed to introduce the legislation called for in the Convention. The CERD once again endorsed its General Recommendation 1, pointed to the preventive effect of law in acts of racial discrimination and called on states parties to implement Article 4 in their domestic law.

An analogous experience occurred in the Human Rights Committee, composed of states parties to the ICCPR. When France ratified the Convention, it at first presented a statement of interpretation to Article 20(1), namely that French Legislation was already in accordance with the Covenant in this respect. France later wanted this to be considered a reservation. Non-compliance is as much a problem in the ICCPR as it is in the Anti-Racism Convention, for in 1983, the Human Rights Committee called on states parties to the ICCPR to

> "adopt the necessary legislative measures prohibiting the actions referred to therein ... In the opinion of the Committee, these required prohibitions fully compatible with the right to freedom of expression ... the exercise of which carries with it special duties and responsibilities."

Most states parties have complied with the Anti-Racism Convention, though the route implementation oftentimes has been circuitous. The Latin American states have been particular pace-setters. Ecuador incorporated Article 4 in its penal code almost verbatim and Brazil went so far as to make any incitement to racial prejudice punishable by law. Both Italy and Greece enacted laws in accordance with the prohibition on racist propaganda.

But many western states are lagging behind. Although Canada banned the public dissemination of racist ideas, no legislation was passed to ban private fascist and racist groups. British Legislation made a similar distinction. In Britain, dissemination of racist ideas is permitted as long as it does not incite racial hatred. Though this still contravenes Article 4 of the Anti-Racism Convention, it nevertheless represents some progress. Britain no longer claims that it has submitted a reservation, and has also reported that laws in accord with Article 4 were in the process of revision.

In 1985, the CERD renewed its appeal to the United Kingdom to bring its legislation in line with the Convention's obligations. The CERD criticised the British position in two ways: it said that Article 4 and freedom of opinion do not contradict one another. It also disputed that a state only has a duty to enact Legislation if there are specific problems in race relations. In the end, though, the CERD reported that progress had been made toward implementing Article 4 around the world.

The Anti-Racism Convention also bans organized groups from inciting racial hatred. In this regard subsection (b) of Article 4 qualities subsection (a) to a certain extent. Using this as an excuse, most western countries have pointed to this provision in their attempt to avoid outlawing racist and fascist organisations. For example, in Canada the fascist "Western Guard Party" still operates. Some of its members have been charged with illegal possession of arms and some racist propaganda was seized, but the organisation was never actually banned. Over a number of years this "Party" had used public telephone services to warn "of

the dangers of international finance and Jewry leading the world into wars". The only result was that they were precluded from using the telephone services, in conformity with the express authority in the Canadian Human Right Act. The Human Rights Committee supported this preclusion because the "Party" seeks to disseminate through the telephone system opinions which clearly constitute the advocacy of racial hatred which Canada has an obligation under Article 20 (2) CCPR to prohibit.[3]

Many signatories have openly stated their intention *not* to forbid racist and fascist organisations. The Federal Republic of Germany, for instance, allows the "National Democratic Party of Germany" (NPD), the "National Assembly", and other neo-fascist organisations to operate freely. CERD criticised this non-compliance. Contrary to its obligations under the Anti-Racism Convention, Germany believes that banning the NPD is not a judicial issue but rather a question of political opportunism. The FRG admitted that 34 neo-fascist organisations exist in the country. At the same time it claimed that the neo-Nazi groups have slipped into political oblivion. This position has been accepted by CERD. It needed as long as the year 2001 after many racist attacks all over Germany that the German government decided to apply from the Federal Constitutional Court the prohibition of the NPD. It is the Federal Constitutional Court alone that decides on the unconstitutionality of political parties. Only applications can be made by the Parliament, the Federal Council or the government.

The United Kingdom violates its obligation to the Convention by allowing neo-fascist and extreme right-wing groups to operate freely. At the CERD, the British representative did not deny these groups' existence. He argued that such organisations were tolerated because they did not have a great following and that banning them would contradict freedom of opinion and expression. He did not answer whether such organisations would be banned if they did attract a mass following. The status of British compliance has not changed. Therefore the CERD expressed in 1996 again its concern over the British interpretation of Article 4: "Such an interpretation is not only in conflict with the established view of the Committee, ... but also amounts to a negation of the State Party's obligation ... to outlaw and prohibit organizations which promote and incite racial discrimination" (UN-Doc. CERD/C/304/Add.9).

In general, Western countries find it difficult to comply with the provisions of Article 4(b). Most do not deny that they are violating international law by failing to take judicial or administrative measures to ban racist or neo-fascist organisations. Instead, they ask for understanding regarding their domestic obligations. Clearly, states parties' obligation to Article 4 of the Anti-Racism Convention will remain a central issue in CERD.

On closer scrutiny, though, this argument of the freedom of opinion is faulty. When, for example, Iceland's representative to the Human Rights Committee maintained that prohibiting of racist propaganda would violate freedom of expression, some committee members asked him to justify that country's ban on tobacco and alcohol advertisements. He was not able to give an answer. In like manner, the United Kingdom refused to withdraw its reservations to Article 20(1) of the ICCPR when called upon to do so by the Human Rights Committee. The government maintained that propaganda posed no problem for the United Kingdom and that there was no need to adopt legal measures banning it.

[3] Manfred Nowak, CCPR Commentary, see supra note 1, 367. Nowak, M.: *U.N. Covenant on Civil and Political Rights. CCPR Commentary.* Kehl, 1993; UNO-Pakt über bürgerliche und politische Rechte und Fakultativprotokoll – CCPRKommentar, Kehl-Straßburg-Arlington, 1989.

Also the newly democratic States in Europe like Croatia have some problems with the prohibition of hatred propaganda and racist organizations, especially after civil wars. Therefore the CERD articulated in 1999 concern at incidents of hate-speech directed at the Serb minority in Croat media and the failure of the State party to take adequate measures to investigate and prosecute those responsible for promoting hatred and ethnic tension through print and audio-visual media. The CERD noted also with concern the lack of legal provisions required in order to implement to prohibition of racist organizations, because it is the absence of legislative measures declaring those organizations illegal which promote and incite racial discrimination (UN-Doc. CERD/C/304/Add.5).

Conclusion

There are still some gaps between international law standards and the practice on some States concerning hatred propaganda. But it is very important that we have nowadays a whole body of international law dealing with information and established clear prohibitions. Clearly, the concept of free expression as reflected in the human rights instruments is non-absolute and may be subjected to impairment in certain circumstances. These norms are binding to more than 150 States which belong to the Genocide Convention, the CCPR and to the Anti racism Convention. Some aspects of these conventions represent without any doubt customary international law. This is reflected by regional instruments. The American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Helsinki Accords each codify the right to free speech with specific limitations. However, it is true that one can observe some hesitation on the side of many States to implement all components especially of the UN-conventions in a correct way, because they are convinced that there are other ways to deal with racist propaganda. On the other hand there is an increasing public awareness worldwide and stronger involvement of the civil societies in the States. This gives hope that international law will be implemented in the future in more proper way.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 4, pp. 253–272 (2010)
DOI: 10.1556/AJur.51.2010.4.2

CSABA VARGA*

Taxonomy of Law and Legal Mapping

Patterns and Limits of the Classification of Legal Systems

Abstract. Attempts from the 17th century onward anticipate the 20th-century mood of legal mapping. They classify legal arrangements by languages, races and genetic roots, then by their ideologies and technicalities. Later on they do so by separating the Western from the Soviet/socialist law, by their correspondence to underlying general cultures, as well as according to legal families. It is the insufficiency of resorting to dichotomy contrasting the Western "Us" to any differing Eastern "Others" that has recently resulted in typologising in terms of the dynamism and directions of legal development in the duality of professionalism and traditionalism or in the cross-reference of what is established/stable and unestablished/instable, and of what is drawn from Western and non-Western sources. Material taxonomy cannot be accomplished in law through genuine class-concepts. Characterisation through concepts of order can be achieved at most. In want of any meta-system, cultures formed to idealise and hypostasise ideas of order by independent principles can provide no common basis of division for law. Accordingly, only some division to major and minor sets and subsets can be achieved. The own arrangement will be better cognised by other schemes' understanding. The gradual transcendence of rule-fetishism by identifying law with some specific culture may prevent the coming "clash of civilizations" from reaching aggressive self-assertion and care for the sustainability of the laws' diversity.

Keywords: family resemblences, legal families, civil/common law, Western/Soviet law, characterisation/definition, comparative law theory, comparative judicial mind

1. Preliminaries

Applying a theatrical metaphor characteristic of the Baroque age, it is *Leibniz*' ambition (1667) regarding the early recognition of the need to describe the "theatre of the legal world" that was transmitted to us, informing us that the more humanity's intellectual world broadened throughout history, the more pressingly humanity felt the need to classify its diverse elements. For example, the English *Saint German* perceived the difference between

Roman	English

laws, while also presenting the correlation between their development, as early as in 1531, pointing out that what is *jus naturale* in case of the former recurs as *reason* in the latter.[1]

* Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30; Professor, Director of the Institute for Legal Philosophy of the Catholic University of Hungary, H-1088, Budapest, Szentkirályi u. 28–30.
E-mail: varga@jog.mta.hu

[1] Chr. Saint German: *Dialogus de fundamentis legum Anglie et de conscientia. The Dialoges in English between a Doctor of Diunity, and a Student in the lawes of England.* Londini, 1528. {Plucknett, T. F. T.–Barton, J. L. (eds): *St. Germain's Doctor and Student.* London, 1974}, quoted–remarking that we remember now the moment underlying such development as the need of *reasonable man*–by Chloros, A. G.: Une interprétation de la nature et de la fonction de la philosophie juridique moderne. In: *Archives de Philosophie du Droit III.* Le rôle de la volonté dans le droit. Paris, 1958, 189.

Seventy years later, in 1602 *William Fulbeck* described a legal world rooted in three laws,[2] such as the

Anglo-Saxon	Continental	canon

ones; and a century later, in 1701 Lord *Holt* wrote that "the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things".[3] This reflects Europe's view of itself in the early modern age, which with respect to the worlds beyond the countries on the two sides of the Channel scarcely perceived anything more than the papacy's somewhat comprehensive influence. Yet the above division is typologically correct and valid up to the present day.

Almost two centuries later, in 1880 *Glasson* proposed[4] a tripartite classification derived from *historical origins* again, namely, laws developing

from barbarian customary law (English, Scandinavian, Russian)	from Roman law (Italian, Romanian, Portuguese, Greek, Spanish)	from the former two's amalgamation (French, German, Swiss)

–, a grouping that, not being based primarily on extant and actually prevailing features, has remained worthy of being taught up to our day. In a typologically characteristic manner, *Glasson* perceives, when mapping Europe's inner division, the particularity of the Nordic and the Russian Plateau. Remarkably, the classification also draws the English and the Scandinavian legal systems within a single category while putting the French and the German together, differentiating both from the actual Romanist heritage.

2. Proposals

Drawing up a legal map of the Earth–by classifying the various legal systems according to the lasting features of *family resemblance(s)* expressed by their basic mission, form, structure and mode of operation–would be a task for 20th century comparative law, matured enough to have become a genuine movement by then.

When we look at such attempts from closer quarters, some standing representatives of the laws' variety will be conspicuous from the beginning, placed in the centre as constant members that launch our interest in mapping at all, by defining the typification's entire contexture and final orientation. When the mapping is completed, further members will be attached mostly as additional items, exemplifying the law's diversity, the effect of which is rather to testify to some loose interest in remote countries (by naming their species) than to cognise the world's richness in actual depth and describe it exhaustively.

[2] Fulbeck, W.: *Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of this Realme of England. Parts I–II.* London, 1601–1602. Cf. also <http://en.wikipedia.org/wiki/William_Fulbecke>.

[3] In: *Lane v. Cotton*, 12 Mod. 472, 482 (1701).

[4] Glasson, E.-D. : *Le mariage civil et le divorce dans les principaux pays de l'Europe, précédé d'un aperçu sur les origines du droit civil moderne: Études de législation comparée.* Paris, 1879.

So, in the early 20th century *Esmein* (1905) thought, for instance, that *language* and *species* would constitute the most appropriate basis of the *divisio*[5]–

Romanist (French, Belgian, Italian, Spanish, Portuguese, Romanian, Central & South-American)	Germanic (Scandinavian, Austrian, Hungarian)	Anglo-Saxon (English, American, English-speaking colonies)	Slavic	Muslim

–, which, despite being rather influential for a while as an early attempt, proved to be too sketchy and limited in outlines. However, at the peak of European imperialism or politico-economic expansion, this analysis theoretically encompassed the world through the historical prism of Europe. Interestingly enough, it also involved Arabic culture–having in mind its presence in the Hispanic Peninsula for centuries in the Middle Ages–as a partner on an equal footing.[6] We see here for the first time the Germans separated as a block from the Roman legal tradition, perhaps owing to the clashes with which the German Empire, with the Austro-Hungarian Monarchy in the background, confronted the rest of the world. At least, there can scarcely be any other explanation in that allusion was also made to Hungarian law.

In another attempt at grouping, *Sauser-Hall* (1913) accepted the exclusive criterion of *race* as the principle for classification, in a manner not alien to the dominant spirit of the age[7]–

Aryan, Indo-European • Hindu–Iranian (Persian, Armenian) • Celtic (Celtic, Gallic, Irish, Gaelic) • Greco–Latin (Greek, Roman, Canonic, neo-Swiss) • Germanic • Anglo-Saxon (English, Anglo–American, new Saxon) • Lithuanian-Slavic (Russian, Serbo–Croatian, Slovenian, Czech, Polish, ancient Prussian, Lithuanian, Ruthenian, Slovak, Bulgarian)	Semitic (Amir, Egyptian, Jewish, Arabic-Muslim)	Mongoloid • Chinese (Chinese, Indo-Chinese, Tibetan) • Japanese	barbarian customary (Negro, Melanesian, Indonesian, Australian, Polynesian, American & Hyperborean native)

[5] Esmein, A.: Le droit comparé et l'enseignement du droit comparé. In: *Procès-verbaux des séances et documents I.* [Congrès international du droit comparé tenu à Paris du 31 juillet au 4 août 1900], Paris, 1905, 451 et seq.

[6] Cf., e.g. Brague, R.: *Europe. La voie romaine.* Paris, 1992.

[7] Sauser-Hall, G.: *Fonction et méthode du droit comparé.* Genève, 1913.

–, and his categorisation remains of a revealing force in several respects notwithstanding the fact that it keeps silence about the specific similarities and differences in the legal nature of the arrangements that he grouped so. Nevertheless, he undoubtedly provided a pioneer attempt at describing the known totality of legal regimes in both their historical development and actual diversity on the globe. Actually, he drew a comprehensive picture of the popular force that may have generated known cultures, inserting for the very first time a "closing category" of visibly "mixed" contents in his scheme. He was also pioneering in drawing a broad and overall framework, albeit he too had a start from his own regime (labelled as the historical performance of peoples, to be identified as "Western" in a cultural sense later on). In this endeavour, he may have been guided by a logically inspired "aesthetical" wish that the borders of his own legal regime should not be defined too narrowly in separating it from the rest of the world.

In the interwar period, *Lévy-Ullmann* (1922) was the first to divide laws, acknowledged as civilised, along the lines of their respective *development*[8]–

Continental [written law, with parliaments & codification in the background]	English-speaking [customary law, developing through legal practice]	Muslim [on a religious basis & with an almost absolute immobility]

–with a conciseness that may increase posterity's suspicion that he (like so many before and after him) actually made the only distinction between his home arrangement, accepted in the natural course as serving as a starting point, on the one hand, and everything else separated from the former, on the other. Or, he proceeded as if for him anything else could be nothing but embellishment, decoration or flourish, with the sheer aim of aesthetic completeness. – From the vast three volumes of the historico-comparative tableau *Wigmore* (1928)[9] drew for the American legal profession, one simply cannot ascertain whether or not the author indeed wished to classify or simply alluded to items by exemplification, when in an all-inclusive overview–

Egyptian	Mesopotamian	Hebrew	Chinese	Hindu
Greek	Roman	Japanese	Muslim	Celtic
Slavic (Czech, Polish, Yugoslavian, Russian)		German	marine	
Papal		Romanesque	Anglican	

–he presented the huge variety of past and contemporary legal systems.

[8] Lévy-Ullmann, H.: Observations générales sur les communications relatives au droit privé dans les pays étrangers. In: *Les transformations du droit dans les principaux pays depuis cinquante ans (1869–1919).* [Livre du cinquantenaire de la Société de législation comparée], Paris, 1922, 85–87.

[9] Wigmore, J. H.: *A Panorama of the World's Legal Systems I–III.* Chicago–Saint Paul, 1928.

Finally, *Martínez Paz* (1934) took alleged *genetic roots* (with a quite telling progressive gradation) as the basis for his division[10]–

barbarian customary (English, Swedish, Norwegian)	barbarian-Romanist (German, Italian, Austrian)	barbarian-Romanist-canonic (Spanish, Portuguese)	Romanist-canonic-democratic (Swiss, Latin American, Russian)

–in a European developmental perspective, while any other arrangement remained simply unnamed.

In the historical sequence of classifications, the categorisation of Anglo-Saxon and Nordic developments as members of a single group emerges as a recurrent feature, while the separation of Latinic–German Central Europe from Western Europe proper within the Romanist coverage is a novel recognition.

The series of classifications produced during the half-century following World War II was opened by a magnificent theoretical conspectus, authored by a triad in France. As is well known, the primary aim of *Arminjon, Nolde* and *Wolff* (1950) was to lay the theoretical-methodological foundations of legal comparatism rather than to accomplish any description of the extent of the legal world. Accordingly, these authors excelled in elaborating private law as a group with criteria of categorisation given in a most promising manner. As an unavoidable by-product, however, they disregarded ideals of order (e.g. of the Far East) where any conceptualisation was abhorred. Eventually, they saw the historical evolution of private law in Europe as stemming from, and represented by, seven independent types. All in all, their classification[11]–

French	German	Scandinavian	English	Russian
Islamic		Hindu		

–has (with its separation of the Nordic region[12]) remained an exceptionally mature accomplishment for a long time.

David (1950), whose work in due course became the number one classic of the international comparative law movement, paved a somewhat different road. Although starting, too, with a dedication to civil law, he extended his research interests from the civil law technical instrumentality to entire legal arrangements as unities organised into a system, with various components gaining specific roles. In parallel with the rise of the Iron Curtain between East and West in Europe and the threat of nuclear devastation with the increased sense of danger through the menace of a Third World War, the *ideology* or *philosophical*

[10] Martínez Paz, E.: *Introducción al estudio del derecho civil comparado.* Córdoba, 1934, 154 et seq.

[11] Arminjon, P.–Nolde, B.–Wolff, M.: *Traité de droit comparé I.* Paris, 1950, 49.

[12] "Regarding its origins and development, the Scandinavian law is neither Roman, nor French, nor German." *Ibid.* 50.

worldview underlying the given legal regime became his primary concern for classification, only to be seconded with the *technique of law* in supplementation.[13] His proposition–

Western • French • Anglo–American [based on the moral rules of Christianity, the political & social principles of liberal democracy & the economic order of capitalism]	Soviet [based on the Socialist economy & related political, social & moral principles]	Muslim [on a religious basis]	Hindu [on a specific philosophical basis]	Chinese

–has exerted a long-standing influence through the basic polarisation implied, despite its elementary simplicity in structure. Or, it constituted a plain reflection of the Cold War ideology raging at the time, whose basics were defined by the opposition of the Western European and Atlantic world to the Third Rome, the Muscovite Empire. And again, as already seen elsewhere, the occasional reference to one or two remote cultures from faraway peripheries (which were starting to loom on the horizon) could only serve as sheer complementation. *David*'s subsequent analysis (1961) did in fact alleviate the harshness of this categorical opposition. Following its own path–he admitted–the West might also be inclined to move towards Socialism; moreover, even Africa and Asia (without Christianity in their past) might commit themselves to the same direction.[14] Ironically enough, the deadly menace by the Soviet superpower (accompanied by the West's growing slump into the pragmatism of *realpolitik,* having relinquished Hungary in the dramatic days of 1956) made Soviet ambitions respected worldwide, compelling the West to cowardly submission. Finally, the very cause of Socialism as a method of building a global system could obtain worldwide acknowledgment by granting its own typological locus to itself, while the Soviet terminology renamed its counter-pole, the *"Western"* law, as "bourgeois" one.

It is by no mere chance, therefore, that *Sola Cañizares* (1954) would propose a version resulting in minor corrections while exhibiting extreme simplification[15]–

[13] David, R.: *Traité élémentaire de droit civil comparé. Introduction à l'étude des droits étrangers et à la méthode comparative.* Paris, 1950, 8, 214–226.

[14] "By the way, the nations of the West are to different extents all committed to the road of socialism, moreover, I think they can make much progress on this way without having to renounce belonging to the system of Western law at the same time. After all, a number of non-Christian countries of Africa and Asia could adhere to the system of Western law without adherence to the principles of Christian morality." David, R.: Existe-t-il un droit occidental? In: Nadelmann, K. H.–von Mehren, A. T.–Hazard, J. N. (eds): *XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema.* Leyden, 1961, 59.

[15] de Sola Cañizares, F.: Iniciación al derecho comparado. Barcelona, 1954, quoted by Rodière, R.: *Introduction au droit comparé.* Strasbourg, 1963, 13.

Western [Christian but not authoritative]	Soviet [atheist & collectivist]	religious • derived from religious principles (canonic, Hindu, Muslim) • Chinese [with a pseudo-religious philosophy in which the law is ethically coloured]

–, almost reminiscent of the tripartite vision by *Lévy-Ullmann* during the earlier peace time in 1922.

It is by no mere chance, either, that the Romanist sociologist *Lévy-Bruhl* (1961) would come forward, with an outsider's ambitions, to propose a new theoretical scheme–

Western	Soviet	Theocratic • ancient Jewish • Muslim	feudal	primitive

–, applying his typological model in order to outline a legal sociological panorama with a historical approach in the background.[16] Albeit being otherwise conservative as permeated by respect for traditional values, this typology may astonish us by presenting both the West and the anti-West, i.e. Bolshevism, with equal taxonomic weight, moreover, in a way mixed sublimely with arrangements originated in world religions that had in their time set our civilisational path for millennia. However, assessing the atmosphere of cosmic threats with expectations of a coming cataclysm, such western submissiveness still needs to be explained in terms of social psychology rather than in cool detachment with some apparent objectivity.

Yet, in the meantime the world opened itself up to the Western mind, and theoretically inspired attempts at a philosophical classification emerged. In a classical manner, *Northrop*'s typification (1959)[17]–based on an understanding of the specifically Far Eastern–discerned the following groups:

"intuitive mediational" (Confucian, Buddhist, Taoist, non-Aryan Hindu)	accorded to natural history (classic China, Manu, ancient Indian Aryan conquerors, Islamic law codes, those preceding the Stoic Roman law)	abstract contractual

–, in terms of which, in the Far Eastern arrangement denominated as *intuitive mediational,*

[16] Lévy-Bruhl, H.: *Sociologie du droit.* Paris, 1961, 116.

[17] Northrop, F. S. C.: *The Complexity of Legal and Ethical Experience. Studies in the Methods of Normative Subjects.* Boston, 1959, 184.

> "[t]he procedure [...] is to push legal codes into the background, preferably dispensing with them altogether, and to bring the disputants into a warm give-and-take relationship, usually by way of a mediator, so that previously made demands can be modified gracefully, and a unique solution taking all the exceptional circumstances of the case into account is spontaneously accepted by both disputants. Codes there may be, but they are to be used only as a last resort, and even then recourse to them brings shame upon the disputants. [...] Not only is there no resort to a legal rule; there is also no judge. Even the mediator refuses to give a decision. Instead, the dispute is properly settled when the disputants, using the mediator merely as an emissary, come to mutual agreement in the light of all the existential circumstances, past, present, and future. [...] Not the abstract universals of a legal code, but the existential particularity of the concrete problematic situation [...] is the criterion of the just and the good."[18]

By contrast, in an arrangement developed in accordance with *natural history* in a naive realistic way–

> "Its codes [...] are expressed in the syntactical grammar of the language of common-sense objects and relations [...;] the codes describe the biologically conceived patriarchal or matriarchal familial and tribal kinship norms of the inductively and sensuously given status quo."

–, realistic universals are applied.[19] Finally, in a law according to an *abstract contractual ideal*, there is some

> "technical terminology [...] permitting the construction of legal and social entities and relations [...while...] its identification of the ethical and the socially legal with abstractly and imaginatively constructed [...] human norms and relations [...] makes possible ethical and legal reform." Because "[b]efore this code all men are equal; they are instances of the same universals; their existential particularity is ethically irrelevant." "Thereby [...] a contractually constructed norm cannot be regarded as ethical unless if it holds for any one individual it also holds for any other."[20]

At just about the same time a new upswing occurred also, due to reform initiatives addressed at classical comparative law. *Schnitzer*, as the pioneering first, claimed (1961)[21]–after having revised his earlier suggestion (1945)[22]–that there were five great blocks of civilisation–

[18] *Ibid.* 184–185. As he remarks on 186, all this is akin to the radical empiricism and nominalism of *Dewey, Kierkegaard*, and *Sartre* as well, as "behind this intuitive, mediational type of law in Asia there is a *Confu*cian, Buddhist and pre-Aryan Hindu epistemology which affirms that full, direct and exact empirical knowledge of any individual, relation or event in nature reveals it to be unique".

[19] *Ibid.* 186.

[20] *Ibid.* 188, 188, 189.

[21] Schnitzer, A. F.: *Vergleichende Rechtslehre I.* 2. aufl., Basel, 1961, 133. et seq.

[22] Schnitzer, A. F.: *Vergleichende Rechtslehre.* Basel, 1945, 86 et seq.

primitive peoples	antique cultural peoples (Egypt, Mesopotamia, Hellas, Rome)	European–American • Romanist • Germanic • Slavic • Anglo–American	religious • Jewish • Christian • Islamic	Afro–Asian • Asian • African

–, within which each and every "great cultural circle" [*große Kulturkreise*] could generate a corresponding "*circle of law*" [*Rechtskreis*]. Accordingly, the respective cultures are to be separated historically in a way that encompasses the whole of legal development. Probably only this can explain, why the Nordic region was not differentiated within a Euro–Atlantic civilisation taken as a coherent block.

It is remarkable that the classification by *Zweigert*, published about the same time (1961), concentrating on the present when distinguishing variations in the middle-term of "circles of law",[23] repeated almost word for word the scheme once formulated by *Arminjon, Nolde* and *Wolff* in 1950, while exclusively adding the Far-Eastern variant to it.[24] His division–

Romanist	German	Nordic	Anglo-Saxon	Communist
Eastern (non-Communist)		Islamic	Hindu	

–is not only conclusive but also justified, in as much as he clarifies his pre-suppositions. Avoiding unifactorality (but presuming that differing results will ensue depending on whether public law or private law has been taken into consideration), the *style* of the overall legal system is selected as the basis of classification, which is a compound of its (1) *historical origin* and (2) characteristic *mode of thinking*, as well as of its (3) *legal institutions* (especially in case of developed Western law) and (4) *sources of law,* taken together with their *interpretation* (especially in case of Islamic and Hindu laws), and, finally, also of the (5) *ideological attributes* underlying the ideal of the respective legal order (especially in case of laws with religious background or Socialist roots).[25]

As already remarked once, the *Socialist* (or, in its original inspiration, the *Soviet) law* appeared as a separate type in the work of David, the first author of the Cold War, as early as in 1950, and remained a recurrent component until the fall of the Socialist world system.

Moreover, the term would also be utilised–in addition to instances of over-ideologisation or over-politicisation–through theoretical generalisation. For example, *Kulcsár* (1961)[26] would suggest a dichotomic division from the outset–

[23] Zweigert, K.: Zur Lehre von den Rechtskreisen. In: *XX*th *Century Comparative and Conflicts Law. op. cit.* 48–54.

[24] *Ibid.* 55.

[25] Zweigert, K.–Kötz, H.: *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts I.* Tübingen, 1971, 69, 74.

[26] Kulcsár, K.: *A jog nevelő szerepe a szocialista társadalomban* [The educative role of law in a socialist society]. Budapest, 1961, 9–12.

exploitative [protection of the *status quo*, affecting external behaviour only by setting limits to it]	Socialist [also building a new society with targeted education transforming the whole man]

–, which would consolidate as precisely an expression of timely need.[27]

Even if from some opposite starting point–based not on the futurism of forming man according to Socialist utopianism, but on exactly that which Socialism denies from the Western achievements of several millennia of civilisational development–, Western thinkers arrived at a similar result in a typological sense. Thus, according to the Indian *Bose* (1962), the only criterion of division cannot be but the nature and degree of *"adherence to the rule of law"*.[28] Accordingly, there are two opposing poles and various transitions distinguished–

Western [so solid that no change in foundations is conceivable]	transitions • West-related (India, Malaysia, Jordan, partly Africa) • partial (Burma, Pakistan, Turkey) • dictatorship behind a mere legal façade (Indonesia, Guinea) • total chaos (Congo)	Communist

–, in which the dynamism of the intermediate sphere (with the value-orientation of the tendencies of development that may forecast recent directions) seems to be the most progressive element.

Gorla (1963) substantiated the world's division into two, taken as the hegemony of one definite standard expected to be a force capable of suppressing anything else, while introducing in his typological foundation the concept that the opposition between the capitalist and the Socialist law overwhelms the one between the Civil Law and the Common Law. As he explicates by a lucid distinction–

[27] As a doubtlessly number one authority, *Szabó* remarks that "it is the discrepancy of characteristics that prevails over formal similarities" see Szabó, I.: Ellentmondások a különböző társadalmi rendszerek joga között [Contradictions between the laws belonging to different social systems]. *Állam- és Jogtudomány,* 6 (1963) 2, 160 {also see Szabó, I.: Des contradictions entre le droit des différents systèmes sociaux. *Dialectica* (Revue internationale de philosophie de la Connaissance), 18 (1964), 351–371}–, therefore "there is no basis for legal comparison between the two types of law that would theoretically »stand beyond« this extent of class determination"–and Szabó, I.: Az összehasonlító jogtudomány. In: Szabó, I. (ed.): *Kritikai tanulmányok a modern polgári jogelméletről* [Critical studies about modern western legal theory]. Budapest, 1963, 72 {also as La science comparative du droitm. *Annales Universitatis Budapestinensis de Rolando Eötvös nominatae Sectio juridical*, 5 (1964), 91–134}.

[28] Bose, V.: Legal Education as a Basis for the Rule of Law in Africa and Eastern Countries. *Columbia University Law Alumni Bulletin,* 7 (1962) 2.

formal difference		difference of substance
Continental	Anglo-Saxon	Socialist

–, "The difference between »continental (or Romanist) law« and »common law« is certainly rather formal, i.e. drawn by a criterion that distinguishes and approaches forms (structures, techniques and concepts), rather than »substance«."[29]

The debate addressing the issue for a quarter of a century as to how much the distinctive features are expected to stem from a common basis and their ideological background–in addition to the separation of the distinctive ones from within a single entity–compelled the French master of post-war legal comparatism to change his stand definitely. Having left behind the community of ethos indicated by the category of "Western law", *David* then proposed (1964) the introduction of two mutually supplementing criteria, namely *"legal technique"* (including vocabulary, concepts, hierarchy of the sources of law and juridical methods) as well as *"philosophical, political or economic principles desired to be implemented"*–only providing that "[t]he two criteria are to be used subsequently and not in isolation."[30] Accordingly, he re-formulated his taxonomy, using the middle term of "legal family" [*famille de droit*] in the following way:

Romanist–German	Socialist • Soviet • peoples' democracies	Anglo-Saxon • English • USA	religious or traditional • Muslim • Indian • Far-Eastern (Chinese, Japanese) • African & Madagascan

Albeit this separates what is obviously distinct from within the diverse formations (or Soviet deformations) of Western civilisation, yet in a scholarly indefensible manner it relegates everything non-Western into one single and improperly defined notional category. For indeed, any reference to "philosophical, religious or traditional"[31] laws is hardly more in the final analysis than a mere pretext for separating what is "other" or "different". Following such logic, any comparatist–from the Far East via the Muslims to the *Malagasy* and *Hova* tribes in Madagascar–might arrange a *cliché* to group Berlin, Paris, Rome, London and New York into the same category of esoterica alongside with Moscow and Tirana.

So it is not by chance that critical self-reflection had to continue. For instance, *Rodière* (1963) responded to the challenge by narrowing the circle of legal regimes to be classified.

[29] Gorla, G.: Intérêts et problèmes de la comparaison entre le droit continental et la Common Law. *Revue internationale de Droit comparé,* 15 (1963) 1, 9.

[30] David, R.: *Les grands systèmes de Droit contemporains.* Paris, 1964, 16.

[31] *David* is also inconsequent in that his Table of contents indicates "*droits religieux et traditionnels*", while the text relates to "*systèmes philosophiques ou religieux*" (*ibid.* 23.), albeit some justification will follow in his presentation, for "These systems, quite independent from each other, are not to qualify as genuine families. [...] Even the claim whether they are to mean law at all can be doubted." *Ibid.*

He opined that as to the prospects of foreseeable future harmonisation, there is no common basis of comparison beyond the reach of *Christianity*.[32] Accordingly, only a threefold partition–with the types of

French	Anglo-Saxon	Soviet

–is suitable for comparison. Moreover, he even remarked that regarding terminology, it is French and Soviet laws, and regarding principles, French and Anglo-Saxon laws, that are genuinely comparable to one another. And he added: Soviet law seems to harmonise with western continental law in formal tradition with well-developed solutions and techniques defining a common direction; Anglo-Saxon law differs from the French one solely by its specified techniques; and the Soviet law sharply separates from the French and the Anglo-Saxon ones mostly by their guiding principles.[33]

Following this line of thought, grouping in terms of the variations of a definite correlation amongst the above elements had by then become the standard pattern. The classification put forward by *Malmström* (1969), based principally upon *historical* characteristics with varying subdivisions[34]–

Western (European–American)	Socialist (Communist)	Asian (non-Communist)	African
• continental • Latin American • Nordic • Anglo-Saxon	• Soviet • peoples' democracies • Chinese		• Anglophone • Francophone

–proposed the most enlarged version since *David*'s early attempt in 1950, as the very first to grant the laws of Latin America a named status, while he grouped distinct civilisations under one bland collective notion to typify regimes in Africa that have managed to survive as faint copies of their English or French colonisers' law. The other variation produced at that time was the typology improved by *Zweigert–Kötz* (1971)[35]–

Romanist	German	Anglo–American	Nordic	Socialist
Far Eastern		Islamic	Hindu	

[32] Rodière: *Introduction... op. cit.* 26–27.

[33] *Ibid.* 14–16.

[34] Malmström, A.: The System of Legal Systems: Notes on a Problem of Classification in Comparative Law. *Scandinavian Studies in Law,* 13 (1969), 127–149.

[35] Zweigert, K.–Kötz, H.: *Introduction to Comparative, Law I.* (trans. Weir, T.) Oxford, 1987. The first edition in German in 1971 (note 25, 74.) still emphasised that "Common historical sources which exist at the beginning of the evolution, lose their importance with regard to the »style« of the legal systems when later events exert a more determining influence on them". A sharp and justified criticism of such a separation of Romanist and Germanic arrangements up to their roots is provided by Zajtay, I.: Reflections on the Problem of Grouping the Families of Law [1973] in his *Beiträge zur Rechtsvergleichung. Ausgewählte Schriften* (hrsg.: Kreuzer, K. F.). Tübingen, 1976, 70–73.

–, which in fact is a version of the proposition by *Zweigert* in 1961, scarcely modified but expressly worsened, as the Scandinavian law, put in-between the Anglo–American and the Socialist arrangements, is definitely cut from both its Romanist and Germanic roots.[36]

The proliferation within a few decades of attempts bearing the marks of fashion may have discredited the undertaking itself and the merits of the whole enterprise; at least no new proposal could be heard about during the subsequent quarter of a century. *Eörsi*'s distinction with sensitivity to civil law (1973)[37] represented again a *Marxist historical perspective*, while adding to *Kulcsár*'s typology ("exploitative / Socialist") framed a decade ago–

natural communities	capitalist • English & Nordic • French • Germanic • Central & Southeast-European	Socialist

–, and excelling by the presentation of Anglo–American and Scandinavian laws in one common category as well as by the very naming of the Central and Southeast-European region.

The other comparatist endeavours at the time mostly contributed to the clarification of the fact that Common Law is a genuinely faithful heir of the richness of Roman law, nurturing exactly both from, and further on, its roots. (Ironically enough, this realisation coincided with the gradual relocation of the scholarly cultivation of Roman law from its one-time exclusivity in the Latin–Germanic region of Middle Europe to the English-speaking areas, calling for common law mentality as local sensitivity.) Accordingly, *Schlesinger* (1960) pointed out that "in spirit and method, and also in many particulars, classical Roman law is closer to the Common Law than to the modern civilian codes." Or,

> "in a common law system the case law, made binding by the doctrine of *stare decisis*, represents an element of stability, and [...] change is brought about mainly by statutory law. [...] In the civil law, on the other hand, the codes provide some certainty (at least verbal certainty) and structural stability, while judicial »interpretation«, unfettered by a formal rule of *stare decisis*, constitutes an element of flexibility."[38]

[36] It is not by chance that the British critic sees in such a grouping more of chaos than of systemic taxonomy. See Twining, W.: Globalization and Comparative Law. *Maastricht Journal of European and Comparative Law*, 6 (1999) 3, 232.

[37] Eörsi, Gy.: On the Problem of the Division of Legal Systems. In: Rotondi, M. (ed.): *Inchieste di diritto comparator II*. Padova–New York, 1973, 196.

[38] Schlesinger, R. B.: *Comparative Law. Cases–Text–Materials*. 2nd ed., London, 1960, 174, 187, note 2. Even if striking by its lucidity, probably all this is by far not new. Rabel, E. asserted as early as sixty-five years ago–Schriften aus dem Nachlaß: Vorträge – Unprinted Lectures. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 50 (1986) 1–2, 322–323–that

"English and Roman [...] analogies in their policies of building an empire, and also in basic qualities of their legal habits. Customary law is paramount; the case law method, progress from case decision to case decision, prevails; a cautious tradition forms crude beginnings into refined justice, supported by the dualism of customary strict law and equitable practice of magistrates–*jus civile* and

In the last decade of the second millennium, some faint attempts at providing at least some didactic indication amongst altered conditions eventually re-emerged. The Czech *Knapp* was among the first to dispense with Socialism (1991) and to acknowledge Western law had survived in its old dual form after the collapse of the Soviet empire–

continental	Anglo–American	Islamic

–, remarking that Civil Law and Common Law, in company with the Islamic legal culture, are now the global systems developed enough to be worthy of dedicated jurisprudential analysis.[39] – At Lund, *Bogdan* (1994) was even more cautious and pragmatic, as if pondering: why talk about more than is worthy of introduction at a certain depth anyway? His specification and treatment in a Swedish textbook–

English	American	French	German	Socialist
Chinese		Islamic		

–did not waste space with Nordic generalisation but saw Socialist law surviving in peripheries, and even proposed Chinese law for analysis.[40]

Conceptions following in time were scarcely more than variations on traditions brought about by predecessors. Thus, for example, *Van Hoecke* and *Warrington* (1998) openly re-proposed the scheme dividing *"us"* from *"others"*[41]–

Western	other • Asian • Islamic • African

praetorium, common law and equity–and the entire doctrine is devoted to the question of what action or defense a party has in court; whereas we now ask with *Justinian*: what is a party's right without any litigation?"

This is a basic truth according to which "The common law establishes its general principles by considering how a reasonable man would act in particular circumstances while the natural law method is to state general principles and then to assume that the reasonable man would act in accordance with them." Goodhart, A. L.: *English Contributions to the Philosophy of Law.* New York, 1949, 35.

It is to be noted how much the characterisation building on the Anglo–American reconstruction of the Roman legal tradition is more sophisticated and alive, compared to continental approaches exhausted by inductivity contrasted to deductivity. For instance, *Pound*'s opinion that the "essential difference between the civil law and the common law is one not of substance but of method" was not interpreted simplistically by Lawson, F. H.: *A Common Lawyer Looks at the Civil Law.* Ann Arbor (MI), 1953, 46 (whereas "a code is not a necessary mark of a civil law system nor the absence of one a mark of a common law system") but all this is to signify a difference in the "type of mind", meaning that "a civil law system is favorable to codification", a circumstance "more important than codes" themselves.

[39] Knapp, V.: *Základy srovnávací právní vědy* [Outlines of comparative jurisprudence]. Praha, 1991, 52–53, 58.

[40] Bogdan, M.: *Comparative Law.* Stockholm, 1994.

[41] van Hoecke, M.–Warrington, M.: Legal Cultures, Legal Paradigms and Legal Dogmatics: Towards a New Model for Comparative Law. *International and Comparative Law Quarterly*, 47 (1998) 3, 495–536.

–, linking (without any originality of thought as simply identified by geographical areas) immensely diverse, vast cultures that have nothing in common beyond merely being "non-Western", with the rest of human culture simply amalgamated. – *Glenn*'s grouping (2000)[42] also met a call for practicality –

chtonic	Talmudic	of civil law	Islamic
common law	Hindu	Asian	

–with the additional feature that, by referring to genuine traditions, (a) he intended to separate philosophically clearly identifiable historical patterns of thought, within the framework of which (b) he started with the *chthonic* (i.e. ancient, primitive, organic [*chthōn* = earth]) model of order, notwithstanding the fact that hardly any institutional law could have developed within it.

Approaching the new millennium, typological experiments re-appeared in a renewed guise that associated the dedication of legal mapping with the present, while including historical developmental overviews. At the same time, they enriched the static reflection of the past or present with an indication of the formation's *dynamic motion* from somewhere to somewhere. All this may have been motivated by the realisation that everything momentarily prevailing can only be interpreted as the section given at a single moment of ceaseless formation. At the same time, there is a practical need to find comprehensively substantive categories expressing the directions and limits of globalising legal effects, both actual and potential. For instance, *Mattei*, the Italian comparatist active in the United States, made a proposition (1997) to amalgamate *politics, law*, and *philosophical and religious tradition* in one scheme of classification,[43] suitable to provoke passionate debates. In the final analysis, this scheme–

professional law (Western legal tradition) [separation of legal & political decision making, secularisation of law] • British & American • Roman & Germanic • Nordic • mixed	political law (law of development) [unstable] (ex-Socialist, Southeast European, Cuban, unestablished African & South American)	traditional law (oriental view) • Islamic • Indian and Hindu • other Asian / Confucian (Chinese {diverging towards the political} & Japanese {developing towards the professional},[1] post-Soviet-Asian, ex-Socialist Asian)

[42] Glenn, H. P.: *Legal Traditions of the World. Sustainable Diversity in Law.* Oxford, 2000. Cf. also Varga, Cs.: Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline. *Acta Juridica Hungarica,* 48 (2007) 2, 95–113 {and <http://www.akademiai.com/content/gk485p7w8q5652x3/fulltext.pdf>}.

[43] Mattei, U.: Three Patterns of Law: Taxonomy and Change in the World's Legal Systems. *The American Journal of Comparative Law,* 45 (1997) 1, 19.

–contrasted the West to the East, that is, the law of secular autonomous *professionalism* to the law of *traditionalism*, rigidified in its past, both standing for permanence and stability as benchmarks of conceivable alignment, only in order to insert in-between that which is in flux, which is instable and dependent, dominated by mere *politics*, yet able to evolve in either of the above directions. In addition, *Mattei* did not even consider his scheme as a system of commensurable subjects but rather as a viewpoint or a recommendable notional approach for possible grouping. This is so because its components are seen to be in constant movement, as subjects that are not homogeneous entities but sets strained by inner conflicts, bound to diverge in various directions. For

> "[t]he same system may belong to the rule of traditional law if we consider family law, while belonging to the rule of professional law as far as commercial law is concerned, and to the rule of political law when we look at its criminal justice system."[44]

In the ethos and drift of debates induced by *Mattei*, the Finnish *Husa* (2004) presented the available configurations in a cross-referential frame. His grouping of a double division[45]–

	Strengthening/established	Weakening/unestablished
Western	• civil law • common law	• Socialist
non-Western	• Islamic • Hindu	• African • Asian
Mixed	(Israeli, of Québec)	(Scottish, Louisianan)

–polarised about the centrifugality of *becoming established* and the centripetality of *being unestablished*, and the substantiation through *Western* and *non-Western* models or impacts, at the same time. It treated Socialism as a transitional phase from the outset, an inherent product of the West, for "socialist law is culturally a European innovation [...] of European *Marx*ism", independently whether taken as generation or degeneration.[46] As to the Eastern tradition, only the Muslim and Hindu laws were specified as sufficiently established and worthy of analysis. Or, Korean, Chinese and/or Japanese *Confuci*anism were portrayed as weakening and vanishing in law, therefore relegateable to a category with the uncertainties of Africa, and as left without doctrinal analysis. Finally, in his mixed category it is reassuringly realistic to encounter Scottish law as foreseen to change (certainly reviving again its Roman roots), Louisiana (presumably weakening in resistance to Americanisation), and Israel (as settled in multiculturality).

[44] *Ibid.* 16.

[45] Husa, J.: Classification of Legal Families Today: Is It Time for a Memorial Hymn? *Revue internationale de Droit comparé,* 56 (2004) 1, 11–38.

[46] *Ibid.* 30.

3. Impossible Taxonomy, or the Moment of Practicality in Legal Mapping

While in theoretical legal thinking one may notice the progressive historical accumulation of philosophical-methodological foundations, legal comparatism needs, apparently as part of each step, to be restarted anew, although a major part of its literature has ever been engaged in resolving the riddle of what comparison may mean at all in law.

The expressive simile that the laws' classification still "finds itself in the condition of botany and zoology before *Linnaeus* and of anatomy before *Cuvier*"[47] highlights the unsettled nature of the preliminary issues of legal mapping. For natural objects exist as evolved timelessly and autonomously, with underlying structures forming the principle of sensible separation, describable by some physicality. In contrast, legal systems are historically forming objectivations. They evolve in various communities belonging to separate civilisations, contextualised by various cultural media, scarcely featuring anything in common. Their common denominator (or *genus proximum*) can only be the need for, and organisational force of, abstracting human conceptualisation on the social ideal of *ordo*. Or, from the variety of ways in which human organisations can be arranged with the help of various (religious, ethical, economic and political) means, that which our conventionality calls 'law' or phenomena 'embodying the law' will be selected–as *differentia specifica*–from the realisation that (a) the law is a global phenomenon by embracing the whole of society when (b) it settles (resolves) society's basic conflicts of interests (c) in its quality of serving as society's final regulatory and controlling force.[48] Consequently, being a heterogeneous set resisting any taxonomy, it is exclusively the practical human need that may, if at all, force it to be classified, in order that minor groups of components can be characterised as some kind of unity. Therefore, stating that grouping "[f]or some comparatist [...] may serve [...] a utility [...] similar to [...] taxonomies."[49] or that it is resorted to "above all, for taxonomic reasons"[50] can at most be a figurative expression. We get closer to a feasible answer by simply declaring that "classifications are made for the purpose of simplification",[51] that is, that conglomerations will be dissected into minor units with the view of rendering their heterogeneous components more manageable in practice.

Literature is clear in realising that "it is impossible to establish a uniform system of classification which is ideal from every point of view and implies a clear distinction between »families« or groups".[52] In conclusion, it is not our knowledge, or initiation into scholarship, that is insufficient–even if this was the case before *Carolus Linnaeus* or *Georges Cuvier*, or (in describing the set of elementary material components) *Dmitri Ivanovich Mendeleev*. What is at stake here is the brutal fact that our object can only be seen as a section of incidental sets, emerged from incidental processes with incidental components, that may, its being in constant formation notwithstanding, yet be projected notionally as a fixed block,

[47] Constantinesco, L.-J.: *Traité de droit comparé 3*. La science des droits comparés. Paris, 1983, 21, note 5.

[48] For further explication, see Varga, Cs.: *The Paradigms of Legal Thinking*. Budapest, 1999, para. 6.1, 204.

[49] Husa, J.: Legal Families in Comparative Law–are they of any Real Use? *Rettfærd* [Copenhagen], 24 (2001), 95, 18.

[50] Zweigert–Kötz: *Introduction to Comparative Law... op. cit.* 63.

[51] Örücü, E.: Mixed and Mixing Systems: A Conceptual Search. In: Örücü, E.–Attwooll, E.–Coyle, S. (eds): *Studies in Legal Systems. Mixed and Mixing*. The Hague, 1996, 335.

[52] Malmström: The System... *op. cit.* 138.

stable enough to be subjected to systematic investigation without, however, any self-closing theory being justified.

Whether the notional designation of a historical epoch, an artistic style, a group of legal systems or the implementation of any other artificial human ordering principle is at issue, this can only be the middle category of some comprehensive socio-cultural description, which is most suited for *characterisation* rather than for definition.[53] Any such notional designation is the conventionalised issue of classifying objects, a generation of human culture to project some sensible order. As to such designations, the dilemma whether they represent a real or an ideal type is not to be resolved by them. Likewise, it is not a *sine qua non* characteristic whether or not they have a reference in reality. In the sense of epistemological reflection (or correspondence), they are not necessarily either true or false, nor need they be without alternatives. Instead, they are suitable for purposes of comprehensive typological characterisation, thanks to the classification performed. Any such description is open-ending as "there can never be any final proof of what is »important« or »essential«"[54] in a grouping. Therefore, the obvious fact that all such operations "are generally embedded in local cultural and social systems, and serve various social functions"[55] is neither an auxiliary feature nor mere historical coincidence but the expression of their plain practicality.

Even though categories like "cultural and legal circles" with varying "styles" may seem somewhat rudimentary,[56] nevertheless all this embodies a decisive step departing from the false objectivity of rule fetishism[57] to arrive at the law's inner understanding as a basically cultural phenomenon. This is an elementary conjecture of the recognition of law as culture, culture of thought, of ordering, etc., to foster also, among others, an interest in the *comparative judicial mind*.[58]

In sum, in order to speak distinctively about past and present legal systems, as arranged in some groupings that may allow us to characterise their minor sets in a generalising way,

[53] For example Cassirer, E.: *The Logic of the Humanities* [Logik der Kulturwissenschaften]. (trans. Smith Howe, C.) New Haven, 1961. 140 separates the *culture-concepts* from the *nature-concepts* with reference to the pioneering groundwork of Wölfflin, H.: *Kunstgeschichtliche Grundbegriffe. Das Problem der Stilenentwicklung in der neueren Kunst.* München, 1915 {*Principles of Art History. The Problem of the Development of Style in Later Art.* (trans. Hottinger, E. D.) New York, 1950}, by stating that the former "characterize but [...] not determine; for the particulars which they comprehend cannot be deduced from them." The same conclusion is reached in logic by distinguishing *concepts of order* (suited for characterisation exclusively) from *class-concepts* (which define inclusion in a conceptual extent), by Hempel, C. G.–Oppenheim, P.: *Der Typusbegriff im Licht der neuen Logik.* Leiden, 1936.

[54] Spiethoff, A.: Die Allgemeine Volkswirtschaftslehre als geschichtliche Theorie. In: Spiethoff, A. (hrsg.): Festgabe für Werner Sombart zur siebenzigsten Wiederkehr seines Geburtstages 19. Jänner 1933. München, 1933, 57. quoted by Zweigert–Kötz: *Introduction... op. cit.* 69.

[55] <http://en.wikipedia.org/wiki/Taxonomy>.

[56] Cf., e.g. by Constantinesco, L.-J.: Die Kulturkreise als Grundlage des Rechtskreise. *Zeitschrift für Rechtsvergleichung,* 22 (1981) 80, 161–178 and Über den Stil der »Stiltheorie« in der Rechtsvergleichung see *Zeitschrift für vergleichende Rechtswissenschaft,* 78 (1979), 154 et seq.

[57] This recognition as an intuition is hardly formulated expressly in comparatism yet. Even the harsh criticism by Hoecke–Warrington: *Legal Cultures... op. cit.* 502 stops at stating that "It is doubtful whether the traditional »law as rules« is able to offer sound basis for »legal family« classifications".

[58] Cf., e.g. Varga, Cs. (ed.): *Comparative Legal Cultures.* Aldershot–New York, 1992, 331–447 and Gessner, V.–Hoeland, A.–Varga, Cs. (eds): *European Legal Cultures.* Aldershot, 1996, 87–166.

first we have to reckon what we are talking about at all. That is, we have to re-construct them within a typology set up for exactly such a purpose, that is, as subordinated to (quasi) class-concepts in a (quasi) logical form. This very form still will remain empty as, in want of any meta-culture suitable for derivation, there is no criterion or framework that could serve as a bridge between differing cultures. Consequently, the result of any classifying enterprise can only be some *characterisation* fluctuating in terms of *more or less,* in the course of which we commeasure independent phenomena by provoking them to respond to questions that are alien to their specifics–even if making sense from some practical point of view. Or, the criticism as to the necessary deficiency of classification is in the final analysis nothing but self-criticism of the presuppositions generated by the Western Utopia of rationalism, ready to logify everything within its one principled perspective. Eventually it tells less about its subject than about ourselves: the predomination of our thought by logifying rationalism and natural-science-patterned theoretical epistemology.

This is one of the cases of enchantment in scholarship. For, in the final analysis, we all live with some "us"-consciousness[59] and–using a double standard in classifications–we put "Western legal culture at the top of some implicit normative scale".[60] By the same gesture, in fact, we deprive ourselves of the "critical potential"[61] of any objective evaluation. Nevertheless, this very bias is not blameworthy. We are mapping legal systems precisely for the sake of perceiving them as contrasted to our familiar one, in the specific characteristics and direction that distinguish them as differing from the one we are accustomed to. Frankly speaking, it is neither a critical distance proposed by the objectivity of scientific description, nor an external observer's position by which we approach such arrangements that we deem to be different. Quite to the contrary, we do so in order to cognise our own better, that is to say, to *compare* the latter with the former, upon the basis of our own culture. So we are neither neutral nor in want of sympathy but, contrariwise, we wish simply to cognise, for ourselves, on the basis of knowledge we have acquired so far. Consequently, in the meantime, in order to know the other, too, we have to act "against the natural tendency to use without reflection the ideals of one's own system as the normative measure".[62]

Considering the extent to which the Soviet/Socialist law could come into focus during the Cold War epoch through also predominating the efforts to group legal arrangements during that period,[63] we can now regard it either as a historical accident or as a contingency of politico-scholarly considerations that almost no typology proposed that the laws of the Bolshevism, Fascism and National Socialism be recognised between the two World Wars, notwithstanding the fact that their expansion was spectacular, and their self-identity, rejecting and surpassing the Roman ideal of law, combative and firm. Maybe the torpidity

[59] Husa: Classification... *op. cit.* 17.

[60] Frankenberg, G.: Critical Comparisons: Re-thinking Comparative Law. *Harvard International Law Journal,* 26 (1985) 2, 422.

[61] Peters, A.–Schwenke, H.: Comparative Law Beyond Post-modernism. *International and Comparative Law Quarterly,* 49 (2000) 4, 821.

[62] Reitz, J. C.: How to Do Comparative Law. *The American Journal of Comparative Law,* 46 (1998) 4, 623.

[63] Cf., as a Hungarian case study by Varga, Cs.: A szocializmus marxizmusának jogelmélete [Legal philosophy of the Marxism of socialism]. *Világosság,* 45 (2004) 4, para. 1.3.d., 96–97. A Hungarian overview: Institutionalisation accompanied by relaxation (from the 1960's: Comparatism on the international scene, the legitimisation of socialist law as a *sui generis* type and, in Hungary, the professionalisation (in rehabilitation) of law taken as a separate scholarly subject.

of comparatism's classifying inclination and the alarm generated by the interwar Bolshevik/Fascist/NationalSocialist experiments–or, in brief, *realpolitik* alone–can explain the selectivity in terms of which at given periods of time, certain phenomena may actually be filtered through conceptual generalisation to become a general category of classification, while others may perhaps not. Therefore, in social matters, the reason why certain features become conceptualised does not lie necessarily and exclusively *in se* and *per se* but, in part at least, also in our desire to make them be classified.

4. Diversity as a Fundamental Quality of Human Existence

Extremities such as the dichotomisation separating "us" from "them" (standing for what is different) may easily lead to subjection by the prevailing mainstream, which frequently changes, by the way. The very threat of World War Two might have let the world's diversity be seen as a potential danger itself, in which even the national particularisation of laws could seem irrational–

> "the diversity of laws [...] is an obstacle to commerce and communications, created by misunderstandings of all kinds, which does not correspond to the economic and spiritual interdependence of the modern world"[64]

–, while we today, after the liberally rooted dogma of humankind's unity and uniformity has broken up, easily tend to antagonise the different as enemy. As a result of this, even a simplifying conclusion drawn from the *clash of civilisations*[65] may potentially expose the legal map's variegation as foreshadowing some "clash of legal families".[66] True, such fears and aversions may have indeed been supported by the Western law's rule-fetishism, forced to sense its own multiplication when it encountered the plurality of non-western laws.

However, once we recognise behind alienating reifications the strength of culture in law, and in the law's specificity the relative autonomy of how to find ways and paths to the order (re-)established,[67] we may come closer to understanding why it is necessary that the world's civilisational and cultural diversity be seen as a prerequisite of human existence, fundamental to survival.

[64] Schnitzer, A. F.: *De la diversité et de l'unification du droit. Aspects juridiques et sociologiques.* Bâle, 1946, 1.

[65] Huntington, S. P.: The Clash of Civilizations. *Foreign Affairs,* 72 (1993) 3, 22–28.

[66] Scholler, H.: Vorwort. In: Scholler, H.–Tellenbach, S. (hrsg.): *Die Bedeutung der Lehre vom Rechtskreis und der Rechtskultur.* Berlin, 2001, 7–11.

[67] Cf., e.g. Varga, Cs.: *Jogfilozófia az ezredfordulón. Minták, kényszerek – múltban, jelenben* [Philosophy of law at the millennial turn: Patterns and coercions in the past and present]. Budapest, 2004, 9–66.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 4, pp. 273–291 (2010)
DOI: 10.1556/AJur.51.2010.4.3

BASHAR H. MALKAWI*

Rules of Origin under U.S. Trade Agreements with Arab Countries: Are they Helping and Hindering Free Trade?

Abstract. Rules of origin mechanism used to determine the origin of a product. Rules of origin serve many purposes such as collecting data on trade flows, implementing preferential tariff treatment, and applying anti-dumping duties.[1] Rules of origin can be divided into preferential and non-preferential rules. Preferential rules of origin are used to determine whether a product originates in a preference-receiving country or trading area and hence qualifies to enter the importing country on better terms than products from the rest of the world.[2] Non-preferential rules of origin are used for all other purposes, including enforcement of product- and country-specific trade restrictions that increase the cost of, or restrict or prevent, market entry. Preferential rules of origin differ from non-preferential ones because they are designed to minimize trade deflection.[3] With rapid increase of bilateral and regional trade agreements, the role of rules of origin has become more evident. In the context of bilateral and regional trade agreements, rules of origin prevent free-riders from enjoying the benefits negotiated between the countries concerned. In other words, once the origin of a product is known, a country can extend the benefit of its free trade agreement to its trading partners thus excluding non-partners. In principle, rules of origin are supposed to be straightforward and easy-to-follow methods used to determine origin especially when a product is manufactured in one country, which rarely happens in reality. However, more than often, rules of origin are complex and protectionist method used a barrier to trade. As another case study, the purpose of this article is to examine rules of origin in the U.S.–Arab countries free trade agreements (FTAs). The article begins with a brief discussion of the concept of free trade, its evolution through the GATT and then the WTO, and the recently concluded FTAs between the U.S. and Arab countries. Then, in section three, the article analyzes in details rules of origin in the U.S.–Arab countries FTAs. The analysis includes, among other things, substantial transformation and value-added tests, product specific processes, and other relevant rules of origin. Sections four and five address the documentations and procedures required to prove origin and the costs involved in this process. Finally, the article provides a set of conclusions.

Keywords: Rules of origin, GATT, WTO, U.S.–Arab countries FTAs

I. Background: U.S.–Arab Countries Free Trade Agreements

Free trade resides on the notion of "comparative advantage," a theory promulgated by Adam Smith and advanced by David Ricardo.[4] Countries that produce certain products more efficiently than other countries have a comparative advantage and can provide those products to the needy countries in exchange for a different set of products that the needy

* Associate Professor, Accounting and Commercial Law Program, Faculty of Economics at Hashemite University, Zarqa 13115, Jordan.

[1] E-mail: bmalkawi@gmail.com

See Inama, S.: *Rules of Origin in International Trade*. New York, 2009, 47.

[2] See LaNasa III, J. A.: Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating them. *American Journal of International Law*, 90 (1996) 4, 625, 627.

[3] Trade deflection occurs when a company undertakes minimal processing or assembly in a preference-receiving country to take advantage of preferences. See McCall, K. L.: What is Asia Afraid Of? The Diversionary Effect of NAFTA's Rules of Origin on Trade Between the United States and Asia. *California Western International Law Journal*, 25 (1995), 389, 393.

[4] See Davis, M. H.–Neacsu, D.: Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and their Governing Principles of Political Economy. *University of Missouri–Kansas City Law Review*, 69 (2001), 733, 749.

country has a comparative advantage for producing.[5] This system of exchange of products is designed to increase prosperity in each of the trading nations, to raise trading nations' standards of living by infusing them with goods, to increase the supply of unavailable products, and to increase competition.

The GATT was born on October 30, 1947, after an aborted attempt at creating the ITO. The GATT 1947 was the principal multilateral agreement regulating trade among nations by reducing tariffs.[6] The GATT 1947, an open, multilateral trading system, worked well.[7] However, the multilateral trading system had its limitations. GATT members launched the Uruguay Round in 1986 whereby they sought, among other things, to liberalize trade in textiles, apparel, and agriculture.

On April 14, 1994, trade ministers from more than 100 countries met in Marrakesh, Morocco, and signed "The Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations."[8] The Final Act was the culmination of the negotiations launched in Punta del Este, Uruguay in September 1986. Unlike the GATT 1947, the WTO is recognized as an organization.[9] In addition, unlike the GATT 1947 which covered trade in goods only, the WTO covers trade in services and intellectual property.[10] The WTO tries to lower barriers to world trade by negotiating and establishing rules to help facilitate and help increase world trade.[11] By lowering barriers to worldwide trade, the WTO is raising opportunities for increased global economic growth. More trade makes more individual choices possible. The WTO secures the smooth flow of trade among nations, settles trade disputes among governments, and organizes trade negotiations.[12] The WTO created a more potent dispute settlement process than had existed previously.

[5] *Ibid.* 754–755.

[6] See Kasto, J.: *The Function and Future of the World Trade Organization: International Trade Law between GATT and WTO.* London, 1996, 4.

[7] See Croome, J.: *Guide to the Uruguay Round Agreements.* Geneva, 1999. (Since 1950, world trade has grown fourteen times to more than $6.5 trillion in 1997. In the same period the proportion of world economic output attributed to trade increased from eight percent to twenty-six percent.)

[8] Over 100 Nations Sign GATT Accord to Cut Barriers to World Trade, see *International Trade Reporter* (BNA), Apr. 20, 11 (1994), 61.

[9] The WTO consists of primary and subsidiary organs. The four primary organs are the Ministerial Conference, the General Council, the Secretariat, and the Director General. The Subsidiary Organs of the WTO are the Council for Trade in Goods, the Council for Trade in Services, the Council for TRIPS, the Committee on Trade and Development, and the Committee on Budget, Finance, and Administration.

[10] See Quaeshi, A. H.: *The World Trade Organization.* 1996, 5.

[11] See Bacchus, J.: Lone Star: The Role of the WTO. *Texas International Law Journal*, 39 (2004) 3, 401, 403.

[12] The WTO agreement contained in approximately twenty-three thousand pages of agreements that incorporate by reference the GATT 1947, amendments to the GATT made in 1994 (GATT 1994), seventeen multilateral agreements, four plurilateral agreements, Ministerial Decisions and Declarations. The WTO agreements regulate tariffs on trade in manufactured goods and agriculture, services, intellectual property, food, customs, dispute settlement system, and government procurement. Special provisions for developing nations include longer time periods for implementing agreements and commitments, special measures to increase trading opportunities for these countries, provisions requiring all WTO members to safeguard the trade interests of developing countries, and technical assistance and support to help developing countries build their infrastructure. See General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

Although the WTO remains as a relevant and important institution, the current era is characterized by the proliferation of regional trade agreements (RTAs) and bilateral free trade agreements (FTAs) around the world.[13] Most of these FTAs are triggered and concluded by the U.S.[14] In the process, the U.S. induced other countries to conclude more FTAs.[15]

Within Arab countries context, the U.S. has concluded several trade agreements. For example, the U.S. concluded FTA with Jordan in 2001 which was the first FTA to be ever concluded with an Arab country.[16] The U.S. has launched a 10-year effort to form a US-Middle East free trade area.[17] The U.S. will employ a "building-block" approach.[18] This approach requires, as a first step, a Middle East country to accede to the WTO or concluding Trade and Investment Framework Agreement(s) (TIFA). Then, the U.S. will negotiate FTA with individual countries. Finally, preferably before 2013, a critical mass of bilateral FTAs would come together to form the broader US-Middle East FTA. To achieve this end result, the U.S. negotiated and signed FTA's with Bahrain (2006), Morocco (2006), and Oman (2009).[19]

There are several reasons that led the U.S. to negotiate free trade agreements with Arab countries. The failed WTO Ministerial Conference in 1999 lead U.S. trade officials to analyze the possibilities for free trade agreements that would include certain provisions that

[13] Looking at regional integration, one can immediately see the upward pattern of the trend. Between 1978 and 1991, the number of RTAs remained nearly static. Since the beginning of the 1990s, the trend was reversed and one could observe a constant dramatic increase in the number of RTAs that are being formed. From 42 RTAs notified to the General Agreement on Tariffs and Trade (GATT) according to Article 7(a) of the GATT in 1991, the number increased by 107% to 87 Agreements in 1998. See Barrier, M. W.: Regionalization: The Choice of a New Millennium. *Currents International Trade Law Journal*, 9 (2000) 2, 25, 27. According to the World Trade Organization (WTO), there are currently 170 RTAs in force. The WTO expects the total number of RTAs to rise to nearly 400 by the end of 2015.

[14] See O'Neal Taylor, Ch.: Regional Trade Agreements: Current Issues and Controversies: The U.S. Approach to Regionalism: Recent Past and Future. *ILSA Journal of International and Comparative Law*, 15 (2009) 2, 411, 415–418. (The United States has developed an entire system for negotiating economic integration agreements over the last two decades. Before the 1980s, the United States focused more on multilateralism and unilateralism than regionalism. In every year from 2003 to 2007, the United States completed, and Congress approved, at least one free trade agreement.)

[15] These agreements include for instance North American Free Trade Agreement (NA FTA),the Southern Common Market (MERCOSUR) and Free Trade of the Americas (FTAA). See Gantz, D. A.: The Free Trade Area of the Americas: An Idea Whose Time Has Come–and Gone? *Loyola International Law Review*, 1 (2004), 179.

[16] See United States (U.S.)–Jordan: Agreement Between The United States of America and the Hashemite Kingdom of Jordan on The Establishment of a Free Trade Area, Oct. 24, 2000, 41 I. L. M. 63 (entered into force Dec. 17, 2001).

[17] See Yerkey, G. G.: President Bush Lays Out Broad Plan for Regional FTA with Middle East by 2013. *International Trade Reporter* (BNA), May 15, 20 (2003), 856.

[18] See Allen, M.–DeYoung, K.: Bush Calls Trade Key To Mideast; President launches Plan For U.S. Pact in Region. *Washington Post*, May 10, 2003, A01.

[19] See Office of the United States Trade Representative, U.S.–MENA Trade Facts, available at http://www.ustr.gov/countries-regions/europe-middle-east/middle-east/north-africa (last visited Feb. 20, 2010).

are resisted at the multilateral trading level.[20] Moreover, the U.S. has signed several trade and investment framework agreements, which are usually a precursor for FTAs.[21]

The selected Arab countries, thus far, were also the right candidates for FTAs in terms of economics and politics. Economically, based on regulatory impact analysis reports, U.S. exports to these Arab countries would increase as a result of the FTA while imports to the U.S. would not threaten U.S. industries.[22] The FTAs could also spur Arab countries' economic growth, allowing for the possibility that it would become less dependant on foreign aid-especially for Jordan and Morocco. Moreover, the U.S. needed to negotiate FTAs because it was losing ground to the EC which, which had concluded association agreements with several Mediterranean countries.[23] By signing these FTAs, the U.S. could catch up to the EC with respect to economic dominance in Arab countries.

Politically, the FTAs reflect a desire to further the historic bonds and friendship between participating countries.[24] Also, these FTAs reflect U.S.'s appreciation for the role of these Arab countries and their cooperation in international counter-terrorism activities. Economic growth will also enhance political stability and encourage peace in the Middle East. In sum, the FTAs would help alleviate or reduce potential security risks in the region.

[20] In the wake of protests by environmentalists and human rights activists at the WTO summit in Seattle in late 1999, then president Clinton promised to link future trade accords to labor, environmental, and human rights issues. See Uslaner, E. M.: The Democratic Party and Free Trade: An Old Romance Restored. *NAFTA: Law and Business Review of the Americas*, 6 (2000), 347, 359.

[21] See for example Yerkey, G. G.: U.S., Jordan Sign Framework For Trade and Investment Pact. *International Trade Reporter* (BNA), Mar. 17, 16 (1999), 468. See also Yerkey, G. G.: U.S., Oman Sign Framework Trade Pact, Agree to Begin Free Trade Negotiations. *International Trade Reporter* (BNA). July 8, 21 (2004), 1163.

[22] Arab countries' exports to the U.S. would not have a measurable impact on U.S. industries, U.S. employment, and production. For one sector, textiles and apparels, a likely rise in U.S. imports of apparel is expected to have a negligible effect on total U.S. imports. See The Office of Economics and the Office of Industries of the USITC, U.S. International Trade Commission, Economic Impact on the United States of a U.S.–Jordan Free Trade Agreement, 5–1 Pub. No. 3340 (Sep. 2000). See U.S. International Trade Commission, U.S.–Bahrain Free Trade Agreement: Potential Economy wide and Selected Sectoral Effects, Pub. No. 3726 (Oct. 2004). See U.S. International Trade Commission, U.S.–Morocco Free Trade Agreement: Potential Economy wide and Selected Sectoral Effects, Pub. No. 3704 (June 2004). See also U.S. International Trade Commission, U.S.–Oman Free Trade Agreement: Potential Economy wide and Selected Sectoral Effects, Pub. No. 3837 (Feb. 2006).

[23] The official movement towards a closer relationship between the EC and its Mediterranean neighbors was launched at a meeting of the European Council in Lisbon in 1992. It takes place between the EC and 12 countries to the east and south of the Mediterranean. The major premise of the partnership is to create an enormous zone of free trade between Europe and several countries of the Middle East by the year 2010. The Euro-Mediterranean Partnership was created in 1995 in Barcelona with the signing of the Barcelona Declaration by the EC and 12 Mediterranean Countries. The 12 Mediterranean countries are as follows: Morocco, Algeria, Tunisia, Egypt, Jordan, Israel, The Palestinian Authority, Lebanon, Syria, Cyprus, Malta, and Turkey. This partnership will lead to a series of Euro-Mediterranean association agreements. The purposes of this partnership is EC's recognition that peace and security in the Middle East is of great interest and concern to the EC and creation of the world's largest free trade zone–comprising more than 800 million people–by the year 2010 to rival NAFTA. See Klosek, J.: The Euro-Mediterranean Partnership. *International Legal Perspectives*, 8 (1996) 173.

[24] See Lawrence, R. Z.: *A US-Middle East Free Trade Agreement: A Circle of Opportunity?* Washington, 2006, 4–9, 12–14.

In terms of their design, the U.S.–Arab countries FTAs include general definitions appearing at the beginning of the agreement text and every chapter, followed by a section on general obligations, and ending with lengthy tariff schedules and detailed annexes that contain either exceptions or reservations to the general obligations.[25] These FTAs also consist of chapters that cover trade in goods, trade in services, competition, investment, intellectual property rights, agriculture, sanitary and phytosanitary standards and technical barriers to trade, safeguard measures, dispute settlement mechanism, and rules of origin and customs procedures.[26]

II. Rules of Origin in the U.S.–Arab Countries FTAs

Among the most important provisions included in the bilateral trade agreements between the U.S. and Arab countries is the one related to rules of origin. Rules of Origin in the U.S.–Arab countries FTAs help the parties to the agreements to ascertain that goods traded between them "originate" in these countries. Since a principal goal of these FTAs is to eliminate or reduce the tariffs on goods traded between trading partners, rules of origin provide certain requirements for an article to be considered "originating" in the territory and entitled to preferential tariffs.

A. Wholly Obtained or Produced

Under the "wholly obtained or produced" rule of origin, in order for a product to qualify for preferential treatment, the product must be "wholly" the growth, production or manufacture of the FTA party.[27] The concept of "wholly" should be interpreted narrowly since all the inputs must be produced in the exporting country to qualify for preferential treatment; third party inputs are not allowed. Moreover, inputs of a product must not have undergone processing in any other country at any stage of production.

The "wholly obtained or produced" rule of origin is relatively straightforward since it provides that a product is obtained or produced in one country, the product originates in that country. The U.S.–Arab countries FTAs provide a list of products to be considered wholly obtained. The list covers primary products, raw minerals, lumber, and unprocessed agricultural commodities.[28]

[25] See United States–Jordan Free Trade Agreement, *supra* note 16; United States–Morocco Free Trade Agreement (2006), available at http://www.moroccousafta.com/ftafulltext.htm; United States–Bahrain Free Trade Agreement (2006), available at http://www.fta.gov.bh/categoryList.asp?cType=Texts; and United States–Oman Free Trade Agreement (2009), available at http://www.omanusfta.com/documents.html.

[26] *Ibid.*

[27] See United States–Jordan Free Trade Agreement, Annex 2.2, Article 1.a; United States–Morocco Free Trade Agreement, Article 5.1(a); United States–Bahrain Free Trade Agreement, Article 4.1; and United States–Oman Free Trade Agreement, Article 4.1. Wholly growth, product, or a manufacture of a party means a product that has been entirely grown, produced, or manufactured in a party and to all materials that are incorporated in the product, that have been entirely, grown, produced, or manufactured in the party's territory.

[28] A list of primary products for example would include mineral products, vegetable plants, and sea fishing products such as fish or shellfish. See United States–Jordan Free Trade Agreement, Annex 2.2, Article 1.a; United States–Morocco Free Trade Agreement, Article 5.14; United States–Bahrain Free Trade Agreement, Article 4.14; and United States–Oman Free Trade Agreement, Article 4.14.

B. Substantial Transformation Criterion

If a product is "not wholly the growth, product, or manufacture of the party", then it must be "substantially transformed" into a "new and different article of commerce", having a new name, character, or use distinct from the article or material from which it was transformed.[29] The language of the U.S.–Arab FTAs regarding substantial transformation is based on U.S. law.[30] Substantial transformation means fundamental change in form, appearance, nature "or" character of article which adds to value of article an amount or percentage which is significant in comparison with value which article had when exported from country in which it was first manufactured, produced or grown.[31]

The disjunctive "or" means that one of three parts of substantial transformation test (change in name, use, or characteristic) must occur.[32] Additionally, the phrase "substantial transformation" is composed of two words. First, "transformation", whether modified by an adjective or not, means a fundamental change, not a mere alteration, in the form, appearance, nature, or character of an article. Second, "substantial" means more than "fundamental" because if that were its only meaning it would be redundant because transformation also means fundamental change. Therefore, "substantial" means a very great change in the article's "real worth value".

There are factors that can be used to determine "substantial transformation" other than change in the "name, character or use". These factors include the value added to the product at each stage of manufacture, degree and type of processing in each country, manner in which the article was used before and after processing, durability of the article before and after processing, and tariff classification of the article before and after processing.[33]

While the U.S.–Arab countries FTAs apply the "substantial transformation" standard if a product is not wholly the growth, product, or manufacture of one party, North American

[29] See United States–Jordan Free Trade Agreement, Annex 2.2, Article 1; United States–Morocco Free Trade Agreement, Article 5.1(b); United States–Bahrain Free Trade Agreement, Article 4.1(b); and United States–Oman Free Trade Agreement, Article 4.1(b).

[30] See Tariff Act of 1930, 19 U.S.C.A. § 1304 (West 1930).

[31] The U.S. Supreme Court defined substantial transformation further in Anheuser–Busch Brewing Association case. See Anheuser–Busch Brewing Assn. v. U.S., 207 U.S. 556, 561 (1908) (the case involved corks imported from Spain to be incorporated in bottles for re-export. The court decided that manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour, and manipulation. There must be transformation: a new and different article must emerge, having a distinctive name, character, or use. Therefore, the careful selection and thorough treatment of corks would render corks a new article of commerce).

[32] Change in name only could not be in and of itself the determinative factor to meet the "substantial transformation" test. The CIT decided that the name factor in meeting the "substantial transformation" test is the weakest evidence of meeting the test. See Juice Prod. Assn. v. U.S., 628 F. Supp. 978, 989 (Ct. Intl. Trade 1986). Change from producer's product to end-use product may not be of significance in determining that an imported product has undergone substantial transformation. See U.S. v. Murray, 621 F.2d 1163, 1170 (1st Cir. 1980) (Although Chinese glue was blended with other glues in Holland that changed from processor's good to consumer's good, it did not increase in value).

[33] See Maxwell, M. P.: Formulating Rules of Origin for Imported Merchandise: Transforming the Substantial Transformation Test. *George Washington Journal of International Law and Economics*, 23 (1990), 669, 673.

Free Trade Agreement (NAFTA) adopts the "tariff shift" rule, i.e. non-originating materials must shift from one tariff heading/subheading into another as a result of production that occurs in a NAFTA party.[34] In other words, the "tariff shift" rule examines specified changes in the tariff classification of the product before and after processing in a particular country. Under this rule, if the components or raw materials used to produce a product undergo the specified change in tariff classification for the imported product in a country, the product is deemed to originate in that country.

The "substantial transformation" test is subjective as it leaves to the custom authorities of the importing country the discretion to determine on a case-by-case basis whether a certain product has undergone substantial transformation. The "name, character or use" factors have been weighed and applied inconsistently, and that supplemental factors are selectively employed according to the context in which the substantial transformation test is applied.[35] Because of the "substantial transformation" subjectivity, it is unclear at what time and to what extent a product has to undergo a substantial transformation. Adopting several factors in the "substantial transformation" test would confuse importers and does not provide helpful precedents.

Origin determinations under the substantial transformation rule are highly individual fact intensive exercises. The "substantial transformation" rule imposes potentially higher transactions costs on importers because all components, ingredients, or inputs used in a manufacturing process will need to have their origin traced and documented. Moreover, "substantial transformation" is itself a complex, highly technical, and uncertain endeavor. As a result, these requirements may have a major adverse impact on companies importing products with components or inputs originating from different countries.

It is argued that the use of a specific tariff schedule to measure change in the commodity status enjoys transparency, predictivity and to an extent, objectivity.[36] There is less possibility to use rules of origin as instruments of industrial policy.[37] Thus, in its bilateral FTAs with Arab countries, the U.S. should have adopted a uniform system of "tariff shift" rules based on the NAFTA country of origin rules to simplify the process of country of origin determinations.

[34] For the first time in the U.S., the concept of change in tariff heading was used first in the U.S.–Canada FTA and then NAFTA. Chapter Four (rules of origin) in NAFTA has a general rule that applies to all products exported from one party to the other. The general rule determines that a good is considered to originate in North America if 1) the good is wholly obtained or produced entirely in the territory of one or more of the parties to NAFTA 2) the non-originating materials used in the production of the good undergoes an applicable "change in tariff classification" as a result of production occurring entirely in the territory of one or more of the parties to NAFTA. See St. Fort, M. K.: A Comparison of the Rules of Origin in the United States under The U.S.–Canada Free Trade Agreement (CFTA), and Under the North American Free Trade Agreement (NAFTA). *Wisconsin International Law Journal*, 13 (1994), 183.

[35] See Cao, L.: Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws. *California Law Review*, 90 (2002) 2, 401, 463, 471.

[36] See Favely, R.–Reed, G.: Economic Effects of Rules of Origin. *Review of World Economics*, 134 (1998) 2, 209, 212–213.

[37] See Bhagwati, J.–Hudec, R. E. (eds): *Fair Trade and Harmonization: Prerequisites for Free Trade*. Cambridge (MA), 1996, 306–309 (the United States has not had an avowed industrial policy. However, some critics have contended that the U.S. does in fact have an industrial policy in the broad sense. The U.S. has an implicit and decentralized industrial policy. Instruments of industrial policy include subsidies and tax breaks).

C. Value-Added Test

The substantial transformation rule may not suffice by itself to confer origin. Specifically, substantial transformation rule may not ensure that a sufficient amount of local materials and value-added processing would be required in order to qualify for preferential treatment.[38] Arab countries partners may be used as a platform for shipment of products to the U.S. though the products in question could have gone through minor processing. Thus, the U.S.–Arab countries FTAs contain a mathematical requirement, known as the value-added or percentage rule.[39] A value-added test commonly stipulates a minimum percentage of the total value of a product which must be accounted for by the value of materials, labor, and other processing costs originating or performed in a particular country in order for that product to qualify as originating in that particular country.

The U.S–Arab countries FTAs applied the value-added test in conjunction with or in lieu of the substantial transformation rule. Under the value-added test, thirty-five percent of the appraised value to produce the good must be based upon costs incurred in the FTA partner country.[40] The appraised value is defined to include materials and direct cost of processing operations.[41] Thus, according to these FTAs, the value excludes overheads, expenses for sales promotion, royalties, shipping and packing costs, and non-allowable interest costs. By way of comparison, the local value requirement of the U.S.–Arab countries FTAs is similar to the net cost method of calculating regional value content under NAFTA, except that only thirty-five percent of the value must be local.[42]

[38] In some instances substantial transformation may confer origin by itself, but with low value such as 10 percent.

[39] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 1(c); United States–Morocco Free Trade Agreement, *supra* note 25, Article 5.1(b); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.1(b); and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.1(b).

[40] *Ibid.* The appraised value of an imported product will be its transaction value. The transaction value generally approximates the ex-factory price of a good sold to an independent buyer on an arms-length basis.

[41] There are indirect materials that are deemed to be originating regardless of their origin. An "indirect material" is defined to mean a product that is used in the production of a good which is not physically incorporated into the good, or which is used in the maintenance of buildings or in the operation of equipment used to produce the good and any good that is not incorporated but whose use can be demonstrated to be part of the production of the good. Examples of indirect materials are fuel, dies, and safety equipment. See United States–Jordan Free Trade Agreement, Annex 2.2, Article 6(a) and (b); United States–Morocco Free Trade Agreement, Article 5.6; United States–Bahrain Free Trade Agreement, Article 4.16; and United States–Oman Free Trade Agreement, Article 4.6.

[42] NAFTA provides that if the good is produced entirely in the territory of one or more of the parties to NAFTA but one or more of the non-originating materials provided for "as parts" of the good does not undergo a change in tariff classification because the good 1) was imported into the territory of a party in an unassembled or a disassembled form but was classified as an assembled good or 2) the heading for the good describes both the good itself and its parts and is not further subdivided into subheadings, or the subheading for the good describes both the good itself and its parts provided that the regional value content (RVC) is not less than 60 percent under transaction value method or 50 percent under net cost method. Under the transaction value method, RVC = TV –VNM / TV X 100. RVC is the regional value content, expressed as a percentage, TV is the transaction value of the good adjusted to a F.O.B. basis, and VNM is the value of non-originating materials used by the producer in the production of the good. Under the net cost method, RVC = NC – VNM / NC X 100. NC is the net

The previous discussion of the value-added test is simplification of what happens in practice. Calculation of value-added depends upon complex accounting issues which can raise significant uncertainty. The reason for this uncertainty is due to the fact that an origin is never finally determined until audits are completed, a process that can take years. If the auditors disagree with the calculations of the parties involved, enormous and unexpected demands for payment of duties may result.[43] In addition, there is a need to verify value added claims as it is necessary to carry out audits after the event to certify the costs of work carried out.

The value-added test is designed to ensure that the process of transformation has resulted in the inclusion of a significant degree of Arabian content. However, operations that will confer origin in one country may not do so in another because of fluctuation in costs of materials and different labor costs. For example, if a U.S. worker applies eight hours labor to an imported input, the valued-added test could be met easily because of high productivity and wage. An Arab worker, on the other hand, may fail to raise the value of the product when employing the same amount of hours because of lower level of productivity and wage. Therefore, the value-added test may be internally discriminatory when evaluated in light of Arab countries' wages and productivity.[44] In summation, the value-added test takes into account factors relevant to the total production cost of the product and not relevant to the nature of the producing country' economy with its varied economic development.

D. Specific Rules of Origin for Certain Product(s)

The U.S.–Arab countries FTAs include specific rules that confer origin when certain production methods have been carried out.[45] These rules apply for a variety of products such as milk, vegetable product, foodstuffs, plastics, and automotive products. In addition, these FTAs have specified production methods for textiles and apparels.[46]

---

cost of the good and VNM is the value of non-originating materials used by the producer in the production of the good. NAFTA defines the net cost as the total cost less the following specific costs: sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, and non-allowable interest costs that are included in the total cost. In calculating the net cost, the producer may use several allocation methods. The difference between the two RVC methods in NAFTA is that the transaction–value method includes some costs that are excluded in the net cost method. NAFTA bases the transaction–value method on the price actually paid or payable for a good or material, and may thus include all costs plus profits. To compensate for this difference, the transaction value method requires a higher percentage of RVC. NAFTA rules provide for calculations based on the total price or the total cost, with deductions for certain cost items and/or the value of non-originating materials. See Ramirez, J. A.: Rules of Origin: NAFTA's Heart, But FTAA's Heartburn. *Brooklyn Journal of International Law*, 29 (2004) 2, 617, 624–633.

[43] See Palmeter, D.: The Honda Decision: Rules of Origin Turned Upside Down, Free Trade. *Observer*, June 1992, 32A.

[44] See Vermulst, E.–Waer, P.–Bourgeois, J. (eds): *Rules of Origin in International Trade: A Comparative Study*. Ann Arbor, 1994, 446–448.

[45] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 9; United States–Morocco Free Trade Agreement, *supra* note 25, Annex 4-A and Annex 5-A; United States–Bahrain Free Trade Agreement, *supra* note 25, Annex 3-A and Annex 4-A ; and United States–Oman Free Trade Agreement, *supra* note 25, Annex 3-A and Annex 4-A.

[46] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 9; United States–Morocco Free Trade Agreement, *supra* note 25, Chapter Four; United States–Bahrain Free

Although U.S.–Arab countries FTAs claim duty free access for textile and apparel products, the specific rules of origin for these products are protectionist and enacted to mitigate the likely effects of textiles and apparels trading on the U.S. clothing industry.[47] These rules were taken verbatim from U.S. regulations on rules of origin for textile products. When analyzing rules of origin for textiles and apparels one must distinguish between the U.S–Jordan FTA on the one hand and U.S.–Bahrain FTA, U.S–Oman FTA, and U.S.–Morocco FTA on the other hand. Rules of origin for textiles and apparels under the latter FTAs are far more restrictive when compared with the U.S.–Jordan FTA.

The old U.S. rules of origin for textiles and apparel products are found in subparagraph 9.b.iv of annex 2.2 of the U.S.–Jordan FTA.[48] The old U.S. rules of origin for textiles and apparels are known as the "four operations" rule.[49] Under the "four operations" rule, a textile product will be considered a product of Jordan if the fabric is dyed *and* printed in Jordan and the dyeing *and* printing is accompanied by two or more of the following operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing or moireing. Under the "four operations" rule, it does not matter if the fabric is actually woven in Jordan. For example, the fabric could be woven in Syria, but the dyeing, printing, bleaching, and shrinking can occur in Jordan.

Under the U.S.–Jordan FTA, the application of the "four operations" rule is limited to silk, cotton, man-made fiber, or vegetable fiber. Wool is excluded from the "four operations" rule, but subject to the Breaux-Cardin rule.[50] Under the Breaux-Cardin rule, it may not

---

Trade Agreement, *supra* note 25, Chapter Three and United States–Oman Free Trade Agreement, *supra* note 25, Chapter Three.

[47] The reasons for protectionist policies in the textile sector are to be found in the importance of the textile sector for employment policy in developed countries. Textile is a labor-intensive industry which requires low skilled workers who if laid off could encounter hard time to find a new job. Dehousse, F. et al.: The EU–USA Dispute Concerning the New American Rules of Origin for Textile Products. *Journal of World Trade*, 36 (2002) 1, 69.

[48] See Textiles and Textile Products, 19 C.F.R. § 12.130.(e) (i) (2005).

[49] In a case of first impression, first before the U.S. CIT and then the United States Court of Appeals for the Federal Circuit in 1987 elaborated more on the U.S. textiles country of origin rules. The Court decided that "marginal operations" performed on the cotton fabric in Hong Kong did not substantially transform the fabric originated in China allowing it to enter to the U.S. duty-free. An article usually will not be considered to be a product of a particular country by virtue of merely having undergone dyeing and/or printing of fabrics or yarns. The court decided that there must substantial transformation: dyeing of fabric and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing. See Mast Indus., Inc. v. U.S., 882 F. 2d. 1069 (Fed. Cir. 1987) (the case involved cotton fabric in greige form [fabric before it is bleached, dyed, or processed] from China processed in Hong Kong. The court noticed that the textile regulation was adopted in a regulatory vacuum where *ad hoc* determinations had been the rule of the day, resulting in inconsistent import treatment).

[50] In order to offset the liberalization the U.S. took by agreeing to the WTO Agreement of Textiles and Clothing, it hardened the rules of origin for textile. The new U.S. rules of origin for textile products, the same as in Annex 2.2 of the US–JO FTA subparagraph (a)(i), (a)(ii), or (a)(iii), under title "general rule", states that a product is considered to originate in Jordan for example if the product is 1) wholly obtained or produced in Jordan 2) the product is a yarn, thread, twine, cordage, rope or braiding, and the "constituent staple" fibers are spun in Jordan or the continuous filament is extruded in Jordan 3) the product is a fabric and the "constituent fibers", filaments or warns are woven,

enough for the fabric to be dyed and printed in Jordan rather in some cases the constituent fibers must be actually woven in Jordan.

The restrictive rules of origin for textiles and apparels in the U.S.–Jordan FTA are not an exceptional. The U.S.–Bahrain, U.S.–Oman, and U.S.–Morocco FTAs have even more restrictive rules of origin for textiles.[51] Under these FTAs, textiles and apparels must be produced from yarn or fiber produced in the partner country, known as the "yarn or fiber forward" rule.[52] This means that everything from the yarn forward up the production chain of an article must be of U.S., Bahraini, Omani, or Moroccan origin. The "yarn forward" rule restricts the ability of a manufacturer to source its inputs. Furthermore, the "yarn or fiber forward" rule may cause tariff escalation since the cost of using foreign yarn from a non-FTA party results in a higher tariff for the entire product. In comparison, the U.S.–Jordan FTA allows the use of unlimited third-country yarn, fiber, or fabric components in the making of apparels that may be eligible for preferential treatment.

As an exception, known as Tariff Preference Level (TPL), the U.S.–Bahrain, U.S.–Oman, and U.S.–Morocco FTAs allow for importation of apparel containing third-party content.[53] This exception is similar to the TPL in NAFTA which allowed up to 25 million square meter equivalents of apparel made from yarn originating outside NAFTA region to be imported into the U.S. duty-free as long as the fabric is first cut in the U.S. and then sent to Mexico for assembly before shipped again to the U.S.[54] However, unlike NAFTA, the TPL under U.S.–Bahrain, U.S.–Oman, and U.S.–Morocco FTAs is temporary. The TPL in these FTAs is scheduled to expire after ten years from the date on which the agreements enter into force.[55]

The specific rules of origin incorporated into the U.S.–Arab countries FTAs are detailed and complex due to the variety of products covered. Moreover, the specific rules of origin can be seen as having been driven by the protectionist interests of domestic U.S. industries. These specific rules have their own limitations which deny their usefulness as a technique to determine origin.

---

knitted, needled, tufted, felted, entangled or transformed by another fabric-making process in Jordan or 4) the product is any other textile or apparel product that is "wholly assembled" in Jordan from its component pieces.

[51] See United States–Morocco Free Trade Agreement, *supra* note 25, Chapter Four; United States–Bahrain Free Trade Agreement, *supra* note 25, Chapter Three and United States–Oman Free Trade Agreement, *supra* note 25, Chapter Three.

[52] See Gantz, D. A.: A Post-Uruguay Round Introduction to International Trade Law in the United States. *Arizona Journal of International and Comparative Law*, 12 (1995) 1, 7, 141.

[53] See United States–Morocco Free Trade Agreement, *supra* note 25, 4.3(9); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 3.2(8) ; and United States–Oman Free Trade Agreement, *supra* note 25, Article 3.2(8).

[54] See Legierski, R. T.: Out in the Cold: The Combined Effects of NAFTA and the MFA on the Caribbean Basin Textile Industry. *Minnesota Journal of Global Trade*, 2(1993), 305, 314. See also Escoto, J. A.: Technical Barriers to Trade under NAFTA: Harmonizing Textile Labeling. *Annual Survey of International and Comparative Law*, 7 (2001), 63, 82.

[55] See United States–Morocco Free Trade Agreement, *supra* note 25, 4.3(14); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 3.2(12); and United States–Oman Free Trade Agreement, *supra* note 25, Article 3.2(12).

E. De Minimis *Rule of Origin*

A *de minimis* rule allows for a specified percentage of non-originating materials to be used in producing the final product without affecting its origin.[56] The U.S.–Jordan FTA does not mention a *de minimis* rule. Accordingly, a product would be disqualified from being "wholly originating" if it contains any foreign input, no matter how insignificant. As for non-wholly originating products, the product in question has to qualify according to the value-added test, among other criteria, if any non-originating part did not undergo the required substantial transformation.

The other U.S.–Arab countries FTAs also do not include a *de minimis* provision. However, these FTAs adopt a *de minimis* exception for textiles and apparels. If a textile or apparel good does not qualify for preferential treatment because a non-originating material did not undergo the specified tariff classification change, the good will still be considered originating in these Arab countries as long as the total weight of non-qualifying materials is not more than seven percent of the total weight of the good.[57] In other words, at least ninety-three percent of the textiles or apparel components must undergo the required tariff change; only seven percent may be exempted. In these U.S.–Arab FTAs, the *de minimis* provision is limited in scope since it covers only textiles and apparel and excludes all other products.

The *de minimis* rule of origin permits products to benefit from preferential treatment provided in FTAs even if these products contain minimal amounts of non-originating materials. In this context, a *de minimis* rule provides clemency by making it easier for products with non-originating materials to qualify. However, the U.S.–Arab countries complicate already complex rules of origin by ignoring any reference to a *de minimis* clause. Even when these FTAs mention the *de minimis* rule, it is limited in application to textiles and apparels and does not extend to some or all other products. The inflexibility provided in the U.S.–Arab countries FTAs regarding *de minimis* rule raises huge alarm.

F. Cumulation

Cumulation allows producers of one FTA country to use non-originating materials from another FTA member without losing the preferential status of the final product. There are three types of cumulation.[58] Bilateral cumulation operates between the two FTA partner countries and permits them to use products that originate in the other FTA country as if they were their own when seeking to qualify for preferential treatment. Diagonal cumulation means that countries tied by the same set of preferential origin rules can use products that

[56] See Hirsch, M.: International Trade Law, Political Economy and Rules of Origin: A Plea for a Reform of the WTO Regime on Rules of Origin. *Journal of World Trade*, 36 (2002) 2,171.

[57] See United States–Morocco Free Trade Agreement, *supra* note 25, 4.3(7); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 3.2(6); and United States–Oman Free Trade Agreement, *supra* note 25, Article 3.2(6). The language in these FTAs is similar to that of NAFTA. For textiles and apparel, the item will be considered NAFTA-originating if the non-originating material constitutes not more than seven percent of its weight. See North American Free Trade Agreement, Dec. 17, 1992, Article 405(5), 32 I.L.M. 289.

[58] See Baldwin, R.–Evenett, S.–Low, P.: *Beyond Tariffs: Multilaterising Deeper RTA Commitments*. 2007, available at http://www.wto.org/english/tratop_e/region_e/con_sep07_e/baldwin_evenett_low_e.pdf (last visited May 20, 2010).

originate in any part of the area as if they originated in the exporting country.[59] Full cumulation extends diagonal cumulation.[60] Full cumulation provides that countries tied by the same set of preferential origin rules among each other can use goods produced in any part of the area, even if these were not originating products. All the processing done in the free trade area is then taken into account as if it had taken place in the final country of manufacture. As such, diagonal and full cumulation can notably expand the geographical and product coverage.

In terms of bilateral cumulation, all U.S.–Arab countries FTAs provides that a producer may cumulate the production value in each country for purposes of establishing that the good is originating, provided that all non-originating materials used in the production of the product have undergone substantial transformation and that the other applicable requirements are satisfied.[61] The presence of bilateral cumulation helps developing trade relations between FTA countries.

However, in terms of regional cumulation or cumulation with other trading partners, the U.S.–Arab countries FTAs show differences. The FTAs with Morocco and Bahrain, which use identical language, contain only a commitment for a discussion on the issue at some future date.[62] In the FTAs with Morocco and Bahrain, the language on regional cumulation was drafted broadly. It does not carry any specific methods, any legal obligation, and has no timeline within which the discussion must be completed or implemented. In summation, the language is vague and exhortatory.[63] By contrast, the FTAs with Jordan and Oman include a commitment to develop a regional cumulation within six months of the agreement coming into effect.[64] Until this date, no regional cumulation regime was developed.

[59] *Ibid.* See also De Wulf, L.–Sokol, J. B.: *Customs Modernization Handbook.* Washington, 2005, 194–195.

[60] In bilateral cumulation, the use of the partner country components is favored; in diagonal cumulation, all the beneficiary trading partners of the cumulation area are favored. While diagonal cumulation and, even more so, bilateral cumulation, promote the use of materials originating within the FTA, full cumulation is more liberal than diagonal cumulation by allowing a greater use of third-country materials. It is, however, rarely used.

[61] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 5; United States–Morocco Free Trade Agreement, *supra* note 25, 5.4; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.4 and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.4.

[62] The US–Morocco FTA and US–Bahrain FTA state that at a time to be determined by the parties, and in the light of their desire to promote regional integration, the parties shall enter into discussions with a view to deciding the extent to which materials that are products of countries in the region may be counted for purposes of satisfying the origin requirement under the agreement as a step toward achieving regional integration. See United States–Morocco Free Trade Agreement, *supra* note 25, 5.13; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.13.

[63] One may argue that leaving the language without specificity would work better rather than being *ceteris paribus*. It ought to be vague to remain flexible and useful because it could be adapted to necessary changes. However, lack of specificity lends itself to uncertainty and insecurity. The reason for this uncertainty is the lack of test that would guide the parties leading to discretionary interpretation.

[64] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 13; and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.13.

G. Other Relevant Provisions

The U.S.–Arab countries FTAs include several provisions that have an impact on the determination of product origin. These provisions relate to packing operations, transshipment, non-qualifying operations, drawback, and roll-up.

No product is deemed eligible for the FTA's benefits merely by undergoing simple operations such as sorting, assembling, or packing.[65] Thus, packing will disregarded when applying the required rules of origin whether substantial transformation or value-added tests. There are trivial operations that even if they are undertaken will not affect the origin of the product and this will be discounted. For instance, a product may not be deemed originating by virtue of either an operation involving mere dilution with water or other substances which does not materially alter the characteristics of the product.[66]

A product will lose its originating status if, subsequent to meeting applicable rules of origin, the product undergoes further production outside the territories of the FTA parties, other than operations related to shipment of the good when in transit to the territory of a party, such as loading or unloading.[67] The purpose of these rules is to prevent non-FTA parties from enjoying its fruits through trivial processing methods and transshipment to claim origin.

The U.S.–Arab countries FTAs do not mention anything about drawback.[68] In other words, these FTAs do not reimburse tariffs paid on non-originating components that are subsequently included in a final product exported to another FTA country. There is no obvious reason why the FTAs in question exclude from their coverage duty drawback. It could be that any drawback rule in the FTA could favor producers who direct their products–using non-originating components- toward export over producers who direct their products to the domestic market. Producers for the domestic market are put at disadvantage. Thus, to ensure equal footing in treatment, the FTAs parties ruled in favor of excluding duty draw back from coverage. However, the absence of duty drawback leads an increase in the cost of final product as a result of incorporating non-originating components with no drawback.

[65] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 2; United States–Morocco Free Trade Agreement, *supra* note 25, 5.3; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.3 and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.3.

[66] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 9; United States–Morocco Free Trade Agreement, *supra* note 25, 4.3(9); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 3.2(8) and United States–Oman Free Trade Agreement, *supra* note 25, Article 3.2(8).

[67] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 8; United States–Morocco Free Trade Agreement, *supra* note 25, 5.9; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.9 and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.9.

[68] Drawback can be defined as the refund or remission, in whole or in part, of a customs duty which was imposed on imported merchandise under because of its importation. See Page Hall, M.–Lee, M. S.: International Trade Decisions of the Federal Circuit. *American University Law Review*, 57 (2008) 4, 1145, 1158. Countries use duty drawback to attract investment and encourage exports. See Easson, A. J.: *Tax incentives for foreign direct investment*. The Hague, 2004, 155–156. See also Panagariya, A.: Input Tariffs, Duty Drawbacks, and Tariff Reforms. *Journal of International Economics*, 32 (1992) 1–2, 131.

Moreover, the U.S–Arab countries FTAs do not mention the roll-up or absorption principle. The roll-up principle is a process whereby non-originating materials are subsumed during the manufacture of new and different products.[69] When shipped across borders, the new product is said to originate where the conversion occurred.[70] Thus, the costs of non-originating material are rolled-up into the value of the final product. Again, there is no obvious reason why U.S.–Arab countries FTAs excluded from their coverage the roll-up principle. It could be to reduce the possibility of counting the full value of the components incorporated into a finished product as originating or non-originating even though these components may consist of a combination of originating and non-originating inputs. Because of the roll-up absence, non-FTA input remains non-originating throughout the manufacturing process until the calculation of value-added is made.

III. Certificate of Origin and Customs Matters

The U.S.–Arab countries FTAs provide interested parties with a balanced framework for resolving customs matters. Regarding certificate of origin, when a product meets the required rules of origin, the trader then seeking preferential tariff treatment must declare that his product is originating and obtain certification(s) that verify his declaration.[71] A trader must maintain records related to origin claims for five years.[72] Thus, the burden is placed upon the trader to satisfy origin requirements and prove it rather than on the customs authority of the importing country. Additionally, it can be deduced that these FTAs are based on good faith by first entrusting the documents presented by traders. However, if there are doubts regarding the origin of a product and any associated claims, the U.S.–Arab countries FTAs established mechanisms for verifying origin claims.

To verify origin, the importing country can verify origin through written determinations that include facts of the matter and issues of law.[73] The U.S.-Arab countries FTA tackle administrative review procedures. For example, interested parties are entitled to inquire about the application of rules of origin.[74] Also, these FTAs provide a notice-and-comment

[69] The opposite of roll-up is roll-down which allows for a component to be treated as non-originating merely because it included third country parts. When such a component was incorporated into a finished good, the component sometimes was treated as containing zero percent originating goods, even though it actually contained substantial originating parts. Cantin, F. P.–Lowenfeld, A. F.: Rules of Origin, The Canada–U.S. FTA, and the Honda Case. *American Journal of International Law*, 87 (1993) 3, 375, 379.

[70] *Ibid.*

[71] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 10; United States–Morocco Free Trade Agreement, *supra* note 25, 5.10; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.10 and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.10.

[72] *Ibid.*

[73] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 10; United States–Morocco Free Trade Agreement, *supra* note 25, 5.11; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.11 and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.11.

[74] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 11; United States–Morocco Free Trade Agreement, *supra* note 25, 6.1(2); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.1(2) and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.1(2).

opportunity for affected parties prior to issuance of regulations or customs determination.[75] The FTAs require customs authorities first to provide administrative review and second to allow access to judicial review.[76] Civil, administrative, and criminal penalties may be imposed for non-compliance with the requirements of local customs laws including rules of origin.[77]

With the exception of the U.S.–Jordan FTA, other U.S.–Arab countries FTAs provide that the customs authorities of each party shall provide written advance rulings concerning matters such as tariff classification, customs valuation, and rules of origin.[78] Advance ruling allow traders to obtain an origin ruling prior to the importation of a product. Hence, advance ruling saves time and energy. The FTAs require customs authorities to issue advance ruling within 150 days of a request.[79] The 150 days seem a long period. Therefore, expeditious determination is required to maximize the benefits of advance ruling. Penalties are imposed against a requesting party that has omitted or misrepresented material facts in its request for a ruling.[80] Thus, parties seeking an advance ruling must exercise caution in formulating their requests.

U.S. companies are very familiar with the mechanisms of advanced rulings but for Arab companies the concept and its mechanics could seem novel. Thus, FTA parties agreed that the U.S. would provide technical assistance that help Arab countries implement the advance ruling provisions.[81] However, the technical assistance provision is lacking the methodological and operative specificity to ensure that Arab countries implement the advance ruling efficiently.

[75] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 11; United States–Morocco Free Trade Agreement, *supra* note 25, 6.1(3); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.1(3) and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.1(3).

[76] See United States–Morocco Free Trade Agreement, *supra* note 25, 6.8; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.8 and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.8.

[77] See United States–Morocco Free Trade Agreement, *supra* note 25, 6.9; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.9 and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.9.

[78] See United States–Morocco Free Trade Agreement, *supra* note 25, 6.10(1); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.10(1) and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.10(1).

[79] See United States–Morocco Free Trade Agreement, *supra* note 25, 6.10(2); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.10(2) and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.10(2).

[80] See United States–Morocco Free Trade Agreement, *supra* note 25, 6.10(7); United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.10(7) and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.10(7).

[81] US–Morocco FTA, Chapter Six, Article 6.11. See United States–Morocco Free Trade Agreement, *supra* note 25, 6.11; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 5.11 and United States–Oman Free Trade Agreement, *supra* note 25, Article 5.11.

The FTA parties agreed to consult regularly with respect to the administration of rules of origin.[82] Where a party believes that a modification to a provision in is required due to a change in production processes or other developments, the party may submit a request for modification along with supporting arguments and materials such as studies for consideration of the concerned parties.

IV. Administrative Costs of Rules of Origin

There are administrative costs associated with fulfilling rules of origin requirements. These relevant costs include maintaining book-keeping procedures to trace origin of inputs, issuance of certificate of origin, and providing all necessary invoices and information. Unfortunately, there are no specific studies that address costs of rules of origin for U.S.–Arab countries FTAs.[83] However, costs for such agreements are expected to be high. This conclusion is based on studies of other FTAs to which the U.S. is party and similar in content to the U.S.–Arab countries FTAs. For example, the administrative costs for NAFTA's rules of origin account for approximately approximate two per cent of the value of Mexican exports to the U.S. market.[84] While in some countries origin certification is free of charge, in many the costs are hardly trivial and can cost $40.[85]

Producers face the added administrative complexity of fluctuations in exchange rates and changes in production costs.[86] Besides increasing unpredictability, changes in relative prices complicate the verification of origin by customs, and may give rise to subjective administrative discretion on the part of the importing country customs.

In theoretical terms, compliance with rules of origin in the U.S.–Arab countries FTAs could prove as complex and expensive process for the parties involved (producers and exporters). For small firms in Arab countries, the FTAs seem to be out of reach, due to administrative costs among other things, and thus they opt out of enjoying the FTAs preferential treatment. Rules of origin make it difficult or even impossible for otherwise

[82] See United States–Jordan Free Trade Agreement, *supra* note 16, Annex 2.2, Article 12; United States–Morocco Free Trade Agreement, *supra* note 25, 5.12; United States–Bahrain Free Trade Agreement, *supra* note 25, Article 4.12 and United States–Oman Free Trade Agreement, *supra* note 25, Article 4.12.

[83] This is a natural feature of papers dealing with rules of origin. Indeed, the paucity of empirical studies may reflect methodological difficulties as well as inadequate recognition of the potential importance of rules of origin. If tariffs are used, the impact of rules of origin is relatively straightforward to measure: it could be calculated as the proportion of imports that in principle satisfy the rule but which pay the duty. The problem is to determine which exports satisfy the rule, something that will generally be difficult for a researcher to determine. If quotas are used rather than tariffs it is even more difficult to measure the effect of origin rules. See Hoekman, B.: Rules of Origin for Goods and Services. *Journal of World Trade*, 27 (1993) 4, 81, 86.

[84] See Cadot, O.–Estevadeordal, A.–Suwa-Eisenmann, A.–Verdier, Th. (eds): *The Origin of Goods: Rules of Origin in Regional Trade Agreements*. London, 2006, 230–243. A study in connection with EC–EFTA agreement suggested that the cost of border formalities to determine the origin of products has amounted to at least three percent of the value of the goods. See Vermulst, *supra* note 43, 158.

[85] See Choi, W.-M.: Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade. *Journal of International Economic Law*, 13 (2010) 1, 111, 115.

[86] Augier, P.–Gasiorek, M.–Lai Tong, Ch.: The Impact of Rules of Origin on Trade Flows. *Economic Policy*, 20 (2005) 43, 567, 578–594.

qualified parties to obtain the preferential duties under these FTAs. The technical nature of rules of origin and the high the costs for an exporter or producers to comply with these rules mean lower incentives to seek preferential treatment offered by these FTAs.

Conclusions

The U.S.–Arab countries FTAs include several kinds of rules of origin. These rules of origin relate to substantial transformation, value-added, specific rules for certain products, cumulation, transshipment, and packing and non-qualifying operations. The most challenging aspect of these rules is the "substantial transformation" test, which is based on U.S. common law. The rule of substantial transformation is too imprecise, too subjective requiring further interpretation.[87] Furthermore, substantial transformation requires case-by-case determination. Minimum differences in manufacturing processes or techniques may affect the treatment of products exported from Arab countries.

The FTAs rules of origin for textiles and apparels are restrictive rules designed to protect the U.S. textiles industry. Not only the U.S. adopted the "four operations" and "yarn-forward" rules for most textiles and apparel products, but also the U.S. designated that textiles and apparels are subject to longer tariff phase-outs.

The inclusion of other rules of origin–*de minimis* and advance ruling for origin–in the FTAs tends to balance against the objectives of predictability and flexibility. In addition, the favorable method to implement is the "tariff shift" rule adopted in the case of NAFTA. Theoretically, in the "tariff shift" rule, customs authorities of the importing country can look at the tariff schedule to see if non-originating materials shifted from one heading to another as a result of the manufacturing process.[88] Even with the inclusion of other rules of origin, every rule or test has its own shortcomings and is subject to discretionary powers in implementation resulting in the fact that rules of origin can act as a trade barrier thus hindering trade. The selection of a "tariff shift" rule seems to be in many ways the selection of a lesser evil rule.

Reform measures should be adopted to ease the complexity and costs of rules of origin in the FTAs. One reform measure is to liberalize rules of origin for certain products that are subject to very low or zero Most-Favored-Nation (MFN) tariff rates. Whether these products are exported from FTA party or a non-FTA party is irrelevant because these products will enter the U.S. at a low tariff rate. Alternatively, the U.S. and Arab countries may conduct a study of different industries and use the results as a basis to potentially allow deviations from rules of origin of the FTAs.

U.S.–Arab countries FTAs should implement full cumulation which allows for the development of regional production networks and deeper integration. The roll-up principle, which permits materials that have acquired origin by meeting specific processing requirements to be considered an originating good when used as input in a subsequent transformation, should also be adopted to simplify rules of origin.

Another reform measure that pertains to *de minimis* rules which allow for a specified maximum percentage of non-originating materials to be used without affecting origin. Currently, the *de minimis* rule is used for certain products. A wider use of the *de minimis* rule,

[87] See Simpson, J.: Reforming Rules of Origin. *Journal of Commerce*, Oct. 4, 1988, 12A.

[88] As a matter of fact, the advantage of the harmonized tariff schedule is its classification of goods into heading and subheading of four digits that would make it easier to certify shifting among headings as a result of manufacturing processes.

not only for specific products, will simplify rules of origin. There is also a need for a concrete and mutual agreement between the U.S. and Arab countries to improve and streamline customs procedures in order to facilitate trade.

These reform measures seem to be workable when compared with other suggestions, such as lowering value-added content, creating a government-sponsored trade manuals published via the internet, or establishing FTA education and outreach activities to educate small and medium size firms about these FTAs.

The U.S. could have adopted a more enlightened, transparent, and fairer approach tailored to Arab countries' specific circumstances. Simpler, least restrictive rules of origin accompanied with streamlined customs procedures would greatly reduce the cost of compliance and maximize benefits from the FTAs. Ultimately, these FTAs will promote trade and international competitiveness of Arab countries.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 4, pp. 293–304 (2010)
DOI: 10.1556/AJur.51.2010.4.4

TAMÁS MOLNÁR*

Stateless Persons under International Law and EU Law: a Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order

Abstract. According to UNHCR, around 12 million people still continue to be denied the right to nationality, and the persistence of "legal ghosts" is likely to be the case on the long run. The article aims at drawing a picture on the legal status and protection of stateless persons, granted principally by public international law and partly, indirectly the law of the European Union. It sheds light to the rather sporadic but noteworthy developments in international law after the adoption of the 1954 New York Convention, then examines the added value of the EU legal order, even if the Community legislator only treated the stateless in an indirect manner. It concludes that the EU law is an extra but thin layer on the international legal framework protecting stateless persons; thus the EU should make steps, using the new legal basis in the Treaty of Lisbon, so as to strengthen the status of these "legal ghosts".

Keywords: Stateless persons, public international law, EU law, development of the protection regime

I. Introduction to the world of "legal ghosts"

According to UNHCR estimations, 12 million people[1] still continue to be denied the right to nationality, and the persistence of "legal ghosts" is likely to be the case even on the long run. This paper aims at drawing a picture on the legal status of stateless persons, granted principally by public international law and partly, indirectly the law of the European Union (EU). The significance of this topic stems from the fact that as a consequence of the dissolution of the Soviet Union and the state successions in Central-Eastern Europe during the '90s, lots of persons having no nationality arrived in the EU from the ex-Yugoslav countries or from the Commonwealth of Independent States, both to the "old" and the newly acceded Member States. Moreover, with the 2004 enlargement, countries having considerable number of stateless persons residing on their territory (e.g. Baltic States)

* Senior legal advisor, Ministry of Interior of the Republic of Hungary, H-1051 Budapest, József Attila u. 2–4; assistant professor (part-time), Corvinus University of Budapest, Institute of International Studies, H-1093 Budapest, Fővám tér 8.
E-mail: tamas.molnar@bm.gov.hu, tamas.molnar@uni-corvinus.hu

[1] UNHCR: *2009 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaces and Stateless Persons.* Division of Programme Support and Management, 15 June 2010, 2. (available: http://www.unhcr.org/4c11f0be9.html). By the end of 2009, UNHCR had identified some 6.6 million stateless persons in 60 countries. However, the UNHCR estimated that the overall number of stateless persons worldwide, given the hidden character of the phenomenon, could be far higher–about 12 million people. According to estimations of the Open Society Institute, being recently involved in the issue of statelessness, this number is even higher, around 15 million (http://www.soros.org/indepth/stateless/where_it_happens.html).

became Member States of the Union. Europe is one of the regions being highly affected by this phenomenon, since around 640 thousand stateless individuals live on the old continent.[2]

II. Responses of the international community to tackle statelessness

In public international law, after the creation of the United Nations (1945), *two parallel approaches* have been formulated to tackle this negative phenomenon. The first focuses on *identifying the magnitude of the problem; preventing statelessness pro futuro and reducing the existing number of stateless persons* as much as possible. This attempt is marked principally by the *1961 UN Convention on the Reduction of Statelessness*[3] on the universal level; and with some other not so comprehensive treaties on the regional (European) level.[4] This specific legal framework is embedded in *the general human rights law* and completed by provisions relating to the right to nationality.[5]

Nevertheless, despite all these efforts, it is a matter of fact that the number of stateless persons will never reach zero. Therefore *a new, autonomous legal status* has been created by virtue of the *1954 Convention relating to the Status of Stateless Persons,*[6] aiming at providing an appropriate *standard of international protection*, a status comparable to other forms of international protection such as refugee status. In today's international law, it is still the 1954 New York Convention alone, almost sixty years later, under which stateless people enjoy specific international legal protection, containing the basic rules and rights determining their legal status.

III. Scope and content of the 1954 New York Convention: an overview

As for its scope *ratione personae*, the 1954 New York Convention applies to *non-refugee stateless persons* (the stateless refugees being covered by the 1951 Geneva Convention

[2] "*No one should have to be stateless in today's Europe*"–Viewpoint of 9 June 2008 of the Council of Europe Commissioner for Human Rights (available: http://www.coe.int/t/commissioner/viewpoints/080609_EN.asp).

[3] Convention on the Reduction of Statelessness of 30 August 1961 (UNTS No. 14458, vol. 989, 175.), entered into force on 13 Dec. 1975.

[4] See, in chronological order, the CIEC Convention No. 13 to reduce the number of cases of statelessness (signed in Bern, 13 September 1973); then two Council of Europe instruments: the 1997 European Convention on Nationality (CETS No. 166), Chapter VI. and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (ETS No. 200).

[5] See the 1948 Universal Declaration of Human Rights (Article 15–right to a nationality;–the 1965 Convention on the Elimination of Racial Discrimination (Article 5–non-discrimination; right to a nationality); the 1966 International Covenant on Civil and Political Rights (Article 24–right to acquire nationality); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Article 9–non-discrimination, re-acquisition, change, retention of nationality, nationality of children); the 1989 Convention on the Rights of the Child (Articles 7 and 8–birth registration, right to acquire nationality, avoidance of statelessness); or the regional human rights treaties such as the 1969 American Convention on Human Rights or the 1990 African Charter on the Rights and Welfare of the Child etc.

[6] Convention relating to the Status of Stateless Persons of 28 September 1954 (U.N.T.S. No. 5158, Vol. 360. p. 117.), entered into force 6 June 1960.

relating to the Status of Refugees[7]) and its definition strictly covers the so-called *de iure stateless persons.*[8] The International Law Commission (ILC) has observed that the definition in Article 1(1) is now part of customary international law.[9] It should be noted however, that not all stateless persons falling under the definition of Article 1(1) are entitled to benefit from this protection regime. According to the *exclusion clause*, the Convention *shall not apply to a)* persons receiving from UN agencies other than the UNHCR (e.g. UNRWA) protection or assistance so long as they are receiving it; *b)* persons recognized by the competent authorities of the country of residence as having the rights and obligations which are attached to the possession of the nationality of that country; and *c)* persons having committed a crime against peace, a war crime, or a crime against humanity or a serious non-political crime outside the country of their residence prior to their admission to that country or having been guilty of acts contrary to the purposes and principles of the UN.[10]

The set of rights provided for in the Convention is similar to those in the 1951 Geneva Convention. Some 30 provisions of the Convention set out a *minimum standard of treatment* for the stateless, without discrimination, beyond which States are free to extend additional protection and rights to them.[11] Three different levels of protection are established: first, treatment at least as favourable as that accorded to aliens generally, secondly, treatment on a par with nationals; thirdly, the absolute rights which are not contingent upon the treatment of any other group, but guaranteed directly.[12] The main *absolute rights* are identity papers (if the person does not possess a valid travel document) (Article 27); travel documents (Article 28); access to courts (Article 16); naturalization (Article 32). The stateless persons shall enjoy the *same protection as is accorded to nationals* of the country of residence with respect to elementary education [Article 22(1)], public relief and assistance (Article 23), social security [Article 24(1)] or duties, charges or taxes [Article 29(1)] etc. The rights in respect to which the *treatment at least as favourable as accorded to aliens generally* apply are, inter alia, acquisition of movable and immovable property (Article 13), right of association (Article 15), right to engage in wage-earning employment [Article 17(1)], right to self-employment (Article 18); right to housing (Article 21) or the right to choose the place of residence and to move freely within the country (Article 26).[13] It is to be underlined that since there is no persecution (risk of persecution) in case of statelessness, no similar protection against *refoulement* like in the 1951 Geneva Convention is provided for stateless persons. However, the 1954 New York Convention sets forth in Article 31 that the Contracting States shall not expel a stateless person lawfully in their territory save on

[7] Convention relating to he Status of Refugees of 28 June 1951 (U.N.T.S. vol. 189, 137), entered into force: 22 April 1954, Article 1A(2).

[8] Article 1(1): "For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law."

[9] Draft Articles on Diplomatic Protection with commentaries. In: *Yearbook of the International Law Commission.* 2006, Vol. II, Part Two, 49.

[10] Article 1(2).

[11] Article 5.

[12] See also: Van Waas, L.: *Nationality Matters: Statelessness under International Law.* Antwerpen, 2008, 230–231.

[13] For a comprehensive analysis of protecting civil, political, economic, cultural and social rights of stateless persons under the 1954 New York Convention and general human rights law, see: Van Waas: *op. cit.*, Chapters IX–XI.

grounds of national security or public order, and such an expulsion shall be only in pursuance of a decision reached in accordance with due process of law.[14]

The international protection regime of stateless persons *cannot be compared with international refugee law* where apart the 1951 Refugee Convention, the UNHCR ExCom and other judicial and non-judicial bodies developed and detailed the conventional rules, interpreted on several occasion the meaning of different concepts such as the *non-refoulement* etc. International refugee law has been constantly evolving since its creation, while the only one international instrument on the protection of the stateless is the 1954 New York Convention; and we cannot witness such a rich documentation, soft law and jurisprudence in this field either. Another weakness of the system is that the 1954 New York Convention is, by substance, *not a self-executing treaty*; States have to adopt domestic implementing legislation to make it effective. Moreover, the Convention *does not contain* provisions on the *statelessness determination procedure* either (it is up to the individual States to establish such legal channels), which gap makes claiming those rights more difficult if one cannot officially obtain that status. To sum up, statelessness law has almost been forgotten for long decades.

IV. Subsequent developments of the protection regime

1. In spite of the above, progressive developments on specific issues, rather sporadically, are enshrined in certain instruments. Going through these thematically, the progress made in the field of *consular and diplomatic protection* of stateless persons is worth attention. Our starting point is the Schedule to Article 28 of the 1954 Convention, which declares that the delivery of travel document "does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and does not ipso facto confer on these authorities a right to protection."[15] As a sign for a different approach, the *1967 Council of Europe Convention on Consular Functions*[16] is the first to mention, since Article 46(1) of this Convention stipulates:

> [a] consular officer of the State where a stateless person has his habitual residence, may protect such a person as if [the consular officer is entitled to protect the nationals of the sending State], provided that the person concerned is not a former national of the receiving State.

This Convention, applying the same definition as introduced by the 1954 New York Convention [referring to the latter in Article 46(2)], makes a significant step forward and this rule can be considered as a progressive development of international law in this domain, since according to the classical standpoint of public international law, States are entitled to grant consular protection only to their own nationals. What makes the picture a bit shaded is, however, that the Convention has never entered into force due to the low number of

[14] The ILC is now dealing with the topic of "expulsion of aliens". The new, restructured draft workplan, presented by the special rapporteur, Maurice Kamto in July 2009 (A/CN.4/618) would devote a separate draft article to the non-expulsion of stateless persons (draft article 6).

[15] Para. 16 of the Schedule to Article 28.

[16] European Convention on Consular Functions (ETS No. 61).

ratifications.[17] This right is therefore not a treaty law in force, but still shows the tendencies of legal developments.

One had to wait a couple of decades until the issue of protecting stateless persons abroad has been put again on the international law-making agenda, this time on the universal level (within the UN system). The ILC included the topic of diplomatic protection into its agenda in 1995[18] and adopted *the Draft Articles on Diplomatic Protection in 2006*, endorsed also by the UN General Assembly.[19] As draft article 1 is definitional by nature it does not mention stateless persons. Article 3 does, however, make it clear that diplomatic protection may be exercised in respect of such persons.[20] Draft Article 3(2) opens the door generally for certain categories of persons not being nationals of the State concerned,[21] including stateless persons. This is explicitly expressed in draft Article 8 which relates to stateless persons and refugees. By virtue of paragraph 1 of this article,

> A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

This is clearly an attempt for progressive development of international law, because traditionally the general rule was that a State might exercise diplomatic protection only on behalf of its nationals. This is well illustrated in the *Dickson Car Wheel Company v. United Mexican States case* (1931) when the United States–Mexican Claims Commission held that a stateless person could not be the beneficiary of diplomatic protection: "[a] State ... does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury".[22] As the ILC found, this dictum no longer reflects the accurate position of international law for stateless persons. Contemporary international law reflects a concern for the status of this category of persons, evidenced by specific conventions on statelessness.[23] In line with these efforts, according to draft article 8(1), a State may exercise diplomatic protection in respect of a stateless person, *regardless of how he/she became stateless*, provided that the person was *lawfully and habitually resident* in that State both at the time of injury and at the date of the official presentation of the claim. The requirement of both lawful residence and habitual residence sets a high threshold, notions

[17] As of 10 July, 4 States have ratified it and an additional 5 States have signed it without ratifying yet (source: http://conventions.coe.int).

[18] First, a Working Group was created dealing with this topic in 1995. Then, in 1998 after two reports of the Working Group, a special rapporteur was designated who prepared several; interim reports on the subject. Finally, The Commission subsequently adopted the draft articles on Diplomatic Protection on second reading as well as decided to recommend to the General Assembly the elaboration of a convention on the basis of the draft articles.

[19] A/RES/62/67. *Diplomatic Protection* (General Assembly of the United Nations).

[20] Draft Articles on Diplomatic Protection with commentaries (2006), 26.

[21] Draft Article 3(2) reads: "Notwithstanding paragraph 1, diplomatic protection may be exercised by a State in respect of a person that is not its national in accordance with draft article 8."

[22] UNRIAA, vol. IV, 669 at 678. See also Weis, P.: *Nationality and Statelessness in International Law*. Alphen aan den Rijn–Germantown (Md.), 1979, 2nd ed., 162. and Draft Articles on Diplomatic Protection with commentaries. 2006, 48.

[23] *Ibid.* 48.

borrowed from the 1997 European Convention on Nationality[24] Habitual residence in this context is intended to convey continuous residence. Although this threshold is high and may lead to a lack of effective protection for some individuals, the combination of lawful residence and habitual residence is, as pointed out by the ILC in the Commentaries, justified in the case of an exceptional measure introduced *de lege ferenda,*[25] since States are more likely to accept such a new rule if enlarging the scope *ratione personae* of diplomatic protection is not without limitations and conditions. I also draw attention to the temporal requirement for the bringing of a claim: the stateless person must be a lawful and habitual resident of the claimant State *both at the time of the injury and at the date of the official presentation* of the claim, even if quite a long time has already elapsed between the two acts. Finally, it is to be noted that the "may clause" contained in draft Article 8(1) emphasizes the *discretionary nature* of the right. In other words, it is not an obligation of States, but an option to include legally and habitually residing stateless individuals into the sphere of diplomatic protection, but States have discretion whether to extend such protection to a stateless person.

By concluding, it can be stated that consular protection and diplomatic protection operate as additional elements of their protection in abroad, even if these rules have not become legally binding yet, but clearly indicate the developments and the will of the international community to move forward.

2. As for other domains or set of rights having been extended to *de iure* stateless human beings by international treaties, the page is blank except *intellectual property rights*. From a human rights perspective, the right to intellectual property forms an element of a cluster of rights broadly referred to as "cultural rights". For the stateless, a cultural identity distinct from that of the majority of the population is often a contributing factor to their plight; similarly difficulties enjoying that distinct cultural life are not uncommon.[26]

In 1971, *Protocol No. 1 was annexed to the Universal Copyright Convention as revised at Paris on 24 July 1971,*[27] which assimilated stateless persons having habitual residence in a State Party to the nationals of that State (paragraph 1). By doing so, this Protocol builds upon the provisions of the 1954 New York Convention. Article 14 of the latter sets forth the rights concerning artistic rights (which is a synonym for copyright) and industrial property, stating that stateless persons shall be accorded in the country in which they have the habitual residence the same protection as it accorded to nationals of that country. However, they also enjoy protection in any other Contracting Party: they shall be accorded the same protection as provided for the nationals of their country of habitual residence in the territory of that Contracting Party. It can be seen that Protocol No. 1 determines the same level of protection (stateless persons are on equal footing with nationals) and the same condition for benefiting from this right (habitual residence in a Contracting Party). The purpose of these rules is to provide protection of the "totality of creations of the human mind".[28] Although the 1954

[24] Article 6(4), point (g), where they are used in connection with the acquisition of nationality.

[25] Draft Articles on Diplomatic Protection with commentaries. 2006, 49.

[26] Van Waas, *op. cit.* 346–347.

[27] Protocol 1 annexed for Universal Copyright Convention as revised at Paris on 24 July 1971 concerning the application of that Convention to works of Stateless persons and refugees 1971 (UNTS No. 13444), entered into force on 24 July 1974.

[28] Robinson, N.: *Convention relating to the status of stateless persons–Its history and interpretation.* New York, 1955 (reprinted by UNHCR, Geneva in 1997), 55.–in relation to Article 14 of the 1954 New York Convention.

New York Convention does not specify the type of protection and it can thus be assumed that all aspects of protection are covered, the Universal Copyright Convention as revised at Paris on 24 June 1971 lays down specific rules in this regard. Even if the scope *ratione materiae* of the two provisions are roughly the same, the two treaties have significantly different number of State Parties. While Protocol No. 1 has only 38, the 1954 New York Convention has 67 State Parties as of now. Moreover, the geographical coverage is different as well, since despite the lower number of ratifications, Protocol No. 1 also applies to India, the Russian Federation, or the United States not becoming parties to the 1954 New York Convention.

3. Finally, two treaties on the equal treatment of nationals and non-nationals *in social security matters* develop the related provisions of the 1954 New York Convention. The treaty with universal vocation (unfortunately not widely ratified)[29] was elaborated by the ILO in 1962 (*Convention No. 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security*[30]). The Convention refers to the 1954 New York Convention definition of "stateless person"[31] and applies to them "without any condition of reciprocity"[32] and without the requirement of residence. It prescribes equal treatment between nationals and stateless persons in different branches of social security (medical care; sickness benefit; maternity benefit; invalidity benefit; old-age benefit; survivors' benefit; employment injury benefit; unemployment benefit; and family benefit). However, the scope of the obligations varies from State to State, since "each Member shall specify in its ratification in respect of which branch or branches of social security it accepts the obligations of this Convention".[33]

As a similar regional international instrument, the *1972 European Convention on Social Security*[34] is worth mentioning shortly. After the European Interim Agreements on Social Security done in 1953 under the aegis of the Council of Europe (CoE), the CoE Member States left open the possibility of extending the Agreements to give non-nationals and migrants more complete and effective protection. Thus in 1959, it was decided to draft a multilateral convention to co-ordinate the social security legislations of the CoE member States.[35] The Convention, using the 1954 New York Convention definition of „stateless person", covers stateless persons resident in the territory of a Contracting Party[36] who have been subject to the legislation of the Contracting Parties, together with the members of their families and their survivors. It affirms the principle of equality of treatment with nationals in the fields of application of the Convention, such as general and special schemes, whether contributory or non-contributory, including employers' liability schemes providing benefits. This instrument can be considered as building upon, between a limited number of States in

[29] As of 10 July 2010, it has only 36 State parties (the Netherlands denounced it in 2004). However, with important countries of concern such as Iraq or Pakistan. See: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C118.

[30] Entered into force on 25 April 1964.

[31] *Ibid.* Article 1(h).

[32] *Ibid.* Article 10(1).

[33] *Ibid.* Article 2(3).

[34] 1972 European Convention on Social Security (ETS 078). It is not a widely ratified convention, with 8 State parties as of 10 July 2010.

[35] Explanatory Report to the 1972 European Convention on Social Security, para. 7.

[36] Article 4.

Europe, on the provisions relating to social security of the 1954 New York Convention, without prejudice to the provisions of the 1962 ILO Convention.[37]

V. Statelessness and EU law

1. With the emerging corpus of *acquis communautaire* in field of migration and asylum, stateless people–even in an indirect or implicit manner–have also been treated by the Community legislator. Some legal texts assimilate them with third-country nationals (e.g. the EU-level readmission agreements), and some grant them rights under EU law similar to EU citizens (e.g. the EU social security legislation). As for the definition of "stateless person", EU law does not have a specific definition but refers to the 1954 Convention.[38] The EU thus does not alter the substance of this definition (covering *de iure* stateless persons), the relevant EU legislation, as a main rule, simply reflects international obligations already undertaken. As a consequence, *this paper will not deal with stateless refugees under EU law*, because this category is not covered by the 1954 New York Convention, but falls under the protection regime of the 1951 Geneva Convention relating to the Status of Refugees. In line with the international refugee law obligations, the EU asylum *acquis*[39] covers stateless refugees, too, but this is a distinct group of people, with different need of international protection as well as with different legal regime applicable to them.

2. In course of time, the EC law has, in a hidden way, enriched the rights enjoyed by stateless persons residing in the territory of the Member States. In the '70s, Community rules have already been applicable to them by virtue of *Regulation (EC) No. 1408/71*[40] *granting them social benefits*. The Regulation lays down equal treatment for stateless persons and nationals of the Member States in different matters of social security, such as sickness and maternity benefits; invalidity benefits, including those intended for the maintenance or improvement of earning capacity; old-age benefits; benefits in respect of accidents at work and occupational diseases; unemployment benefits etc. This Regulation can be conceived as implementing Article 24(1)–(3) of the 1954 New York Convention on the Community level. It was replaced by *Regulation (EC) No. 833/2004*[41] which, with almost identical content, is now the legislation in force in this domain.

[37] Article 6(1).

[38] See e.g. Article 1, point (c) of Council Regulation (EC) No. 1408/71 and Article 1(h) of the new Regulation (EC) No. 883/2004 replacing the former since 1 May 2010.

[39] Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; Council Regulation No. 2725/2000 of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[40] Regulation No. 1408/71/EC of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community [OJ L 149, 5.7.1971, 2–50.].

[41] OJ L 166, 30.4.2004, 1–123.

Some jurisprudence has also been developed concerning the intra-Community status of the stateless in this respect. In the *Khalil and others case*[42] the plaintiffs were Palestinians from Lebanon who, in flight from the civil war in the Lebanon, had arrived in Germany in the middle of the '80s where they have since lived continuously. Under German law, they were regarded as stateless persons. Since those persons had the grant of child benefit discontinued under new German legislation during the period from December 1993 to March 1994, they submitted in support of their actions challenging the decisions depriving them of those advantages that they and/or their spouses had to be regarded as stateless persons. Consequently they should enjoy family benefits in accordance with Community law, which would enable them to be treated in the same way as German nationals or other nationals of the EU Member States. According to them, payment of those benefits should not have been made conditional on possession of a specific residence document.

The ECJ pointed out in its judgment in 2001 that, in 1957, the original six Member States were all contracting parties to the 1954 New York Convention. The Court also found that the *Council cannot be criticized for having included stateless persons* resident on the territory of the Member States, even though those persons do not enjoy the right of freedom of movement according to the EC Treaty, *within the scope* of the Community regulation on social security for migrant workers and their families. *The Council did so in order to take into account the international obligations of all the Member States.* The inclusion of this category into the Regulation simply reflected international obligations already undertaken (both at the level of the United Nations and within the Council of Europe[43]). Furthermore,

> coordination excluding stateless persons ... would have meant that the Member States, in order to ensure compliance with their international obligations, had to establish a second coordination regime designed solely for that very restricted category of persons.[44]

As a result of those international obligations, national law already assimilated stateless persons to nationals for social security purposes, whereas the treatment of foreign nationals depended upon reciprocity or bilateral as well as multilateral arrangements. As the Advocate General argued, in Europe of the 1950s,

> grappling with the aftermath of the Second World War, it was undoubtedly felt that it would be politically and morally unacceptable for one of the very first regulations adopted by the fledgling European Economic Community to exclude a category of persons who had been expressly included in and protected by the earlier agreements and conventions binding on the original Member States.[45]

Another question was to decide whether stateless persons *may rely on the rights* conferred by the Community regulation where they have travelled to that Member State *directly from a third-country and have not moved within the Community.* The Court held

[42] Joined Cases C-95/99 to C-98/99 and C-180/99 *Mervet Khalil, Issa Chaaban and Hassan Osseili v Bundesanstalt für Arbeit et al,* ECR [2001] I-07413.

[43] See the 1972 European Convention on Social Security (CETS No.: 078).

[44] *Khalil and others:* para. 57.

[45] Opinion of Advocate General Jacobs delivered on 30 November 2000, Joined Cases C-95/99 to C-98/99 and C-180/99 *Mervet Khalil, Issa Chaaban and Hassan Osseili v Bundesanstalt für Arbeit et al.*: para. 39.

that the objective of Community law in respect of migrant workers is coordinating the social security schemes of the Member States and payment of benefits under those coordinated schemes. Regulation No. 1408/71/EC lays down a whole set of rules founded upon the prohibition of discrimination on grounds of nationality or residence and upon the maintenance by a worker of his rights acquired by virtue of one or more social security schemes which are or have been applicable to him. The Court referred to its earlier case-law according to which those rules do not apply to situations which have no factor linking them to Community law. The advantages derived from the status of migrant worker within the European Union *cannot be granted to stateless persons* residing in a Member State where *they are in a situation which is confined in all respects within that one Member State.*[46] In other words, the "external element" (*élément d'extranéité*) required for EU citizens to benefit from the rights granted by Community law is also a precondition for stateless persons: without moving form a Member State to another, they are in a purely internal situation where EC law does not come into play.

3. In the middle of the first decade after the new millennium, facilitation was made in favor of stateless persons concerning their *right to travel within the European Union.* The reason behind was that the EU enlargement with ten new Member States on 1 May 2004 had the paradoxical effect of reducing the scope of the possibility of granting a visa exemption, since Regulation No. 539/2001/EC[47] did not provide for a visa exemption for stateless persons residing in a Member State that does not yet fully apply the Schengen acquis, who have to cross an external Schengen border when entering into the Schengen zone or other non-Schengen Member State. To remedy this situation,[48] *Regulation No. 1932/2006/EC* included a new type of automatic visa exemption for stateless persons recognized by the EU Member States. Article 1(1), point b) of the Regulation says as follows: "stateless persons and other persons who do not hold the nationality of any country who *reside in a Member State and are holders of a travel document issued by that Member State*" shall be exempt from the visa requirement. This means that stateless residing in a Member State in possession of a travel document (not necessarily that prescribed in the Schedule annexed to the 1954 New York Convention) are not required to have visa in order to enter into other Member States and reside in their territory up to three months after the first entry within any six-month period (short-term stay). Beside this automatic (compulsory) visa exemption category, the Regulation goes even farther when *giving the discretion to Member States* to exempt those stateless persons from the visa requirement who *reside in a third country listed in Annex II ("the white list") of Regulation No. 539/201/EC having issued their travel document.* So does Hungary with regard to stateless persons residing in any Annex II (visa-free) third-countries.[49]

[46] *Khalil and others:* paras 65–72.

[47] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ L 81, 21.3.2001, 1–7.].

[48] The European Commission has been expressly asked to do so by Parliament and the Council in the course of the negotiations on the proposal of the Schengen Borders Code (Regulation No. 562/2006/EC). This exemption was mainly aimed at resolving the situation of "Latvian non-citizens" [see: COM 2006(4) final, 5.].

[49] Government Decree No. 114/2007. (V.24.), Article 4, point (a).

It is an innovative element in these rules on visa-free travel that *they cover all stateless persons*, both those under the 1954 New York Convention and those outside of the scope of that Convention.[50] For example, non-citizens of Latvia are given a special passport (not the one according to the 1954 New York Convention) which not only grants them the constitutional right to belong to the State, but it has also been recognised by the EU as valid for visa-free travel.[51] This is thus the first time in EU legislation where a *larger personal scope* (including eventually the *de facto* stateless as well) *applies* than that defined in the 1954 New York Convention.

4. Nevertheless, despite all these developments, provisions of European Union law only lay down *sporadic rules*; a well-developed European system as in case of refugees (beneficiaries of subsidiary protection) does not exist with regard to stateless persons. The Community legislator should put more emphasis on their legal protection. Just to mention an example: *the majority of the Member States do not have specific procedures governing the recognition of stateless status* (exceptions are Spain or Hungary), which shortage was highlighted by UNHCR as well.[52] As a result, it is impossible to determine the magnitude of this problem within the EU. Knowing the fact the 1954 Convention does not provide a comprehensive regulation (old treaty–new challenges, lack of detailed rules, no procedural rules), the EU should make steps with a view to strengthening the status of these "legal ghosts".

The most progressive EU institution in this regard, the *European Parliament* has already started raising awareness and putting this issue on the higher political agenda. In the summer of 2007, it organised a seminar on issues relating to statelessness,[53] then in 2009, the EP passed a non-legislative resolution on the situation of fundamental rights in the EU (2004–2008),[54] which devoted a paragraph for the stateless as well. These recommendations call on the Member States concerned "to ratify the Convention Relating to the Status of Stateless Persons (1954), and on the reduction of statelessness (1961)" as well as call on "those Member States which gained or regained sovereignty in the 1990s to treat all persons previously resident in their territory without any discrimination, and [call] on them to systematically bring about just solutions, based on the recommendations of international organisations, to the problems encountered by all victims of discriminatory practices"; and finally "condemns, in particular, practices of deliberate erasure of registered permanent

[50] Regulation No. 1932/2006/EC amending Regulation (EC) No. 539/2001/EC listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ L 405, 30.12.2006, 23–34.].

[51] Bauböck, R.–Perchinig, B.–Sievers, W. (eds): *Citizenship Policies in the New Europe: Expanded and Updated Edition.* Amsterdam, 2009, 73.

[52] UN High Commissioner for Refugees, *The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation*, October 2003 (available at: http://www.unhcr.org/refworld/docid/415c3cfb4.html), 4, 6, 12, 19.

[53] *Seminar on Prevention of Statelessness and Protection of Stateless Persons within the European Union* (26 June 2007), Brussels, European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE).

[54] European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004–2008 (2007/2145(INI)).

residents within the European Union and [call] on the governments concerned to take effective measures to restore the status of those stateless persons".[55]

These recommendations are, however, not urging the setting up of the EU-level framework for the protection of stateless people, but highlight the importance of undertaking the relevant international obligations by all Member States.[56] It is not surprising, since there was no legal basis in the founding Treaties, even after the Treaty of Amsterdam, for adopting such specific secondary legislation, exclusively focusing on the protection of the stateless. The existing rules protect stateless in an indirect way, where the legal basis is linked to a fundamental freedom (freedom of movement of workers; their social security) or other EC policy (entry and stay of third country nationals). As a consequence, this category of people has been covered as a result of side effects of the legislation.

Nonetheless, the *Treaty of Lisbon* opened a new era, since it *explicitly refers*, for the first time in the primary law, *to stateless persons*, which can be a basis for further developments. Article 67(2) TFEU stipulates that "[f]or the purpose of ... Title [V], stateless persons shall be treated as third-country nationals". It is promising that generally speaking they are on equal footing with the third-country nationals in the area of justice, freedom and security, and this will surely be reflected in the personal scope of the new secondary EU legislation adopted under the provisions of Title V. We will see in the future how far the Union legislator will go on the basis of this treaty provision in order to provide an area of justice, freedom and security for this hardly visible group of human beings.

[55] *Ibid.* para. 50.

[56] As of 1 July 2010, 21 EU Member States are parties to the 1954 New York Convention and only 14 of them have ratified the 1961 Convention on the Reduction on Statelessness.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 4, pp. 305–316 (2010)
DOI: 10.1556/AJur.51.2010.4.5

ÁKOS KŐHIDI*

Critical and Ameliorating Thoughts on Consumer Protection Concerning Product Liability

Abstract. In this paper the rules of product liability (the strict liability for defective products) will be discussed. Albeit the EU orders of this liability form were established more than twenty years ago, it is worth to explore that again, because new vital questions have arisen and arise nowadays, furthermore relevant essays were published on it, which emphasize the economic relations as well. The author has the intention to collect the most significant critical thoughts contrasting these with English and German studies, outline the problematic issues, loopholes, and experiences. Beyond the EEC Directive, the implemented rules in the acts of member states shall be cited and compared simultaneously.

Keywords: product liability, strict liability for defective products, negligence, deficient performance, development risks defence, alternative dispute resolution, immanent problems, reasonable man, Sale of Goods Act, Consumer Protection Act

Introduction

Consumer protection is really an emphatic policy issued by the European Union. The latest principal achievement in the Charter of Fundamental Rights of the European Union is the policy of consumer protection, stating that *"Union policies shall ensure a high level of consumer protection"*,[1] which stresses again the intention of a higher protection. It is logical and plausible, because an efficient internal market needs common consumer policy, hence the development of consumer protection law in the European Union since the beginning of the seventies.

Several rules, among others, of the Hungarian contract and tort law were changed under those EC directives, which had focused on the interest of consumers. New contract forms were established, for instance "door to door sale", "distance selling", "time-sharing", and thus traditional types have changed. We can detect basic changes in the field of liability, for instance in product liability, the EC legislation has changed the negligence base for these cases, and constituted a new strict liability form. I wish to highlight the system of strict liability for defective products, and draw attention to the practical problems and criticism of the regulation through a few cases and studies. Last but not least, I will summarize the predictable changes in the new Civil Code of Hungary. Can the law be the watchdog of people, who are not able to protect themselves against consumerism? It is still a vital question of this theme. Some studies (especially the thoughts of private lawyers) highlight the side-effects of this protection. The main problem is the artificial balance between the consumer and the seller or producer. The law is unable to make the consumer

* Assistant lecturer, Department of Civil Law and Civil Procedural Law, Faculty of Law, Széchenyi István University, H-9026 Győr, Egyetem tér 1; junior research fellow, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.
E-mail: kohidi@sze.hu

[1] Article 38 of the Charter of Fundamental Rights of the European Union, Official Journal C 83, 30.3.2010, 399.

smarter, it can only change the rules, within those the purchasers can enforce their rights. Why should a typical private law relation be modified with public law instruments? Is this the way of the future, or education, prevention? The EU wished to harmonise the national rules by setting minimum standards, yet why is it still disputed? One reason is the fact, that the model of the regulation is essentially based on the economical and legal traditions of welfare states. These rules can be barely implemented by the countries of Eastern Europe, but it does not change the fact that the consumer society is not sufficiently developed at the time of the implementation. It raises further but very significant questions, for instance: who is actually the ideal type of consumer, who is to be protected? The American type of consumer, a real Européer, the "reasonable man" or a Hungarian pensioner? We should avoid characterizing them as silly, reckless people, who cannot protect themselves, instead of developing a positive, self-conscious civilian ideal.

The evolution of the strict liability concept

In this study I try to embrace the main statements and critical opinions concerning product liability. First of all I want to discuss some aspects of the historical background, and the evaluation of this liability form. The so-called product liability (in other words: strict liability for defective products) has been adopted into the EU law with the Product Liability Directive 85/374/EEC. Before this directive none of the member states had special rules regarding the liability of the producer, only court decisions, which had established a higher protection and liability level (a specialized duty of care).[2] Let me illustrate it with an early case from the United Kingdom.

Before the regulation in the United States or Europe began, there was a case in the United Kingdom, which was actually a forerunner of the present product liability form.[3] This was the decision in the case *Donoghue vs. Stephenson* in 1932.[4] In 1928 Donoghue and her friend took their seats in a cafe in Paisley. They ate ice cream, and the friend of Donoghue ordered a ginger beer. It was claimed that the remains of a snail in a state of decomposition dropped out of the bottle. After this incident Donoghue became ill, suffered from shock and complained of stomach pain and several other symptoms. She brought an action against the manufacturer, named Stephenson, and claimed 500 pounds as damages (which she was awarded). The dispute between Donoghue and Stevenson was eventually decided by the court in Donoghue's favour. *"But in fact, the importance of the case went far beyond the correction of this wrong; it changed the distribution of wealth in society in a significant way by deciding that in future, manufacturers would have to bear costs associated with the manufacturing process which, on the assumption we have made, were previously borne by consumers".*[5] This highlights some economical aspects of this topic, which I explain in details later.

One of the curiosities of this case was that the jury subsumed the "duty of care" doctrine without any contractual relationship between the two parties. Because Donohue was not the person, who ordered the ginger beer and neither did she pay for it. This concept existed before this case, but it was generally held that a "duty of care" was only owed in

[2] Benacchio, G.: *Az Európai Közösség Magánjoga* (Private Law of the European Community). Budapest, 2003, 289, 241, 242.

[3] It should be noted that the decision was based on the general rule of negligence.

[4] See for the full description of the case http://www.leeds.ac.uk/law/hamlyn/donoghue.htm.

[5] Cane, P.: *The Anatomy of Tort Law.* Oxford, 1997, 18.

very specific circumstances, for instance where a manufacturer made dangerous products (the ginger beer was obviously not such a product) or was acted fraudulently. Thus the jury set aside the usual conditions, and developed the common law therefore. Consumers in the position of Donoghue could not recover damages from manufacturers in the position of Stevenson, while after the decision they could, thus it becomes clear that one result of the case was to alter the distribution of resources in society by giving consumers a right of action against manufacturers which they did not have before.[6] It can be considered to be a revolutive change, because outsiders, such as the recipient of goods as a gift, or the user of goods, who was not also the purchaser, had no remedy in contract until the changes introduced by the Contracts (Rights of Third Parties) Act 1999. This Act, in certain circumstances, allows third parties to enforce or rely on contractual provisions.[7]

Product liability is a strict liability form for defective provision. In Hungary, there was a controversial issue by jurisprudence and praxis identifying the substance of product liability. Is it a contractual relationship between the two parties, or a delictual one? It had been determined as a delictual relation, and established a special liability form in a special Act X of 1993, which implemented the formerly referred EEC Directive.[8] The new Hungarian Civil Code will probably contain this liability form, in the chapter of torts.[9]

Otherwise the former judicial practice usually emphasizes the delictual character of product liability. We can detect it in few court decisions, for example: it shall be owed the general duty of care standard, if the person or entity, who causes the damage, is a producer of a good, and the defect of this product is the cause of the damage. Notwithstanding the lack of a contractual relationship between the consumer and the producer, or rather the claimant can bring an action against third parties because of breaching the contract. The reference to the lock of relevant legal relation between the parties is incorrect, as the causation creates this relation itself (ergo the obligation between the consumer and the producer).[10] So the jury could determine stricter standard through subsuming the general rule of delictual liability: "A person who causes damage to another person in violation of the law shall be liable for such damage. He shall be relieved of liability if he is able to prove that he has acted in a manner that can generally be expected in the given situation." (Act IV of 1959, hereinafter: HCC) Therefore we can achieve the same result in different ways (via strict liability or subsuming the general rules. It should be noted that not all of the

[6] *Ibid.*

[7] Harpwood, B.: *Principles of Tort Law.* London, 2000, 329.

[8] Before 1993 in the Hungarian law it has not been decided that this kind of damages could be recovered under the Section 310 (on contractual base) or 339 (on delictual base) of the Hungarian Civil Code. The Hungarian courts usually based their decisions on delictual rules, for example, BH 1984/208. In Germany, the firstly preferred contractual or semi-contractual theories were considered and rejected by the Supreme Court in its decision of 1968. (See more: Markesinis, B. S.–Unberath, H.: *The German Law of Torts. A Comparative Treatise.* Oxford, 2002, 94–99; and "Liability for defective products is an area where contract and tort meet and overlap" see Samuel, G.: *Tort: Cases and Materials.* London, 2008, 183.)

[9] The former Act on the new HCC (Act CXX. of 2009) had not come into force on schedule (1 May 2010) according to the decision of the Hungarian Consitutional Court. Let me conclude the taxonomical emplacement of this former Code, as to suspect the incorporation product liability and the further category of this institution.

[10] BH 1986/12/501.

states adopted the delictual concept. For instance, in France and USA the product liability was emplaced in the field of the contractual liability.

Deficient performance

Firstly, we should deal with the nature of deficient performance, because product liability is based on it. Deficient performance is, in short, the non-conformity of goods with the contract, which occurs if the parties owe mutual services to one another and the goods or provisions do not, at the time of performance, correspond to the characteristics stipulated by law or by the contract. For example, contract specifications can be sumptuous as well (for instance special colour or feature of the goods). The consumer needs to prove that the fault existed at the time of performance. However, the Directive 99/44 EC has changed this rule by means of a presumption, which I will review below. Thus who has to prove the time, when the goods became faulty? A rebuttable presumption of non-conformity was established for the first six months after the time of the performance. It is a form of strict liability (to be more exact: a duty), thus the obliged party cannot exculpate himself. However, the conformity can be proved, therefore the presumption can be rebutted, and the duty won't exist at all.

The obligee shall be entitled to request repair or replacement of the good according to his or her choice. Unless the choice is impossible or its accomplishment causes disproportional costs. If the obligor is unable to fulfill either of the former alternatives, the consumer can request appropriate price reduction or can rescind the contract. Both of these should obviously be fulfilled free of charge.

Furthermore, there is special three-day period for replacement in relation to goods designed for long term use. If the consumer bases his claim on this rule, the obligor cannot invoke disproportional costs. Except that the rights are the same regarding express and implied warranty. If the consumer signs a special consumer contract, he will be entitled to rescind the contract within a more favourable period without stating any reason. Last but not least, the consumer shall be entitled to claim damages, if damage has been caused, because deficient performance is a kind of breach of contract. There is a special commerce practice in Hungary, according to which the seller should refund the price if the contract is rescinded. But the Hungarian seller typically urges the consumer to purchase some other goods, because they do not wish to reimburse the customer. What can the consumer do? Basically, nothing, because it is not worth initiating a lawsuit in case of cheap goods.

What is the difference between the general rules of deficient performance and the rules of product liability? *"The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage."*[11] As we can see no such presumption exists, which can be especially problematic, because the burden of proof falls on the claimant and it can be difficult, especially in medical and pharmaceutical cases.[12] It is the first occasion, where the producer can find a loophole in the law, the second is definitely in the rules of development risk defence, which I explore later.

[11] Article 4 of the Directive 85/374/EEC, we can find the same in Act X of 1993 of Hungary, or the Consumer Protection Act (1987) of UK, or the Produkthaftungsgesetz of Germany.

[12] See, for exmple, the case *Kay vs. Ayrshire and Arran Health Board* (1987) cited by Woodroffe, G.–Lowe, R.: *Consumer Law and Practice*. London, 2010, 65.

In which circumstances is the product defective? We can find different rules in the relating Directive[13] and the Hungarian Product Liability Act. Let us see the former first:

A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:

(a) the presentation of the product;

(b) the use to which it could reasonably be expected that the product would be put;

(c) the time when the product was put into circulation.

The Hungarian Product Liability Act implemented these articles, but one extra condition was added to the former ones: *a product is defective when it does not provide the safety which a person is entitled to expect, taking the state of scientific and technical knowledge into account.* This provision is favourable to the consumer, because of the discussed rules of the burden of proof. Moreover the producer can refer to the state of scientific and technical knowledge to defend himself.

Differences could be detected concerning the concept of the defect in the rules of deficient performance and product liability. As it was stated, the defect means relating to deficient performance (and the consequence of this: several warranty and guarantee forms), if the provided goods do not, at the time of performance, correspond to the characteristics stipulated by law or by the contract. If the character is stipulated by the law itself, the general rules of performance should be invoked. Briefly these are the followings in the HCC: if the parties have not stipulated the quality of the object defined, performance must be made in accordance with commercially available things of standard good quality.[14] Furthermore, services shall be suitable for their intended purpose or for use that is otherwise in conformity with the purpose known to the obligor at the time the contract is concluded. So the HCC states an average quality, if the parties do not stipulate specialized terms. Also, if the claimant proves the defect and therefore the breach of contract, it does not support the defect concerning product liability. The situation is different for instance in British law, where the definition of "defective goods" of the Consumer Protection Act (1987) is broadly similar to the definition of" satisfactory quality" of the Sale of Goods Act (1979).

Immanent problems with the rules of product liability

Turning to the scrutiny of the rules, let me outline and sum up the controversial articles regarding the cited liability form. J. Macleod summed up the chief problems, which arose in the United Kingdom and divided these into five several categories: the state-of-the-art issue, burden of proof, the cost of civil litigation, liability for acts of another, the international dimension.[15] This division is fully asserted, and being applicable to describing a wider range of regulation, as for example the problems in other member states. Discussion of the problems of the last two issues is beyond the scope of this essay, because these are relating not immanent problems.

[13] Section 3 of the Consumer Protection Act (1987) and the same Section of the German Produkthaftungsgesetz broadly follows the three main categories of Directive 85/374/EEC.

[14] See more in para. 277 of the HCC.

[15] Macleod, J.: *Consumer Sales Law. The Law Relating to Consumer Sales and Financing of Goods.* London, 2002, 516.

The relating directive creates a scheme of strict product liability for damage arising from defective products. The producer (or if the producer cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product) shall be liable for damage caused by a defect in his product.[16] The liability of the supplier is consequently subsidiary (in addition joint and several), but it can be defended according to the Article 7 (which I review below in detail). This complex concept of the producer is not a satisfactory solution, if the manufacturer or the supplier will be terminated without a legal successor.

The liability, as I stated earlier, is a kind of strict liability, in Hungary that is to say objective liability. But the obligor can defend with reference to the Article 7:

The producer shall not be liable as a result of this Directive if he proves:

(a) that he did not put the product into circulation; or

(b) that, having regard to the circumstances, it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation by him or that this defect came into being afterwards;[17] or

(c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose nor manufactured or distributed by him in the course of his business; or

(d) that *the defect is due to compliance of the product with mandatory regulations issued by the public authorities*; or

(e) that the *state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered*; or

(f) in the case of a manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

The reasoning of sections (a), (b) and (c) are logical and plausible. But the others are not so easy to justify, because these commands are not really favourable to the consumers. Firstly, we should explore section (e), which is in other words the development risks defence. The producers obviously have the pull over the consumers regarding the proving, because they know the construction process, the characteristics of the product. It is hard to imagine, that the claimant can successfully prove the contrary. (And it is not only about the fee of an expert.[18])

Therefore the risk of the scientific and technical development our Act in accordance with the regulation model of most states place upon the consumers. However, they feel it very much, because of their lower bearing capacity of economic sense. Non plus ultra, the producer can calculate the higher risk concerning the product liability with less effort,

[16] Article 3 of Directive 85/374/EEC.

[17] The origin of this article can be found in the case *Grant v. Australian Knitting Mills* of 1936, where the Court rejected the claim, and exlicated, that the maxim of *res ipsa loquitur* was inapplicable because the manufacturer loses control after the relase of the article upon the market and intermediaries handle it before it reaches the consumer.

[18] We can face similar statements concerning the anglo-saxon praxis, where this trouble of proof is mentioned as the erosion of the principle *res ipsa loquitur*. Cp.: Harpwood: *op. cit.* 331. Furthermore the burden of proof regarding medical damages raises a lot of especially vital questions.

through signing an insurance contract. On the contrary, not every citizen has personal insurance, nor a general asset insurance (various forms of insurance can be signed, but these probably do not cover every sort of damage). In summary we could likely state, that insurance is more readily available to the manufacturer than it is to the consumer. It is not a wonder, that Directive 85/374/EEC, the written origin of the regulation caused serious argument among the representatives of consumers and sellers. The reason being was that we could find in the draft of the Directive published in 1976 the following: the producers are also liable, if the *state of scientific and technical knowledge at the time when they put the product into circulation was not such as to enable the existence of the defect to be discovered.* The member states made a compromise at the end, therefore the directive gives member states the option of excluding the development risks defence, this is permitted in all member states except Luxembourg, Finland and Norway. Reasons can be found, why most states reserve the former type of defence. If it were not adopted, it would raise the prices, because the development defence would be calculated as a part of the price. Therefore a state without this defence can preserve or increase its competitiveness.[19] "The development risk defence was the prime reason why the EC draft Directive took nearly ten years to become a Directive. There was strong lobbying from United Kingdom industries (especially pharmaceutical industries) on the basis that without such a defence, research and development would be severely hampered. The other side of the argument is equally compelling – such a defence would leave victims of a future Thalidomide-type tragedy without a remedy."[20]

Furthermore, there is an other debuted form of defence that *the defect is due to compliance of the product with mandatory regulations issued by the public authorities.* The consumer can only claim against the state itself for damages caused by legislation.

The concept of damage is different than the generally used private law concept, this does not embrace every kind of damage. The damage caused by the defective[21] product can be divided into two different categories[22]

– death or by personal injuries;

– damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of 500 EUR,

provided that the item of property: is of a type *ordinarily intended for private use or consumption*, and *was used by the injured person mainly for his own private use or consumption.*

It must be noted, that the damage should be caused to an item of property different from the item, which was the first link of causation (for example, the consumer is not

[19] "Even the development risks defence was introduced into the legislation because of the self-interest of the Conservative government which feared that British goods would not be competitive in Europe if price increases were required to meet the cost of insuring against liability for possible defects in newly developed products." See Harpwood: *op. cit.* 341.

[20] Woodroffe–Lowe: *op. cit.* 72.

[21] What is actually the product under the referred Act? According to it, any movable goods and the electricity. Albeit the groving crops and things comprised in land by virtue of being attached to it, and pharmaceutical products had been excluded, later these were included due to the consideration of the legislator. The definitions of the memberstates are really diversified (e.g. the groving crops are almost everywhere excluded, except Sweden and Luxembourg).

[22] Article 9 of Directive 85/374/EEC.

entitled to claim for damages relating to the damage of defect of the product itself, or the delay of repairing or replacing).[23]

Two cases around the former issue have been collected just for curiosity. In the one there was a component built into the car after finishing the original construction. Should the producer be liable for such a damage, which was caused by a fault in the original construction to the subsequently built in part?[24] G. Woodroffe and R. Lowe give the example: "C buys a defective car. It crashes and injures. The car is a write-off. C can recover for his injuries but not for the cost of replacing the car."[25] In my opinion, "C" shall be entitled to claim for damages to the car, just not under product liability rules, but the general rules of breaching the contract.

The source of the problem is the following. If defect of the final product, which a component built in subsequently, caused the damage, then–although product liability cannot be stated concerning the component–under the theory of complexity the product liability form cannot be adopted relating to the damage of the final, nor the component product. Because it cannot be determined as damage to another item of the property.

A contrario, would the producer be liable if the component caused a short circuit in the electric system of the vehicle and the damage is due to this fact? It is nearly impossible to answer this question. There are an infinite number of similar questions. Would the producer of the final product be liable, because the quality of the component should probably have been tested before building it in? Is it relevant, that the producer of the component considered the special instructions of the producer of the final product in the construction process? Who will be actually liable, if the damage is not caused directly through the defect of the component, but the way of building into the final product?[26] The questions can only be answered case by case, not in general. The problem traces back to the concept of causation. It is not favourable for the consumer, because the causation – under the general rules of liability – shall be proved by the claimant. The dilemma exists in spite of the normative regulation. Para. 7(2) of Act X of 1993 or para. 1(3) of the German *Produkthaftungsgesetz,* for instance, stated in the same way, that the manufacturer of the component can defend himself, if he proves, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.[27]

Turning back to the concept of damage, the economical loss cannot be requested under the cited Acts. Otherwise the actual damage can only be requested, if the product is of a type *ordinarily intended for private use or consumption.* As the former the following section is hard to be explained too: the product shall be *used by the injured person mainly for his own private use or consumption.* The reason is, that not only the consumers can become claimant, the legislator tried to impound the social relations, which aimed to be used. The privity was not created by a consumer contract between the claimant and the defendant,

[23] In the Anglo-Saxon praxis could these damages recovered, too, the so-called "pure economic loss" could be requested from the case Junior Books vs. Veitchi (1983) to the case Murphy vs. Brentwood DC (1990).

[24] Cp.: Markesinis–Unberath: *op. cit.* 93.

[25] Woodroffe–Lowe: *op. cit.* 69.

[26] See more: Markesinis–Unberath: *op. cit.* 100–101.

[27] "*Die Ersatzpflicht des Herstellers eines Teilprodukts ist ferner ausgeschlossen, wenn der Fehler durch die Konstruktion des Produkts, in welches das Teilprodukt eingearbeitet wurde, oder durch die Anleitungen des Herstellers des Produkts verursacht worden ist.*" [ProdHaftG para. 1(3)].

therefore the inequality relation should have been considered by establishing the concept of the damage. It may have happened under too broad a meaning, the private person (who is actually a consumer in a contractual relation) cannot claim for damages to the items of the property, which ordinarily not intended for private use or consumption, but it was used mainly for his own private use or consumption. These kinds of problems can be raised, if objects are in the focal point of the regulation.

Economical and critical theories

Firstly, let me explain some dogmatic aspects of the discussed liability form. Some cases could be noted for curiosity, where more than one strict liability form should be applied. Ergo the product liability rule should be examined correlate to other strict liability forms. It occurred for instance, if a car were to cause damage to a third party through an inner defect. Strict liability rule is traditionally applicable for the damages caused by cars and other similar vehicles. However, the person who carries out an activity involving considerable hazards could not avoid the danger through having the car serviced the car, the cause would not certainly be beyond the realm of activity and the person could not therefore defend it. The liability of the producer can also be stated, thus the case of the claimant is under the cover of several liability forms. They caused the damage together, thus their liability is qualified as joint and several. Obviously, this is only theoretically noted, the claimant would certainly turn against the insurance company.

This liability form is usually reviewed in scope of economy, I wish to contrast some of the thoughts and treatises, which arise nowadays.

It shall be noticed, how the producer tries to handle the economic effects of the strict liability rule. The next citation serves as food for thought: could the goal of prevention be reached or not? It is worth invoking the relevant thesis of economics.

"A manufacturer produces automobile fuel additives that demand careful control over quality. If quality control is maintained at a high level, the chemical mixture in the product is correct, and it never causes damage to automobile engines. If, however, quality control is relaxed and allowed to fall to a low level, some batches of the chemical mixture will be flawed. A few of the cars using the flawed batch will be harmed; specifically, the engine will throw a rod and tear itself to pieces. After a rod is thrown, an alert mechanic can detect the cause of the harm by examining the car's fuel and other signs. The manufacturer determines that a high level of quality control costs more than the harm to some automobile engines caused by a low level of quality control, so the manufacturer adopts a low level of quality control. The owner of the damaged car sues the manufacturer and asks for punitive damages."[28]

Some scholars argue against the rule of strict liability by asserting that consumers would not voluntary buy insurance at the price imposed by the tort liability system.[29] Nowadays disputes are involved by similar issues between lawyers and scholars. One of these was published by Mitchell Polinsky and Steven Shavell reflecting the contributions of Professor Goldberg and Zipursky.[30]

[28] Cooter, R.–Ulen, T.: *Law and Economics.* California, 2000, 288.

[29] *Ibid.* 338.

[30] Polindsky, A. M.–Shavell, S.: A Skeptical Attitude about Product Liability is Justified: A Reply to Professors Goldberg and Zipursky. *Harvard Law Review,* 8 (2010) 123, 1919–1948.

They analyzed empirical studies of the effect of product liability on product safety.[31] In their article all of the empirical literature that they could locate was considered that sought to identify the effect of product liability on product accident rates, and they focused attention on studies that were concerned with specific products. These products were general aviation aircraft, motor vehicles, and childhood vaccines. In none of the studies did researchers find that increased product liability litigation resulted in a measurable decrease in accident rates.[32]

The researchers failed to uncover a beneficial effect of product liability on product safety even though product liability litigation increased greatly during the periods studied (spanning the 1970s and 1980s).

In support of their point that individuals receive significant compensation for product-related accidents from insurance, they observed that most Americans have private or public insurance coverage for medical expenses, loss of life, disability, and property damage. In the referred study was noticed that about 85% of the population possesses health insurance, approximately 78% of families own life insurance, at least one-third of the workforce holds some form of disability coverage, and 96% of homeowners have property insurance. They also observed in the article that individuals do not obtain as much compensation through the product liability system as might first appear.[33] Benefit-cost evaluations are usually made, they cited in their article a number of studies that documented the high legal costs of tort liability. They also discussed indirect costs stemming from product price increases due to product liability.[34]

As Anthony J. Duggan stated[35] that the economic efficiency reason for creating product liability is based on two grounds, the *"pricing effects argument"* and the *"deterrence argument"*. The pricing effects argument means, that consumers systematically underestimate the risk of accidents relating to defective products. The imposition of this strict liability form will cause them to raise their prices, through the explicit price of the product includes a component for accident costs. The result should be a drop in demand to the optimal level, and a consequent reduction in the number of accidents. The deterrence argument could be described as follows. The imposition of liability on a manufacturer should persuade producers to avoid accidents (for example due to design improvements, provisions of warnings, or the adoption of testing procedures) and consequently less damages would be paid. Thus it will be worthwhile for the manufacturer to take precautions as long as the cost of this is less than the reduction achieved in the expected accident cost. If product liability were eliminated, the manufacturers should at least be liable in negligence (for instance because of the failure to take cost-justified accident precautions). However, plaintiffs may have difficulty in proving negligence and therefore, in the interests of effective deterrence, a strict liability regime may be warranted. The corollary of the deterrence argument in favour of manufacturers' liability is that in so far as there are cost-justified accident precautions that can more easily be taken by the plaintiff (for example,

[31] *Ibid.* 1956.

[32] Goldberg and Zipursky claimed that they were selective in the empirical studies and choosing the examined goods, citing studies examined only the influence of the adoptation of modern product liablitiy law, without the fomer on negligance based rule.

[33] *Ibid.* 1962.

[34] *Ibid.* 1967.

[35] Duggan, A. J.: Saying Nothing with Words. In: Ziegel, J. S.–Lerner, S. (eds): *New Developements in International Commercial and Consumer Law.* Oxford, 1998, 479–480.

careful handling of the product), the manufacturer should not be liable. Otherwise, the plaintiff may have an insufficient incentive to take such precautions.

Nowadays the number of critical opinions concerning consumer liability is constantly increasing, these can easily be supported by the "legal achievements" of American consumerism, which would hopefully not be adopted into the European legal systems. It could be called "consumer overprotection". One of the favourite shocking cases of frivolous lawsuits involves McDonald's. An irresponsible woman spilled coffee on herself and then collected millions. The claimant, Stella Liebeck, suffered third-degree burns that required skin grafts and a week of hospitalization, because McDonald's served its coffee thirty degrees hotter than its competitors, too hot to drink but hot enough to burn. Prior to Liebeck's case, McDonald's had received more than seven hundred complaints about the temperature. Even then, the jury reduced Liebeck's compensatory damages by twenty percent because she was partly at fault, and the judge cut the jury's punitive damage award from USD 2.7 million to USD 480,000.[36]

In addition, the enforcement process should be shortly examined, it is enough to touch upon the probably most crucial questions concerning the enforcement of the rights. To be more specific the most vital problem is the out-of-court settlement of consumer disputes (or in other words: alternative dispute resolution), which should be officially endorsed (duly stating the financial background and the legal personality of these) as it is usually not worth taking up a lawsuit. For this reason, mediators and specialized *quasi* judicial bodies have been created. However, these solutions are faster, easier and cheaper than the traditional legal procedures, their decisions cannot be enforced in Hungary, because they are not real courts. It is worth to outlining the relating solutions of the British law, because this system seems to be fine tuned. If the consumers could not solve the problem through contacting the supplier, they can call a solicitor or a Citizen's Advice Bureau or they can turn to the Office of Fair Trading (hereinafter: OFT) helpline Consumer Direct. As the next step, one assistant of the Office will contact the supplier playing "the part of conciliator rather than advocate".[37] After this they can contact the trade association. As we can see, there is a multi-level out-of-court settlement, it is at the first sight similar to the Hungarian system, however we can highlight a relevant difference: the codes of practice, which were approved by the OFT. These optional rules are more likely to be followed, because the suppliers set these for themselves.

Conclusion

The question could be raised concerning the directive on product liability too: whether the consumer protection policy is a social political or economic political issue? We can imagine it as a policy, which addresses both of them, but it can hardly realise one of them. At first the European Union tried to fix the side-effects of free movement of goods and services, but later it became a separate, self-supporting legislation focusing on the interest of consumers.[38] It should be added to my opinion, that contrary interests are usually articulated in the case of each legal instrument, depending on the intervention of the market regulators. As we could see in the first draft of the product liability directive, a higher protection level was

[36] Feinman, J. M.: *Un-making Law. The Conservative Campaign to Roll Back the Common Law.* Boston, 2004, 24.

[37] Woodroffe–Lowe: *op. cit.* 187.

[38] Cp.: Benacchio: *op. cit.* 202–203.

established, than at present. This has been decreased under pressure from manufacturers. Hence the recent directive states only the minimum level of protection and gives the handling of this problem back to the judicature. In the countries, where the liability of manufacturers could effectively be handled within the frames of negligence, the aspect of the interpretation has not been changed substantially just by the directive. The directive could effect powerful changes, where the jurisdiction was not based on negligence, notwithstanding the fact, that in these countries the diversity of legal culture will challenge the possibility to achieve a common level of protection.

1216-2574/USD 20.00

ACTA JURIDICA HUNGARICA
51, No 4, pp. 317–323 (2010)
DOI: 10.1556/AJur.51.2010.4.6

BOOK REVIEW

ANTAL VISEGRÁDY

Péteri Zoltán: Jogösszehasonlítás. Történeti, rendszertani, és módszertani problémák [Comparative Law. Historical, theoretical and methodological problems].[1] Pázmány Péter Catholic University Faculty of Law, Budapest, 2010. 284 p.

In the spring of 2010, an impressive book was published to celebrate the 80th birthday of professor Zoltán Péteri. The first part comprises short personal greetings from internationally known colleagues–Attila Harmathy, Géza Herczegh, Vanda Lamm, Ferenc Mádl, Csaba Varga and János Zlinszky. The second part offers a panorama of professor Péteri's most important writings related to the theoretical questions of comparative law.

In the early years of his career, Zoltán Péteri focused his research on the questions of legal and political theory. Following this period he turned to problems of the rule of law, human rights and constitutional law. However, the focus of his oeuvre has always been related to the world of comparative law. He edited several volumes of the Hungarian national reports submitted to the international congresses of comparative law and he has been teaching at the *Faculté internationale de droit comparé* for long decades.

1. In the first essay–The Beginnings of Comparative Law in English Jurisprudence–, following a well-developed historical introduction, the author points out that the comparative method was adopted in English jurisprudence due to the influence of Maine. Pollock, who also accepted the interconnected nature of historical and comparative methods, warned that comparison only makes sense among institutions of civilizations being at the same stage. Another important step was the establishment of the Society of Comparative Legislation–following the example of the French *Société de legislation comparée*–in 1894. The main aim of this scholarly society was to study the law of people living in the British Commonwealth and to make the findings of these studies applicable for practice. It must also be mentioned that this society did not neglect the study of European legal systems either, e.g. for the reform of English criminal law.

2. In the introduction of the second paper–Theoretical Questions of Comparative Law in Soviet Jurisprudence–, Péteri refers to the process during which the rejection of comparative law gradually turned to the acceptance of a socialist version of comparative law. Then he discusses the fundamental questions of comparative law in the light of a monograph written by A. A. Tille, the leading personality of Soviet comparative law of the time. Concerning the origins of comparative law, Péteri rejects both the antique and medieval origin of comparative law, and points out–contrary to Tille and others–that the birth of comparative law dates back to the turn of 19th and 20th century. Péteri bravely

[1] Editors: Balázs Fekete and András Koltay.

advocates the autonomy of the theory of comparative law against those approaches of Socialist jurisprudence emphasizing its secondary and applied nature. Last but not least, the author does not even share the conception of Tille about the existence of comparative law within the frontiers of a given country. The solution of collisions of the different legislative levels within the Soviet Union is a problem of the system of legal sources rather than one of legal comparison, since the precondition for comparison is the existence of at least two legal systems.

3. The next essay–Some Preliminaries to the Comparison of Legal Cultures–inspiringly discusses one of the most important questions of today's comparative law, the role of legal cultures in the comparison.[2] In the introduction, the author rightly stresses that the connection between law and cultural phenomena was already recognized by the philosophical schools of the late 19th century. In the literature of comparative law, the approach to law as a cultural phenomenon was related to Kohler, who was otherwise named Hegel-redivivus by his contemporaries. One of Kohler's main points was that law should always adapt to the culture of a given people, including its transformations, and it should also offer solutions to new challenges. Péteri shows that culture also has a value-function in Kohler's approach.

A leading personality of Neo-Kantian philosophy, Radbruch, defines law as cultural power, thus improving Kohler's thesis. He also explains that the type of law (*Rechtstyp*) and the idea of law are the two standards that have to be applied in the comparison of different legal systems.

During the first International Congress of Comparative Law (Paris, 1900) the whole issue got a new interpretation in the discussions related to the emergence of the new discipline of *droit comparé*. Kohler, for one, pointed out that a nation can only accept foreign rules which are in harmony with its conditions and institutions. Moreover, Zittelmann argued that the main value of comparative law was its capacity to approach law as a cultural phenomenon.

The author concludes by claiming that the advantage of the approach called "comparative legal cultures" consists in enabling comparative law to find a way out of the uncertainties related to a recent paradigm shift. It also seems possible, however, that the "comparative legal cultures" approach may make comparative law lose its relationship to law and assimilate to legal theory, legal anthropology or even to the sociology of law.

4. The fourth essay–Paradigm Shift in Comparative Law?–analyses an exciting and important problem. Péteri draws attention to the fact that the analysis of the paradigms of comparative law is part of the history of comparative law not yet written. Furthermore, he cannot accept the approach in the history of ideas which declares that the beginnings of comparative law could be discovered even at the earliest stages of human thinking.

The dominant view suggests that comparative law–called *droit comparé* in the years of its birth–has a relatively short history. Some scholars say it starts with the First International Congress of Comparative Law (Paris, 1900), others date it back to the 1860s or the

[2] From the Hungarian literature see Kulcsár, K.: *Jogszociológia* (Sociology of Law). Budapest, 1997; Varga, Cs.: *Összehasonlító jogi kultúrák* (Comparative legal cultures). Budapest, 2000; Visegrády, A.: *Jogi kultúra, jogelmélet, joggyakorlat* (Legal culture, legal theory and the practice of law). Budapest, 2003; Kondorosi, F.–Marosi, K.–Visegrády, A.: *A világ jogi kultúrái – a jogi kultúrák világa* (Legal cultures of the world–the world of legal cultures). Budapest, 2008.

establishment of the first scholarly society (*Société de legislation comparée,* 1869) devoted to the field.

From the aspect of the history of ideas, Maine's *Ancient Law* can be regarded as a starting point. However, as the author points out, the so-called legal ethnology was also seriously related to the first paradigm of comparative law. This first paradigm had been dominant until the First International Congress of Comparative Law (Paris, 1900).

According to the new concept or paradigm emerging at this congress, it was reasonable to draw a dividing line between the formerly dominant, mostly theoretical comparative law and *droit comparé* properly understood. As Lambert argued, the former is strongly related to legal history or sociology of law, while the other is a new branch of the study of positive law. During the interwar period, the research of similar or different solutions in Common Law and Civil Law systems came to the fore at the levels of both written and case-law. This transformation was a sign of paradigm-shift in itself and it could imply that Far-Eastern or even Socialist laws could also be compared. After World War II, scholars tried to find some convergence between Socialist and Western laws, some of them even regarded Socialist law as a degenerated branch of Western Law. But from the 1950s, the new paradigm identified Socialist Law as an independent legal family on the basis of ideological factors, and it focused on the research of the style of legal families as well as their "determining" and "interchangeable" elements.

If a new paradigm shift may happen in the close future, it will be lead by advocates of the so-called "comparative legal cultures" approach–Péteri argues.

5. The fifth study–Sociological Questions in Comparative Law–discusses the problems of sociological approach in comparative law. Péteri starts by emphasizing that the failure of promising opportunities in legal unification based on comparative law was related to socio-economic relations behind the legal regulation. There is, however, a serious question related to this point. Does the research of sociological background of the legal institutions in the context of Socialist legal system mean the twilight of the classical approach in *droit comparé*? The author answers negatively, since the sociological approach was also applied by representatives of Western *droit comparé*, mostly in order to achieve practical means.

The reason why the earlier, unilateral normative approach was replaced with a sociological one is the fact that the main goals of comparative law cannot be achieved nowadays by simply juxtaposing legal rules. Consequently, one really needs the sociological approach. Moreover, this complex approach allows for a better consideration of value elements in the theory of comparative law. By way of a conclusion, Péteri points out that this approach is the essence of comparative law, and it could also serve as the proper basis for a "realist" comparative law capable of studying the sociological roots of legal and state-related phenomena.

6. In the sixth essay–Theoretical Questions of the Application of the Comparative Method in the Sphere of State Phenomena–the author highlights that this issue has been rather neglected in the literature of comparative law thus far. However, new behaviorist approaches show a comprehensive departure from the rule-centered approach in comparative law. Furthermore, the view has also been spreading among scholars that the aim of comparative law is not only the observation of similarities, and that the study of differences is equally of scientific value.

The sociological aspect in general or in particular can be the starting point of any comparison. As Péteri emphasizes, the real task is to give some relevance to the sociological aspects of state phenomena in terms of comparison. The term "state phenomenon" refers to legally defined state phenomena or institutions. This special socio-legal approach has the

following main criteria: (1) besides the legal framework, also principles have to be taken into account, (2) in the study of a given state institution, historical, moral and other traditions should also be considered, and (3) the function of the given state institution should also be analyzed.

7. The following pages–Goals and Methods of Comparative Law–introduce the reader to the goals and methods of comparative law. The author begins by asserting that there is no "Chinese Wall" between the fields of theoretical and applied comparative law, but their intersection is increasingly typical. However, the extension of comparative law to the legal practice and other factors influencing both legislation and practice enriched the so-called "legal approach" with sociological elements. Last but not least, the emergence of Socialist state and law also enforced the reinterpretation of the goals and methods of comparative law.

One of the fundamental questions of modern comparative law is whether Western and Socialist legal systems can be compared at all. According the position of Péteri, the opportunities of the comparison of earlier legal systems are limited since their social principles are rather different. Thus, a sociological approach has to be applied in research, as a simple declaration of formal similarities does not make much sense in a comparative study–he argues. This is also relevant when one investigates the development of states and legal systems or evaluates state and legal phenomena.

8. The next paper–Comparative Law and Legal Theory–analyses the relationship between comparative law and legal theory. The first important problem discussed here is the recognition of comparative law as an independent discipline. Emphasizing the significance of Maine's oeuvre, Péteri also points out the important role of Pollock, who stated that jurisprudence has to be historical and comparative at the same time. Thus, comparative law was regarded as an autonomous field of research. Moreover, from the 1870s it had a department in Oxford under the direction of Maine and his fellows.

A new approach to the scientific nature of *droit comparé* was formulated during the First International Comparative Law Congress (Paris, 1900). Lambert claimed that the task of comparative law is to help the formulation and emergence of the so-called common legislative law (*droit commun legislative*). This position was refined in the following decades by dividing comparative law to two fields of study: comparative legal history and comparative legislation.

In Hungary, comparative law occupied a central position in the oeuvre of Szalay and Wenczel. In a few decades, however, another approach became increasingly popular. It emphasized the subordinate nature of comparative law to general legal theory, and was advocated by scholars like Pikler or Moór. The jurisprudence of the Socialist era regarded comparative law as a method or transitory science. Péteri convincingly refutes this view and stresses the independence of comparative law.

In the concluding section, the author formulates an interesting and important position: "If one can speak of some kind of plurality within general legal theory, the basis for that can only be the different levels of abstraction. On the basis of that, one could even speak of general legal theories belonging to different legal families (as the Romano-Germanic, Common Law or Scandinavian legal families). Yet for formulating the most general theoretical conclusions, the best instrument is a legal theory having the most general scope and embracing all the legal systems. Thus, plurality within legal theory is possible and we think that a general legal theory has to be developed, which recognizes the different groups of legal systems."

9. The work continues with a discussion of the concept of "Western Law"–Some Remarks about the "Decline of Western Law". After an overview of the main ideas concerning the taxonomy of legal systems, Péteri quotes an opinion, according to which the simple comparison of all the legal systems is impossible and unnecessary. Therefore, what is really needed, is their classification. The approach based on the concept of legal culture can enrich comparative studies with new insights.

But what does the concept of "West" mean for comparative law? On the basis of the widely spread distinction between Common Law and Civil Law, Péteri reminds the reader that the term of Western Law was introduced in comparative law by David in 1950. The aim of David was to distinguish it from Socialist Law. It also has to be mentioned that by using this term David emphasized the unity of Civil Law and Common Law due to capitalism, liberalism, and Christian ethics. Even though David did not think this concept of Western Law was applicable in 1969, the concept of a common Western Law is still used in comparative law.

10. The author discusses the question of whether Hungarian Law can be integrated into any legal family of the world in a most interesting and scholarly paper–Hungarian Law and the Legal Families of the World. He thinks this question can be answered by focusing on the "styles" of the different periods of Hungarian legal history.

Medieval Hungarian law was part of the so-called Romano-Germanic legal family, but it also had some peculiarities. Either the doctrine of the Holy Crown and the lack of a codified constitution, or the resistance to the codification of private law can be regarded as differences from the general features of this legal family.

In the wake of World War II, Hungary got under Soviet influence and rule and consequently it became a member of the Socialist legal family. However, this was a somewhat unusual situation, since the Hungarian legal system underwent serious transformations, not only in a material, but also in a formal sense. Péteri points out that this formal transformation disrupted both the ancient roots and the former style of Hungarian law. In this process of transformation the newly enacted Socialist codes and the consequent rejection of both customary law and judge-made law played an important role. The constitution of 1949 symbolized a rupture with the former historical constitutional system. Moreover, Péteri adds, this constitution–contrary to many changes–remains the constitution of Hungary up to our days. The democratic transition in 1989 meant the return to the Romano-Germanic legal family in a legal sense.

11. As a first problem of the next paper–Traditions and Human Rights in Hungary–Péteri mentions three factors which influenced the formation of political and human rights in Hungary: first of all the English, French and German ideas, secondly the historical Hungarian constitution, and thirdly the Marxist ideology.

Imposing limits on the king's power, the Golden Bull of András II is rather similar to the English Magna Carta. This act, indeed, codified the legal position and privileges of the nobility emerging in the 13th century. The *Tripartitum* of 1514 also comprised these and it was living law until the 19th century. The improvement of the position of the peasantry could happen relatively slowly, mostly by the abolition of the feudal tenures in the 19th century. In the reformist movement emerging at the end of the 18th century, it was not the so-called third class (*tiers état*) but the nobility which acted as the leading force of the socio-political transformation.

As an example of the 20th-century Marxist interpretation of civil and human rights, the author gives a detailed analysis of the constitution and statehood of both the Soviet Council's Republic and the People's Republic. Lastly, Péteri points out that the main feature of the

recent developments is that the role of human and civil rights includes the limitation of state intervention as well as the protection of the individual sphere of liberty.

12. In what follows–Comparative Aspects in the Administration of the Law–the author scrutinizes the responsibility of judges and other functionaries dealing with the application of law. He first defines the three main features of the application of law: it is (1) not a mechanical activity, it is (2) obligatory for the judges, and (3) it has a comprehensive nature.

Placing the issue into a more general framework, Péteri continues his discussion with the comparison of European legal families. In so-called "Continental" legal systems, the "birth" of law is basically limited to the process of parliamentary legislation. However, Common Law systems look for the origin of law in the conventions, customs and traditions of society, that is, in the real behavior of people living together.

There are further differences between the two legal families in terms of the relationship of legislation and application of law. The prohibition of judge-made law is still a valid rule in Continental systems, although one can mention certain efforts to change this attitude.[3] Without doubt, Common Law is judge-made law.

The author reminds that if we look for the road leading back to Europe, we should harmonize our ancient traditions with the determining factors of European legal development. And we can count on the fact that both legal families are parts of what is called Western Law. Moreover, we should recall Zlinszky's dictum: the more legal knowledge, the more empowerment from the society, and the more responsibility.

13. One of the most important challenges to both European and Hungarian legal development is legal unification and legal harmonization. In the theoretical foundations of these processes, certain aspects of comparison can play a prominent role.

As the author rightly points out, legal harmonization only means the application of similar or equivalent solutions, while legal unification implies more. It implies that a new common regulation replaces former–divergent–rules. In terms of legal unification, one can speak of "internal" (within the national law) or international ones, while legal harmonization can be bilateral, regional or multilateral.

For all kinds of legal unification or harmonization, there are two fundamental questions to be discussed. Are they possible and desirable at all?

Obviously, the simple knowledge of legal rules is insufficient for legal unification. Their social, economic, political and ideological context has to be studied as well. For instance, unification is much less difficult between two countries having the same or similar ideological and political background. It is not mere coincidence that the traditionally successful fields of international legal unification were private and commercial law, while the unification of public law was considered as a mere dream by the participants of the First International Congress of Comparative Law. The author concludes that the activity of EU member states in the field of legal unification is really facilitated by the fact that their common intellectual heritage is strongly related to the Mediterranean culture with Jewish and Christian roots.

14. The last paper–Teaching of Comparative Law and Comparative Law Teaching–is devoted to the problem of legal education. The author starts from two premises. Firstly, he

[3] See Visegrády, A.: *A bírói joggyakorlat jogfejlesztő szerepe.* (The role of jurisprudence in the development of law). Budapest, 1998.

declares the necessity of a reform of legal education. Secondly, he accepts that the challenges of globalization render the spreading of a comparative attitude necessary.

When dealing with the question of comparative law in legal education, one has to discuss two different aspects: the teaching of comparative law as an independent subject on the one hand, and the reform of the entire legal education by applying a comparative attitude on the other.

Nowadays there exist different models of comparative law teaching in the law schools of the world: (a) the teaching of comparative law within the framework of legal theory, (b) the teaching of the main legal families of the world, (c) the teaching of national law compared to a foreign legal system, and lastly (d) the teaching of a given legal institution on a comparative basis.

According to Péteri, it is more suitable to talk about two different courses: (a) an introductory and theoretical course and (b) the comparative discussion of foreign legal systems. The first has its own place in the curriculum of legal theory classes, while the second is related to the teaching of various fields of law. The author endorses the proposal that an independent introductory comparative law course should be integrated into legal curricula.

Discussing the history of comparative law teaching in Hungary, Péteri points out that it started in 1850 at the law faculty of Pest (Wenczel). Subsequently, there were two main tendencies. Some scholars studied the kinship between Hungarian and Common Law (Grosschmid), while others interpreted comparative law as one of the methods of studying positive law (Pauler, Somló and Pikler).

As for the developments after 1945, it should be mentioned that besides the courses concentrating on the comparative aspects of a given legal institution, also introductory classes on general comparative law appeared in Hungarian law faculties.

In addition to the above chapters, the book also includes a bibliography of the author and the abstracts of the papers, in French or English.

***

One final remark. This volume is an important piece of *droit comparé* for many reasons. Its value is, first of all, due to its subject and methodology, then to its insightful findings, and finally to the fact that it deals with some of the most fundamental and current questions of comparative law. These questions are analyzed with a critical attitude. One may conclude by saying that this book deserves a place in the library of everyone–legal academics as well as practitioners–who deals with questions of legal theory, legal history, or EU law.

INSTRUCTIONS FOR AUTHORS

Acta Juridica Hungarica publishes original research papers, review articles, book reviews and announcements in the field of legal sciences. Papers are accepted on the understanding that they have not been published or submitted for publication elsewhere in English, French, German or Spanish. The Editors will consider for publication manuscripts by contributors from any state. All articles will be subjected to a review procedure. A copy of the Publishing Agreement will be sent to authors of papers accepted for publication. Manuscripts will be proceeded only after receiving the signed copy of the agreement.

Authors are requested to submit manuscripts to the Editor as an attachment by e-mail in MS Word file to lamm@jog.mta.hu. A printout must also be sent to *Prof. Vanda Lamm,* Editorial Office of Acta Juridica Hungarica, Országház u. 30, P.O. Box 25, H–1250 Budapest, Hungary.

Manuscripts should normally range from 4,000 to 10,000 words. A 200-word *abstract* and 5–6 *keywords* should be supplied. A submission of less than 4,000 words may be considered for the *Kaleidoscope* section.

Manuscripts should be written in clear, concise, and grammatically correct English. The printout should be typed double-spaced on one side of the paper, with wide margins. The order should be as follows: author, title, abstract, keywords. Authors should submit their current affiliation(s) and the mailing address, e-mail address and fax number must also be given in a footnote.

Authors are responsible for the accuracy of their citations.

Footnotes should be consecutively numbered and should appear at the bottom of the page.

References to books should include the facts of publication (city and date). References to articles appearing in journals should include the volume number of the journal, the year of publication (in parentheses), and the page numbers of the article; the names of journals should be italicized and spelled out in full. Subsequent references to books, articles may be shortened, as illustrated below (*Ibid.;* Smith: *op. cit.* 18–23; or Smith: Civil Law... *op. cit.* 34–42). When citing a non-English source, please cite the original title (or a transcribed version, if the language does not use the Roman alphabet) and a translation in brackets.

Tables should have a title and should be self-explanatory. They should be mentioned in the text, numbered consecutively with Arabic numerals.

New subject collections available

2010

Akadémiai Kiadó is offering new, minor and more adaptable collections in Arts & Antiques, Health Science, Hungary & Beyond, HiCited, Linguistics & Literature, and Social Studies with significant pricing discounts. Subscribers of any collection can pick an additional title from the Plus collection for free; its fee is included in the price of the subscribed pack.

Akadémiai Journals Collection ■ **Social Studies**

Acta Juridica Hungarica
Acta Oeconomica
European Journal of Mental Health
Journal of Evolutionary Psychology
Learning & Perception
Society and Economy

Akadémiai Journals Collection ■ **Plus**

Acta Geodaetica et Geophysica Hungarica
Central European Geology
Nanopages
Pollack Periodica
Studia Scientiarum Mathematicarum Hungarica

Additional details about the prices and conditions can be found at
www.akademiaikiado.hu/collections

AKADÉMIAI KIADÓ

VANDA LAMM, editor-in-chief
Corresponding member of the
Hungarian Academy of Sciences
Professor of International Law
Széchenyi István University (Győr)
Director, Institute for Legal Studies, HAS
Member and Vice-President
Institut de Droit International
Research fields:
public international law, nuclear law

ISSN 1216-2574

constitutional law ■ administrative law ■ human rights ■ legal philosophy ■ European law ■ civil law ■ penal law, public and private international law ■ labour law