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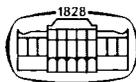
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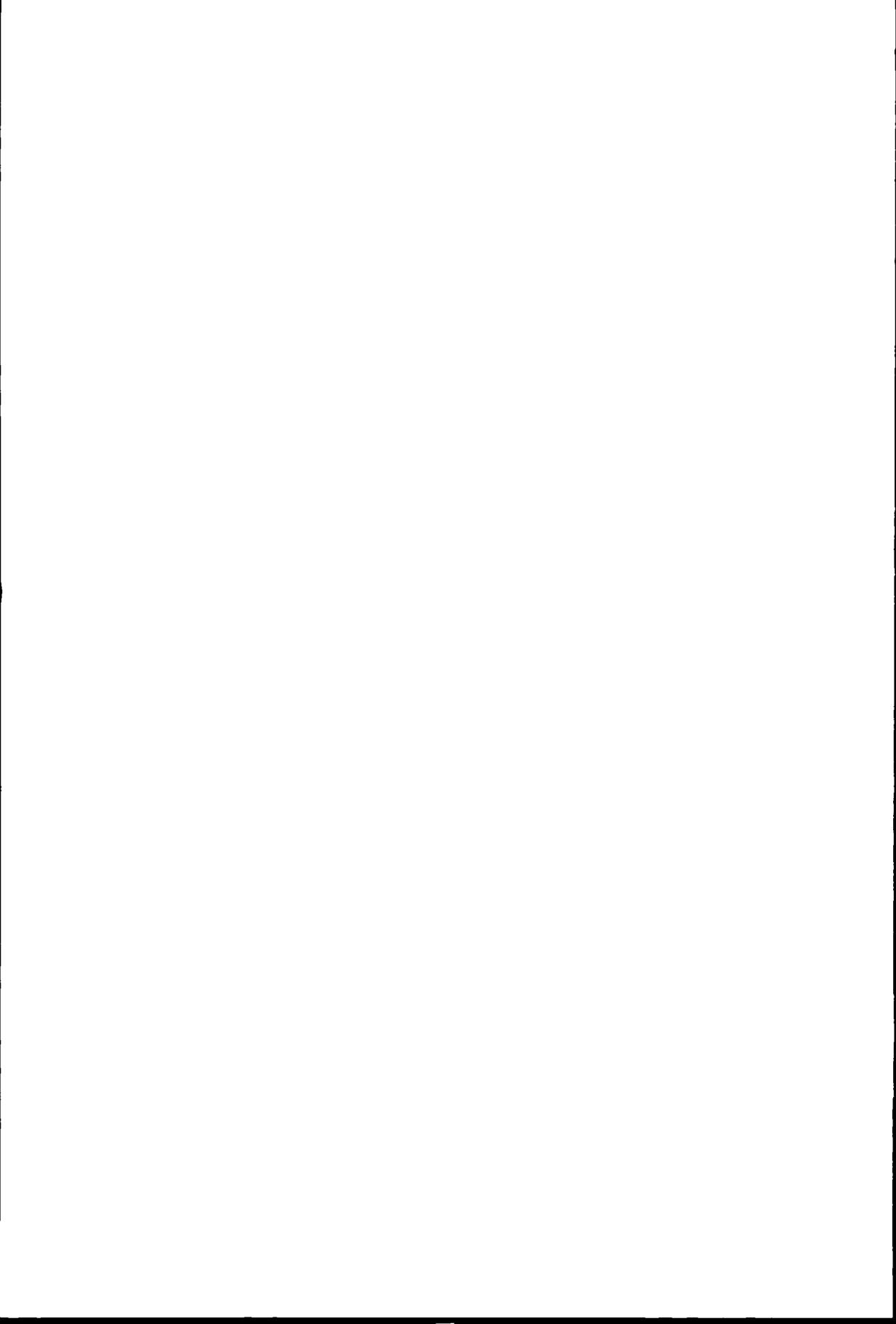
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ISTVÁN H. SZILÁGYI\*

## Law and Literature in Hungary – An Introduction

**Abstract.** This paper aims to give a concise review of contemporary Hungarian researches carried out in the field of “law and literature”. It evokes the preliminaries from previous century’s in Hungarian legal philosophy, and it discusses the recent achievements by taking a closer look on the results of three subsequent symposia organized in 2006, 2008 and the previous year. In conclusion, the paper outlines the possible directions for further development of certain aspects of legal education and the critical potential of “law and literature” studies.

**Keywords:** law and literature, Hungarian jurisprudence, legal education

The recent development of “law and literature” studies, as occurred in the past decade, is not without antecedents in Hungarian legal thinking—as it is not either in the American<sup>1</sup> or in the other European national jurisprudences.<sup>2</sup> Hungarian legal philosophy was flourishing during the early 20th century due to the oeuvre of such internationally renowned scholars as Felix Somló or Julius Moór. In this period, Barna Horváth’s work,<sup>3</sup> *Der Rechtsstreit des Genius*,<sup>4</sup> published in 1942, became a groundbreaking piece in the Hungarian study of “law and literature”.<sup>5</sup>

The theme of “law and literature” as a research subject reappeared on the horizon of the Hungarian legal thinking nearly a half century later, in the middle of the 1990’s. During these years Hungarian legal scholars were beginning to look for new impulses following the enforced hegemony of the “socialist legal science”. As a first sign of interest a

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<sup>1</sup> About the origins and the “returns” of “law and literature” in the history of American jurisprudence see Ferguson, R.: *Law and Letters in American Culture*. Cambridge (Mass)–London, 1984; Duxbury, N.: *Patterns of American Jurisprudence*. Oxford, 1995; Weisberg, R.: Coming of Age Some More: “Law and Literature” Beyond The Cradle. *Nova Law Review*, 13 (1988), 107–124; Smith, J. A.: The Coming Renaissance in Law and Literature. *Journal of Legal Education*, 30 (1979), 13–26.

<sup>2</sup> For a survey tracing “law and literature” in the European national jurisprudences see Varga, Cs.: Literature? A Substitute for Legal Philosophy? [2007]. In: Varga, Cs.: *Contemporary Legal Philosophizing*. Budapest, 2011 [forthcoming].

<sup>3</sup> For a concise curriculum vitae of Barna Horváth see Varga, Cs.: Barna Horváth. In: Horváth, B.: *The Bases of Law/A jog alapjai*, Budapest, 2006. xvii–xviii.

<sup>4</sup> Horváth, B.: Der Rechtsstreit des Genius: I. Sokrates; II. Johanna: a) Der Tatbestand, b) Das Verfahren. *Zeitschrift für öffentliches Recht*, 22 (1942) 1, 126–162; 2–3, 295–342; 4–5, 395–460.

<sup>5</sup> Cf. H. Szilágyi, I.: Barna Horváth’s Genius. In: Cserne, P.–H. Szilágyi, I.–Könczöl, M.–Paksy, M.–Takács, P.–Tattay, Sz. (eds): *Theatrum Legale Mundi. Symbola Cs. Varga oblata*. Budapest, 2007. 189–202.

propedeutical piece of Maria Aristodemou,<sup>6</sup> providing a comprehensive survey of the aspirations and themes of the field, was published in a reader edited by József Szabadfalvi.<sup>7</sup>

The present author started his studies in this field of study in the second part of the 1990's because it offered new possibilities to combine the history of Hungarian political and legal thinking with the anthropological perspective—his previous research themes. The subject matter of an experimental course emerged, which, connecting Horváth's legal philosophical concept of drama with Victor Turner's anthropological ideas of "social drama" and with the Geertzian methodology of "thick description", arranging all these around the analysis of Gabriel García Márquez's *Chronicle of a Death Foretold*.<sup>8</sup>

In the first years of the 21th century, Tamás Nagy, one of the most influential author in the field up to now, began his researches. As a starting step, he methodologically mapped the American tradition of "law and literature" from the time of the antebellum up to the Posner-debate.<sup>9</sup>

A group of younger scholars—Balázs Fekete, Miklós Könczöl, Máté Paksy, Szilárd Tattay—, members of the Department of Legal Philosophy in the Pázmány Péter Catholic University Faculty of Law participated in the organization of the *I. Law and Literature Symposium* in May 2006 in Budapest. Interestingly, although the majority of the participants could have been seen as "hard core" legal philosophers, a significant part of the presentations mixed a legal or political philosophical viewpoint with a historical perspective.

Thus, Attila Simon rethought Sophocles' drama, he analysed it with the fine tuned means of the post-modern literary hermeneutics in his "Antigone's and Kreon's Law". The study not only painted a nuanced picture of the antique political and legal thinking for its reader, but also familiarized them with the eternal tension of community life stemming from the ever present threat of using violence and power on the one hand, and the unforeseeable consequences of the enforcing actions on the other hand.<sup>10</sup> In his reading of Thomas Mann's *Magic Mountain*, Balázs Fekete brought to the surface those contradictions which were perceived by the writer between the heritage of the traditional, middle age thinking and that of the enlightenment, and which were dramatised by the spiritual duel of Naphta and

<sup>6</sup> Aristodemou, M.: Studies in Law and Literature: Directions and Concerns. *Anglo-American Law Review*, 22 (1993), 157–193.

<sup>7</sup> Szabadfalvi, J. (ed.): *Mai angol-amerikai jogelméleti törekvések* [Current Trends in Anglo-American Legal Theory]. Miskolc, 1996.

<sup>8</sup> For a summary of the theoretical and didactic outcomes of this seminary course see H. Szilágyi, I.: The Chronicle of a Death Foretold: A Retrospection. In: Mittica, M. P. (ed.): *ISSL Special Issue. Dossier on Law and Literature*. Bologna, 2010. 105–127. [<http://www.lawandliterature.org/index.php?channel=PAPERS>]

<sup>9</sup> See Nagy, T.: Néhány eljárás: Kafka-olvasatok a jogirodalomban [Several processes: Kafka-readings in the jurisprudence]. *Jogelméleti Szemle*, (2001) 3 [<http://jesz.ajk.elte.hu/nagy7.html>]; Narratív tematika a kortárs amerikai jogelméletben [The narrative theme in American jurisprudence]. *Acta Universitatis Szegediensis, Acta Iuridica et Politica*, Tomus LXIII, Fasc. 15, Szeged, 2003; Az amerikai jogelmélet és intézményrendszerének kapcsolata [The relationship of the American jurisprudence and its institutional system]. *Acta Universitatis Szegediensis, Acta Iuridica et Politica*, Tomus LXVI, Fasc. 15, Szeged, 2004; Jog és irodalom az antebellum korszakának Amerikájában [Law and literature in antebellum America]. *Jogelméleti Szemle*, (2005) 4 [<http://jesz.ajk.elte.hu/nagy24.html>].

<sup>10</sup> Simon, A.: Antigone és Kreon törvénye [Antigone's and Kreon's law]. *Iustum Aequum Salutare* III, (2007) 2 [hereafter: *IAS*]. 71–94.

Settembrini.<sup>11</sup> Szilárd Tattay interrogated Umberto Eco's *The Name of the Rose*—as if he started an investigation as a detective—to what extent William Occam's person and philosophy could be recognized behind the character of the novel's protagonist, brother William.<sup>12</sup> As for Tamás Nagy, he discussed the constellation of law and literature in antebellum America.

Another part of the presentations were inspired by the “law as literature” perspective. Ferenc Hörcher analysed the problem of the poetic justice on the basis of Martha Nussbaum's theory,<sup>13</sup> furthermore the present author discussed Barna Horváth's conception of “law as drama”.<sup>14</sup>

Critical voices about the goals of “law and literature” were not absent either. In his provocative speech, Csaba Varga emphasized partly that the “law and literature” was not an American “discovery”—as a rich scholarly literature had already existed in the European national jurisprudences. And, similarly to Richard Posner,<sup>15</sup> he also fervently criticised the feminist and the narrativist trends of “law and literature”.<sup>16</sup> While Lajos Cs. Kiss, basing his arguments primarily on the German social theoretical traditions, called attention to the limits of the efforts aiming to connect the law and literature.<sup>17</sup>

Péter Sólyom introduced a theme which was considered by the skeptics as the only relevant context in which to study the relationship of law and literature:<sup>18</sup> namely, when writers of literary works are tried for offence against public morality, for libel or for defamation.

The following year the papers presented at this symposium were published in the journal of the Law Faculty. The event also stirred interest outside of the academic circles focusing strictly on legal theory. At this time we began to establish an informal framework for the symposium. According to our plans, symposia should be organized every second year, each time at another place, and the presentations and other invited author's articles should subsequently be published next year. It was also agreed that, since “law and literature” is an extraordinarily suitable field for interdisciplinary studies, we should not only invite scholars from different legal disciplines, but also researchers coming from the field of literary science and other humanities.

The *II. Symposium* was organized in the spirit of these principles and it took place in Síkfőkút in October 2008, hosted by the Doctorate School of the Faculty of Law of the Debrecen University. The composition of the group of new participants fortunately mirrored

<sup>11</sup> Fekete, B.: A századforduló szellemi körképe a *Varázshegyről* [The spiritual panorama of the turn of the century from the *Magic Mount*]. *IAS*, 19–30.

<sup>12</sup> Tattay, Sz.: A rózsza neve: Ockham. Nominalizmus és természetjog Eco regényében [The name of the rose: Ockham. Nominalism and natural law in Eco's novel]. *IAS*, 111–118.

<sup>13</sup> H. Hörcher, F.: A költői igazságszolgáltatásról [On the poetic justice]. *IAS*, 43–56.

<sup>14</sup> H. Szilágyi, I.: Horváth Barna génusza. *IAS*, 31–42. For the English version see *op. cit.* in note 5.

<sup>15</sup> Both Posner's and Varga's approach can be characterised by the attitude of “cultural conservatism”. Cf. Seaton, J.: The Two Branches of Law and Literature Movement: A Critique of Stanley Fish. *Legal Studies Forum*, 15 (1991) 65–73.

<sup>16</sup> Csaba, V.: Irodalom? Jogbölcsélet? [Literature? Legal Philosophy?]. *IAS*, 119–132. For the English version see Varga: *op. cit.* in note 2.

<sup>17</sup> Cs. Kiss, L.: Megjegyzések a jog és művészet viszonyához [Some remarks on the relation of law and art]. *IAS*, 13–18.

<sup>18</sup> Cf. Posner, R.: *Law and Literature: A Misunderstood Relation*. Cambridge, 1988. 319–352.

our efforts to encourage an interdisciplinary approach: legal philosophers, legal historians, legal sociologists, political philosophers, civil lawyers and literary scholars could exchange views in these two days. The papers were published in 2009, in a volume entitled *Iustitia Goes on Excursion*.

Let us now take a closer look at the contents of the book in order to illustrate the diversity of the subjects!

The series of studies is opened by Tamás Nagy's essay that enlightens the legal layers of *The Stroker* by Péter Hajnóczy, the literary genius' of the socialist era plagued by misfortune, and compares those with the findings of the contemporary sociographical literature.<sup>19</sup> Ferenc Horkay Hörcher examined the problem of breaching the rules in the dynamics of man–woman relationship by the discussion of another 20th century Hungarian literary classic's, Géza Ottlik's short story.<sup>20</sup> Attila Horváth contextualized the highly celebrated *Strange Marriage* by Kálmán Mikszáth, one of the most well-known novelist of the 19th century, within the legal and political relations of the novel's birth, and opened up the inherent political content of the authorial intent.<sup>21</sup> Balázs Fekete analysed, in turn, the legal historical, legal sociological, criminological and legal philosophical aspects of Alexander Solzhenitsyn's *The Gulag Archipelago*.<sup>22</sup> Ferenc Tallár demonstrated how little of the reality can be grasped by the narratives born in the legal procedure by discussing the trial scene in Fyodor Dostoyevsky's *Brothers Karamazov*, a classical piece of the "law and literature" canon.<sup>23</sup> Dorottya Somlai characterized the sociological conditions of the 19th century French jurisdiction and legal profession, on the basis of Honoré de Balzac's novel-cycles.<sup>24</sup> Miklós Könczöl offered the "naturalist's perspective" for the analysis of the legal phenomena after the reading of Gerald Durrell's two novels.<sup>25</sup> The present author accounted for his experiences gained during the ten-year teaching of "law and literature".<sup>26</sup> János Jany revealed the meaning of a 6th century Persian tale, the *Dymnah's Trial*, written in Pehlevi by the means of thorough legal historical investigations.<sup>27</sup> Béla P. Szabó discussed a drama

<sup>19</sup> Nagy, T.: Egy arkangyal viszontagságai a szocializmusban. Hajnóczy Péter A fűtő című elbeszélésének egy lehetséges olvasata [The vicissitudes of an arcangel in the time of the socialism. A reading of Péter Hajnóczy's *Stroker*]. In: Fekete, B.–H. Szilágyi, I.–Könczöl, M. (eds): *Iustitia kirándul* [Iustitia goes on excursion]. Budapest, 2009 [hereafter: *Iustitia*]. 9–40.

<sup>20</sup> H. Hörcher, F.: Csalás és megcsalás. A szabályok áthágása és a férfi–nő kapcsolat természete Ottlik Géza *Hamisjátékosok* című elbeszélésében [Fraud and cheating. The transgression of rules and the nature of the man–woman relationship in Géza Ottlik's *Cardsharppers*]. In: *Iustitia*, 41–52.

<sup>21</sup> Horváth, A.: Mikszáth Kálmán "különös" házassági története [Kálmán Mikszáth's "strange" history of a marriage]. In: *Iustitia*, 53–58.

<sup>22</sup> Fekete, B.: A nyugati jog vágyálma. Jogi rétegek Szolzsenyicin Gulág szigetcsoport című művében [The dream of the western law. Legal layers in Solzhenitsyn's *Gulag Archipelago*]. In: *Iustitia*, 59–72.

<sup>23</sup> Tallár, F.: Regényköltészet Szkotoprigonyevszkban. A tárgyalás témája Dosztojevskij *Karamazov testvérek* című regényében [Novel-poetry in Skotoprigonyevsk. The theme of trial in Dostoyevsky's *Brothers Karamazov*]. In: *Iustitia*, 73–80.

<sup>24</sup> Somlai, D.: Jog a realista regényben. Két Balzac-regény jogszociológiai aspektusai [The law in the realist novel. The legal aspects of Balzac's two novels]. In: *Iustitia*, 81–100.

<sup>25</sup> Könczöl, M.: Két per leírása Grealld Durrellnél [The description of two trials by Grealld Durrell]. In: *Iustitia*, 101–110.

<sup>26</sup> H. Szilágyi, I.: Egy előre bejelentett gyilkosság krónikája: visszatekintés [The chronicle of a death foretold: a retrospection]. In: *Iustitia*, 111–132. For an English version see *op. cit.* in note 8.

<sup>27</sup> Jany, J.: Dymnah pere [Dymnah's trial]. In: *Iustitia*, 133–152.

about Papinianus, written by Andreas Gryphius, in his lengthy study. He considered one by one the different meaning-variations of the history of Papinianus' facing the will of Caracalla. He discussed the "messages" that can be drawn by a legal historian striving for objectivity, by the 17th-century drama writer, by the 17th-century audience, and by today's lawyers from this drama based on the clash of law, political reason and ethical obligations.<sup>28</sup> Márton Falusi treated the changing roles of law and literature in the legitimizing of power after the 1989's political changes in Hungary.<sup>29</sup> Péter Cserne investigated the altering meanings of the *contra proferentem* rule in the world of the civil law pointing out how the different legal-political aims influenced the interpretation of the rule in different historical periods and in different national legal systems.<sup>30</sup> Finally, János Frivaldszky analysed the relationship between the medieval jurisprudence and rhetoric in the light of the recent Italian legal philosophical findings.<sup>31</sup>

The present author held his inaugural lecture in 2009 at the Law Faculty of the Pázmány Péter Catholic University giving a comprehensive account of the research topics related to the field of "law and literature".<sup>32</sup>

One may call 2010, with some exaggeration, "the year of law and literature". The *III. Law and Literature Symposium* took place at Piliscsaba in April. The host institution was the Faculty of Humanities of the Pázmány Péter Catholic University, in this way expressing, in a symbolic form, too, the participants' commitment to the interdisciplinary approach. One interesting feature of the program was that the discussed literary works nearly perfectly drew the picture of the modern history of the Hungarian literature.<sup>33</sup> A pleasing part of the symposium was the presence of Anna Kiss. She, as a criminologist, had started her researches in the field of "law and literature" almost a decade earlier, independently from the above sketched efforts of the legal philosophers. She also tried to integrate "law and literature" into the way criminal law is taught. She published her experiences in a monography in 2008 entitled *Literary Heroes Fallen in Crime*.<sup>34</sup>

Three books also appeared in 2010 which practically summarized the outcomes of the researches of the past decade. An unusual reader on criminal law was edited by Anna Kiss.

<sup>28</sup> P. Szabó, B.: Papinianus a színpadon. A jog mártírja vagy modern példakép? [Papinianus on the stage. A martyr of law or a modern model?]. In: *Iustitia*, 153–198.

<sup>29</sup> Falusi, M.: Jog és irodalom Magyarországon 1990 előtt és után, avagy egy termékeny diszciplináris hasonlat [Law and literature in Hungary before and after 1990, or a fruitful disciplinary simile]. In: *Iustitia*, 199–208.

<sup>30</sup> Cserne, P.: Szerződésértelmezés hermeneutika és jogpolitika között. A *contra proferentem* szabály [Interpretation of contracts between hermeneutics and legal policy. The *contra proferentem* rule]. In: *Iustitia*, 209–228. For an English version see Cserne, P.: Policy considerations in contract interpretation: the *contra proferentem* rule from a comparative law and economic perspective. In: Radhika, G. (ed.): *Contract Theory–Corporate Law*. Hyderabad, 2009. 66–104.

<sup>31</sup> Frivaldszky, J.: Jogtudomány és diszkurzivitás a középkorban a kortárs olasz jogfilozófiai kutatások fényében [Jurisprudence and discourse in the Middle Age in the light of the current Italian legal philosophical researches]. In: *Iustitia*, 229–270.

<sup>32</sup> H. Szilágyi, I.: Jog és irodalom. (Habilitációs előadás) [Law and literature. (Inaugural lecture held at the Faculty of Law, Pázmány Péter Catholic University, 12 May 2009)]. *Iustum Aequum Salutare*, 6 (2010) 1, 5–27.

<sup>33</sup> The list of the Hungarian masters' name treated in the lectures is eloquent: Dániel Berzsenyi, Ferenc Kölcsey, János Arany, Imre Madách, József Eötvös, Gyula Illyés, Géza Féja, Péter Hajnóczy.

<sup>34</sup> Kiss, A.: *Jog és irodalom. Bűnbe esett irodalmi hősök* [Law and literature. Literary heroes fallen in crime]. Budapest, 2008.

It contained documents, taken from the various phases of the criminal process, which were based on the storylines of literary works.<sup>35</sup> Just like Tamás Nagy in his *Tracking Josef K.*,<sup>36</sup> the present author published his collected essays under the title of *Law–Literature*.<sup>37</sup>

Now, let us cast a glance on the above enumerated literary achievements from a more general angle, and investigate the general features of the state of art of the Hungarian research in “law and literature”.

The first striking feature is the dominance of the historical perspective. This is quite understandable, since the socialist era inflicted an artificial break in the Hungarian legal culture, as well in the literature. The endeavours to find the cut up threads of the traditions naturally appear in this post-colonial situation, and the “law and literature” field can be an excellent area for these efforts.<sup>38</sup>

As for the *strictu sensu* legal philosophical studies, it can be clearly seen that the “law and literature” researches promotes the reception of the “linguistic turn” of philosophical thinking.

Looking for positive trends, we can additionally point out that scholars of more and more legal disciplines are interested in the possibilities offered by “law and literature”, and the interest in the involvement of “law and literature” in the legal education is also increasing.<sup>39</sup> This kind of course is present in the curriculum of three out of nine Hungarian law faculties at the moment, but this number will probably grow thanks to the increasing number of the books suitable for educational purposes.

At the same time, it is a huge problem that those currents of “law and literature” which have the highest critical potential are absent from the contemporary Hungarian research, especially minority consciousness and the feminist perspective. However, the “legal storytelling” could have an important role, for example, in calling the attention of the Hungarian lawyers to the disadvantaged legal position of the Roma minority. So the greatest challenge of the following years will be to integrate the critical thinking into “law and literature”.

<sup>35</sup> Kiss, A. (ed.): *Bűntények a könyvtárszobából* [Crimes from the library room]. Budapest, 2010.

<sup>36</sup> Nagy, T.: *Josef K. nyomában – jogról és irodalomról* [Tracking Josef K.–on law and literature]. Máriabesnyő–Gödöllő, 2010.

<sup>37</sup> H. Szilágyi, I.: *Law–Literature*. Szeged, 2010.

<sup>38</sup> About the importance of “law and literature” in a post-colonial situation see Lenta, P.: Is There a Class in This Text? Law and Literature in Legal Education. *The South African Law Journal*, 119 (2002), 841–865.

<sup>39</sup> On the educational ambitions of “law and literature” see Ward, I.: The Educative Ambition of Law and Literature. *Legal Studies*, 13 (1993), 323–331; White, J. B.: *From Expectation to Experience. Essays on Law and Legal Education*. Ann Arbor, 2000.

BÉLA P. SZABÓ\*

## Papinianus on the Stage: A Martyr of Law or a Modern Model?

**Abstract.** This paper discusses Andreas Gryphius's tragedy (*Großmütiger Rechtsgelehrter oder Sterbender Aemilius Paulus Papinianus: Trauerspiel*) about the death of Papinianus, the famous Roman jurist of the Late Classic era. The author analyzes the historical context of the death of Papinianus in detail, and he also examines how Gryphius used the historical sources and his poetic imagination in writing his drama. The second part examines Gryphius's ideas about the law and state and argues that he followed Jean Bodin's teaching when he declared that the sovereign is bound by divine law and natural law. Additionally, the author also discusses the message of this 17th century drama for the contemporary lawyers. His main argument is that the *exemplum* of Papinianus encourages modern lawyers to create their professional value system and to insist on it conscientiously.

**Keywords:** Aemilius Papinianus, Andreas Gryphius, Jean Bodin, drama and law, moral resistance, passive resistance

### I.

It is probably a rare occurrence in the history of world literature that the protagonist of a work of “high literature” is a jurist. Even though the historical tragedy of Andreas Gryphius (1616–1664), one of the most important Baroque poets from Silesia, titled *Großmütiger Rechtsgelehrter oder Sterbender Aemilius Paulus Papinianus: Trauerspiel* (title of English translation: *Papinianus*) is not primarily about the professional activities of a lawyer, and not even about his life, but rather about his death, it may still be of interest to readers who wishes to discuss the relationship between law and literature, as well as interprets literary works (also) as legal professionals.

Our job as jurists is to identify legally relevant facts, reconstruct the facts of a case, find solutions and answers (provided they exist) and evaluate those solutions. In the present case we only have limited opportunities to do this. Although—if we really insist—the historical facts of the case (in the legal sense of the word) can be reconstructed, yet it is not primarily the interpretation of the literary historical facts of the case that we are faced with, but rather the investigation and comprehension of the circumstances and motives that are behind the reconstructed events.

Our situation is complicated by the fact that the events need to be reconstructed on two levels. When readers/interpreters defines themselves as historians and the author depicts well-known or easily identifiable events in history, the desire will inevitable emerge in the readers to know how much fiction encroached upon history. Historians compulsively compare and contrast the factual statements of a literary work that reaches back into the past with the historical facts identified by themselves: in addition to (before) outlining the

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sequence of events in a the literary work—in our case, a drama—they must also outline the historical events on which the plot is built.

It is evident that the task of approaches applying the historical method is not only to identify the antecedents of the solutions to certain problems that are, or appear, as accepted today. It is also their task to reconstruct such other possible solutions that were or may have been entirely accepted in their own age, but due to different—usually very complex—reasons have become worn out of practice or pushed into the background by more recent interpretations and solutions of problems. For this reason, the interpretation of Gryphius’s text is also realized in several (historical) layers, on multiple levels. In other words, we will attempt to consider the message of the drama through the eyes of its contemporaries, and will examine what it may have had to say to audiences/readers of its own time. Further, we will also examine whether it is possible for a work written and frequently staged three and a half centuries ago, in a particular set of historical and intellectual circumstances, with certain, easily identifiable intentions—which were the characteristics of the given historical era—to speak (“convey a message”) to the readers/legal professionals of our present age.

### **The historical hero—the history of the hero**

Aemilius Papinianus<sup>1</sup> was a Roman jurist in the Late Classic era. His origins are uncertain: some sources mention African, while others Syrian origins, but neither is certain. He was born around 150 AD, during the reign of Marcus Aurelius, and he was a student of the jurist Cervidius Scaevola, together with the would-be emperor, Septimius Severus.<sup>2</sup> He started his career as a *advocatus fisci*. Under Septimius Severus he became the *assessor* of the *praefectus praetorio assessor*,<sup>3</sup> then the *chief of the bureau of the imperial chancery concerned with petitions (magister libellorum)*,<sup>4</sup> and finally from between 203 and 205 he was *praefectus praetorio*, the commander of the Praetorian Guard, the highest ranking imperial officer and *de facto* deputy of the emperor.<sup>5</sup>

Traditional sources assert that he was in close friendship with the emperor (some sources even say they were brothers-in-law). This was the reason why the two sons of the emperor (Caracalla and Geta) later asked Papinianus to support them as co-emperors.<sup>6</sup> A few months after the death of Severus, Caracalla (who is called Bassianus in some of the sources) ordered Geta to be murdered, for reasons and in circumstances that are still debated by historians, and soon afterwards Papinianus also fell victim to the “cleansing” by the emperor, sometime early in 212.

In the Late Antiquity—due to his traditionally accepted martyrdom<sup>7</sup>—he was considered as the greatest of jurist, “a sanctuary of law and treasure-house of jurisprudence” (“*asylum*

<sup>1</sup> On his life and work, see Kunkel, W.: *Herkunft und soziale Stellung der römischen Juristen*. Graz–Wien–Köln, 1967. 224–229; Schulz, F.: *Geschichte der römischen Rechtswissenschaft*. Weimar 1961. 126 and 296–302; Vécsey T.: *Aemilius Papinianus pályája és művei*. Budapest 1884.

<sup>2</sup> *Hist. Aug. vita Caracallae* 8, 3. Cf. Knütel: *ibid.* 485.

<sup>3</sup> *Digesta* 22, 1, 3, 3. *praefectis praetorii suasi*.

<sup>4</sup> *Digesta* 20, 5, 12, pr. ...*libellos agente Papiniano*...

<sup>5</sup> *Hist. Aug. vita Severi* 21, 8.

<sup>6</sup> *Hist. Aug. vita Caracallae* 8, 3.

<sup>7</sup> Knütel: *ibid.* 485. Nörr, by contrast, started out from the position that due because, among other things, the real reasons for the killing of Papinianus were unclear in the Antiquity, a cult of martyrdom could not be formed around his person, and he therefore assumes that its appearance dates

*et doctrinae legalis thesaurus*”). The evaluation of Papinianus as a jurist was extremely positive in the Middle Ages and also in the Modernity. It is enough to refer here to the notions of Jacobus Cuiacius. As one of the most important legal humanist—following the value judgment of St. Jerome, who considered Papinianus, as the teacher of *lex caesaris*, on par with the Apostle Paul, the teacher of *lex Christi*—he regarded Papinianus as *Summus Iurisconsultus*, the paragon of jurists of unattainable professional and moral heights.<sup>8</sup> In this he followed the tradition of the Late Antiquity in which Papinianus was considered the most important jurist.<sup>9</sup>

### The “historical facts of the case”

Why Papinianus had to die is not clear on the basis of the sources. The diversity of the explanations given as the cause of his fall can already be seen in the *Historia Augusta*.

According to one version, Papinianus became a victim of Caracalla, aiming at tyranny, because he was one of the supporters of the agreement (*fautor concordiae*) between the co-emperor brothers.<sup>10</sup>

This is the most neutral explanation, in which Papinianus appears as an entirely passive character.

According to another explanation, later regarded as the “official” one, Papinianus had to die because he took the side of Geta.<sup>11</sup> It is easy to see why this became the official version more often embraced by historians, since Caracalla was not subjected to a *damnatio memoriae* after his death; on the contrary, his successors (especially Elagabalus) referred to his reign as grounds of legitimation. It would have contradicted with subsequent dynastic aspirations to find anything to object to in the reign of Caracalla, and naturally it was also not in the interest of the historians to diverge from this explanation.<sup>12</sup>

The view that Papinianus had to die because he disobeyed the orders of the emperor, and almost “impertinently” even justified his refusal, did not initially square with official historiography. Nevertheless, as a debatable claim it did find its way into the *Historia Augusta* and thus into common historical knowledge.<sup>13</sup> What is more, Spartianus (the author of the given part of the *Historia Augusta*) only presents this version when describing the life of Septimius Severus, who “slew, because he refused to absolve him of his brother’s murder, Papinian, a sanctuary of law and treasure-house of jurisprudence...”<sup>14</sup>

The hesitation of the author of *Historia Augusta* among the reasons leading up to the execution of Papinianus shows that, contrary to the official position, the historians of later periods (early 4th century) also started to consider other possibilities. In any case we can

back to the age of humanism. Nörr, D.: Papinian und Gryphius: Zum Nachleben Papinians. *Savigny-Zeitschrift für Rechtsgeschichte, Romanistische Abteilung*, 83 (1966), 309–310.

<sup>8</sup> Behrends, O.: Papinians Verweigerung oder die Moral eines Juristen. In: Mölk, U. (ed.): *Literatur und Recht: Literarische Rechtsfälle von der Antike bis in die Gegenwart*. Göttingen, 1996. 248.

<sup>9</sup> See also Giuffré, V.: Papiniano: fra tradizione ed innovazione. In: *Aufstieg und Niedergang der antiken Welt* II. 15. Berlin–New York, 1976. 632–666.

<sup>10</sup> *Hist. Aug. vita Caracallae* 8, 2–4.

<sup>11</sup> *Hist. Aug. vita Caracallae* 8, 7.

<sup>12</sup> Behrends: *op. cit.* 264.

<sup>13</sup> *Hist. Aug. Vita Caracallae* 8, 5–6.

<sup>14</sup> *Hist. Aug. Vita Severi* 21, 8.

start out from the assumption that there may have been some grounds in reality for the reasons later becoming dominant (and proposed last), which established the reputation of the uncompromising Papinianus for subsequent centuries: already in the Late Antiquity, the *praefectus praetorio* was viewed as a protector of justice, who became a victim of his consistency of principle.<sup>15</sup> This approach survived the Middle Ages and became generally accepted in the Early Modernity, since even those who did not think highly of his “sacrifice for justice” began the evaluation of his action from these historical facts of the case. (The most famous among them, as we will see, was Jean Bodin.)

### Gryphius and his historical raw materials

As we have seen, it was debated already in the Antiquity whether Papinianus was indeed executed for refusing to absolve Caracalla of his bloody actions. Gryphius also knew this well; nevertheless, he consciously accepted this explanation and took it as the *communis opinio*, as the basis for his drama.<sup>16</sup> In his notes written for the drama,<sup>17</sup> he discusses why, from among the several possibilities that can be found in the historical sources as the cause of the death of Papinianus, after weighing their historicity, he chose the refusal to compose a speech defending the emperor as the most likely one.<sup>18</sup> Although Gryphius reconstructs the external events leading to the death of Papinianus mainly on the basis of the ancient sources,<sup>19</sup> in elaborating the character of Papinianus (due to dramatic constraints) he also relied on his own poetic imagination and didactic intentions. He relies on poetic liberty where he has to fill in certain gaps or to move the plot of the drama toward a purpose set by himself.

In the light of this it may appear as odd to the contemporary reader that Gryphius also added footnotes to the manuscript of his drama, much as if it was a scholarly work. The reason for this is that in Gryphius’s time the aim of history, as the teacher of life, was to give examples (*exempla*) for the future generations.

However, for a historical event to be exemplary, it had to be “true”, and the truth content consisted less in the—often uncritical—reconstruction of the historical connections, but rather in the faithful representation of the details.<sup>20</sup> Accuracy of the details is important,

<sup>15</sup> There is no agreement in the literature or in the modern era either: most frequently, historians phrase their words so carefully that all possible reasons for an execution could be understood. Perhaps the most characteristic phrasing is the following: “Caracalla had him executed in connection with the killing of Geta.” Cf. Bund, E.: Papinianus. In: Ziegler, K.–Sontheimer, W. (eds): *Der Kleine Pauly. Lexikon der Antike*, Bd. IV. München, 1979. 487–488.

<sup>16</sup> Modern analysts are divided on this issue, too: Dieter Nörr finds it more likely that Papinianus was executed for political reasons, because he was a follower of Geta. Okko Behrends, on the other hand, considering the available sources once again, accepts that the specific reason for Papinianus’s death was his refusal to fulfil the request of the emperor. Nörr: *op. cit.* 308; Behrends: *op. cit.* 257–261.

<sup>17</sup> *Andreas Gryphii Kurtze Anmerckungen über seinen Papinianum*. In: Barth, I-M. (pub.): *Andreas Gryphius: Großmütiger Rechtsgelehrter oder Sterbender Aemilius Paulus Papinianus: Trauerspiel*. Stuttgart, 2000. 117–135.

<sup>18</sup> Anmerckungen III. 510.

<sup>19</sup> His insistence on details is emphasized by many scholars. Heckmann, H.: *Elemente des barocken Trauerspiels am Beispiel des “Papinian” von Andreas Gryphius*. Darmstadt, 1959. 15–16; Keller: *op. cit.* 145; Michelsen: *op. cit.* 48; Nörr: *op. cit.* 317.

<sup>20</sup> Nörr: *op. cit.* 346; Michelsen: *op. cit.* 48.

therefore, but larger historical connections are not to be discarded either, since the *exempla* cannot only be presented as models but also at the same time serve as evidence, and appropriate truth content is indispensable for this. Scholastic philosophers (and similarly also the Stoics in the Early Modernity) deduced the correctness of a statement from the *consensus omnium*; however, *exempla* that have been “historically” verified on the basis of the *consensus* also serve as proof for the existence and content of the *consensus* at the same time.<sup>21</sup>

## II.

### The first reading—Gryphius’s theory of law and state

For Gryphius and for contemporary readers, however, the “story” of Papinianus, with potential to develop it into an *exemplum*, offered opportunities for much more. *Papinianus* is not only one among the many martyr or tyrant dramas, which were “fashionable” at the time: the protagonist not only serves as a model, but his canonized decision was also debated in the Early Modernity, and thus served as a good moot point in university education. The conflict of the contemporary statesman is concretized through the example of Papinianus. One possibility is ensuring survival through energetic action, whereby we create the conditions of a good life for our fellow human beings. While the other is committing ourselves to a moral order and personifying it by way of identifying, preserving and supporting the basic convictions and aims of the given community.<sup>22</sup>

With his tragedy, Gryphius also wanted to take a standpoint in this contemporary debate related to (what we would call today) the theory of law and state.

At the beginning of the work, the dramatic Papinianus is not only a prestigious jurist and much sought expert on the *responsum* tax, but also a politician, in two senses of the word. On the one hand, he holds a high public office, and on the other hand, he is also an experienced expert, familiar with the basic principles of *politica*.<sup>23</sup> Naturally, Gryphius is not fashioning his protagonist into a modern “politician,” but it is clear from the entire drama that Papinianus is well-versed in the “political” discourses of Gryphius’s age (and so are also his adversaries). This is manifested in such sentences,<sup>24</sup> that unmistakably reflect the constitutional debates of the second half of the 16th century, and this underlines, time and again, the topicality of the example of Papinianus. Gryphius, in his great introductory

<sup>21</sup> Nörr: *op. cit.* 317.

<sup>22</sup> Kreuz, R. G.: Überleben und gutes Leben: Erläuterungen zu Begriff und Geschichte der Staatsräson. *Deutsche Vierteljahresschrift für Literaturwissenschaft und Geistesgeschichte*, 52 (1978), 207.

<sup>23</sup> The science of *politica* was a university discipline, emerging at the time, responding to the theoretical questions raised by the early absolutist states, which stood on the foundations of the received Roman law and attempted to draw up normative principles of the rules and regularities of the *ratio status*, looking for illustrations in the works of Tacitus. Cf. Die Lehre der Politik an den deutschen Universitäten vornehmlich vom 16–18. Jahrhundert. In: Oberndörfer, D. (ed.): *Wissenschaftliche Politik. Eine Einführung in Grundfragen ihrer Tradition und Theorie*. Freiburg, 1962. 59–116; Maier, H.: *Die ältere deutsche Staats- und Verwaltungslehre*. München, 1986<sup>3</sup>.

<sup>24</sup> For example: V, 119.

monologue, presents to the audience a protagonist confronted primarily with political questions and exposed to political attacks.<sup>25</sup>

Indisputably, the person of Papinianus was debated in this age. Large intellectual storms were caused by the antagonism between the views of Melanchton and Bodin concerning the role of divine and human law, as well as the issue of responsible action in an absolutistic state.<sup>26</sup> The experiences gained in the French civil war, but especially the questions of state philosophy and political actions related to the then forming early absolutist state, made the *exemplum* of Papinianus particularly important for contemporary philosophers. The recurring discussions of the case of Papinianus in scholarship and literature indicate that this model reflects not only the basic dilemma of jurists and politicians (the intelligentsia) but also of the emerging bourgeoisie. The latter accepted and supported court centralization, on the one hand, which could ensure order and peace; on the other hand, however, they also had to reckon with the appearance of individual and group interests (primarily the interests of the ruler and his circle).<sup>27</sup>

1. Gryphius's *Papinianus* reflects a peculiar understanding of the concept of state, which also highlights the final essence of the author's perceptions on political theory. Gryphius's dramas in this respect show some development: while in his earlier drama on Charles Stuart he clearly just positioned himself against the monarchomachs (those opposed to absolutism),<sup>28</sup> in *Papinianus* (since it does not treat a contemporary issue) he had more leeway for clashing different political views. The rhetoricization of Macchiavellistic opinions (Laetus), the absolutist standpoint (Bassian, Cleander) and the pragmatic *prudencia*-consideration tied up with the situation (Hostilius) makes this work much more multilayered from the point of view of the history of ideas than his other tragedies are.<sup>29</sup>

Gryphius does not deal with the question of whether or not the monarchy is a natural form of government. This, however, is much more the result of keeping out of the contemporary debates between monarchists and those advocating popular sovereignty<sup>30</sup> than the lack of a standpoint. In practice, on the analogy of monotheism, it was the

<sup>25</sup> Barner, W.: Der Jurist als Märtyrer. In: Mölk, U. (ed.): *Literatur und Recht: Literarische Rechtsfälle von der Antike bis in die Gegenwart*. Göttingen, 1996. 324.

<sup>26</sup> Hinrichs, E.: *Fürstenlehre und politisches Handeln im Frankreich Heinrichs IV. Untersuchungen über die politischen Denk- und Handlungsformen im Späthumanismus*. Göttingen, 1969.

<sup>27</sup> Kühlmann, W.: Der Fall Papinian. Ein Konfliktmodell absolutistischer Politik im akademischen Schrifttum des 16. und 17. Jahrhunderts. *Daphnis. Zeitschrift für Mittlere Deutsche Literatur*, 11 (1982) 1–2, 252.

<sup>28</sup> Fetscher, I.–Münkler, H. (eds): *Pipers Handbuch der politischen Ideen*. Bd. 3. *Neuzeit: Von den Konfessionskriegen bis zur Aufklärung*. München–Zürich, 1985. 107–124.

<sup>29</sup> Gryphius's models with regard to his theories of state are discussed in detail in H. Hildebrandt: *Die Staatsauffassung der schlesischen Barockdramatiker im Rahmen ihrer Zeit*. Diss. Rostock, 1939.

<sup>30</sup> On the debate between proponents of popular sovereignty (Althusius) and monarchic sovereignty (Bodin), which was also interpreted as the debate between the republic and autocracy. Cf. Scupin, H. U.: *Gemeinsamkeiten und Unterschiede der Theorien von Gesellschaft und Staat des Johannes Althusius und des Jean Bodin*. In: Dahm, K.-W.–Krawietz, W.–Wyduckel, D. (eds): *Politische Theorie des Johannes Althusius*. Berlin, 1988. 301–311; Scupin, H. U.: *Der Begriff der Souveränität bei Johannes Althusius und bei Jean Bodin*. *Der Staat*, 4 (1965), 1–26.

monarchy that appeared to Gryphius as the state of government most corresponding to natural law.<sup>31</sup>

At the same time, Gryphius's work also reflects Luther's perception of the state.<sup>32</sup> According to Luther's doctrine of two kingdoms,<sup>33</sup> the representatives of both the secular and the ecclesiastical authority are ordained by God. Accordingly, the sovereign is not entirely *legibus solutus*, but is subordinated to the power of God. The subjects, on the other hand, are required to obey the sovereign ordained by God, which means that active resistance is impossible.<sup>34</sup> At the same time, according to Luther's notions, passive resistance is allowed in such a way that the subject disobeys certain orders.<sup>35</sup> Influenced by Luther's teachings, Gryphius also differentiated between the sovereign's claim to power and one's conscience, and divided the spheres of *ratio status* and *ius divinum* sharply.<sup>36</sup>

On the basis of several passages in the text we can assume that Gryphius's concept of sovereignty is not based on the contract theory. This is somewhat unusual, since in the 17th century the various theories of state (both the defenders of absolutism and those advocating popular sovereignty) generally reached back to the tenet of the contract with the state. By contrast, Gryphius starts out from the divine origin of the sovereign's power: the gods are those, who delegate power to the sovereign.

Building upon the above theoretical foundations, in *Papinianus* Gryphius takes sides in the most important questions of his age related to the theory of state.

First of all, he rejects the paramount importance of state interests on moral grounds. As Cleander refers to *ratio status*, which may overrule any right (*Die Stat-Sucht wischt das Recht bei allen Völckern aus*), Papinianus immediately provides the already quoted maxim-like answer: *Wo Stat-Sucht herrscht: verfällt der Fürsten Stul und Haus*.<sup>37</sup> With this, Gryphius joins into one of the most topical debates of his age: while Cleander sees a legal horizon created by way of *consensus omnium gentium* in the *usus gentium*, which can be placed above conscience, Papinianus claims that sovereigns must, despite all this, remain immaculate, and there is no exemption from a gross violation of the law.<sup>38</sup> Papinianus (i.e. Gryphius) is willing to accept that the state interest requires minor infringements on the part of the sovereign,<sup>39</sup> but he finds the sins that shake the entire world,<sup>40</sup> even if committed with reference to state interests, unbearable. This standpoint of Gryphius very much

<sup>31</sup> Heckmann: *op. cit.* 87–89.

<sup>32</sup> Barner: *op. cit.* 241–242; Keller: *op. cit.* 152; Michelsen: *op. cit.* 50 and 58; Nörr: *op. cit.* 332.

<sup>33</sup> Most recently, see N. H. Gregersen: *Religion in der Öffentlichkeit. Die Zwei-Regimente-Lehre zwischen Privatisierung und Gouvernentalisierung* [[http://s6.rewi.hu-berlin.de/online/fhi/articles/pdf-files/0808\\_greger-sen.pdf](http://s6.rewi.hu-berlin.de/online/fhi/articles/pdf-files/0808_greger-sen.pdf)].

<sup>34</sup> Luther: *Von weltlicher Obrigkeit*. In: *Dr. Martin Luthers Deutsche Schriften theils vollständig, theils in Auszügen I*. Pub. F. W. Lomler. Gotha, 1816. 341.

<sup>35</sup> Luther: *op. cit.* 342. Cf. also Heckel, J.: *Widerstand gegen die Obrigkeit? Pflicht und Recht zum Widerstand bei Martin Luther*. In: Wolf, G. (ed.): *Luther und die Obrigkeit*. Darmstadt, 1972. 1–21.

<sup>36</sup> Franck, L.: *Die Papinian-Tragödie des Andreas Gryphius: Eine Lektürehilfe für Juristen. Zeitschrift für das Juristische Studium*, (2009) 1, 108.

<sup>37</sup> III, 491.

<sup>38</sup> Barner: *op. cit.* 235.

<sup>39</sup> V, 119–122.

<sup>40</sup> V, 123–125.

resembles the theory of Justus Lipsius analyzing the various forms of *fraus*.<sup>41</sup> Gryphius is certain that, using conscience, it is possible to differentiate between violations of law that can be explained by state interests and those that cannot.

Gryphius is also formulating his position in the *ratio status* debate when Hostilius, Papinianus's father, using pragmatic considerations, tries to convince his rebelling son, who has already been sentenced to death. It is argued by Hostilius that contrary to the mere stubbornness of the emperor, Papinianus would have an opportunity, by way of delivering the speech they want him to, stabilize the state and save the empire.<sup>42</sup> In its most interesting part, Hostilius's argumentation makes the claim that active deeds that may result in the saving of the state are at least as virtuous as Papinianus's stoic, reactive and rebellious persistence.<sup>43</sup>

In addition to denying the omnipotence of the state interests, however, Gryphius also rejects the active resistance to the tyrant. He considers the ideal of passive martyrdom in the sphere of politics as valid as on the level of the individual: there is no opportunity for resistance, but the imperial power can only destroy the body, not the soul.<sup>44</sup> Phrased in extreme terms we could say that Papinianus is prepared to obey the emperor if the latter wishes him to die, rather than to disobey the divine law.<sup>45</sup>

Gryphius's position on the theory of state is very clear and received quite a bit of attention from his contemporaries. His work was quickly elevated into the *ratio status* discussion of his age, which is also indicated by the fact that the tragedy was staged unusually often over a short period of time.<sup>46</sup> The drama had several adaptations until the 18th century in the German-speaking world<sup>47</sup> and also in Hungary.

2. As we can already see from the above, there is a peculiar perception of law behind the political notions of Gryphius, which, of course, may also reflect the ideas of his contemporaries.

In *Papinianus* there are two legal positions clashing:<sup>48</sup> on the one hand, the sovereign's "natural law" claim for obedience by his subjects, and on the other hand, the possibility (obligation) of resisting the orders of the sovereign violating the natural law, also with a reference to natural law.<sup>49</sup>

<sup>41</sup> In his work of political theory, Lipsius differentiates between allowed (*fraus levis*, *fraus media*) and not allowed *fraus* (*fraus magna*). What he calls *fraus magna* so much contradicts virtues and laws that it must be entirely avoided. The *fraus levis* used by the sovereign, may be useful to the state, while the *fraus media* is still tolerable. Lipsius: *Politicoorum libri*, IV, 14. See also Nörr: *op. cit.* 328–329.

<sup>42</sup> V, 87–90.

<sup>43</sup> Barner: *op. cit.* 236.

<sup>44</sup> III, 478.

<sup>45</sup> This is what he said at the execution of his son: V, 257–259.

<sup>46</sup> Cf. Gryphius, A.: *Dramen*. Pub. E. Mannack. Frankfurt am Main, 1991. 1003–1007.

<sup>47</sup> Barner: *op. cit.* 322–323.

<sup>48</sup> Nörr: *op. cit.* 325.

<sup>49</sup> Gryphius, therefore, examines the "evergreen" theme of the conflict between law and justice (positive law and natural law) using the approach of "law in literature" and using a specific historical example. Cf. H. Szilágyi I.: Előszó: A "Jog és irodalom" szimpózium előadásaihoz [Foreword to the lectures of the "law and literature" symposium]. *Iustum Aequum Salutare*, 3 (2007) 2, 8.

These legal positions are clashed in case of Gryphius not only in the form of dry arguments, as is the case in contemporary writings on the theory of state, but in the full life-likeness of dramatic action. Caracalla and his courtiers represent the unlimited application of the principle of *princeps legibus solutus*, while Papinianus stands for the natural law (manifested with the use of different concepts),<sup>50</sup> the principles of which cannot restrict the autonomy of the sovereign.

An important question is on what basis does Gryphius, advocating the theocratic nature of absolutism, accept the existence of law that is independent of the sovereign's power or can be located outside of it. The answer to this question is given by Papinianus when he has to administer the collection of laws deprived of his power.<sup>51</sup> The "right" law of Papinianus stands above the positive law of the *praefectus praetorio* (*Das Käyserliches Buch der hohen Ambts-Gesetze*—"the imperial book of official laws"<sup>52</sup>), and for the sake of the latter he does not want to violate the general law that governs the world.<sup>53</sup> There is, therefore, opposed to and above positive law, a certain "general law," which was written by God into our souls. Gryphius clearly refers here to the Epistle of Paul to the Romans.<sup>54</sup> This idea of Paul reflects the stoic, natural law notions about a law given by nature, which also played an important role in the elaboration of theory of natural law in the Early Modern Age. Thus, in Gryphius's conception, the "divine law," rooted in the heart and in the conscience, is merged with the natural law (*Natur-Recht*) that we were born with.<sup>55</sup>

Caracalla, by contrast, refers to a distorted natural law, which forbids subjects to judge the actions of the sovereign and—at least in the opinion of Laetus—stands above the people's right (*Völker-Recht*).<sup>56</sup>

In Gryphius's text, the law above the emperor is personified by Themis: she is the divine law and order, judge and avenger in one person. To die for Themis is sweeter than to sacrifice ourselves for our motherland.<sup>57</sup> Themis, the avenger, the "dreadful," still wears an antique gown, but the hymn of the dying Papinianus already praises her as a divine figure who brings healing, and the pagan goddess is thus somewhat "Christianized."<sup>58</sup>

By allowing the acts of Papinius to be governed by the naturally given law in the conscience, rather than positive law, Gryphius remains entirely within the theoretical boundaries of Neostoicism. Thus, indeed, conscience as the highest judge is the primary motif of *Papinianus*. The protagonist is a moral hero of rare purity, whose conscience (the "sacred law") is in the centre of the drama. The emperor has power over everything, except his conscience, which is untouchable. The preservation of this purity is the highest gain and glory of the protagonist: *Diß ist der höchste Sieg / daß mein Gewissen rein*.<sup>59</sup>

<sup>50</sup> Due to the poetic language Gryphius cannot be expected to use legal terms always in the technical sense. Therefore, concepts such as the people's right (*Völkerrecht*), divine right (*göttliches Recht*), conscience (*Gewissen*) and Themis cannot be sharply differentiated.

<sup>51</sup> IV, 335–342.

<sup>52</sup> IV, 335.

<sup>53</sup> IV, 336–338.

<sup>54</sup> *Romans* 2, 14–15.

<sup>55</sup> Michelsen: *op. cit.* 52–53.

<sup>56</sup> II, 68–69.

<sup>57</sup> III, 514–6.

<sup>58</sup> V, 343–346.

<sup>59</sup> V, 266.

The only question is how one can act rightly in the given situations, lead by one's conscience. Gryphius provides the following guidance: in all cases where conscience-rooted in the "sacred law," the *ius divinum*—does not forbid, one must be obedient, and suffer all vicissitudes without even thinking of resistance.

At the same time, Gryphius's Papinianus also lives in this world, and he is willing to shut his eyes to many things. However, fratricide that serves as the foundation of tyranny does not belong in this category. The *Heilige Recht* does not allow him to accept fratricide and to absolve it with his speech. This is shown by his arguments raised in response to the arguments of his father.<sup>60</sup> Disobedience starts here and also comes to an end, since when the defending his conscience brings him to deadly peril, he rather chooses glorious death.<sup>61</sup>

By his poetic depiction of the relationship between positive and higher law, Gryphius addressed one of the highly debated issues of his own time in a very original way. As it is proved by the drama, in the debate about the principle of *princeps legibus solutus*, Gryphius occupied a middle position: he stood between those who advocated the sovereignty of the emperor above natural law (this position is best represented in the drama by Laetus) and those who insisted that the sovereign was fully bound by law.<sup>62</sup> In the opinion of Gryphius, the sovereign is bound by *leges divinae et naturales*, but otherwise he is *legibus solutus*. In this respect he followed Bodin.<sup>63</sup>

*Papinianus* is characterized by an acknowledgement of the transhistoricity of natural law, meaning that it is not only identifiable in the Christian world order.<sup>64</sup> As a peculiar dilemma, however, Gryphius's concept of natural law may be interpreted to some extent as conflicting with his obligation of obedience (toward the sovereign in power at all times), which derives from his Lutheran faith. The ideological content of Gryphius's drama is measured against the touchstone of the obligation of obedience,<sup>65</sup> based on the Epistle of Paul to the Romans. His choice of topic and the answer he attempted to give clearly testify to Gryphius's courage and intellectual anxiety, which elevates him from among his contemporaries not only as a lyric poet and dramatist, but also as political and legal thinker, and explains the high popularity of *Papinianus* in his own age and thereafter.

### The second reading—Papinianus "reloaded"

We have examined through the eyes of a jurist what message Gryphius's drama, Papinianus's *exemplum*, may have conveyed to the intelligentsia and educated bourgeoisie of the 17th century. What may they have thought upon reading or seeing the dramatic depiction of the last day in the life of Papinianus.

Finally, let us turn our attention to the drama through the eyes of a present-day reader, a jurist of the 21st century. Can a three-hundred-and-fifty-year-old drama that—unlike the works of Shakespeare, which are only two generations older—is no longer performed on the stage teach us anything?

<sup>60</sup> V, 118–126. (see above); V, 131–134.

<sup>61</sup> V, 223–224 and 227–229.

<sup>62</sup> Althusius was a typical representative of this view, according to whom the sovereign is *lex viva, executor, custos et minister legis, qui nihil nisi lege iubente velit, faciat vel omittat*. Althusius: *Politica* 24, 48. Quoted by Nörr: *op. cit.* 327–328.

<sup>63</sup> *Ibid.* 328.

<sup>64</sup> Kühlmann: *op. cit.* 250.

<sup>65</sup> *Romans* 13, 1.

First of all, it is important to note that, however didactic the tragedy may have aimed to be, Gryphius was not looking for answers to simple questions and did not present the audience with the gift of *dixit*. And the lines of Gryphius may lead to many reflections also in today's readers—even despite the fact that certain approaches (such belief in suffering, martyrdom and a higher justice) are rather far from both today's jurists and people in general. It is not just a historical curiosity since—as we had mentioned before—the text probes constantly recurring questions. As is usual for all literary works, we have an extremely large number of interpretive possibilities, and in the present case it is a legal historian who is going to provide his analysis.

It is obvious to us that Papinianus did not just have to prove his perseverance, but Gryphius also puts him to an intellectual test, and in this respect he apparently places much emphasis on ensuring that Papinianus can support his conduct in comparison with other standpoints and possible solutions.<sup>66</sup>

Gryphius, however, does not simply present his protagonist with the simple choice of “you either obey or you die,” but actually opens up several possibilities (temptations) with which he can react to the emperor's challenge. All temptations appeal to Papinianus with rational arguments. It is not sufficient either that the title character should repel these “attacks” schematically, by way of reference to Themis or his legal consciousness building on his conscience, but he is forced to bring forward objective—one could almost say “professional”—counterarguments, thus overcoming the temptations. Fighting a two-front intellectual war, he does not only have to justify why he refuses to comply with the emperor's request, but also why he abandons the possibility of resistance beyond the refusal of obedience. Conducting and following this discussion apparently had major significance for the author and not only his contemporaries (spectators and fellow scholars), but perhaps also for the posterity:<sup>67</sup> What are the principles on which Papinianus is basing his standpoint? How does he answer all those questions raised from both sides to challenge his own position?

Among the “temptations” that Papinianus—relying on higher legal and moral principles—must face, two may be of interest from the perspective of the theory of state: the reference to the state interest (*raison d'état*)<sup>68</sup> and—perhaps the more important one—the call for rebellion against a tyrant.<sup>69</sup>

1. Caracalla and his followers attempt to justify both the obvious violation of law that fratricide constitutes and the claim formulated against Papinianus by saying that it was, or would be, in the interest of the state.<sup>70</sup> In the final analysis it is the state interests that force

<sup>66</sup> See Schnabel: *op. cit.* 560–565.

<sup>67</sup> Michelsen: *op. cit.* 50 and 54.

<sup>68</sup> On the appearance of the notion of the “*raison d'état*” in the German empire, cf. Schönemann, B.: Staatsräson im Alten Reich der Frühen Neuzeit und im Deutschen Bund. In: Heydemann, G.–Klein, E. (eds): *Staatsräson in Deutschland*. Berlin, 2003. 23–44; Schnur, R. (ed.): *Staatsräson. Studien zur Geschichte eines politischen Begriffs*. Berlin, 1975.

<sup>69</sup> Roth, K.: Geschichte des Widerstandsdenkens: Ein ideengeschichtlicher Überblick. In: Roth–Ludwig (eds): *op. cit.*

<sup>70</sup> III, 419: “Die Noth zwingt Fürsten offft, was auß der Bahn zu gehn.”—It is not difficult to recognize in this the principle of (“Necessity has no law”), which functioned in the 17th and 18th centuries as a basic political principle. Cf. Oestreich: *op. cit.* 57.

Caracalla, against his own intention, to have Papinianus executed,<sup>71</sup> since on the one hand his perseverance would generate sympathy in the population and turn the people against the emperor, and on the other hand the killing of his son would certainly prompt Papinianus to take revenge against the emperor. What Caracalla finds suspicious in Papinianus's behaviour is exactly that he knows: the *praefectus* is intelligent enough to recognize that the sovereign has to leave the path of unswerving lawfulness.<sup>72</sup>

Formally, therefore, it would be easy for Papinianus to explain the deed of Caracalla in such a way that it would not extend beyond the powers vested in the *princeps*. However, he did not explain it in such a way, and this—based on our current knowledge—can only (perhaps) be explained with his specific view of law and his conscience.

Reference to state interests appear even graver when coming from Papinianus's environment: he is warned that by his death he jeopardizes the existence of the empire. In the arguments set forth by his father and the responses that Papinianus gives, Gryphius deliberates all the points of view that Jean Bodin expounded in connection with Papinianus's behaviour. The position of the father, Hostilius, is summarized in the following lines: “*Schön ist / mit einem Wort / den Geist vors Recht hingeben / Doch schöner Recht und Reich erretten durch sein Leben.*”<sup>73</sup>

This suggestion stems from the virtue of *prudentia*, and it enlists such arguments that were explained in detail by Bodin. Bodin—who necessarily also started out from the fact that Papinianus disobeyed the order—condemned Papinianus's deed because with his (in itself commendable) perseverance he did not improve the public state of affairs, but rather deteriorated it. He expounds his criticism in the chapter of his work *The Six Books of the Commonwealth*<sup>74</sup> in which he raises the question whether public officials must obey laws that contradict “natural law”?

As a first step, Bodin sets up the basic principle that in such a case the official – in order to avoid being in conflict with *leges divinae* and *leges naturae*—resign his office. In this case, *constantia* can protect the state and also the sovereign himself from many bad things.

His opinion is different, however, if *constantia*, perseverance rather deteriorates the situation, as it happened in the case of Papinianus, since his death caused much more damage to the empire than the violation of the higher values would have, if he had absolved the emperor from fratricide.<sup>75</sup> Bodin, of course, starts out from the assumption that, after his surrender, Papinianus would have actually had an opportunity to have a moderating influence on Caracalla. Bodin, therefore, explicitly criticized Papinianus's conduct,<sup>76</sup> determined by tradition, since it did not help at all, and in fact caused much damage to the Empire. This criticism even questions Papinianus's stoic behaviour, since in his opinion the former *praefectus* was motivated in his act by an impulse that is inadmissible for a stoic: he let his pain control him.<sup>77</sup> Gryphius may have adopted these arguments either directly from

<sup>71</sup> V, 297–298 and 307–308.

<sup>72</sup> IV, 24.

<sup>73</sup> V, 87–88.

<sup>74</sup> *Les Six Livres de la Republique* de Jean Bodin Angeuin., Cartier, 1608.

<sup>75</sup> *Ibid.* 421–422.

<sup>76</sup> Nörr: *op. cit.* 313–314; Kühlmann: *op. cit.* 228–230.

<sup>77</sup> Kühlmann, W.: Der Fall Papinian. Ein Konfliktmodell absolutistischer Politik im akademischen Schrifttum des 16. und 17. Jahrhunderts. In: *Europäische Hofkultur im 16. und 17. Jahrhundert*, II. (Hrsg. Buck, A.–Kaufmann, G.–Spahr, B. L.–Wiedemann, C.), Hamburg, n.d. 249.

Bodin's work or from authors who counted as Bodin's followers in contemporary debates on law. Yet, Papinianus does not heed the advice of his father (Bodin): his decision, however, is not based on principle, but is prudential, applied to the given situation. He explains his decision with the seriousness of the emperor's crime and the unavoidability of the situation.

2. The other temptation—which could point beyond conscientious resistance to the emperor's order—is active resistance, the possibility of a rebellion against tyranny. It is very telling that Gryphius even flashes up this possibility for his protagonist. This is because if Gryphius's aim would have simply been to emphasize the martyrdom of his protagonist, then he—more in line with the historical sources and the constellation of the events—could have easily isolated the title character from the very emergence of the possibility of active resistance. This way, however, he would have excluded himself from the discussion of the right of active resistance against rulers. Papinianus would have been a great hero, the martyr of law, even without this. But Gryphius did not want to stop here, and by way of giving Papinianus the opportunity to actively influence the course of history, to act rather than to simply suffer the consequences, he also made his own further aims obvious.<sup>78</sup>

Papinianus (and Gryphius) represent the type of monarchistic absolutism that is responsible only to God. Accordingly, the sovereign who is put in his position by God has only one obligation: to discharge his office in accordance with the natural and the divine law. However, individuals (the subjects) have no grounds for forcing their sovereigns to do so. Their only possibility is patient, suffering obedience.<sup>79</sup> Since the sovereign received his power from God alone, he can only be judged by Him. The subjects have no power to judge the sovereign.<sup>80</sup> At the same time, the divine tribunal passing judgment over the tyrant cannot exempt the subjects from the obligation to comply with the requirements of divine law.

All of this conforms with the teachings of Luther, as well as of the proponent of sovereign monarchy, Bodin. It is more important to obey God than to obey man: *regibus obedientia debetur, sed post deum immortalem*.<sup>81</sup> It follows from the above that active resistance to the sovereign is forbidden; however, passive resistance, i.e. the disobedience of orders that contradict the divine law, is outright an obligation of the subjects.<sup>82</sup> For officeholders, the obligation that follows from this is that they must resign their office if requested to do something that violates the divine or the natural laws.<sup>83</sup>

Papinianus discards the possibility of active resistance on the same basis that he mounts his unswerving passive resistance on: the basis of "law."<sup>84</sup>

In the interest of preserving his principles, Gryphius even goes as far as leading his protagonist into what appears to contemporary readers a dead-end street: there is no active way out if a contradiction emerges between the obligations toward a sovereign put on the throne by God and the divine legal order. The surrender of the right of resistance stems

<sup>78</sup> Michelsen: *op. cit.* 56.

<sup>79</sup> Troeltsch, E.: *Naturrecht*. In: *Die Religion in Geschichte und Gegenwart*. Bd. IV. Tübingen, 1913. 701.

<sup>80</sup> IV, 411–412.

<sup>81</sup> Bodin: *De republica* I, 8, 99.

<sup>82</sup> Bodin: *De republica* I, 8, 99. Kühlmann: *op. cit.* *Daphnis*, 233.

<sup>83</sup> Bodin: *De republica* III, 4, 294.

<sup>84</sup> Michelsen: *op. cit.* 59.

from the pessimistic realization that a struggle for a good cause may itself lead to suffering and lawlessness.

At the same time, the idea that the subject should passively accept unlawful death even was certainly welcomed by absolutistic monarchies. No matter how justice and ideology encounter in this conflict, for the people of the 17th century it was only suffering similar to Christ's that could mean transcendence of the ephemeral world and the only possible realization of human freedom.<sup>85</sup>

3. Perhaps still the most important question of the drama is why Papinianus died. What forced him to undertake this fate? As the original title of the tragedy suggests, Papinianus died for law. But how is this to be understood?

The law for which Papinianus died is an absolute value. In his eyes, law stands above the orders of humans and of emperor: it is the gift of heavens (*Himmels Gabe*),<sup>86</sup> burnt into the soul.<sup>87</sup> The law is sacred,<sup>88</sup> God and law are one.<sup>89</sup> Papinianus, therefore, is not interested in the consequences of his conduct.<sup>90</sup> It is not the public good he wants to serve with his death, he only wishes to give testimony, to be a placatory offering, whose death contributes to the survival of law in the world: *Mehr wenn das Recht dardurch erhalten in der Welt*.<sup>91</sup>

The death of Papinianus teaches that the evil powers of this world destroy the just. At the same time, some "recompense" is available in the fact that the just are elevated by their fall, while the—seemingly victorious—unjust are sinking to the depth.<sup>92</sup> The judgment of a sovereign's sins falls in the jurisdiction of the divine tribunal.<sup>93</sup> Therefore, all left for an individual (Papinianus) confronted with the unlawful demands of the sovereign is endurance and suffering. However, the harmony between conscience and law makes it possible to rise above needs, transience and human fear. Obedience to conscience, which is linked to the divine law, earns one a lasting reward, which points beyond death.<sup>94</sup>

Of course, for contemporary readers all of this is not satisfactory, since Gryphius leaves judgment to a transcendent forum, and even that does not work. This may have been an acceptable (although even then a not very practical) solution for the intelligentsia and bourgeoisie of the 17th century, but in our age the prevailing idea is that human jurisdiction can also restore the proper order of things and that a conflict between law and justice (positive law and principles of natural law) can be resolved still in this world.

Contemporary readers may see the failure and complete un-lifelikeness of Gryphius's solution in the fact that Papinianus's martyrdom does not restore anything and does not recreate lawful conditions. What is more, this is something that Papinianus also had to see in advance. Furthermore, he must think it most likely (and historical sources also evidence

<sup>85</sup> Nörr: *op. cit.* 332–333.

<sup>86</sup> I, 224.

<sup>87</sup> IV, 340.

<sup>88</sup> I, 92. II, 258. III, 474. IV, 330. V, 66. V, 259.

<sup>89</sup> V, 154. V, 288.

<sup>90</sup> III, 499–504.

<sup>91</sup> III, 515.

<sup>92</sup> The opposite movement, rise and fall, which is generally characteristic of Baroque dramas can be observed throughout this text: Bassianus's fate is to become a tyrant, Papinianus's to end up as a martyr. Cf. Keller: *op. cit.* 155.

<sup>93</sup> IV, 509–410.

<sup>94</sup> Keller: *op. cit.* 150–151.

this) that after his death Bassianus will exercise his despotic power even more uncontrollably. His son's dramatic fate also warns him of this. Papinianus's son himself discloses to the spectators the point of view which demonstrates the terrible circumstances in advance: *Wernur das Recht ansieht schlägt Kinder in den Wind*.<sup>95</sup>

The fate of the son unmistakably foreshadows that the strict legal position of Papinianus—on which he bases his refusal of the emperor's request—will be the source of further injustice, including such that would not have happened otherwise. Paradoxically, the unwavering insistence on law gives rise to the lawlessness, and even prevents the possibility that, by way of strictly insisting on his own position the occurrence of these injustices could really be avoided. Of course, this is a situation stretched to the extremes. Gryphius made sure that Papinianus is faced with an extreme alternative: he either becomes an active agent in the interest of the public good, and thereby also positions himself across from "law" in the absolute sense of the word, or he follows his conscience only and thus accepts that this will also cause others to suffer negative consequences.<sup>96</sup>

Bodin saw it only too well that politically Papinianus was defeated. With his self-sacrifice (in which his political, moral and legal identities appear) he practically submits to the representatives of an unscrupulous sovereignty. Gryphius attempts to present on the stage the contradiction that emerged in his age in the rhetorical literature concerning the evaluation of Papinianus. However, as we can sense, he cannot find a satisfactory way out of the dilemma.

If we examine the teachings of Gryphius, which he professes by way of the dramatic presentation of Papinianus's action, in the (even contemporary) political context, then—at first sight—the "failure" of Papinianus seems obvious, since it only offers the possibilities for the common man to either save himself—even if reluctantly—by way of being a partner in crime or to fall victim of the circumstances without any actual countersteps other than declaring his disobedience. The common man, therefore—in this constellation—can only choose between falling into sin himself or becoming persecuted: either committing a sin or being a victim of it.<sup>97</sup> These are disappointing prospects. Consequently, to avoid this, in Papinianus's fate we can only see a warning against the individual to participate in public life, in politics. One should withdraw, live a simple life, far from the grandeur and misery of the court.<sup>98</sup> Armed with conscience alone, one can only lose in the arena of politics.<sup>99</sup>

A careful examination of the development of Gryphius as a poet and thinker, however, reveals that he moves beyond the proclamation of the "withdrawal from the world." In our reading of *Papinianus* the model to follow is no longer necessarily turning away from politics, but the demonstration of the politically (still more) active *virtus*, which serves perseverantly and committedly ideal aims, and is thereby able to lend politics certain sense

<sup>95</sup> IV, 310: "He who only sees law trusts his child to the wind."

<sup>96</sup> Michelsen: *op. cit.* 63.

<sup>97</sup> *Ibid.* 59–60.

<sup>98</sup> This is clearly the conclusion drawn in two earlier dramas of Gryphius: according to *Leo Armenius* and *Carolus Stuardus*, withdrawal from politics and burying oneself in private life is the proper life for a humanist. Lenk, W.: *Das Schicksal der Regenten: Zur Trauerspielkonzeption des Andreas Gryphius*. In Honsza, N.–Rolloff, H-G. (eds): *Daß eine Nation die ander verstehen möge. Festschrift für Marian Szyrocki zu seinem 60. Geburtstag*. Amsterdam, 1988. 512.

<sup>99</sup> Michelsen: *op. cit.* 63.

and values.<sup>100</sup> This is also manifested in the fact that Papinianus does not run away, but stands up for his own legal and political principles. And in the given situation this insistence can have a huge weight.

4. In any case, for a contemporary reader, a jurist in particular, Papinianus appears as a rather un-lifelike character: he is the complete opposite of the turncoat or (to use a milder expression) opportunist—and in this sense modern—image of jurists, having no difficulty in changing their standpoints. A modern jurist is an opportunist *ex officio vis-à-vis* the state power and the values it represents.<sup>101</sup>

This, of course, does not mean that the self-reflection of contemporary jurists could be exempt from the questions raised by the example of Papinianus. It is evident that the acts of Papinianus could be evaluated differently if we relativize the human being and law, as soon as the necessity of self-preservation and, in connection with this, the preservation of society and the state replace absolute values. This is something that, to soothe their conscience—in the interest of the abovementioned objectives—European intellectuals of the 20th century were very much inclined to do, and—in the eyes of many—especially inclined among them were the members of the legal profession on the Continent who traditionally received a positivist education. Papinianus's upholding of the banner (which led to failure, if viewed pragmatically) was hardly ever followed by jurists who accepted, supported or served autocratic systems. It is commonly known that major traumas were necessary for such questions to be formulated in the thinking of Continental European legal professionals that Gryphius confronted his protagonist centuries before.

However, while individuals in the Early Modernity could at least rely on—or believe more directly in—divine guidance (even in the form of Themis), jurists of our age stand alone with their conscience.

Gryphius's Papinianus *exemplum* can be regarded as the warning of a Christian humanist utopia, since, in a certain sense, we can also regard the conservative standpoint of the author as an indictment of the political reality. The reality, however, even at that time obeyed the laws of political schemes and games rather than the principles of justice and rationality. For us—in my opinion—even the possibility of the utopia is gone.

Even if the example of Papinianus is not capable of shedding light on how a jurist should actively proceed in a situation when his or her own value system and the orders of the power are in conflict, it will nevertheless encourage us to form our own (even professional) value system. And once this value system is established, we should insist on conscientiously, and be vocal about it, even if we are left alone in this.

<sup>100</sup> Lenk: *op. cit.* 512.

<sup>101</sup> The notion that personal moral dignity and the professionalism of a jurist can be separated from each other, and that in fact the exclusion of moral doubts is the proof of professionalism only gained ground in the thinking and self-image of jurists in the 19th century. Cf. Behrends: Papinians Verweigerung... *op. cit.* 248.

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## Law and Literature and the Christian-humanist Educational Ideal in Hungary

**Abstract.** Politics and literature traditionally developed in a close contact with each other in Hungary. This paper argues that this intimacy had a particular reason: the fact that Latin educational ideals determined the way youth were brought up well into the 20th century. This had an impact on the way politics was understood here, including the fact that parliamentary debates were carried out in Latin well into the early 19th century.

And this had a further consequence as well: literature was not viewed simply as an autonomous field of activity, aiming only at aesthetic merits, but as a way to reflect on the fate of the nation. Lawyers had a professional training in rhetoric and therefore they had a familiarity with classical literature, which led many of them towards their own creative writing. And professional writers, too, had no other education than that of the Latin Christian-Humanist model, which made them representatives of the nation, as well as followers of earlier, classical patterns of writing. These features played a major role in the formation of the two heroes of the paper, the poets Dániel Berzsenyi and Ferenc Kölcsey, who had an internal conflict between each other, but who both embodied the type of late humanist political writers, so characteristic of the reform era of this region of Central Europe.

**Keywords:** Christian-humanist ideal, lawyers, Latin education, rhetoric, political writers, Dániel Berzsenyi, Ferenc Kölcsey, reform era

### I. 19th-century Hungarian writers with a legal background—lawyers publishing fiction

One of the key elements of Hungarian literature is that it is overloaded with politics, as memorably demonstrated by the competing views of two 20th century authors, Gyula Illyés and Péter Esterházy. While the former envisaged the Hungarian writer as thinking in terms of the people and the nation, according to the younger one the distinguishing feature of a writer was to think in terms of subject and predicate. These latter criteria do not make the Hungarian writer a homeless stranger, he claimed in one of his novels, and added that it was pointless as well as stylistically criticisable to use rhetorically charged sentences about your love of your home country.

The opposition between these two, contrasting self-perceptions of the function of literature did not turn out to be very fruitful, and it resulted in rather gloomy and tragic consequences in Hungarian politics in the 20th century. The barren debate on these issues took place under the pseudo-name of the populist-urbanist conflict. But it had at least one lasting conclusion: it called attention to the fact that while in the more fortunate part of the globe politics and literature got separated, here they are still closely connected.

If one looks for the reasons why the autonomy of literature was so hard to achieve in Hungary one should consider the traumas of national history (Tatars, Turks, Habsburgs, Russians, Trianon, the Holocaust, 1956) and the many sorts of sins, wrongdoings and cancelled choices which make 20th century Hungarian history such a hard reading. The answer to the above question is to be found somewhere among the balks of the breakdowns and other disasters of the political community.

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To put it in a summary fashion, Hungary in the 19th century was very different from that of the 20th. It might be true, that urbanisation had its obstacles as well. But according to the hypothesis of this paper, the belatedness of Hungarian socio-political history left intact an even today very significant legacy among the changing circumstances of the early 19th century. The fact that in the first half of the given period most frequently writers were recruited from the law students is just one reason why literature remained interpreted within a wider cultural–social and political–context. What follows is meant to illustrate the thesis that if we want to understand why literature was very much a political issue in the first half of the 19th century, and why politicians were still so eager to shine with their literary virtues, we should not overlook the fact that the nobility which took part in public life had a Latin-based culture, which had been the determining factor in Hungarian public life for centuries. Even in the first decades of the 19th century Latin was regarded as the official language of parliamentary debates. This paper argues that the literate nobility had natural roots in the Christian-Humanist heritage which had an impact through both primary education built on Latin language, and the higher education of lawyers based on Roman law legal terminology. This led to a situation where the mind frame of the middle ranks of the Hungarian estates was formed by a late version of humanist Latin.

In what follows I want to present the examples of two illustrious early 19th century authors, Dániel Berzsenyi and Ferenc Kölcsey, to propose that the Latin-based cultural substratum had a determining influence on the way of thought of literary gentleman, as far as both their legal and literary culture was concerned. They illustrate the extent to which legal professional qualification and literary “*Bildung*” suited each other, under the aegis of the Latin Christian-Humanist educational ideal. In the latter part of the paper I shall reconstruct some segments of this tradition they both cultivated, and which played a role in keeping together literature and law well into the 19th century.

## II. Berzsenyi and Kölcsey—two examples of the Latin-based culture of Hungary

The debate between Berzsenyi and Kölcsey is one of the most interesting literary quarrels in the 19th century Hungarian cultural history. It is certainly grown out of mutual misunderstandings, and we shall not be able to clear up all that mess here. To judge the merits of the two sides’ cause is even less our job. What makes their story interesting for us is to show that the two opponents belonged more or less to the same cultural climate, a fact that came to light only when Berzsenyi—after much preparation and delay—has published the piece in which he defended himself against the accusations of his 14 year younger colleague. In this piece he vindicated his concept of literature, his moral-Aesthetic system of thought. And yet, a latecomer would recognise that the two of them belonged to the very same intellectual tradition. In order to make that recognition easier, we are not going to concentrate on the differences of the two authors. It seems more important to show the common cultural ground under their feet. It is worth considering why these two poets were so keen to defend political liberty in their literary texts.

To draw the outlines of an answer to these questions, let us begin to deal with Berzsenyi. He received that upbringing of the Lutheran gentry, which kept the protestant ideal of Hungarian liberty in its focus, up to the beginning of the early Reform Era.<sup>1</sup> The

<sup>1</sup> “...that kind of urbanised gentry, whose intellectual horizon was determined by their lutheran upbringing, and by their need for culture. This way of life has been for long characteristic of the

poet attended the Liceum in Sopron, an institution which was established in the middle of the 16th century, in the fresh fever of reformation. As we shall see, the educational programme of the school determined in many respects the way of thinking and writing of its most famous student. Although the impatient and non-sociable youngster gave up his learning before matriculation, the nation- and knowledge-ideal of the school, inspired by ancient Roman historical narratives, did have a lasting influence on his poetic outlook.

Kölcsey, on the other hand, was born into a gentry family with a Calvinist leaning, and was brought up in Debrecen, nicknamed in those years as the Calvinist Rome. Although it is well known that the poet-politician remained in conflict with his school, and with the provincialism embodied by it, and in spite of the fact that he turned out to be one of the proponents of reforming feudal Hungary, even his poetic vision is to be interpreted in the context of the nobleman's republic inspired by antique models.

To compare Berzsenyi's and Kölcsey's views of the role of literature in the nation's life in what follows I sum up the line of arguments of one of their respective works. In Berzsenyi's case it is going to be his "*Poétai harmonistica*" (A Theory of Poetical Harmony), a theoretical work written in a Platonic vein as an academic inaugural speech in 1833. My interpretative approach will be based on the primary research of Lajos Csetri and Ágnes Bécsy. In Kölcsey's case, I take a short piece, entitled: *Iskola és világ* (School and world), which was written as an epistola in 1815, and published in 1826.<sup>2</sup>

Ágnes Bécsy interprets Berzsenyi's efforts in this late theoretical piece with the help of an earlier letter by him, stating: "I look at the Aesthetician... not only as a florist, like Kazinczy, but as in all respects the main defender of culture. Because of this, I cannot and do not want to separate the beautiful from the useful, and because of this, I made the job of my old age to defend our poesy from the harmful floristic ornaments, affectations, artificiality, and from drowning into music."<sup>3</sup> From this quote, I would argue, one can see that Berzsenyi's aim is to show why poetry—or art in general—is not as autonomous as Kant and his followers would like it to be, and following the footpath of neokantianism and Romanticism modern Aesthetics claims it to be. Berzsenyi's main reason for his understanding of the term is that he does not want to see poetry as a feminine and sentimental attitude to the world, as it is stylized by sentimentalism. Berzsenyi finds the role of the critic also more than simply expressing the inner emotions brought out by a work of art: "... it is not enough to criticize the work in itself, but you have to be able to criticize it from the most important point of view, from where the question is: how does the whole work fit together with the aims of the nation and humanity and with the philosophy of the whole of culture".<sup>4</sup> The reason behind the birth of a work of art is not simply to raise emotions, but to serve the aims of the nation—which seems to be in harmony with those of humanity in his philosophy of culture, in which the Roman inheritance remains a strong component of the order of values. A further aim of poetry is to train humans, and more particularly, to train the human spirit. According to Bécsy, it is here that the Platonic concept

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evangelical "intellectuals". The context was very nicely drawn by László Németh in his Berzsenyi-book and in his essays on the great poet." Thimár, A.: Hol maradt el Berzsenyi? [Where did Berzsenyi fall away?] *Kortárs*, 52 (2008) 9, 68–77. <http://www.kortaronline.hu/0809/thimar.htm> (All translations mine, unless indicated.)

<sup>2</sup> In: Kölcsey, F.: *Erkölcsei beszédek és íráások* [Moral speeches and writings]. Publ. by Csaba O. Budapest, 2008. 9–10.

<sup>3</sup> Letter to Döbrentei, June 4, 1828.

<sup>4</sup> Quoted by Bécsy, Á: *Berzsenyi Dániel* [Daniel Berzsenyi]. Budapest, 2001. 97.

of “*ēros*” re-emerges in an old-new garment: “this tradition has been married in the retort of European Neohumanism with the Christian tradition”.<sup>5</sup> This *ēros*, which has its humanistic-educational function, raises man to follow “the harmonic middle” (“*harmonitás közép*”), a model, in which human spirit, responsive to beauty, is in connection with the morally good, itself supported by the ethics of the New Testament.

In connection with the educational and spiritually motivating functions of poetry Bécsy reminds us that the late Berzsenyi held in high esteem the moral thought of Michel Montaigne.<sup>6</sup> I take this fact as a sign that whenever Berzsenyi thinks along ancient patterns, about the educational and nation-sustaining capacity of the concept of taste, he must be moving within the framework of those Christian (and neo-pagan) humanist ideals.

Bécsy herself refers to Lajos Csetri’s Berzsenyi analyses, which in an exemplary fashion showed other sources from which Berzsenyi’s classical *Bildung*-conception might stem. Csetri adds to the list of the names of Horace and Plutarch the writers of German neoclassicism. Their texts are claimed by him to have established the antique ideal of the young Berzsenyi, that neoplatonic Hellenism, which was shared by Winckelmann and other late 18th century representatives of German neoclassicism: “his whole Greekness can be traced back to the German spiritual life of his age, his Greekness is the Hellenism of Winckelmann, of German neohumanism and the ‘hellenism’ of German classicism”.<sup>7</sup> Csetri also emphasizes that this is a pre-Kantian German influence, a mode of thinking in which ethics and aesthetics is closely connected—and here he discovers a further dimension of a strong English impact: “...practical English philosophy of life<sup>8</sup>, which in its more democratic context can realize more of the nature of Greek “*phronesis*”, does never excommunicate rhetoric, the mediator of the two thousand years old tradition of the philosophy of life and its ideal of the human being”.<sup>9</sup> This English substratum is regarded as a counter current within German classicism by Csetri, and he connects it to the name of Herder, Jean Paul and Bouterwek. He claims that Berzsenyi is supported by this tradition, when he writes that human(e) education, meant in the most general terms, or “real poetry is a beautiful religion”, and “its aim is not simply emotional, intellectual and imaginative perfection, but it has to be supported on the second level by moral greatness, and on the third level by the divine majesty and by the happy calmness of religion”.<sup>10</sup>

Now let us see, how Berzsenyi’s debating partner, Kölcsey speaks about the problem of *Bildung*, or of the meaning of the original ancient Greek concept of *poesis*? Of the possible forms of knowledge he picks out four in the text we analyse: “fine arts” (“*szép mesterségeket*”), “human studies” (“*Humanisticum*”), “Mathematics” (“*Mathésis*”) and “Metaphysics”. Of these he shows as exceptionally relevant the man who lives in the fine arts, as “Grace connects itself to him”. He contrasts the ancients, in other words the great

<sup>5</sup> Bécsy: *op. cit.* 104.

<sup>6</sup> “According to references in his letters and theoretical works, a great reading experience of his long sunset was a crumpled volume, which was saved in his library: Mihály Montaigne’s ideas of different subjects, by Nagy Tóth József, 1803” Bécsy: *op. cit.* 216.

<sup>7</sup> Csetri, L.: *Nem sokaság, hanem lélek. Berzsenyi-tanulmányok* [This is not crowd, but spirit. Studies on Berzsenyi]. Budapest, 1986. 377.

<sup>8</sup> This is the English equivalent of the German term of “*Lebensphilosophie*”.

<sup>9</sup> Csetri: *op. cit.* 378. At another point, he mentions that Berzsenyi made extensive notes of his readings of the Aesthetic works by Home, Schiller, Bouterwek, Batteux, Jan Paul and Luden. *Ibid.* 382.

<sup>10</sup> *Ibid.* 384.

Greeks and some Romans with those who rule today, and he regards the former as belonging to the “happy skies”. In their circle “the feeling for the beautiful” was paired with the wisdom of a matured age, that is why they could become lovable philosophers and soldiers, and “non-effeminate poets”. The effeminate poet of modernity is a victim of “sensibility and speculation”, while the ancients were formed by practice: “Actions, and public performance form a useful man, who, if he carries in his heart the seeds of the beautiful, will turn into Pászthori, Ürményi”.

As one can read in the notes to the modern edition, Pászthori, Ürményi refer to two contemporaries. Sándor Pászthori was “a legal scholar, governor of Fiume (Rijeka), appointed by Joseph II as the referent administrator of the Hungarian Schools”. József Ürményi was “ ‘országbíró’ (Judex Curiae Regiae). He created *Ratio Educationis* (1777).” This means that both lawyers excelled as reformers of the Hungarian school system.<sup>11</sup>

The short text of Kölcsey is a proof that for him, too, poetry preserved its antique Greek connotations. That is why “*poesis*” (according to its original meaning: creating) is connected to activity (*praxis*). It is not accidental that Kölcsey refers to the humaniores—his conception is also tied to the humanistic ideal of education. Before, however, we turn towards this ideal of human(e) education, we have to consider shortly the nobility’s ideal of the state, which was also inspired by antique role-models.

### III. The ideal of the state of the Hungarian noble republic<sup>12</sup>— as an idealised version of the antique *polis* and the Roman republic

If we try to understand how the learned and educated<sup>13</sup> nobility turned towards the problems of the country, first we have to reconstruct the language which was available for them to conceptualise their experiences. Naturally I do not mean that the artificial reformation of the language accomplished by the generation of the turn of the 18–19th century would be responsible for the schism between our political vocabulary and the political ideas of the early reformers. Rather, I claim that the patterns and patents of political thought and speech available in the age, were closely connected to those historically embedded moral elements of culture, which had been transmitted in the schools of the age, also in connection with the teaching of Latin, since the reformation, generation after generation. József Takáts, in a writing in which he reconstructs the political languages of the age, talks about the republican discourse<sup>14</sup>—the way of speaking which is identified by Csetri with the language of the young Berzsenyi’s “Spartan type of plutarchism”. This way of thought was introduced and first explained in Plutarch’s *Parallel lives*, contrasting it with that of the Athenians, aimed at the all-round, bodily-cum-spiritual self-development. In Csetri’s narrative Berzsenyi starts

<sup>11</sup> In the original version József Dessewffy was mentioned instead of Ürményi. He was one of the founders of the Hungarian Academy of Sciences and a translator of Cicero.

<sup>12</sup> I take this term from the Polish ideal of Noble Republic, Nobles’ Democracy or Nobles’ Commonwealth (Polish: *Rzeczpospolita Szlachecka*).

<sup>13</sup> These two terms are not simply synonyms, but rather complement each other in the usage of the age.

<sup>14</sup> Takáts, J.: Magyar politikai beszédmodok a XIX. század elején. A keret [Hungarian political discourses at the beginning of the 19th century. The framework]. In: Szajbély, M. (ed.): *Mesterek, tanítványok. Ünnepi tanulmánykötet a hetvenéves Csetri Lajos tiszteletére* [Masters, followers. Studies dedicated to the 70 years old Lajos Csetri]. Budapest, 1999. 224–248.

out from a Spartan starting point and arrives at the Athenian paradigm at the end. That is, starting from the cult of physical exercise, and the purity of the soul and the body he arrives step by step at the Athenian ideal of the perfection of the human spirit. It is again the Anglo-Saxon orientation that leads him in that direction, because “this Athenian humanistic ideal built on *‘kalokagathia’* will be the foundation of the gentleman-ideal of the English Enlightenment and through the Göttingen neohumanism of the German literary classicism and early Romanticism”.<sup>15</sup>

Yet Takáts also refers to another type of discourse, which he distinguishes from this republican discourse: and the second type is the discourse of the ancient constitution. In this version of the famous Pocockean theme,<sup>16</sup> Takáts uses the earlier results of László Péter, Béla Németh G. and Miklós Szabó, claiming that the Hungarian version of patrician liberalism resembles “the classic Anglo-Saxon type”. This constitutional thinking is not born in the age of written constitutions, but is based on earlier traditions of statesmanship. Analysing a text by poet Sándor Kisfaludy, Takáts characterises this discourse the following way: “According to this interpretation, the constitution has been in existence for 900 or 1000 years, it is unchanged in its basic principles, as the common creation of the nation and its prince. The nation in this political language means the community of citizens participating in government: it means the nobility”.<sup>17</sup> Beside Kisfaludy, Takáts can show up the scheme of ancient constitution in the texts by Kölcsey, as well, mainly in his county assembly speeches.

It is even more interesting that, as Takáts points out, the reference to the ancient constitution is often linked to the republican language.<sup>18</sup> This rhetorical combination can be traced back at least to Cicero, who, as the last great ideologue of the Roman republic, taught, in accordance with Roman habits, the wisdom of the forefathers and the honour of accepted manners. It is, therefore, not accidental, that Takáts, too, accentuates the Latin-humanist educational ideal, which is present in the contemporary Hungarian schools: “it is easy to answer the question where did Berzsenyi learn this republican language: from the middle of the 16th century up to the end of the 18th century the reading lists in the curriculum of the gymnasium classes included beside the Latin authors Sallust, Livy, and Cicero’s *De officiis*. Their works are the most frequently mentioned classical sources of the republican discourse”.<sup>19</sup>

The Spartan and/or Athenian republican discourse, transmitted by Roman sources, and the language of the ancient constitution are both easily available to the early modern Hungarian nobles turned into lawyers and writers, when they draw the outlines of the patrician ideal of the nation and the state. The substance of their culture consisted of narratives taken from Latin (and Greek) authors and historians, and this predestined them to return to the language of neo-classicism. But the same direction was pointed at by their legal practice as well, which was based on the *Tripartitum* by Werbőczy, prescribing the privileges of the Hungarian nobility on a customary law basis. Werbőczy, who was educated

<sup>15</sup> Csetri: *op. cit.* 64.

<sup>16</sup> Pocock, J. G. A.: *Ancient Constitution and the Feudal Law*. Cambridge, 1957.

<sup>17</sup> Takáts: *op. cit.* 229.

<sup>18</sup> *Ibid.* 230.

<sup>19</sup> Cicero, in the second book of his *The Republic* lets “old Cato” claim that “Our constitution... had been established not by one man’s ability but by that of many, not in the course of one man’s life but over several ages and generations.” *The Republic*, book 2, 1. I used the following edition: Cicero: *The Republic and the Laws*. Transl. by Niall Rudd. Oxford, 1998. 35.

at the university of Kraków, was a kind of humanist himself, reading both Latin and Greek. Although he sharply opposed the reformation, his *Tripartitum* served as the ideological basis for the nobility's struggle to defend their independence. This law book soon turned into a historical-constitutional reference-point. It was used as a guide for political orators to preserve that Nobles' Commonwealth, which was itself based on Roman precedents.

#### IV. Linguistic-rhetorical education, and the role of rhetoric in early 19th century culture

Above I tried to reconstruct how our two heroes thought of their own poetic activity, and how it was connected to an idealised vision of education, which was claimed to bring perfection not only to the individual, but also to the nation. We have shown, that poetry for them was not a *l'art pour l'art* activity, but a part of the humanistic programme of human fulfilment, not the expression of an individual passion simply, but a service for the political community, a kind of cultural religion. We have seen the antique sources of these ideas, and that the self-concept of the patrician nation is also derived from those sources, although transformed by the local tradition of post-reformation Latin teaching established as part of the humanistic heritage. Now let us turn to the concept of rhetoric as understood within this framework of humanist education. The claim, here, is that this rhetoric served as a natural mediator between our heroes' literary-aesthetic and lawyer-politician ways of thinking and writing.

The antique heritage was taken over in Renaissance Europe in the context of lively debates on Christian religion. Christian humanism took human self-fulfilment as its most important target. Already Pico della Mirandola's, or even Petrarca's writings outlined an ideal, based on antique sources, which saw the potential for this worldly human fulfilment in culture, in the cultivation of the human mind and spirit.<sup>20</sup> Hans-Georg Gadamer nicely sums up in a comfortable way those terms, which played a major role in the human mission of realizing our potentials through culture.<sup>21</sup> Through the categories of *Bildung* (culture), "*sensus communis*", judgement and taste Gadamer successfully reconstructs a vocabulary which proves that humanism—both in its Aristotelian, Neoplatonic or simply Christian version—was stronger philosophically than those historians of ideas claim, who take as the early modern *lingua franca* the new philosophy based on the fresh natural sciences, like the teachings of Descartes and Kant. Christian humanism turns out to be definitely more than simple rhetoric. And yet Gadamer also stresses that rhetoric has a major role in this tradition, even if the humanist programme of rhetoric was soon overtaken by hermeneutics, as a result of the spread of literacy and of the printed word. Yet for him, hermeneutics is not simple philology, but keeps its organic relationship with practical philosophy: the written word is connected to action, and its message is not simply of epistemological interest, but has

<sup>20</sup> Words like culture and cultivation became frequently used only in the 18th century, following ciceronian-humanist patterns. About the historical development in the background, see the classical work of Joseph Niedermann. Niedermann, J.: *Kultur: Werden und Wandlungen des Begriffs und seiner Ersatzbegriffe von Cicero bis Herder*. Florence, 1941.

<sup>21</sup> The guiding concepts of humanism, In: Gadamer, H-G.: *Truth and Method*. Transl. Rev. by Joel Weinsheimer and Donald G. Marshall. London—New York, 1975, 1989. 1.1.1. B., 8–36.

relevance in one's daily life, and therefore it is connected to the question of individual and communal fulfilment.<sup>22</sup>

In the writings and deeds of its best representatives, the Hungarian reform age connects its national programme of cultivation (meant as the education of the spirit) to a kind of practical philosophy, the *vita contemplativa* to the *vita activa*. Gadamer's philosophical hermeneutics helps to reconstruct the key concepts of the rhetorical tradition, including the principle that each item of communication is itself an (inter)action. Kölcsey is one of the best examples of the literary gentleman who does not refrain from political action, or of the statesman who is able to express himself in the world of ideas as well. Perhaps the key to the formation of this type of mind is the practice of being a lawyer, educated in the Roman model. The concept of law which has been preserved in Hungary for centuries guaranteed that the lawyer was practically oriented, learning his job by imitating the example of more experienced colleagues, and in the same time was historically or even also literally cultivated and well-versed, to be able to perform his role as a public orator. In the political and legal practice of the country, political and legal actors were expected to follow the role model of the cultivated, sociable humanist intellectual.<sup>23</sup> The political situation, generally conceived in Hungary as being under the yoke of foreign despotism, and the traditional way of practicing politics in the county assemblies, both contributed to the continuing relevance of rhetoric and the public persona of the *rhetor*. This conclusion was also reasserted by the lively communities of protestants in the country who were trained in oral and written disputations. The teaching of the orator's skills in legal education remained important and according to the stylistic conventions of contemporary literature being rhetorically polished was a first requirement—it will remain the standard until Petöfi arrives on the scene, who transforms literary diction by denying the legitimacy of high flying, sublime rhetoric and preaching a poetics of honesty and the language of ordinary men.

My claim is, therefore, that until Petöfi, both literature and law as a linguistic art was interpreted within the context of eloquence. Neither the lawyer's, nor the literary writer's activity was easily separable from forms of morally or politically relevant practices. The ideal form of education cherished by the humanists was not the way towards professionalism, or the working out of separate individual systems of rules for each discipline or skill. Instead, it promulgated an ideal of cultivation, based partly on the scholastic concept of potentiality, itself relying on certain Aristotelian insights, according to which one, as the creation of God, was called to exploit the most of his/her inner, still latent, and sleeping abilities, and to do it as radically as one could. Even more interestingly, these capacities were to be activated not by theoretical knowledge but in practice, empirically, in accordance, with the living tradition of the given form of activity.<sup>24</sup> And these capacities could strengthen

<sup>22</sup> A similar description of humanist thought is provided by Ernesto Grassi, see Grassi, E.: *Rhetoric as Philosophy. The Humanist Tradition*. University Park (Pennsylvania)—London, 1980.

<sup>23</sup> An ideal, which Gadamer traced back to that of the courtier, as created by Castiglione and Balthasar Gracián, and even to earlier traditions of the heroic virtues of antiquity, and also relying on Christian virtues.

<sup>24</sup> For a relevant theory of practices within a community, see A. MacIntyre's *After Virtue*, claiming: "By a practice I am going to mean any coherent and complex form of socially established co-operative human activity through which goods internal to that form of activity are realised in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended". MacIntyre, A.: *After Virtue*. London, 1985. 187.

each other in each individual's own practical economy, and contribute to the emergence of a general sense, which was perhaps the most important fruit of self-development: the ability to choose wisely, which was synonymous with taste or practical wisdom in this discourse.

Through taste the individual acquired a direct insight into the value system of his community, but not in an abstract, universalisable format, but as applied in concrete, in worldly emergency situations. Each occasion, when the individual could operate his/her taste, contributes to the further refinement of the personality, and on the long run this enabled the individual to develop even further, learning also one's self better and better. In the humanist ideal, therefore, both literary and legal activity found its final *raison d'être* in the life long learning process in the school of self-cultivation.<sup>25</sup>

The fact that both law and literature—as an oral art—was to be performed like eloquence lead to a situation where reflections on the inner dynamism and surprising mechanics of living language become ever more relevant. It is therefore logical, that the inheritors of German neo-classicism, who were inspired by the humanist heritage, paid particular attention to the nature and workings of language. The same is true about the Hungarian Reform age: an obvious sign of the refined linguistic reflectivity of the age is called in Hungarian intellectual history the “age of neology”, with a language theoretical debate between neologs and traditionalists. Ironically, it is exactly this very same linguistic self-awareness which led to a new born interest in the primacy of the native language both in education, in legal practice and in political debates that has a disastrous effect on the keeping up of the Latin Humanist model. In Hungary, by the 1830s a new generation stepped up on the stage of public life and with them the Reform age was taking over another great intellectual inspiration—that of the Romantic movement—both in literature and in political thought.

## V. Summary

This paper tried to answer the question how to explain the fact that the language of law and that of literature had an interface in the Hungarian Reform Age of the first half of the 19th century. What was the reason behind the fact that there was an overlap between the circles of writers and lawyers, that a number of writers were educated and even practiced as lawyers, and that lawyers tried themselves as writers, as well. The paper argued that the concept of literature which governed the early Reform Age was deeply embedded into the humanist tradition, which was supported by the widespread teaching of Latin, transmitting elements of antique culture and narratives of ancient history, presented as part and parcel of native culture. Humanist tradition also preserved a rhetorical practice for this period, which was opposed to the specialised languages of professional science in the early modern era, and provided a framework for understanding literature as part of a more general social normative system of personal virtue and decorum. Grassi and Gadamer provides a framework of interpretation in which a rhetorical humanism is opposed to a science based philosophical rationalism, as two competing systems of knowledge, or episteme in Foucault's sense of the word, within the early modern context.

<sup>25</sup> The idea of a practice or tradition acquired by the individual as part of one's self-cultivation was introduced by Pierre Hadot. See: Hadot, P.: *Philosophy as a Way of Life Spiritual Exercises from Socrates to Foucault*. Oxford, 1995. Hadot had a huge impact on the late, although differently tuned philosophy of Michel Foucault.

As examples of the overlap between literary and legal forms of culture I presented Dániel Berzsenyi and Ferenc Kölcsey, two early 19th-century poets who were schooled in the manner characteristic of the middle ranks of the nobility in the protestant territories of Hungary, and this way acquired a culture, which looked at literature as a public activity, with very definite moral and political functions, and which encouraged its subjects to complement even their legal and political rhetoric with a literary-artistic ambition. I claimed that there was a common ground between the two fields of activity, which enabled practitioners to commute between the two genres.

The humanist heritage could survive for a long time in Hungary, which, however, is not to be taken simply as a sign of Eastern-European provincialism, although the element of belatedness is very much there in the phenomenon. If the literary-cum-legal culture which was inherited from Latin-Christian humanism, prevailed in the first third of the 19th century and was nicely complemented by a robust political discourse of republican type ancient constitutionalism, it is the result of local-political, legal and theological-culture, which created new, unprecedented cultural configurations and often presented quite remarkable achievements. The cohabitation of the lawyer and the writer was one of the governing forces behind the emergence of a Reform Age in the political and cultural history of Hungary, behind the Age of Neology in the history of Hungarian as a native language. It had, though, a special effect on Hungarian literature, which on the long run has proven disadvantageous: a debate between “Nationalists” and “cosmopolitans”. This afterlife of the phenomenon gives a special flavour to this tradition of the lawyer writers, unparalleled by other national literatures, except, perhaps, the Polish one.

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## The Lord of the Rings. The Tale and the Unfolding Wisdom of Lawyers

**Abstract.** This essay aims to explore the political and legal philosophical layers of J.R.R. Tolkien's masterpiece. First, it demonstrates the ambivalent feature of power and authority appearing in *The Lord of the Rings*. The second part gives a reading of Tolkien's philosophical anthropology. Next, it is shown how Tolkien's concept of law can be placed in the framework of a Lockean political theory. Finally, the paper discusses the educational potential of this literary work in the process of moral and legal socialization of the "lawyers-to-be".

**Keywords:** law and literature, *Lord of the Rings*, legal education

*"I have forgotten much that I thought I knew,  
and learned again much that I had forgotten."*<sup>1</sup>

### 1. The Dark Side of the Power

The primary concerns of *The Lord of the Ring* are the nature and the division of power. The plot revolves around the Ruling Ring what Sauron, the Dark Lord, made forged in the fire of Mount Doom in the previous age of the world. Other magic rings were also created and the kings of the Elves, those of the Dwarves, and those of the Men got them from Sauron. These rings acquired their power from the One Ring serving as means for Sauron to subdue the peoples of the Middle-Earth. "One Ring to rule them all, One Ring to find them, One Ring to bring them all and in the darkness bind them."<sup>2</sup>

The history of the One Ring reveals the immense corrupting force of the absolute power. First, it destructed Isildur who obtained it from Sauron defeating him in the last great battle of the previous age when the alliance of the Elves and the Men fought against the Dark Lord's forces. But Isildur could not resist the temptation of power, and therefore he failed to throw the Ring into the Cracks of Mount Doom. Two thousand years later the Ring got to Gollum who killed his cousin to claim it for himself. The Ring gave an unnatural long life to Gollum living nearly six hundred years under its magic. Being exiled from his people and lurking in the depths of the Misty Mountains, Gollum slowly became a pitiful and frightful monster.

However, the Ring left Gollum since it felt the return of the spirit of its Master, and Bilbo, the Hobbit, found it, and he still kept the Ring by himself for sixty years. Although Bilbo was the only one among the "Ring-bearers" who could voluntary renounce the Ring,

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<sup>1</sup> Tolkien, J. R. R.: *The Lord of the Rings: The Two Towers*. New York, 1965 [hereafter: *The Two Towers*]. 125.

<sup>2</sup> Tolkien, J. R. R.: *The Lord of the Rings: The Fellowship of the Ring*. New York, 1965 [hereafter: *The Fellowship of the Ring*], vii.

he needed to this the help of the wizard, Gandalf the Gray.<sup>3</sup> Then the Ring was given to the noble-minded Frodo whom the White Council assigned the mission of destroying it. It meant that the Ring must have been returned to the Cracks of Doom in Mordor, the realm of Sauron. However, Frodo also failed in the last moment, his moral strength was broken by the Ring, and the success of his mission depended on pure luck.

The absolute power can not serve any “good” aim. Gandalf’s words, by which he declines Frodo’s offer to take the Ring to himself, are illuminating.

““With that power I should have power too great and terrible. And over me the Ring would gain a power still greater and more deadly.’ His eyes flashed and his face was lit as by a fire within. ‘Do not tempt me! For I do not wish to become like the Dark Lord himself. Yet the way of the Ring to my heart is by pity, pity for weakness and the desire of strength to do good. Do not tempt me! I dare not take it, not even to keep it safe, unused. The wish to wield it would be too great for my strength.’”<sup>4</sup>

Nevertheless, the absolute power ruins not only the true and the innocent but also the Orcs, the servants of the Dark Lord. They are constantly wrangling, and they solace their fear from the “bigwigs” by cruelties against each other. Several times during his adventurous travel, Frodo can escape only because his pursuers start fight among themselves.<sup>5</sup>

The Dark Lord’s fall is also caused by the enchantment of power at the end. Sauron cannot reveal the imminent danger, while he cannot imagine that someone wants to get the Ring just for destroying it.<sup>6</sup> On the other hand, he can trust neither in his servants and nor in his allies who, if they recognise the power of the Ring, would claim it for themselves. This enlightens the self-destructive characteristics of tyrannical power.

Saruman, who has been once the head of the Magicians’ Order and of the White Council, betrays the Council and allies with the Dark Lord. He raises a great army in his fortress, Isengard, and with the Lord of Mordor, they take in crossfire the free peoples of Middle-Earth. But Saruman secretly wants the Ring for himself, and Sauron soon recognises the potential rival in him. So Saruman divides and distracts Sauron’s attention from the real intention of his enemies.

Sauron sets free Gollum to find and claim the Ring for him. But Gollum is driven by the only desire to retrieve the Ring—his *precious*—what he had owned for so long time once. He rather undertakes to lead Frodo in Mordor—meanwhile he is constantly looking for the opportunity to seize his precious from Frodo—just for precluding that the Dark Lord lays hands on it. And in the last moment, when Frodo realises that he cannot give up the Ring, then Gollum tears away it from him, and falls with it into the glowing cauldron.

<sup>3</sup> Gandalf could persuade Bilbo to leave the ring to Frodo in fact only by a surprising action of his authority. First he tried to talk Bilbo over, but when the dispute deteriorated, Gandalf, who generally wandered “incognito”, revealed his true power, “[...] and he seemed to grow tall and menacing; his shadow filled the little room.” *The Fellowship of the Ring*, 59–60.

<sup>4</sup> *The Fellowship of the Ring*, 95.

<sup>5</sup> Tolkien, J. R. R.: *The Lord of the Rings: The Return of the King*. New York, 1965 [hereafter: *The Return of the King*], 248–249; see also “The Uruk-Hai” in *The Two Towers*, 58–79 (esp. 66–69); “The Tower of Cirith Ungol” in *The Return of the King*, 211–235 (esp. 221–227).

<sup>6</sup> See *The Two Towers*, 127–128, and also “The Last Debate” in *The Return of the King*, 181–194 (esp. 190–193).

It is worth stopping, for a moment, at this dramatic scene, because its metaphorically thickening meanings illuminate further characteristics of the contradictory nature of power. The absolute power dwindles away in the tension of the forces aiming to hold it. The moral strength in itself is not enough to curb the concentrated power: it must to level power against power. In fact, this insight is the foundation of the division of power.

But Gollum's fate exemplifies that rational deliberation of the risks of power is not enough for its limitation of absolute power. Gollum can reach to the Mount Doom only because first Bilbo, then Aragorn—the King of the Men—and Gandalf, and at last Frodo spared his life, although his corruption and wickedness has given several causes for his destruction.<sup>7</sup>

Saving Gollum's life is not an irrational deed. On the one hand, Gandalf believes that Gollum can be healed out from his wickedness, even if this has not much of a chance to happen. On the other hand, Gandalf, just because he knows the self-destructing character of the absolute power, thinks that Gollum is involuntary capable to help them: "Let us remember that a traitor may betray himself and do good that he does not intend."<sup>8</sup> Both reasons have been justified to a certain degree during the dangerous mission. At the last stay on the road to Mordor Gollum lets slip a chance to seize the Ring from Frodo, because he suddenly feels sorry for Frodo who has tried to handle him decently in the course of their forcedly shared travel. Gollum has seemingly started to cure out of his wickedness, at least for a while, under the influence of Frodo's goodness.<sup>9</sup> And in the last dramatic moment, in the Crack of Mount Doom, Gollum falls with his madly desired precious in the seething kettle.

The absolute power is destructing and self-destructing—this is the dark side of power. The tyrannical power is never capable to create: it can only imitate and distort the existing creatures.<sup>10</sup> The existence of this dark power in the word notwithstanding contributes to the rich emanation of the creative forces. With the perishing of the One Ring, the other rings lose their magic forces, too, and all of those great works which have been built by their help dwindle to nothing.

## 2. The Ages of the World and the Human Nature

The Third Age of the World ends by the War of the Ring. Therefore, only rare references can be found to the events of the previous epochs in *The Lord of the Rings*.<sup>11</sup> The history of these ages can be learned from *The Silmarillion*.

The First Age of the World begins with the creation of the Earth—Arda—and ends with the expelling of Melkor—or Gorgoth as the Elves calls him—, the spirit of envy, revolt and evil, into to the Timeless Space. In this period takes form the face of the Earth in the midst of the fights of the Valars—the creating and protecting spirits of the Earth—against Melkor. Then the children of Ilúvatar, Father of All, awake: first the Elves, later the Men.

<sup>7</sup> Cf. *The Fellowship of the Ring*, 92–93.

<sup>8</sup> *The Return of the King*, 108.

<sup>9</sup> See *The Two Towers*, 411.

<sup>10</sup> Neither the Orcs were created by Sauron: their ancestors had been Elves who were captured by the enemies, and their nature distorted by torture. See Tolkien, J. R. R.: *The Silmarillion* (ed. Tolkien, C.). London, 1999 [hereafter: *The Silmarillion*], 47.

<sup>11</sup> See also: "Appendix B, The Tale of Years" in *The Return of the King*, 452–472.

The Elves resemble Men in their physical appearance, but they are alike to the Valars in their nature, since they are immortals: “For the Elves die not till the world dies, unless they are slain or waste in grief (and to both these seeming deaths they are subject); neither does age subdue their strength, unless one grow weary of ten thousand centuries; and dying they are gathered to the halls of Mandos in Valinor [the isle of the Valar], whence they may in time return.”<sup>12</sup> The Elves are high-minded and skilled in many trades and arts—especially in singing and poetry—what they have learned directly from the Valars. The Elves’ wisdom increases by the time, but so does their sorrow, because they witness the changes of Arda, and see how the great works of the earlier times fall, and how the world “becomes colourless”.

The Men awake after the Elves. They have less physical strength and they are more vulnerable than the Elves, from whom they learnt most of their knowledge. But Ilúvatar has prepared a peculiar gift for them: the Men are free—“they should have a virtue to shape their life, amid the powers and chances of the world” [...]:

“It is one with this gift of freedom that the children of Men dwell only a short space in the world alive, and are not bound to it, and depart soon whither the Elves know not. [...] [T]he sons of Men die indeed, and leave the world; wherefore they are called the Guests, or the Strangers. Death is their fate, the gift of Ilúvatar, which as Time wears even the Powers shall envy. But Melkor has cast his shadow upon it, and confounded it with darkness, and brought forth evil out of good, and fear out of hope.”<sup>13</sup>

The Dwarves also appear in the Old Times, however, they are not Ilúvatar’s offspring, but the creations of a Vala. They are physically smaller than the Elves and the Men, but more stubborn, and they endure suffering more than any other people. Since their fathers were created in the time when Melkor’s power shadows the world, the Dwarves have lived underground. Because of that, they are masters of mining and the art of metallurgy. The Dwarves are generally closed, so they do not care so much for the Elves and the Men, they have made closer friendship only with Elf smiths. The Dwarves are equally steady in friendship and hatred that is why Melkor’s magic does not have much effect on them, and their primary habit is the avid love of treasures.<sup>14</sup>

The Ents, the shepherds of trees, were also born in the First Age. Yavanna, the creator Vala of the flowers and trees, gave life to these powerful beings, because she had seen that the fields and forests were threatened not only by Melkor’s wrongdoings,<sup>15</sup> but also by the Elves, the Men and the Dwarves.<sup>16</sup> The Ents’ task is to protect the forests and to punish those who absent-mindedly or unnecessarily cut down trees. There cannot be found too much about the Ents in the chronicles of the Old Times and those of the Second Age, so they

<sup>12</sup> *The Silmarillion*, 36.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*; see also *The Return of the King*, 437–451.

<sup>15</sup> The evil power threatens not only the speaking beings—the Elves, the Men and the Dwarves—but all of the livings. Wherever it gets a foothold, it turns the landscape into dreary desert. The description of Mordor for example can at best evoke in the readers’ mind the picture of an industrial wasteland, or a wreck dumping ground. Cf. *The Two Towers*, 302.

<sup>16</sup> *The Silmarillion*, 40–42.

appear rather unexpectedly at the end of the Third Age, in the War of the Ring: they destroy a great part of Saruman's troops, and they imprison the magician in his tower at Orthanc.<sup>17</sup>

The First Age of the World is elapsing by the struggle of the Valars and the Elves against Melkor. The Men do not play a significant role in this epoch, although, by the end of the Old Times, several heroes emerge among them who have fought on the side of the Elves against Gorgoth. Yet these heroes are also tangled up in the net of Melkor's lies—he can raise discord even between the Elves—, so most of the Men become servant of the evil. Then the alliance of the Valas and the Elves defeats Gorgoth in the War of Wrath. Most of the Elves leave Middle-Earth after this, and move to the island of Tol Eressa, from where they can sail to Valinor.

The Second Age begins with the rise of Númenor, the realm of the Men. But the Valars have not destroyed all the evil's power by expelling Melkor: a number of servants of the evil escape, among them Sauron who will collect the forces of evil later. Sauron feigned repentance for a long time, while he made the Rings of the Power with the help of the Elf smiths. Although the Kings of Elves realised that Sauron had betrayed them, so they hid their rings, the other rings given to the Dwarves and the Men fulfilled the power of the One Ring: the Kings of Men became the servants of the One Ring, the Ringwraiths, and the Dwarves were ruined by their rings from which two perished and the other five were reclaimed by Sauron in the Third Age.

Sauron could not win Númenor with force, however, so he deployed a stratagem. He went to Númenor as a hostage, but he soon poisoned the mind of the King. Sauron persuaded him to turn against the Valars claiming the immortality for the Men with arms. The Valars got Númenor sunk in the depth of the sea, and they hid Valinor from the mortals: the face of the World changed again.

Only a few men, who remained loyal to the Valars, survived the drowning of Númenor: Elendil and his two sons, Isildur and Anárion. The tide, which destroyed Númenor, cast them into the Middle-Earth where they founded two kingdoms, Gondor and Arnor. Sauron's spirit reincarnated in Mordor, and he promptly attacked the two kingdoms. The Elves made alliance with the Men, and they defeated Sauron in the last battle of the Second Age whereupon Isildur took hand on the One Ring.

At the beginning of the Third Age, Isildur was killed and the One Ring disappeared. The magicians—the Istars—, appeared around the end of the first millennium of the Second Age; they had been sent by the Valars to aid the Men and the Elves against Sauron, “and to unite all those who had the will to resist him; but they were forbidden to match his power with power, or to seek to dominate Elves or Men by force or fear.”<sup>18</sup> The two most important members of the Order of Magicians were Saruman and Gandalf, the “Gray Pilgrim”. Saruman had already studied the skills of forging magic rings for long time, because he wanted to defeat Sauron with this knowledge. Although he was more and more involved in dark practices, and, first, he had started to admire Sauron, later to envy him, and, at the end, he betrayed the White Council for laying a hand on the One Ring.

The story of *The Lord of the Rings* is set in the Third Age of the World, and it begins when Gandalf discovers that the Ring is in Bilbo's hand. The alliance of the Elves, the Men

<sup>17</sup> Saruman's undoing has been caused by he made cut the forests around Eisengard for getting wood necessary to stir fire for the black magic, enraging the Ents with this. See *The Two Towers*, 186–231.

<sup>18</sup> See “The Grey Pilgrim”, *The Return of the King*, 455.

and the Ents undo the power of Saruman and Sauron at the end of the Ring's War. The ring is perished in the fire of Mount Doom and Sauron's spirit is left for ever. Aragorn, Isildur's heir, takes Gondor's throne, and the rest of the Elves leave Middle-Earth, with the Ring bearers—Bilbo and Frodo—, they sail to Valinor. With this begins the Fourth Age of the World, the Age of the Men.

What can we learn from this story about the world and the nature of men? First of all, that the world is declining. The forces forming the world have been losing their strength for Ages: Sauron was only a servant of Melkor, and, as first the Valars had left it, at the dawn of the Men's rule, the Elves also leave the world. The Men could become the master of the world only after the superhuman forces are already tamed it. The struggle of the creating and destroying forces wounds the face of Arda again and again while with their lessening strength, extinguishing each other, the world is "loosing its colour".

But the Men are free, so it's only their turn when their times sets in, whether they save the beauty of Arda, they renew it, or they spoil her and make her infertile fulfilling her destiny. So, the Men are responsible for the fate of Earth.

The primary problem of the human nature is the price of freedom: mortality. Originally, death was a gift—the spirit of the man can leave the circles of the World<sup>19</sup>—but Melkor had changed it into a curse, into the fear from death that makes the Men defenceless against the power of violence and that of dread. This caused the fall of the mankind and that of the realm of Númenor: while the Númenorians' power and richness was increased, "but their years lessened as their fear of death grew, and their joy departed."<sup>20</sup> They more and more desired immortality, and it caused the fall of Númenor at the end.

Aragorn's life exemplified the Men's original, uncorrupted relation to the death. He was the last breed of the Kings of Númenor, who had been given three times longer life than other common mortals. He fought as a hero against Sauron. He occupied the throne of Gondor at the end of the Ring's War, and married Arwen—his love since his youth—, the daughter of Elrond, who was the King of the Elves. Then Arwen waived the immortality for the sake of her love, and she chose the fate of the Men. Nevertheless, Aragorn had not only the privilege of the long life, but, as all his ancestors, also of choosing the time of his exit. So, when he felt his decline arriving, he said farewell to Arwen, and offered her to choose between the fate of the Men and immortality once again.

"'Nay, dear lord,' she said, 'that choice is long over. There is now no ship that would bear me hence, and I must indeed abide the Doom of Men, whether I will or I nill: the loss and the silence. But I say to you, King of the Númenoreans, not till now have I understood the tale of your people and their fall. As wicked fools I scorned them, but I pity them at last. For if this is indeed, as the Eldar say, the gift of the One to Men, it is bitter to receive.'

'So it seems,' he said, 'But let us not be overthrown at the final test, who of old renounced the Shadow and the Ring. In sorrow we must go, but not in despair. Behold! we are not bound for ever to the circles of the world, and beyond them is more than memory, Farewell!'"<sup>21</sup>

<sup>19</sup> Cf. *The Silmarillion*, 316.

<sup>20</sup> *The Return of the King*, 392.

<sup>21</sup> *The Return of the King*, 427–428.

Well, the Man is free: even if he is exposed to the fear of death, yet he can overcome of it, and he can assure the peace of his conscience with virtuous deeds. Nevertheless, the virtues could be many kinds, and they are changing themselves by the ages of the word. The story of the *Lord of the Rings* ends at the dawn of the Men's Age, in the door of freedom, and we would not know to what direction will be taken the Mankind's fate. The Work calls the Reader by this, and encourages him to continue the tale, to think over and to make a decision about the Mankind's fortune. Did we really stop the decay of the Word? Several handholds are given to the Reader by the Work for the quest of the answer to this question—although the answer itself depends exclusively on the Reader—, because the various peoples and heroes playing roles in the story are exemplifying different virtues and characteristics that can lead the Mankind's fate in diverse directions.

The Elves appearing in the Ring's War embody the refined aesthetic values, harmony and beauty.<sup>22</sup> They are strange, dreamlike beings, whose bodily existence is airy, and their wisdom turns into silence and riddles.<sup>23</sup> But their wisdom has been matured slowly. In fact, the Third Age Elves are inheritors of a heroic value system: their ancestors lived in a constant war against Melkor, and their exaggerated pride plunged them into fraternal war in the previous word age.<sup>24</sup> It seems that their beauty is an essence distilled from heroism mellowed in their wisdom and grief.

The beauty and perfection of the "Firstborns" is unattainable for the Men. Yet, the fading human memory still keeps the reminiscences of the Elves' love for Arda and their noble-mindedness in the everlasting craving for the Lost Paradise, for beauty, peace, and harmony. Among the Men, Aragorn embodies the most excellence by the Elves' virtues—the heroic desperation against the evil and the refined aesthetic sense—, although his eminence is "superhuman", like that of the Greek mythological half-gods. Nevertheless the source of his wisdom cannot be found in the Elves' thinking, but in the teachings of Gandalf, the Grey Pilgrim.

As we have already seen, the two most prominent features of the Magicians' Order are Gandalf and Saruman. Their prominence and power burst from the same stem: both of them lean upon the force of the rational. However, they know well the mysteries of the nature and of the human mind, as well as they are masters of the art of persuasion. Although, while Saruman symbolises the technical knowledge uncontrolled by the moral virtues,<sup>25</sup> then Gandalf represents the wisdom guided by the moral virtues.

The technical knowledge—the capacity for producing artefacts—is neutral in itself, neither good, nor bad. But the possession of this knowledge means a temptation for its bearer to enter in competition with nature.<sup>26</sup> In fact, the arrogance and the desire of power defeated even Saruman at the end.

<sup>22</sup> The Hobbits called the Elves as "Fair Folk". Cf. *The Fellowship of the Ring*, 119.

<sup>23</sup> "Elves seldom give unguarded advice, for advice is a dangerous gift, even from the wise to the wise, and all courses may run ill." *The Fellowship of the Ring*, 123.

<sup>24</sup> *The Silmarillion*, 68–107.

<sup>25</sup> Saruman in Elvish was called Curunír, Man of Skill.

<sup>26</sup> While Saruman's practices destroy nature (see note 15 and *The Return of the King*, 354), Gandalf wins with the force of nature: this is what symbolises the alliance of Gandalf and the Ents.

What are those virtues which give form and measure to Gandalf's wisdom, and examples and teachings for Aragorn? These are generosity, compassion, and humility.<sup>27</sup> All these appear in a concentrated form in Aragorn's apotheosis, in the scene of his crowning:

"Then to the wonder of many Aragorn did not put the crown upon his head, but gave it back to Faramir, and said: 'By the labour and valour of many I have come into my inheritance. In token of this I would have the Ring-bearer bring the crown to me, and let Mithrandir set it upon my head, if he will; for he has been the mover of all that has been accomplished, and this is his victory.'"<sup>28</sup>

While the Elves exemplify an ideal value system unattainable for the men, then the description of the Dwarves can even be read as a critique of the modernity. The Dwarves are not evil by nature, and they are not so refined as the Elves,<sup>29</sup> but they bear many virtues: they are determined and steadfast both in friendship and hatred, they are longing for freedom,<sup>30</sup> and they are skilled in many kind of craftsmanship. However, their primary weakness is the selfishness—they do not care for nature or for the worries of other peoples, indeed, they have difficulties to get on with each other.<sup>31</sup> To these failings the craving for treasure has been added by the curse of Melkor and Sauron.<sup>32</sup> That being said, we can easily recognise the figure of the honourable, workaholic citizens of the modern industrial state in the Dwarves' character who push the world irresistibly, day by day, with their brave efforts to an ecological cataclysm.<sup>33</sup>

Interestingly, at the dawn of the Men's Age, the human-sized "civil" virtues are embodied neither by the Elves or the Dwarves, nor by those heroes like Gandalf or Aragorn, but by the Hobbits.<sup>34</sup> The Hobbits, about whom we have not talk much yet,<sup>35</sup> albeit Bilbo and Frodo—the two ring-bearers—and Samwise Gamgee—who is a real folk hero like Sancho Panza—are Gandalf's and Aragorn's companions in the story of *The Lord of the Rings*. We do not know much about the origin of the Hobbits: the chronicle of the first two ages of world does not mention them, they appear only at the fall of the Third Age. The land of the

<sup>27</sup> We do not mention here the courage and the self-denial, because these virtues flow from different sources in the case of Gandalf and that of Aragorn. For Aragorn, these are parts of his "family heritage" and consequences of the Elf values. But for Gandalf, these are acquired virtues which he due to gain through a quasi initiation rite: he has to fight with a Balrog—an Old-Age daemon—and to descend into the "hell" for returning as White Gandalf who can break the power of Saruman and help the Fellowship overcoming Sauron.

<sup>28</sup> *The Return of the King*, 296.

<sup>29</sup> It is characteristic that while the Elves made jewels then the Dwarves forged weapons and tools. Cf. *The Return of the King*, 435.

<sup>30</sup> Cf. *The Return of the King*, 442.

<sup>31</sup> See *The Return of the King*, 445–447.

<sup>32</sup> Cf. *The Return of the King*, 442.

<sup>33</sup> Just like the Dwarves who had delved too deep under the Misty Mountains arousing such forces which destroyed them at the end. Cf. *The Return of the King*, 434.

<sup>34</sup> A big hit of the film version (*The Lord of the Rings. Trilogy*. Directed by Peter Jackson, New Line Cinema, 2001–2003) is that while every other character of the story wear the clothes and arms of the flourishing age of chivalry, then the Hobbits' cloths were of the 17–18 century "civic" fashion—except that they do not were shoes, because, according to the book, they walk on barefoot, since their feet have tough leathery soles and are clad in a thick curling hair. Cf. *The Fellowship of the Ring*, 2.

<sup>35</sup> See "Concerning Hobbits" in *The Fellowship of the Ring*, 1–21.

Hobbits is the Shire, the North-West angle of Middle Earth neighbouring the Grey Havens' land from which the Elves have shipped to Tol Eressa and to Valinor. In their bodily appearance the Hobbits are similar to the Dwarves, just more fragile—we would recon them children according to the human measure—that is why the Orcs call them “Halflings”.<sup>36</sup>

The Hobbits are peaceful creatures, and heroic deeds of them had not been noted in the earlier times—that is why Sauron did not notice them at all—, though they can stand their ground if they are strained. They passionately love their land what they cultivate assiduously and diligently, and they do not leave their country's boundaries voluntary, that is why they regard Bilbo and Frodo, who have undertaken adventurous journeys, as a bit fool. However, the Hobbits' industriousness does not couple with selfishness as in the case of the Dwarves—they are constantly make festivities and give presents for each other—, and their vice is not craving for treasures, but for a good meal and pipe weed.

The most important virtue of the Hobbits, is the capacity for self-government: they themselves elect the leader of the Shire—the Thain—and the citizens of the villages elect Mayor for a certain period.<sup>37</sup> So, the Hobbits do not need divine kings for keeping order and peace. And when Saruman has escaped, outwitting the Ents, from Isengard to the Shire to resume his dark practices, the Hobbits take their fate in their hands and expel the fallen magician and his servants from the Shire.<sup>38</sup>

The Hobbits try to live in peace not only with their neighbours but also with nature: after expelling Saruman, the first task of Samwise Gamgee is to plant seedlings in the place of the demolished trees.<sup>39</sup>

Besides Frodo, Bilbo and Sam transmit the virtues of Gandalf to the Hobbits as Aragorn to the Men. As Gandalf says when he leaves his friends:

“You must settle its [the Shire's] affairs yourselves; that is what you have been trained for. Do you not yet understand? My time is over: it is no longer my task to set things to rights, nor to help folk to do so. And as for you, my dear friends, you will need no help. You are grown up now. Grown indeed very high; among the great you are, and I have no longer any fear at all for any of you”<sup>40</sup>

<sup>36</sup> The smallness is symbolic, of course, and it can be unstitched a lot of layers of its meaning from the book, or from its context that means naturally nothing but the Reader's (now the present author's) background knowledge and associations: first of all, the smallness of the Hobbits enlarges their heroism; “we are dwarves, but we are standing on giants' shoulders”—as the modern men should think on the classics' works that laid the foundations of our civilizations; in the Chinese writing the same sign stands for the “wise”, the “fool” and the “childe”; *The Small Is Beautiful*—albeit Tolkien could not read Ernest F. Schumacher's famous writing about a humanist economy, published two decades after appearance *The Lord of the Rings*, but the descriptions of the Hobbits' life easily can be read as illustrations of these essays.

<sup>37</sup> See “Of the Ordering of the Shire” in *The Fellowship of the Ring*, 12–14.

<sup>38</sup> See “The Scouring of the Shire” in *The Return of the King*, 334–364.

<sup>39</sup> See *The Return of the King*, 367.

<sup>40</sup> *The Return of the King*, 332.

### 3. Natural Law and the Nature of Law

One can read about law just on a few pages, rather sporadic notes, in *The Lord of the Rings*. Furthermore, law plays an important role only in a couple of scenes. Although these fragmented references organically and coherently fit in the wider political philosophical frame of the work, we can even learn much about the nature of law from them.

First, law has already existed in the Old Times and the Third Age,<sup>41</sup> in the period that can be seen as the “state of nature” from the point of view the mankind.<sup>42</sup> In Aragorn’s story, it is mentioned, for example, that the laws of Kingdom of Gondor regulated the process of the choice of the King.<sup>43</sup> Moreover, one can also find three eloquent episodes in the story of the Ring’s War.

In one of them, Aragorn, with his fellows, is chasing a group of Orcs entering the land of Rohan. Here, Éomer, the young Chief Marshal of Riddemmark, leading a troop of mounted men, holds them up. Aragorn reveals his identity then and asks him to help or let them continue the pursuit.<sup>44</sup> Éomer is still reluctant, because he cannot let strangers wandering throughout the land of Rohan for their own good, unless the King gives his permission.

“How shall a man judge what to do in such times?”

‘As he ever has judged,’ said Aragorn. ‘Good and ill have not changed since yesteryear; nor are they one thing among Elves and Dwarves and another among Men. It is a man’s part to discern them, as much in the Golden Wood as in his own house.’”<sup>45</sup>

Éomer decides to let Aragorn on his way, and he even gives them two horses, but he asks Aragorn to visit the King of Rohirs, Théoden, after the chasing, what Aragorn promises, and he fulfills his promise later in fact.

Faramir, son of Denethor, the Steward of the realm of Gondor, gets in a similar situation like Éomer. Denethor learns of the mission of the Ring bearer, and he orders Faramir to arrest the Hobbits and to bring them to him. Faramir, although, when he meets Frodo and understands the aim of the mission—the plan of the destruction of the Ring—, sets Frodo and his fellows free defying his father’s command (and the temptation of the Ring).<sup>46</sup>

In the third scene, Beregon, soldier of Gondor, Faramir’s devoted man, saves the life of Faramir whom his father, in his bloody fury, wants to burn with himself in the House of

<sup>41</sup> *The Silmarillion*, 310, 314.

<sup>42</sup> I use the concept of the “state of nature” here somewhat altering from that of the traditional contractualism, because the “state of nature” happens not by some kind of contract—albeit we can trace the tracks of contract in the story of Aragorn’s accession to the throne—, but by the symbolic action of bringing under control the absolute power, that is by the destruction of the Ring and Sauron’s power with it. By the way, the concept that the transition from the “state of nature” into the civic state happens not by contracting, but by mastering the absolute power (of which the idea of the contract is only a symbolic expression), is according with the concept of such political thinkers as Guglielmo Ferrero or István Bibó. So the civic state is the subjection of power to the laws, the state of organised peace. On the other hand, the main characteristic of the state of nature is that the law is always threatened by the invasion of absolute power. In my opinion, the picture unfolding from *The Lord of the Ring* can mostly be related to the Lockean concept of the “state of nature”.

<sup>43</sup> See “Gondor and the Heirs of Anárion” in *The Return of the King*, 402–405.

<sup>44</sup> See *The Two Towers*, 32.

<sup>45</sup> *The Two Towers*, 38.

<sup>46</sup> See “The Frobidden Pool” in *The Two Towers*, 361–375.

Dead. Thus Beregond impedes the execution of this mad order with arm breaching the rule of the Ancient Law that there should be no living in the House of Dead.<sup>47</sup>

And, of course, we should not forget the Hobbits, as “[...] they attributed to the king of old all their essential laws; and usually they kept the laws of free will, because they were The Rules (as they said), both ancient and just.”<sup>48</sup> We can also learn that Bag End has been left by Bilbo to Frodo in a properly formed will<sup>49</sup>—for the most earnest pity of the legal heirs, Otho Sackville-Baggins and his wife, Lobelia.

These details refer to the fact that there is an existing law—the natural law—in the state of nature, although its foundations are not in the power, but in justice and virtues or—as in the Hobbits’ “civic” everyday—in usage. Indeed the uncertainty of the state of nature arises from the fact that the absolute power, symbolised by the tyrannous power of Sauron and the One Ring, always threatens the sound functioning of law. For, in the state of nature, the true foundation of the law is not the power relying on force and fear but, on the one hand, the authority flowing from the personal excellency and charisma, and the art of persuasion, the rhetoric, on the other hand.

At certain occasions both Gandalf and Aragorn reveal, respectively, their true personality letting overflow their personal charisma: for example, when Gandalf persuades Bilbo to pass the Ring to Frodo,<sup>50</sup> when he exposes the intrigues of Saruman to Théoden,<sup>51</sup> or when Aragorn meets Éomer. The power of their personal influence does not stem from violence or fear, but from the excellence of their personality. This forcelessness belongs to the very core of his mission in the case of Gandalf, while it is granted to Aragorn by his fate—since he is nothing but a hiding heir, a “strider”, in the time of the Ring’s War.

Although Gandalf and Aragorn use their personal authority only as a last resort, they usually try to persuade their friends or enemies by their arguments. They never ask or order anything without a reason. So the primary device for realising rights and duties is persuasion, the so-called “constitutive rhetoric”.<sup>52</sup>

The substance of the constitutive rhetoric is very well enlightened in a scene of the *Lord of the Rings*, in which Gandalf’s constitutive rhetoric confronts Saruman’s “destructive rhetoric”. Following the defeat of Saruman’s army by the Rohirs and their allies, he locks himself in Isengard surrounded by the Ents. Then Gandalf, accompanying by his fellows—Théoden, Aragorn and Éomer—rides to the tower of the fortress to try to persuade him to give up his dark conspiracies and to join the Alliance. Though Saruman, a master of the words (and Gandalf has in advance warned his companions of the bewitching power of Saruman’s voice), speaking from above the tower’s balcony, tries to address them one by one—first Théoden, then Éomer and Gandalf—and to take them on his own part by flattery or threats, outwitting them against each other. First it seems that he succeeds, but as the

<sup>47</sup> See “The Pyre of Denethor” in *The Return of the King*, 141–150.

<sup>48</sup> *The Fellowship of the Ring*, 12.

<sup>49</sup> Cf. *The Fellowship of the Ring*, 51.

<sup>50</sup> See note 3.

<sup>51</sup> See *The Two Towers*, 136–141.

<sup>52</sup> I have borrowed the term of “constitutive rhetoric” from James Boyd White who sees in this the distinct form of persuasion aiming to re-establish the community of the disputing parties reinterpreting their own respective place in the community forming the face of the community itself by this way at the same time. In a wider sense the concept of “constitutive rhetoric” embodies all linguistic activities contributing to the maintenance of the human community and culture. Cf. White, J. B.: *Heracles’ Bow. Essays on the Rhetoric and Poetics of the Law*. Madison (WI), 1985. 37–39.

conversation is going ahead, more and more of Saruman's real intention gets cleared before his audience. At the end of the scene Gandalf gives a last chance to Saruman for leaving freely and repairing his faults, but he answers Saruman's high-handed rejection by revealing his true power: he shows Saruman that he already is not "Gandalf the Grey" but "Gandalf the White" who has been returned from death, and he breaks Saruman's magic staff with the force of his mere thought.<sup>53</sup> When he is questioned by a fellow why he has tried to negotiate with Saruman at all, he replies:

"But I had reasons for trying; some merciful and some less so. First Saruman was shown that the power of his voice was waning. He cannot be both tyrant and counsellor. When the plot is ripe it remains no longer secret. Yet he fell into the trap, and tried to deal with his victims piece-meal, while others listened. Then I gave him a last choice and a fair one: to renounce both Mordor and his private schemes, and make amends by helping us in our need. He knows our need, none better. Great service he could have rendered. But he has chosen to withhold it, and keep the power of Orthanc. He will not serve, only command. He lives now in terror of the shadow of Mordor, and yet he still dreams of riding the storm. Unhappy fool!"<sup>54</sup>

When the world steps out of the state of nature not the nature of law but the essence of power changes: the arbitrary, tyrannous power having an end in itself is replaced by the lawful power, and, for the law's foundations are justice and virtue, the lawful power means the morally justified power. The essence of the civic state is thus the rule of law. That is why the pre-existence of the (natural) law bears at least equal importance with that of the act of bringing under control the unlimited absolute power (by destructing Sauron and the Ring) for reaching the civic state.

This can be seen when Aragorn carefully followed the old laws and traditions in the process of accessing the throne: he visited Minas Tirith, the town of Gondor's King, only incognito during its siege; he did not hold up neither the title of the Governor of Minas Tirith, nor that of the Steward of Gondor<sup>55</sup>—although it would be quite natural for everyone in the given situation; and, after the last victorious battle, he entered Minas Tirith only with the permission of the city's Governor and with the consent of the people.<sup>56</sup> The first task of the King was the jurisdiction after his inauguration: he granted the defeated peoples pardon and delivered an equitable judgement in Beregon's case.<sup>57</sup>

#### 4. Three Questions

Next I shall inquire three interrelated questions. First, whether it is worth for lawyers to read literature at all? Is it not enough for practising lawyers to read legal materials and treatises, or, for legal philosophers to read political or legal philosophical works?

The second question is directly bounded to the previous, and it is preconditioned by the positive answer the first. That is, even if we suppose that the literary readings are not without any good for the lawyers yet we can pose the question whether it is worth reading

<sup>53</sup> See "The Voice of Saruman" in *The Two Towers*, 219–234.

<sup>54</sup> *The Two Towers*, 230–231.

<sup>55</sup> See *The Return of the King*, 157.

<sup>56</sup> *The Return of the King*, 293–297.

<sup>57</sup> See *The Return of the King*, 297–298.

that kind of works like *The Lord of the Rings*? At last we can still ask why should we read particularly just *The Lord of the Rings*?

As for the first question it is enough, now and here, to refer to Ian Ward and James Seaton concerning the advantages and disadvantages of applying literature in legal education.<sup>58</sup>

In answering the second question—whether it is worth reading the kind of works like *The Lord of the Rings*—first we should identify the work's literary genre. Behind this phrasing of the question stands, of course, the implicit assumption that the different literary genres have different importance for the legal mind. We have to add to this the thought already advanced in the title of the present essay, that is—against any opposing rumour—, nobody is born to be a lawyer. Which means that one's decision to choose law as a profession, and to hold herself to this decision subsequently in her later period of life, this is the outcome of a long socialising process developing special motives—striving for justice or wealth, social reputation etc.—and capacities—such as empathy or eloquence—in the personality. So the question of the literary genre can be precise in a way that who—if anyone—should read the kind of works like *The Lord of the Rings*? Is it valuable for the “done” or for the “would be” lawyers?

Three genres are at hand by the classification of *The Lord of the Rings*: the tale, the myth and the novel. It is worth recalling the thoughts of Bruno Bettelheim, as a starting point, who compared tale and myth and offered interesting standpoints for the following analysis.<sup>59</sup>

First of all, the tale is optimistic: it teaches the children that albeit the life keeps in reserve a lot of trials for them, it is always worth fighting, and they can be happy here, in this worldly, everyday life. The tale is related to our ordinary world, and it deals with even the most unexpected events in a natural, unaffected voice. This effect is increased by the fact that the protagonists of the tale are nameless—the “youngest son”—or bear such names—“Johnny and July”—that can be seen as collective nouns.

Contrary to tale, myth tells the extraordinary stories of superhuman heroes. Here the protagonists are individual, particular persons—not the “youngest prince” but Theseus or Oedipus—whose stories rather show us what can happen if we do not control certain instinctive impulses—such as vengefulness, jealousy or the marrying of one of our parents—, what tragic consequences will flow from our unchecked behaviour.

When comparing tale and myth to a novel, it can be seen that the novel's main characteristics, and especially the modern novel's one, lies in its complexity. The personality, intentions and actions of the characters are contradictory, and they affect each other in a complex way, and they can change and transform with the move of the plot. That is why the “lesson” of the novel is never unambiguous, therefore it constantly forces the reader to confront with and to recognise the profound uncertainty of the human condition and the sometimes hardly foreseeable consequences of the individual actions.

<sup>58</sup> See Ward, I.: “The Educative Ambition of Law and Literature”. *Legal Studies*, 13 (1993), 323–333; “From Literature to Ethics: The Strategies and Ambitions of Law and Literature”. *Oxford Journal of Legal Studies*, 14 (1994), 389–400; Seaton, J.: “Law and Literature: Works, Criticism and Theory”. *Yale Journal of Law and Humanities*, 11 (1999), 479–507.

<sup>59</sup> See Bettelheim, B.: “Fairy Tale versus Myth”. In: Bettelheim, B.: *The Uses of Enchantment: The Meaning and Importance of Fairy Tales*. New York, 1989 [1976], 35–40.

While the tale as a literary genre is important in the psychic development and the shaping of the child's personality, the myth offers a transition from the tale to the adult literature requiring more mature thinking, so it is a characteristic reading of adolescence and of early adulthood. These points and conclusions are in accordance with the outcomes of the researches which have taken place in the field of "law and literature" concerning the relationships between the literary genres and the process of legal socialization.<sup>60</sup>

Though it is not easy to identify the literary genre of *The Lord of the Rings* taking in account the above described viewpoints, because the characteristics of all the three genres—the tale, the myth and the novel—can be found in the work. *The Lord of the Rings* tells us about the extraordinary events of an invented world in common parlance, and the story has a "happy end" within its own frames, so far the work is tale-like anyway. On the one hand, some characters are sketchily portrayed, they rather represent only "archetypes"—e.g. Gimli or Legolas. On the other hand, the protagonists are individuals and superhumans for a certain degree—mainly the character of Gandalf and Aragorn—, not to mention that the plot itself follows clichés of Old English and Celtic mythology. The work recreates this mythological world, so far it is close to the genre of myth.

Although we can discover the characteristics of the novel in *The Lord of the Rings*, since the story's fictive social background is very elaborated—the author discloses geographical, ethnographic and linguistic descriptions in the Appendix in one and a half hundred pages length—and the "human sized" characters—of Bilbo's, Frodo's and of Gollum's, not at last—personality is indeed dynamic, and it illuminates their controversial inducements. Furthermore the novel reveals—hopefully as I illuminated it in the previous part of this essay—the dialectic nature of power and authority. It is not by chance that Umberto Eco classified the work into a special genre of the historical novel, the *romance*, in which "the past [appears] as scenery, pretext, fairy-tale construction, to allow the imagination to rove freely."<sup>61</sup>

If we accept Eco's stand-point then we can regard *The Lord of the Rings* as a kind of "modern myth"<sup>62</sup> by which readers can be localised within the circles of adolescents and young adults. So we can offer the book for the "lawyers-to-be" (and their teachers) as a reading which dramatises the contradictory nature of power, and the relationship of law and justice with an extraordinary force.

Finally, closing our inquiries, let us pose the third question what we can precise taking in account the arguments above: why should we chose just *The Lord of the Rings* to recommend to the "lawyers-to-be" from the other modern myths concerning the nature of power and law, to which belong such excellent works as Orwell's *1984* or Huxley's *Brand New World*? We may mention first the optimism of the work that is needed by all of us, not only by the "lawyers-to-be", at the dawn of the 21st century.

As for the aesthetic values of the work, it is no need to wonder on its linguistic richness and classic style, if we consider that the author was the professor of Old and Middle English

<sup>60</sup> Cf. Ward, I.: *Law and Literature: Possibilities and Perspectives*. Cambridge, 1995, 90–118.

<sup>61</sup> Eco, U.: *Postscript to The Name of the Rose* (translated by Weaver, W.). San Diego–New York–London, 1983.

<sup>62</sup> Tolkien himself called his writing "mythopoesis" in a discussion in the early 1930s. Cf. Carpenter, H.: *The Inklings: C.S. Lewis, J.R.R. Tolkien, Charles Williams, and their Friends*. London, 1978.

in Oxford, who invented new languages in his freetime.<sup>63</sup> This linguistic richness is especially important for lawyers-to-be who will be “professional translators”, since the mediation between the different subcultures of their professional groups—judges, attorneys, policemen—, and of the different social groups belongs to the very matter of their profession, they have to work as translators in the communication among these various groups.<sup>64</sup> This means that they ought to learn to speak to everybody on her own language.

The evaluation of the message of the work has divided the literary critics since its publication. Influential authors—e.g. W.H. Auden, C.S. Lewis—have enthusiastically praised it, while others of not less specific density—e.g. E. Wilson, E. Muir and P. Toynbee—, have heavily criticised it. The present author, as an uninitiated, would not incline to take part in this discussion, only brings out his opinion.

In my opinion, *The Lord of the Ring*'s primary value is that it re-tells the traditional mythological matter, expressing a heroic value-system, in a modern fashion inspired by the Christian values<sup>65</sup>—such as compassion, forgiveness, and generosity—adding to these the idea of undertaking responsibility for the future of our world and for the preservation of all the nature's values. I believe that these ideas will have an actual importance in the long run—maybe even for the lawyers-to-be.

<sup>63</sup> On Tolkien's biography see Dougham, D.: “Who was Tolkien?” [<http://tolkiensociety.org/tolkien/biography.html>]. White, M.: *Tolkien: A Biography*. London, 2002.

<sup>64</sup> Cf. White, J. B.: *Justice as Translation. An Essay in Cultural and Legal Criticism*. Chicago, 1990.

<sup>65</sup> About the role played the Catholic faith in Tolkien's life see White: *Tolkien*, 22–31.

TAMÁS NÓTÁRI\*

## Forensic Strategy in Cicero's Speech in Defence of Aulus Cluentius Habitus

**Abstract.** The statement of the defence delivered in the criminal action (*causa publica*) of Aulus Cluentius Habitus—Cicero's longest actually delivered speech left to us—is from 66, that is, the year when Cicero was *praetor*. In certain respect, it is the precious stone of Cicero's *ars oratoria* since its narrative is vivid, full of turns like a crime story; events, scenes, planes of time replace one another boldly, sometimes seemingly illogically but, being subordinated to the effect the orator means to attain, in an exactly premeditated sequence. Cluentius was charged, on the one hand, with poisoning his stepfather, Staius Albius Oppianicus. The other part of the charge was founded on the criminal proceedings under which eight years before Cluentius charged Oppianicus with poisoning attempt against him, as a result of which Oppianicus was compelled to go into exile—in the current lawsuit, however, the prosecution brought it up against him that the former court of justice declared Oppianicus guilty purely because Cluentius had bribed the judges. *Lex Cornelia de sicariis et veneficis* of 81 served as basis for judging crimes that provide grounds for the charge of poisoning; however, the prohibition of bribing judges applied to the order of senators only, and Cluentius belonged to the order of knights. First, we intend to outline the historical background of the oration, so to say, the historical facts of the case (I.); then, we turn our attention to the opportunity of applying statutory facts of the case, i.e. *lex Cornelia de sicariis et veneficis*. (II.) Finally, we examine the rhetorical tools of Cicero's strategy to explore how the orator handled, modified or distorted the system of the charges and chronology—to support the argument, which can be considered brilliant with a lawyer's eyes, too. (III.)

**Keywords:** Cicero, *Pro Cluentio*, *lex Cornelia de sicariis et veneficis*, forensic strategy

### I. Historical background of Pro Cluentio

Cicero refers to the oration delivered in defence of Aulus Cluentius Habitus in 66 in *Orator* written twenty years later as an example of using the three genres of style in the same speech,<sup>1</sup> and quotes a truly successfully made phrase<sup>2</sup> from it.<sup>3</sup> Writing about the orator's power of judgement Quintilian brings up *Cluentiana* as a textbook example of properly built rhetorical strategy,<sup>4</sup> and elsewhere he expounds that Cicero threw sand (that is, dust) into the judges' eyes.<sup>5</sup> The oration is cited by Gellius too;<sup>6</sup> Pliny considers it Cicero's most

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<sup>1</sup> Cicero, *Orator* 103.

<sup>2</sup> Cicero, *Pro Cluentio* 199.

<sup>3</sup> Cicero, *Orator* 108.

<sup>4</sup> Quintilianus, *Institutio oratoria* 6, 5.

<sup>5</sup> *Ibid.* 2, 17, 21. *gloriatu est offudisse tenebras iudicibus Cluentianis.*

<sup>6</sup> Gellius, *Noctes Atticae* 16, 7, 10.

outstanding rhetorical achievement,<sup>7</sup> and from among Claudius Tryphoninus mentions it.<sup>8</sup> Philology of the modern age also devoted considerable scope to the *Pro Cluentio*, Theodor Mommsen refers to the speech as an outstanding example of antique "criminal statistics".<sup>9</sup>

The accused of the lawsuit, A. Cluentius Habitus was born in Larinum in north Apulia controlled by the Auri, Albii, Cluentii and Magii related by manifold marriage connections and kinship,<sup>10</sup> which shows the reflection of crimes growing wild in Rome<sup>11</sup> and it cannot be said that at a rate of a small town.<sup>12</sup> He lost his father, Cluentius senior when he was fifteen, in 88;<sup>13</sup> two years later his mother, Sasia got married again, and to the husband of her daughter, Cluentia, that is, her own son-in-law, A. Aurius Melinus, at that.<sup>14</sup> That is where Cicero dates the bad relation between the accused and his mother from as he claims that Cluentius was so much shocked at Sasia's act that he decided not to maintain any relation with his mother.<sup>15</sup> Aurius—purportedly as a result of the machinations of St. Abbius Oppianicus—fell victim of Sulla's *proscriptiones*,<sup>16</sup> and Cluentius's mother married Oppianicus, who earlier divorced at least two wives, Papia (Magius's widow) and Novia, and lost two wives, the elder Cluentia and Magia.<sup>17</sup>

It is worth noting that to illustrate the hatred between Oppianicus senior and Cluentius Cicero does not use the opportunity that he could properly exploit as the psychological motivation of the assassination attempted by Oppianicus against his stepson, namely, he does not mention how Cluentius responded—possibly with antipathy or anger—to the fact of the marriage of his mother and Oppianicus.<sup>18</sup> Magia was the mother of Oppianicus junior, who acted as accuser against Cluentius, that is, the son of his stepmother in 66. Oppianicus senior purportedly wanted to get his stepson, Cluentius poisoned and used C. Fabricius for carrying out his plan, who tried to win the help both of Scamander, the libertine and the slave of the physician who treated Cluentius for performing the murder.<sup>19</sup> It is impossible to clarify how much the fact of the assassination attempt could be considered proved; however, Cluentius brought a charge first against Scamander, then Fabricius and finally his stepfather, Oppianicus senior. The court of justice found all the accused persons guilty; however,

<sup>7</sup> Plinius minor, *Epistulae* 1, 20, 4.

<sup>8</sup> Tryphoninus, D. 48, 18, 39. Cf. Nörr, D.: *Cicero-Zitate bei den klassischen Juristen. Zur Bedeutung literarischer Zitate bei den Juristen und zur Wirkungsgeschichte Ciceros*. In: *Ciceroniana. Atti del III Colloquium Tullianum. Roma, 1978*. 111–150, 122ff.

<sup>9</sup> Mommsen, Th.: *Römische Geschichte, III*. Berlin, 1875<sup>6</sup>. 528. *Die Criminalstatistik aller Zeiten und Länder wird schwerlich ein Seitenstück bieten zu einem Schaudergemälde so mannichfaltiger, so entsetzlicher und so widernatürlicher Verbrechen, wie es der Prozeß des Aulus Cluentius in einem Schoß einer der angesehensten Familien einer italischen Ackerstadt vor uns aufgerollt*.

<sup>10</sup> See Hoenigswald, G. S.: The murder charges in Cicero's *Pro Cluentio*. *Transactions of the American Philological Association*, 93 (1962), 109–123, 109f.

<sup>11</sup> Cf. Sallustius, *De coniuratione Catilinae* 11, 4.

<sup>12</sup> Kroll, W.: Ciceros Rede für Cluentius. *Neue Jahrbücher für das klassische Altertum*, 53 (1924), 174–184, 176.

<sup>13</sup> Cicero, *Pro Cluentio* 11.

<sup>14</sup> *Ibid.* 12f.

<sup>15</sup> Cicero, *Pro Cluentio* 16. Cf. Hoenigswald: *op. cit.* 115.

<sup>16</sup> Cicero, *Pro Cluentio* 25.

<sup>17</sup> *Ibid.* 27f.

<sup>18</sup> Hoenigswald: *op. cit.* 116.

<sup>19</sup> Cicero, *Pro Cluentio* 47ff.

Oppianicus was convicted with a little majority of the votes cast.<sup>20</sup> The lawsuit involved several suspicious circumstances, for example, the judges were drawn irregularly,<sup>21</sup> the suspicion of bribe<sup>22</sup> emerged with respect to several senators, e.g. C. Fidiculanus Falcula,<sup>23</sup> M. Atilius Bulbus and Staienus.<sup>24</sup>

Based on all that, suspicion extensively spread that the lawsuit was influenced by bribes and bribe attempts. In spite of the fact that Oppianicus was convicted, Cicero tries to present the case as if Oppianicus himself might have been the briber and it was thanks to this that almost half of the members of the court of justice voted for his innocence, in contrast with Scamander and Fabricius who were unanimously convicted; on the other hand, Oppianicus's counsel, L. Quinctius suspected Cluentius of bribe as by his formal accusation he eventually won success, and used this case for agitating as a tribune before the popular assembly against the corruptness of the order of senators constituting the courts of justice.<sup>25</sup> Consequently, the lawsuit caused political stir and served as grounds for proceedings against several senators who participated in the lawsuit as judges.<sup>26</sup> Cicero, who defended Scamander in the 74 proceedings, refers to the case as a textbook example of the bribeability of courts of justice just because Oppianicus was sentenced by only little majority of the votes cast, from which he wanted to create evidence of or at least arguments on the bribe committed by the accused.<sup>27</sup>

Two years after he was convicted, in 72, Oppianicus senior died in exile but near Rome<sup>28</sup>—the prosecution claimed that Cluentius had him poisoned<sup>29</sup>—however, no factual data are available on the circumstances of his death. His widow, Sassia suspected her son (that is, Oppianicus's stepson), Cluentius of having poisoned Oppianicus, and she tried to confirm her suspicion by testimonies—primarily forced from slaves—but she did not succeed in it.<sup>30</sup> However, after further deaths occurred, and Cluentius got involved in them under unclarified circumstances, in 66 Abbius Oppianicus junior—presumably twenty-one years old at the time of the lawsuit<sup>31</sup>—brought a charge against Cluentius, a member of the order of knights, based on Sulla's *lex Cornelia de sicariis et veneficis*, which contained the state of facts elements homicide, illegal possession of arms, making and passing on poison for the purpose of manslaughter, arson and certain procedural crimes, such as for example bribing the court of justice in order to have innocent persons sentenced—however, it extended this later scope of state of facts to magistrates and senators only.<sup>32</sup> Based on that—

<sup>20</sup> Cf. Cicero, *Pro Caecina* 29.

<sup>21</sup> Cicero, *In Verrem* 2, 1, 157.

<sup>22</sup> *Ibid.* 1, 29.

<sup>23</sup> Cicero, *In Caecilium* 28f.

<sup>24</sup> Cicero, *In Verrem* 2, 2, 79.

<sup>25</sup> Cicero, *Pro Cluentio* 74ff.

<sup>26</sup> Classen, C. J.: *Recht, Rhetorik und Politik. Untersuchungen zu Ciceros rhetorischer Strategie*. Darmstadt, 1985. 21.

<sup>27</sup> Cicero, *In Verrem* 1, 38–40.

<sup>28</sup> Kroll: *op. cit.* 174.

<sup>29</sup> Cf. Cicero, *Pro Cluentio* 161ff.

<sup>30</sup> Hoenigswald: *op. cit.* 111; Kroll: *op. cit.* 175.

<sup>31</sup> Stroth, W.: *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden*. Stuttgart, 1975. 195.

<sup>32</sup> See Mommsen, Th: *Römisches Strafrecht*. Leipzig, 1899. 628; Kunkel, W.: *Untersuchungen zur Entwicklung des römischen Kriminalverfahrens in vorsullanischer Zeit*. München, 1962. 64–70;

paying regard to the letter of the law—Cluentius could not be declared guilty in the charge of bribe if for no other reason than because he did not belong to the scope of subjects of the law as he came from a family in the order of knights and had never held a state office.<sup>33</sup> The office of *iudex quaestionis* was fulfilled by Q. Voconius Naso,<sup>34</sup> the young Titus Attius, knight of Pisaurum acted on the side of the prosecution,<sup>35</sup> the defence of Cluentius, who can be most probably considered guilty in the charges brought against him, was undertaken by Cicero, a *praetor* in 66, who attained that the accused was acquitted.<sup>36</sup> The court of justice consisted of thirty-two jurors, made up, on the grounds of *lex Aurelia iudiciaria* of 70, of senators, knights and aerar tribunes each constituting one-third of the panel.<sup>37</sup>

The defence followed a double path: it did not come to the main count of the indictment immediately; instead, it dealt with the issue of bribe first. In order to support his own narrative on bribe, to discuss the subject of bribe more extensively than the accuser: first, he details Oppianicus senior's guilty past record, and deals with two former lawsuits related to the assassination attempt against Cluentius. In the introduction Cicero announces that in his statement of the defence he will follow the double path indicated by the prosecution and will justify why he deals with the first point more profoundly than with the second one: the charge of poisoning is fully unfounded, therefore, it can be get done with briefly; the bribe case has been generally known for eight years already, and the joint effort of the counsel for the defence and the judges will be required to do away with it. The first part of the statement of the defence consists of three subchapters, which deal with Oppianicus senior's past record, the poisoning lawsuit of the year 74 and the bribe case. In the second part of the oration, which now covers the main count of the indictment, i.e. the issue of assassination committed by Cluentius against Oppianicus by poison, the orator passes over other purported acts of the accused and the crime of poisoning with lapidary conciseness and almost suspicious ease, and he spends more time only on the testimonies enforced from slaves brought up by the prosecution as evidence.

## II. Applicability of *lex Cornelia de sicariis et veneficis* in Cluentius's lawsuit

In the beginning of the speech, in the *prooemium*, Cicero strictly separates the charge of murder committed by poison and the charge of bribing the court of justice that passed sentence on Oppianicus senior eight years before, which was politically highly exploited by *subscriber* Attius.<sup>38</sup> The charge could be based (i) on assassination and mixing of poison, (ii) several poisoning attempts and bribing the court of justice, (iii) simply on assassination attempt.<sup>39</sup> It makes it rather difficult to reconstruct the facts that Cicero both conceals facts

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Cloud, J. D.: The primary purpose of the *lex Cornelia de sicariis*. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 86 (1969), 258–268; Classen, C. J.: Cicero, *Pro Cluentio* 1-11 im Licht der rhetorischen Theorie und Praxis. *Rheinisches Museum*, 108 (1965), 104–142; Humbert, J.: Comment Cicéron mystifia les juges de Cluentius. *Latomus*, 16 (1938), 275–296, 276.

<sup>33</sup> Stroh: *op. cit.* 196.

<sup>34</sup> Cicero, *Pro Cluentio* 147f.

<sup>35</sup> *Ibid.* 65. 84. 156; Cicero, *Brutus* 271.

<sup>36</sup> Kroll: *op. cit.* 174.

<sup>37</sup> Stroh: *op. cit.* 202.

<sup>38</sup> Cicero, *Pro Cluentio* 1–2. 11. 119. Cf. Humbert: *Comment Cicéron mystifia... op. cit.* 287.

<sup>39</sup> Classen, C. J.: Die Anklage gegen A. Cluentius Habitus (66 v. Chr. Geb.). *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 89 (1972), 1–17; Classen, C. J.: Cicero, the Laws, and the Law-Courts. *Latomus*, 37 (1978), 597–619, 604ff.; Köhler, Ch.: *Die*

unpleasant to his defendant and dispenses with elements self-evident to the audience of the period but no longer known to the reader of the present day. It is clear that as counsel for the defence Cicero's task was to prove to the judges that his defendant had not committed the crime(s) he was charged with—that is, in accordance with the fundamental rhetorical principles he had to proceed in compliance with *status coniecturalis*.

To a lawyer's eyes, one of the most interesting questions of *Pro Cluentio* is whether the charge brought by Oppianicus junior based on *lex Cornelia de sicariis et veneficis* against Cluentius applied to manslaughter committed by poison only or covered bribe of the court of justice too, which the accused committed, as claimed by the accuser, eight years before, in the lawsuit against Oppianicus senior. In clarifying the question, as a matter of fact, the problem of the reliability of the source base arises as Cicero's form of presentation and his references to the text of the law are most probably tendentious—even if he could not have modified or distorted the text of the law on the merits when citing it—and the form of Sulla's laws left to us is from a much later age;<sup>40</sup> furthermore, it must be taken into account that the text effective at the time of the lawsuit is not necessarily identical with the text left to us.<sup>41</sup> Although the later version of *lex Cornelia de falsis* sanctions active bribe in court of justice, it is not probable that the original *lex Cornelia testamentaria* contained provisions to such effect. In the attempt to determine the counts of the indictment precisely, one should not forget about the circumstance that in the *quaestio* proceedings the accuser was allowed to present everything to the jurors that he could bring up against the accused since his aim was to declare guilt in general only and not to fix guilt that can be declared in specific counts of the indictment since punishment was not based on the discretion of the court of justice.<sup>42</sup> We cannot know for sure if in *delatio nominis* it was mandatory to notify the law and if in addition to naming the law that provided grounds for the charge it was mandatory to specify its exact passage or if it was mandatory to name other counts of the indictment to be referred to in the scope of the charge and whether they were binding with respect to the continuation of the lawsuit in the event that they were determined.<sup>43</sup>

There is a good chance of stating that in the introduction of the lawsuit it was mandatory to set the counts of the inducement in writing, as Cicero notes this in *De inventione* regarding the period before Sulla.<sup>44</sup> It is worth looking at how much Cicero specifies statutory grounds of the charge of the given lawsuit in his speeches and to what extent he comments on the introductory part of the lawsuit (*postulatio, delatio nominis, receptio nominis*). References to the state of facts and charge of *de pecuniis repetundis*,<sup>45</sup> *de*

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*Proömientechnik in Ciceros Reden: Ein Beitrag zum Verhältnis von rhetorischer Theorie und rednerischer Praxis bei Cicero.* Diss. Jena, 1968. 100–109; Pugliese, G.: *Aspetti giuridici della Pro Cluentio di Cicerone.* *Iura*, 21 (1970), 155–181.

<sup>40</sup> Paulus, *Sententiae* 5, 23; *Collatio legum Mosaicarum et Romanarum* 1, 2, 3; D. 48, 8. Cf. Mommsen: *Römisches Strafrecht.* *op. cit.* 628ff.; Cloud: *The primary purpose... op. cit.* 258ff.

<sup>41</sup> Classen: *Die Anklage gegen A. Cluentius Habitus.* *op. cit.* 2.

<sup>42</sup> *Ibid.* 3.

<sup>43</sup> Mommsen: *Römisches Strafrecht.* *op. cit.* 385<sup>4</sup>.

<sup>44</sup> Cicero, *De inventione* 2, 58.

<sup>45</sup> Cicero, *In Caecilium* 76; *In Verrem* 2, 2, 142; *ad Quintum fratrem* 3, 1, 15; *ad familiares* 8, 8, 2, 3.

*maiestate*,<sup>46</sup> *de ambitu*,<sup>47</sup> *peculatus*,<sup>48</sup> *inter sicarios* and *veneficii*,<sup>49</sup> *iniuriarum*,<sup>50</sup> *furti*,<sup>51</sup> *de vi*,<sup>52</sup> *de alea*<sup>53</sup> and *de parricidio*<sup>54</sup> can be found item by item.<sup>55</sup> Furthermore, in several cases he names the particular law, for example *lex Plautia de vi*,<sup>56</sup> *lex Iulia de pecuniis repetundis*,<sup>57</sup> *lex Papia*,<sup>58</sup> *lex Acilia*<sup>59</sup> and *lex Scantinia*.<sup>60</sup> In several orations he refers *expressis verbis* to the charge being in conformity with the facts of the case, for example, in *Pro Roscio Amerino*,<sup>61</sup> *In Verrem*—among others regarding the statues erected<sup>62</sup>—*Pro Scauro*,<sup>63</sup> *Pro Rabirio Postumo*<sup>64</sup> and *Pro Ligario*.<sup>65</sup>

In *Pro Cluentio* Cicero's form of presentation is twofold. On the one hand, it gives the impression that the court of justice is competent exclusively in the case of poisoning,<sup>66</sup> and article six of *lex Cornelia de sicariis et veneficis* on bribing the court of justice does not apply to Cluentius as the scope of persons is restricted to the order of senators;<sup>67</sup> on the other hand, it deals with bribe continuously as *crimen*. The *quaestio* chaired by Q. Voconius Naso was undoubtedly competent primarily in cases of poisoning—which, as a matter of fact, does not exclude bringing up other counts of the indictment—at the same time it contained a section that sanctioned bribe.<sup>68</sup> It is worth looking at the points referred to by Joachim Classen in order to clarify if the charge was in conformity with the facts of the case. In spite of incomplete source base it can be pointed out that in no other cases was a charge brought due to bribe in court of justice on the grounds of *lex Cornelia de sicariis et veneficis* as there were other opportunities for sanctioning bribe of the court of justice. Furthermore, it is not probable that *iudex quaestionis* would have sustained the charge contrary to the letter of the law, more specifically, that the prosecutor would extend the state of facts of Sulla's law to the order of knights, beyond the order of senators. Cicero asserts that Attius often referred to *aequitas*, by which he argued for the extensive interpretation of

<sup>46</sup> Cicero, *Q. fr.* 3, 1, 15; *De inventione* 2, 72; *ad familiares* 3, 2, 3; *Philippicae* 1, 23.

<sup>47</sup> Cicero, *Cael.* 16. 76; *De oratore* 2, 274. 280; *ad Quintum fratrem* 1, 2, 15; 2, 3, 5; 3, 2, 3; *Pro Cluentio* 114.

<sup>48</sup> Auctor ad Herennium 1, 22.

<sup>49</sup> Cicero, *De inventione* 2, 58; *Pro Roscio Amerino* 90; *Pro Cluentio* 21; Auctor ad Herennium 4, 23.

<sup>50</sup> Cicero, *De domo sua* 13; *De inventione* 2, 59.

<sup>51</sup> Cicero, *Pro Cluentio* 163; *ad familiares* 7, 22; *Pro Flacco* 43.

<sup>52</sup> Cicero, *Post reditum in senatu* 19; *ad Quintum fratrem* 2, 3, 5; *Pro Sestio* 90. 95.

<sup>53</sup> Cicero, *Philippicae* 2, 56.

<sup>54</sup> Cicero, *Pro Roscio Amerino* 28. 64.

<sup>55</sup> Classen: *Die Anklage gegen A. Cluentius Habitus. op. cit.* 5.

<sup>56</sup> Cicero, *ad familiares* 8, 8, 1.

<sup>57</sup> Cicero, *Pro Rabirio Postumo* 12.

<sup>58</sup> Cicero, *Pro Balbo* 52.

<sup>59</sup> Cicero, *In Verrem* 2, 1, 26.

<sup>60</sup> Cicero, *ad familiares* 8, 12, 3; 8, 14, 4.

<sup>61</sup> Cicero, *Pro Roscio Amerino* 28. 61. 64. 76.

<sup>62</sup> Cicero, *In Verrem* 2, 2, 141.

<sup>63</sup> Cicero, *Pro Scauro* 1.

<sup>64</sup> Cicero, *Pro Rabirio Postumo* 8. 9. 37.

<sup>65</sup> Cicero, *Pro Ligario* 1. 4. 5. 9. 11.

<sup>66</sup> Cicero, *Pro Cluentio* 1. 2. 148. 164.

<sup>67</sup> *Ibid.* 144ff.

<sup>68</sup> Classen: *Die Anklage gegen A. Cluentius Habitus. op. cit.* 10f.

the law, and Cicero—although he wants to protect Cluentius against the peril arising from the suspicion of bribe—does not refer to bribe even once as *crimen* in conformity with the charge, and quotes no testimony to refute it; instead, he underlines it much rather as a point brought up by the prosecution that can generate prejudice<sup>69</sup> and bias.<sup>70</sup>

### III. Rhetorical tactics and double handling of facts of the case in *Pro Cluentio*

Discussion of *crimina veneficii*, that is, actual, legally relevant counts of the indictment in the first place could give the impression to the judges that Cicero tries to evade the less considerable but highly effective part of the charge, *iudicium Iunianum*, for this reason, he admittedly—in fact only apparently since he starts discussing the Oppianicus lawsuit on the merits much later only<sup>71</sup>—follows the system set up by Attius. Regarding the forced choice between *status collectionis* and *status coniecturalis* Cicero resolves to perform a stunt, a highly break-neck one, at that, which he, however, already used successfully in *Pro Roscio Amerino*.<sup>72</sup> he separates his own intentions and his defendant's interests and claims by stating that for him as counsel for the defence it would have been absolutely sufficient to refer to the law itself,<sup>73</sup> but at the request of Cluentius, who wanted not only to win the lawsuit but to restore his reputation<sup>74</sup> he has chosen the more difficult way, specifically he wants to prove the innocence of the accused not only formally but also substantively.<sup>75</sup> By that he can absolutely give the impression as if each of the two *status*es represented proper weight for him to make a success of his case.<sup>76</sup>

The double argument technique, at the same time, fits in with the “needs” of the members of the court of justice with brilliant accuracy since by applying *status collectionis* he defends the interests of the order of knights adhering to the words of the law, which take them out of the scope of culpability;<sup>77</sup> at the same time, he arouses fear in them that in the event that the extensive interpretation gains ground, charge can be brought at will in the future due to bribe against knights too;<sup>78</sup> on the other hand, he does not have to be afraid of drawing the anger of judges who come from the order of senators because having used *status coniecturalis* he can be sure of their sympathy since by proving bribe committed by Oppianicus and not by Cluentius and by having explored that only a few judges were bribed in the Oppianicus lawsuit and only Staienus was actually given money,<sup>79</sup> through a kind of “washing the Moor white”—so kind to senators so much damaged by the events of the lawsuit in 74—he restores the honour of the judges in the present case by providing them with a scapegoat.<sup>80</sup> With respect to the application of two *status*, in the *dispositio* of *Pro Cluentio*, together with Wilfried Stroh we can create the following system:<sup>81</sup> in the

<sup>69</sup> Cf. Cicero, *Pro Cluentio* 142.

<sup>70</sup> Classen: *Die Anklage gegen A. Cluentius Habitus. op. cit.* 14f.

<sup>71</sup> Cicero, *Pro Cluentio* 59ff.

<sup>72</sup> Cicero, *Pro Roscio Amerino* 128ff.

<sup>73</sup> Cicero, *Pro Cluentio* 145.

<sup>74</sup> *Ibid.* 144.

<sup>75</sup> Stroh *op. cit.* 200.

<sup>76</sup> Quintilianus, *Institutio oratoria* 6, 5. 9.

<sup>77</sup> Cicero, *Pro Cluentio* 150–155.

<sup>78</sup> *Ibid.* 152. 157. Cf. Mommsen: *Römisches Strafrecht. op. cit.* 634f.

<sup>79</sup> Kroll: *op. cit.* 178.

<sup>80</sup> Stroh: *op. cit.* 203.

<sup>81</sup> *Ibid.* 204.

discussion of *iudicium Iunianum*,<sup>82</sup> *status coniecturalis* (i.e. it was not Cluentius who committed bribe) was addressed to senators<sup>83</sup> and *status collectionis* (i.e. Cluentius could not be punished pursuant to section six of *lex Cornelia de sicariis et veneficis*) to knights,<sup>84</sup> and it is followed by the discussion of *crimina veneficii*.<sup>85</sup>

To counteract the sympathy shown towards Oppianicus junior, Cicero chooses a masterly tool: he enters in the picture Cluentius's mother (that is, the widow of Oppianicus senior and stepmother of Oppianicus junior), Sassia, who is fired by *hostile odium* and *crudelitas* against her son, and in whose hands—for she is moving the threads of the charge—Oppianicus junior guided by a child's *pietas* is merely a tool for accomplishing her revenge.<sup>86</sup> It is worth examining closer at what points and in what context Cicero mentions Sassia.<sup>87</sup>

Directly after *exordium/prooemium* he names Sassia as a mother guided by cruelty and hatred and as the source of the charge.<sup>88</sup> The question whether Sassia (as Joachim Classen argues) was personally present at the trial<sup>89</sup> or (as Wilfried Stroh and Jules Humbert asserts) was absent<sup>90</sup> cannot be settled, as Cicero does not address her directly at any point and it is not known if she testified or not, and perhaps it is not exceptionally relevant. He emphatically alludes to Sassia's significance in terms of the lawsuit,<sup>91</sup> and states that for the sake of saving Cluentius he cannot show consideration for her,<sup>92</sup> however, it is much later, in the discussion of *crimina veneficii* that we learn what this significance is.<sup>93</sup> The minutes of the interrogation of the slave was read (caused to be read) by Attius before the court of justice,<sup>94</sup> but it is doubtful if Sassia's name occurred in it;<sup>95</sup> however, the most probably rather subjective reconstruction of the events imbued with rhetorical exaggerations enabled Cicero to make an attack against Cluentius's mother.<sup>96</sup> The orator keeps the promise made earlier<sup>97</sup> only after that, and he presents a stylised image of the mother as *monstrum* to the judges who probably had not known anything about the relation between mother and son before the trial. Accordingly, she was already part of the assassination attempt against Cluentius,<sup>98</sup> she made her stepson her son-in-law in order to enter him as an accuser acting resolutely against her son;<sup>99</sup> then, after brief summary of the interrogation of the slave<sup>100</sup> the

<sup>82</sup> Cicero, *Pro Cluentio* 9–160.

<sup>83</sup> *Ibid.* 9–142.

<sup>84</sup> *Ibid.* 143–160.

<sup>85</sup> *Ibid.* 161–187.

<sup>86</sup> *Ibid.* 12ff. Cf. Quintilianus, *Institutio oratoria* 6, 5, 9; 11, 1, 62.

<sup>87</sup> Stroh: *op. cit.* 205ff.

<sup>88</sup> Cicero, *Pro Cluentio* 12ff.

<sup>89</sup> Classen: *Recht, Rhetorik und Politik. op. cit.* 36.

<sup>90</sup> Stroh: *op. cit.* 206; Humbert, J.: *Les plaidoyers écrits et les plaidoiries réelles de Cicéron*. Paris, 1925. 115f.

<sup>91</sup> Cicero, *Pro Cluentio* 17.

<sup>92</sup> *Ibid.* 18.

<sup>93</sup> *Ibid.* 176ff.

<sup>94</sup> *Ibid.* 184.

<sup>95</sup> Stroh: *op. cit.* 206.

<sup>96</sup> Cicero, *Pro Cluentio* 176–187.

<sup>97</sup> *Ibid.* 17.

<sup>98</sup> *Ibid.* 189.

<sup>99</sup> *Ibid.* 190. Cf. Kroll: *op. cit.* 175; Hoenigswald: *op. cit.* 111.

<sup>100</sup> Cicero, *Pro Cluentio* 191.

orator creates the image of Sassia who manipulates witnesses, arrives to Rome to hasten her son's ruin, holds the threads in her hands in the background but hides from public.<sup>101</sup>

As the prosecutor most probably did not mention Sassia, instead, tried to strengthen the "*pius Oppianicus–impius Cluentius*" opposition in the judges, Cicero, with good sense, using the tool of *retorsio criminis* let the characterisation set up by the prosecution fall back—if not on Oppianicus junior, of whom the orator could not speak much ill for he was young and gave a good impression to the judges—on Sassia purportedly manipulating the charge, who seemed to be suitable for this role all the more because the fact of her marriage entered into with her son-in-law<sup>102</sup> around 86 offered the defence the opportunity to expound the topos of a female violating the order of nature and for this reason undoubtedly not shrinking back from other foul deeds either.<sup>103</sup> Cicero achieves all that by brilliant regrouping of the events since it is just this *ordo artificiosus* that allows him to build the *narratio* divided into two into the *argumentatio* and to get from here straight to the *peroratio* that fulfils the function of invective against Sassia, in which the attention and effort of the judges should be aimed no longer at deliberating if Oppianicus junior was right or wrong in taking vengeance for the conviction and death of his stepfather but at saving the son from the revenge of the mother, who is treading under foot the laws of nature and wants to use administration of justice to achieve this goal.<sup>104</sup>

In the part on *iudicium Iunianum*<sup>105</sup> Cicero handles the tools of *narratio* and *argumentatio*, traditionally and theoretically clearly separable and to be separated, with brilliant and deceptive ease. Although after the *propositio*<sup>106</sup> and the interposed narrative on Sassia<sup>107</sup> he starts the *narratio* that culminates later in *confirmatio*,<sup>108</sup> its given parts,<sup>109</sup> for example, the paragraphs on Oppianicus's foul deeds<sup>110</sup> and those relating *praeiudicia*<sup>111</sup> actually fulfil the function of *probabile e causa* working towards the purpose to be proved<sup>112</sup> because they are meant to support that it was not Cluentius but Oppianicus who might have had and did have a reason for bribing the court of justice.<sup>113</sup> Similarly, the argument on the amount of bribe as *probabile e facto* partly precedes,<sup>114</sup> partly follows,<sup>115</sup> that is, surrounds the *narratio* on this topic;<sup>116</sup> in other words, the *argumentatio* discussing these events, outlining an approximate chronology is of a narrative kind.<sup>117</sup>

<sup>101</sup> *Ibid.* 192ff.

<sup>102</sup> *Ibid.* 12.

<sup>103</sup> Hoenigswald: *op. cit.* 113.

<sup>104</sup> Stroh: *op. cit.* 210.

<sup>105</sup> Cicero, *Pro Cluentio* 9–142.

<sup>106</sup> *Ibid.* 9–11.

<sup>107</sup> *Ibid.* 11–18.

<sup>108</sup> *Ibid.* 81.

<sup>109</sup> *Ibid.* 21–61.

<sup>110</sup> *Ibid.* 21ff.

<sup>111</sup> *Ibid.* 49ff.

<sup>112</sup> Stroh: *op. cit.* 211.

<sup>113</sup> Cicero, *Pro Cluentio* 62. 64. 81.

<sup>114</sup> *Ibid.* 64f.

<sup>115</sup> *Ibid.* 82.

<sup>116</sup> *Ibid.* 66–81.

<sup>117</sup> Stroh: *op. cit.* 211.

This complicated procedure is indispensably necessary for Cicero to make the—lesser lifelike—train of thoughts believable to the judges which states that in the lawsuit in 74 it was not the winner Cluentius but Oppianicus declared guilty that bribed the court of justice and in such fashion, in fact, that the hired intermediary, Staienus promised to hand over the bribe to the judges but later he alleged that the accused was not willing to pay, thereby he turned the judges against him and made sure that Oppianicus would be convicted, and all that he did in order to keep the whole amount for himself. Cicero, however, did not shower this narrative on the audience without any preparation, therefore, he was compelled to give reasons for the reconstructive *narratio* by a preceding *argumentatio* claiming that Oppianicus—being aware of his numerous foul deeds and *praeiudicia* negatively influencing his case—must have had a serious motif to bribe the court of justice.<sup>118</sup> Cicero, as a matter of fact, gets into conflict with his promise that in his speech he intends to follow the order set up by the opponent;<sup>119</sup> yet, he more or less keeps his promise during the actual *narratio*, although prior to it he speaks about the points not touched upon by the prosecutor. And in long preparatory passages he assures the judges several times that he wants to make it short what he has got to say,<sup>120</sup> which he can do because right at the beginning of the *oratio* he states that he does not intend to conceal anything of the facts of the case and is willing to deal with every circumstance mentioned by Attius.<sup>121</sup>

Breaking strict chronology can be clearly observed especially in discussing *praeiudicia* that are against Cluentius's case and the list of Oppianicus's crimes. The chairman of the Oppianicus lawsuit (*iudex quaestionis*), C. Iunius was convicted in 74, and in the same year the senate issued a resolution that made it possible to hold judges affected by *iudicium Iunianum* responsible for bribe.<sup>122</sup> In 73, C. Fidiculanus Falcula was acquitted in two lawsuits;<sup>123</sup> in 72, P. Septimius Scaevola was convicted for *crimen repetundarum*, between 73 and 70 M. Atilius Bulbus was convicted for *crimen maiestatis*; in 70, on the occasion of census M. Aquilius, Ti. Gutta and P. Popilius—just as Cluentius himself—were reprimanded by the censors; in the following years Popilius and Gutta were convicted due to *ambitus*, Staienus was convicted on the grounds of other charges.<sup>124</sup> The prosecutor presents each of these lawsuits and judgments as it were—independently of the nature of the particular charge—as the outcome of *iudicium Iunianum*;<sup>125</sup> whereas Cicero, contrary to natural chronology, sets up an artificial chronology that suits his intentions as counsel for the defence, in which judgments appear as the consequence of the *invidia* stirred up by tribune Quinctius,<sup>126</sup> furthermore, by anticlimactic editing, from cases with greater weight<sup>127</sup> through Septimius Severus's *listis aestimatio*,<sup>128</sup> censorial measures considered weight-

<sup>118</sup> *Ibid.* 312.

<sup>119</sup> Cicero, *Pro Cluentio* 1.

<sup>120</sup> *Ibid.* 19. 20. 30. 36. 41.

<sup>121</sup> *Ibid.* 1.

<sup>122</sup> *Ibid.* 136.

<sup>123</sup> *Ibid.* 114.

<sup>124</sup> Stroh: *op. cit.* 215f.

<sup>125</sup> Cicero, *Pro Cluentio* 115.

<sup>126</sup> Hoenigswald: *op. cit.* 111; Kroll: *op. cit.* 174ff.

<sup>127</sup> Cicero, *Pro Cluentio* 89–114.

<sup>128</sup> *Ibid.* 115–116.

less,<sup>129</sup> Egnatius's last will and testament<sup>130</sup> and the *senatus consultum*<sup>131</sup> he gets to his own opinion formulated in *Verrine orations*,<sup>132</sup> thereby—by striking a tone ranging from pathetic to irony—he gives the impression of decrescendo of the *invidia* to the audience.<sup>133</sup>

Similarly, with respect to Oppianicus's murders and foul deeds—real ones and those attributed to him<sup>134</sup>—a relative chronology suitable for rhetoric tactics set up by Cicero can be clearly observed. The first murder: Oppianicus poisons his wife, Cluentia, Cluentius's aunt with his own hands.<sup>135</sup> The second and third murders: Oppianicus poisons the pregnant wife of his brother, C. Oppianicus and then his brother to get his inheritance.<sup>136</sup> After that, following the death of his brother-in-law, Cn. Magius, who named Oppianicus junior as his inheritor, Oppianicus senior induces Magius's pregnant widow to abort the embryo then marries her.<sup>137</sup> The fourth murder and counterfeiting of the last will and testament: by the assistance of a travelling pharmacist/poison mixer Oppianicus poisons his former mother-in-law, Dinaea, who had named him as her inheritor in her last will and testament, then, he has the last will and testament, from which he had already deleted bequest orders, drafted again and has it sealed by a forged seal.<sup>138</sup> The fifth murder: Oppianicus gives order to find and murder M. Aurius, Dinaea's son, of whom he learns—he bribes the messenger to provide false information for the relatives—that he was taken prisoner of war and lives in Gallia as a slave, and to whom his mother left four hundred thousand *sestertii*.<sup>139</sup> The sixth, seventh, eighth and ninth murders: by creating the appearance of *proscriptio* Oppianicus has A. Aurius killed, who threatened to sue him due to the assassination of M. Aurius, and has three other citizens of Larinum killed under the pretext of the same legal title.<sup>140</sup> The tenth and eleventh murders: Oppianicus wants to marry A. Aurius's widow, Sassia, but she does not want to be the stepmother of three male children, therefore, Oppianicus kills two of his sons and leaves only Oppianicus junior alive.<sup>141</sup> Counterfeiting of the last will and testament and the twelfth murder: to indicate himself as inheritor Oppianicus forges the last will and testament of Asuvius from Larinum, then has Asuvius killed, and pays off Q. Manlius, *triumvir capitalis* who starts investigations in the case.<sup>142</sup>

Changing this chronology Cicero gives account of Oppianicus's crimes in the following chronology: assassination of M. Aurius,<sup>143</sup> A. Aurius and three citizens from Larinum,<sup>144</sup> the

<sup>129</sup> *Ibid.* 117–134.

<sup>130</sup> *Ibid.* 135.

<sup>131</sup> *Ibid.* 136–138.

<sup>132</sup> *Ibid.* 138–142.

<sup>133</sup> Stroh: *op. cit.* 217.

<sup>134</sup> Cicero, *Pro Cluentio* 20–41.

<sup>135</sup> *Ibid.* 30.

<sup>136</sup> *Ibid.* 30–32.

<sup>137</sup> *Ibid.* 33–35.

<sup>138</sup> *Ibid.* 40–41.

<sup>139</sup> *Ibid.* 21–23.

<sup>140</sup> *Ibid.* 23–25.

<sup>141</sup> *Ibid.* 26–28.

<sup>142</sup> *Ibid.* 36–39.

<sup>143</sup> *Ibid.* 21–23.

<sup>144</sup> *Ibid.* 23–25.

two male children,<sup>145</sup> Cluentia,<sup>146</sup> the sister-in-law and the brother, C. Oppianicus,<sup>147</sup> instigation for abortion,<sup>148</sup> counterfeiting of the last will and testament and assassination of Asuvius,<sup>149</sup> assassination of Dinaea and forging her last will and testament.<sup>150</sup> Why was Cicero “compelled” to act like that?<sup>151</sup> As the *narratio* is not directly linked to the Cluentius case, the orator cannot dwell on specific cases by supporting them by documentary evidence or testimonies, instead, he must content himself with flashing the appearance of demonstration from time to time.<sup>152</sup> Furthermore, possible demonstration would be made difficult by the fact that the crime story like narrative is not lifelike because it would be hard to explain: why a Richard III like serial murderer Oppianicus, who gets his victims from his own family, who settles in their estate, who marries his victim’s widow, was called to account for his deeds only one and a half decades after his first assassination; why he was named as their inheritor in their last will and testament by several persons during the times although they must have known that thereby they hastened their own death; why his brother, C. Oppianicus should have made the murderer of his wife his inheritor; why he killed his two sons only and left the third one alive; and why he had M. Aurius killed although earlier, when forging Dinaea’s last will and testament he had already deleted the bequest ordered to be given to the son.<sup>153</sup>

The orator does not even try to refute the counter-arguments listed above; much rather he makes efforts to avoid that they should occur to the audience at all, that is, to achieve his goal, instead of obvious lies, by delicately dislocating and concealing facts and arbitrarily determining the dramaturgical order of the cases—and that in doing so he meets success is proved by the sheer fact that the authors of later comments did not form a suspicion either, and only Wilfried Stroh made an attempt at reconstructing the actual order of events.

Placing the assassination of M. Aurius first in the order proved to be a masterly trick since as “evidence” it was possible to bring up the idle talk about the case and the open threat by A. Aurius,<sup>154</sup> and as the cause of failure to commence any trial it was possible to bring up the use of Sulla’s *proscriptiones*, that is, the assassination of A. Aurius by political machinations,<sup>155</sup> which supported failure to call Oppianicus to account for his deeds regarding other cases by his political influence.<sup>156</sup> Cicero eliminates questions that might arise regarding Dinaea’s death and last will and testament by similar ingenuity. When Dinaea is mentioned for the first time, only her illness and death and the existence of her last will and testament is referred to but counterfeiting of the last will and testament is not,<sup>157</sup> and only much later—once he has showered the stream of Oppianicus’s crimes on the

<sup>145</sup> *Ibid.* 26–28.

<sup>146</sup> *Ibid.* 30.

<sup>147</sup> *Ibid.* 30–32.

<sup>148</sup> *Ibid.* 33–35.

<sup>149</sup> *Ibid.* 36–39.

<sup>150</sup> *Ibid.* 40f.

<sup>151</sup> Stroh: *op. cit.* 220.

<sup>152</sup> Michel, A.: *Rhétorique et philosophie chez Cicéron. Essai sur les fondements philosophiques de l’art de persuader.* Paris, 1960. 257ff.

<sup>153</sup> Stroh: *op. cit.* 221.

<sup>154</sup> Cicero, *Pro Cluentio* 23.

<sup>155</sup> Kroll: *op. cit.* 176.

<sup>156</sup> Stroh: *op. cit.* 222.

<sup>157</sup> Cicero, *Pro Cluentio* 21f.

audience, which as it were makes the new and umpteenth murder logical—does the orator bring up the fact of the assassination of Dinaea and forging of her last will and testament.<sup>158</sup> Cicero explains the momentum that Oppianicus was willing to murder also his own sons not from the character of Oppianicus but of Sassia, who agreed to marry him only under this condition, and the dark portrait depicted of Sassia who married the murderer of her husband<sup>159</sup> does not rule out but definitely makes the double assassination probable.<sup>160</sup> Lack of evidence does not prevent Cicero in his narrative at all, he turns necessity into a virtue and reminds the judges of the point that their indignation must be dwarfed by the indignation of the court of justice eight years before that examined proofs and heard witnesses in details.<sup>161</sup>

Referring to shortage of time, Cicero gets down briefly with the assassination of the one-time wife, Cluentia and the sister-in-law and brother, C. Oppianicus, however, there are good chances that reference to Sassia after the former wife, Cluentia—of whom he does not state *expressis verbis* that she remained Oppianicus's wife until his death—might make the audience believe that Cluentia was Oppianicus's wife later, after Sassia; and suspicion that the orator speaks about events that occurred before 82 does not even arise. Undoubtedly: Cicero's aim must have been just to confuse the chronology and thereby the audience completely since he could not prove, only complain of the assassinations listed here.<sup>162</sup> The gifts given by Oppianicus to the widow of his brother-in-law, Magia by themselves would make only the intention to marry probable, however, connecting them not with the marriage but with the abortion carried out by Magia upon Oppianicus's instigation presents them as *merces abortionis*.<sup>163</sup> To make the assassination of Dinaea and especially counterfeiting of her last will and testament<sup>164</sup> lifelike, Cicero inserts the assassination of Asuvius after the above—in whose last will and testament Oppianicus was indicated in the first place as inheritor—which is supported by the testimony of Oppianicus's accomplice, Avillius, and thereby inheriting through assassination is made the outstanding motivation of Oppianicus's deeds,<sup>165</sup> and so poisoning of Dinaea and forging of her last will and testament are now nothing else than enhancement of the motives of the Asuvius case.<sup>166</sup>

Cicero's *narratio* in *Pro Cluentio* is a beautiful example of the appearance of *ordo artificialis*—and *mos Homericus*<sup>167</sup>—in which *perspicuitas* considered a virtue is replaced by the strategy justified by *utilitas causae*, based on which in the representation of both the chain and the internal structure of events elements that are more believable and better supported by proofs precede elements that can be proved with difficulties—or cannot be proved at all—as it were creating credit and basis for having them accepted too.<sup>168</sup>

To give a technical summary of the rhetorical virtuosity of *Pro Cluentio*: by discussing the charge of bribe and the charge of poisoning separately Cicero doubles *narratio* and

<sup>158</sup> *Ibid.* 40f.

<sup>159</sup> *Ibid.* 12–16.

<sup>160</sup> Stroh: *op. cit.* 222.

<sup>161</sup> Cicero, *Pro Cluentio* 29.

<sup>162</sup> Stroh: *op. cit.* 223.

<sup>163</sup> Cicero, *Pro Cluentio* 34.

<sup>164</sup> *Ibid.* 40f.

<sup>165</sup> *Ibid.* 36–39.

<sup>166</sup> Stroh: *op. cit.* 224.

<sup>167</sup> Quintilianus, *Institutio oratoria* 7, 10, 11.

<sup>168</sup> Stroh: *op. cit.* 224f.

*argumentatio*; he inserts *propositio*, which usually follows *narratio*, directly after *prooemium*; *argumentatio* in connection with both the first and second count of the indictment unnoticeably and almost inseparably flows together with *narratio*; *peroratio* is a logical outcome of *narratio* inserted as conclusion; the narratives inserted *extra causam*, free handling of chronology and joint application of *status collectionis* and *status coniecturalis* built on each other strengthen the positions of the defence. This rhetorical tactics becomes astonishing just by the fact that the listener or the reader never feels that he is the victim of Cicero's knowing misleading, what is more, the links of the narrative are intertwined without spectacular jumps, seemingly integrated in a logical order, which is supported also by the fact that, except for Wilfried Stroh, modern commentators of the text mostly set out from the order of the events outlined by Cicero in order to reconstruct the historical facts of the case.<sup>169</sup>

As *exemplum* of the exemplary combination of the three genres of style of rhetoric Cicero himself also referred to *Pro Cluentio*,<sup>170</sup> in which extended introduction, soberly brief descriptions, precise argumentation, colourful narrative, reasons full of emotions, pathos and irony, linguistic humour and keywords hammered with passion, apposite characterisations, polemical statements not free from exaggerations, questions formulated with tormenting temper and invective like insertions are combined into a harmony not seen anywhere else.<sup>171</sup> Thanks to Cicero, Cluentius was acquitted; however, as we can learn it from Quintilian's account, the orator himself admitted that he had achieved that by cleverly manipulating the judges.<sup>172</sup> Perhaps for this reason, Cicero considered *Pro Cluentio* one of the maximum outputs of his orator's career,<sup>173</sup> which both Quintilian<sup>174</sup> and Pliny, who praised this *oratio* as Cicero's most excellent speech, agreed with.<sup>175</sup> The oration can be indeed considered exemplary: the orator masterly changes elements of style; combines pathos, simple description and humour; represents situations and characters appropriate for a crime story with apt preciseness; palpably connects arguments and planes of time, except when he intends to make obscurity denser, without distorting lucid arrangement of facts. From first to last engaging the attention of the audience—since later he himself admitted that he had to throw dust in the judges' eyes during his speech<sup>176</sup>—and leading the judges qualified to decide the case, as a matter of fact, towards the direction he wanted to.

<sup>169</sup> *Ibid.* 226f.

<sup>170</sup> Cicero, *Orator* 103. Cf. Humbert: *Comment Cicéron mystifia... op. cit.* 280.

<sup>171</sup> Classen: *Recht, Rhetorik und Politik. op. cit.* 105.

<sup>172</sup> Quintilianus, *Institutio oratoria* 2, 17, 21.

<sup>173</sup> Cicero, *Orator* 107f.

<sup>174</sup> Quintilianus, *Institutio oratoria* 4, 1, 35; 6, 5, 9.

<sup>175</sup> Plinius minor, *Epistulae* 1, 20, 4.

<sup>176</sup> Quintilianus, *Institutio oratoria* 2, 17, 21.

TAMÁS NAGY\*

## Law, Literature and Intertextuality

**Abstract.** Most of the contemporary scholarships of both literature and law categorize the coincidences and overlaps between an author's literary work and his or her legal career, a given literary period and the same historical era of law and jurisprudence or between innumerable pieces of literature and the texts of the law merely as things of no real interest, curious facts that are not worthy of detailed academic analysis. While a point of view of this kind has its reasons the aim of the following paper is to change this attitude to a certain extent. In my opinion instead of talking about the "death of law and literature" we should consider the possibilities of (re)opening new ways of research for law and literature studies that may provide mutual benefits to both the representatives of legal and literary sciences. Hereinafter I will try to show why and how exploring the intertextual connections between the texts of law and those of literature seems to me the most fruitful endeavour to connect law and literature to each other.

**Keywords:** law and literature, interdisciplinarity, intertextuality, law as intertext, critique of contemporary jurisprudence and literary criticism, Dostoevsky, Kafka, Kleist, Hajnóczy, Cover, Ferguson, Ziolkowski

"In the last analysis, everything that happens to writers—  
good or bad—forms a part of their literary destiny  
(and they have no other). *Tout est à boutir à un livre,*  
says Mallarmé. Everything in the world exists to be turned into a book."  
Danilo Kis<sup>1</sup>

### Introduction

Kleist, Hoffman and the *Allgemeines Landrecht*, Heine, Stendhal and the *Code Napoleon*, Dostoyevsky and the 1864 Russian legislation, Kafka and the *Strafgesetzbuch* from 1852, the Penal Code of Austria-Hungary. Authors, their works and modern legal history's texts of privileged status. Codes that—by fate or accident—have made it into the text of a writing or in some cases, an entire life's work, the reception of which, however, has gone by without much attention being paid to the significance and the meaning of these connections either by literary or by legal scholarship.

Just consider the above-mentioned examples: the remark of Stendhal, that in the course of writing *The Charterhouse of Parma* he read the *Code Napoleon* each morning to make sure that the novel's style could stay "sufficiently dry and objective",<sup>2</sup> is well known as a sort of *bon mot*, just as it is well known of Hoffman that he was a high court judge, or that Kleist, Heine and Dostoyevsky were committed supporters of the codifications of their era.

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<sup>1</sup> Kiš, D.: Introduction to *The Anatomy Lesson*. Trans. R. Manheim. In: *Homo poeticus: essays and interviews*. Manchester, 1996. 11.

<sup>2</sup> Babits, M.: *Az európai irodalom története (reprint)* [History of European Literature]. Budapest, 1991. 495.

And just as with regards to Dostoyevsky it is almost always mentioned that he was to suffer the processes of the Russian criminal justice system, up until the last minute mitigation of his death sentence to one of forced labor, so the Kafka-reception's pieces don't fail to mention either that the author's days were filled with legal work performed as a functionary of the Worker's Accident Insurance Institute for the Kingdom of Bohemia in Prague.

So many historical facts, biographical and sociographical details which might serve as starting points for drawing suspicions and assumptions with regards to the nature of the relationship between the texts and the worlds of literature and law (*whatever these latter words might in fact mean*), but in and of themselves are hardly capable of anything more: we cannot draw more audacious conclusions merely from these circumstances. Accordingly, the contemporary scholarships of both literature and law categorize the coincidences and overlaps between the author's literary work and his or her legal career, a given literary period and the same historical era of law and jurisprudence or—and let's draw our attention primarily to this for the purposes of the present writing—between innumerable pieces of literature and the texts of the law, as they appear in the codes, judicial decisions and other legal documents, merely as things of no real interest, curious facts that are not worthy of detailed academic analysis.

### 1. What is wrong with these scholarships?—actually, nothing, just

*The aversion and distance of literary scholarship* is understandable. Modern literary theory and criticism, as opposed to the positivist approach of comte-ian origin, championed by Hyppolite Taine, has, throughout the 20<sup>th</sup> century, gradually and ever so vigorously refused to apply the kind of interpretation of literary texts that have reference to the so-called 'reality'. In today's literary discourse, any and all interpretations treating the text as a derivation of the author's biography or psychology (the taine-ian *la race, le milieu et le moment*<sup>3</sup>) or intention seem irredeemably obsolete.

Nevertheless what is surprising: those approaches that insist on the suspension of referential interpretation and instead opt for a (close) textual analysis of literature, and the intertextual analyses fueled by the theoretical energies of these, seem to accept only in exceptional cases the validity of law's texts as intertexts in the course of the interpretation of literary works.<sup>4</sup> On occasion postmodern literary scholarship may provide counterexamples—what's more, has even gone as far as asking the more general question of whether there is an irrelevant context in the course of the interpretation of literary texts<sup>5</sup>—

<sup>3</sup> Taine, H. A.: Introduction to the History of English Literature. In: Eliot, C. W. (ed.): *Prefaces and Prologues to Famous Books*. Charleston (SC), 2007. 412.

<sup>4</sup> For a review of the basic literary principles of the theory of intertextuality the Hungarian reader might want to see the thematic issue of Helikon periodical. Intertextualitás. [Intertextuality] *Helikon*, 42 (1996) 1–2. Otherwise for a general overview see: Allen, G.: *Intertextuality*. London–New York, 2000.

<sup>5</sup> Szilasi, L.: Nyakvers (irodalmilag releváns kontextus-e az angol jog?) [Neckverse (is English law a relevant context from a literary perspective?)] In: *Miért engedjük át az ácsnak az építkezés örömét* [Why let the carpenter have the joy of building operations]. Budapest, 1994. 57–67. In this work Szilasi interprets the last poem of Bálint Balassi, the psalm translated on his death bed, starting with the words *Ah Deus immensum clemens miserere precantis*, in a new light, using the context of the English legal custom—of which a central moment was the reading out aloud of this particular psalm—that provided for the possible avoidance of the execution of the death penalty in certain cases.

but despite this, the written and spoken (or put down as spoken: witness statements, victim reports, oral pleadings/requests etc.) language of the law usually stays outside the realms of intertextuality. In the background of this denial there stands the following conviction: the representatives of literary studies with regards to the interpretation of literary texts treat with suspicion—and often with good reason—any approach to the realm of literature that tries to apply “outside” viewpoints and the value judgments included therein. Opposing such types of analysis, Milan Kundera said that they tear away the studied texts (Kundera of course refers primarily to novels, but his statements can be applied to other types of literary genres as well) from the “large context of literary history” and thus degenerate the act of interpretation into cheap (biographical, psychological, political, theological and so on) explanation or in the words of the Czech author: “kafkology”.<sup>6</sup>

I find that this approach somewhat limits the range of intertextual research, as it hinders the recognition that literary and legal texts can often enter into a fruitful dialogue that is often laden with new meanings.

With regards to Kundera’s statement (and actually contrary to it), I believe not only that through intertextual investigation certain episodes of legal history may fit into the web of the grand connections of literary history, but also that this sort of dialogue’s mutual—that is, it can be enjoyed both by literary and by legal scholarship—benefit appears where we don’t expect it beforehand. Not only is this true of those works (and their interpretations) where the role of the interplay between legal and literary texts in the process of creating aesthetic experience and meaning is apparent right away (let’s just recall Michel Foucault’s remark that Greek drama can be read as the theatrical version of Greek legal history<sup>7</sup>), but also in the case of those where the mechanisms of text connections take more invisible forms; where the catharsis- and meaning-creation works in somewhat more mysterious textual ways.

The presence of legal themes (the portrayal of the legal profession, the justice system and certain legal problems) or the unraveling of the possible opinions of the authors with regards to the law, the legal system and its questions should not signify the ending point of those interpretation possibilities that include a legal viewpoint. I find those types of analysis that try to show how a legal text may influence the formation of the text (the narrative structure, plotline, style, choice of words, sentence structure etc.) of a piece of literary

As Szilasi says: “the guilty literate is saved from death through his ability to read that what is written”. The more general question is similarly fundamental for law and literature studies as well, namely whether literary and legal texts can form an intelligent context for each other, whether the study of texts in one group can be of benefit to the interpretation of texts in the other group.

<sup>6</sup> See Kundera, M.: *The Castrating Shadow of Saint Garta*. Trans. Linda Asher. In: *Testaments Betrayed. An Essay in Nine Parts*. New York, 1996. 42–44.

<sup>7</sup> As Foucault says *Oedipus the King* is “a kind of compendium of the history of Greek law”. He reads certain dramas by Sophocles, especially the *Antigone* and the *Electra*, as a sort of theatrical ritualization of legal history. In his interpretation what we see here is the most important moment of the spreading of Greek democracy summarized in a dramatic form: the story of the process through which the people acquire the right to judgement and to provide justice and can turn this against those who had previously disposed of this right. For more on this see Foucault, M.: *Truth and Juridical Forms*. Trans. Robert Hurley et al. In: *Power (The Essential Works of Foucault 1954–1984. Vol. 3.)* New York, 2000. 17–33. Another great example of a similar analysis can be found in: Simon A.: *A törvény Szophoklész Antigonéjában [The law in Sophocles’ Antigone]*. *Iustum Aequum Salutare* 3 (2007) 2, 71–93.

fiction, or in other words, *how it becomes part of the poetical tools operating the text in question, and how and to what extent it determines the process of interpretation*, an entire valid area of research. Solely for the purposes of illustration—without any sort of analysis—let me mention a few obvious examples.

On the stories of Heinrich von Kleist—both with regards to style and structure—a visible influence can be detected, formed by those *Landrecht* style handbooks that strictly determined the language use, formalities and structure of those judicial pre-decision materials the construction of which was among the tasks of Kleist as an employee of the chamber of treasury of Königsberg.<sup>8</sup> Thus, the patterns of codified Prussian law often served as organizing principles in the stories of the *oeuvre*, from the relentless efforts at precision resulting in strict stylistic and editorial consequences to the kleistian sentence structures.

The language use and formalities of the contemporary Russian criminal process (with regards to which Dostoyevsky talked directly of his opinion and ideas in *A Writer's Diary*<sup>9</sup>) have a central role in several novels of Dostoyevsky—especially in *The Brothers Karamazov*. In the trial act the narration becomes rather repetitive—thus evoking the repetition that is present with regards to the same events in the witness statements, trial records, and summaries prepared by the judge. Moreover, the structure and text of the novel presents the same problems—and thus forces the reader to face these—, which could and still cannot be solved satisfactorily by legal scholarship, namely the difficulties relating to the narration of past events (stories) and the possibilities of reconstruction with regards to the conscience of the free-willed subject in the modern era.<sup>10</sup>

In Franz Kafka's case—whose story, *The Stoker* can also be seen as a sort of Kleist-paraphrase and therefore it is a remarkable piece of that “exciting intertextual tangle”<sup>11</sup> that becomes Péter Hajnóczy's *The Stoker* in Hungarian literature<sup>12</sup>—, not only his interest in the

<sup>8</sup> See Ziolkowski, T.: *The Mirror of Justice: Literary Reflections of Legal Crisis*. Princeton (NJ), 1997. 194–214.

<sup>9</sup> See Murav, H.: *Russia's Legal Fictions*. Ann Arbor (MI), 1998. 125–155.

<sup>10</sup> Did everything happen the way the novel originally narrates or in some other way, like how—in the course of the trial—the lawyers approach it and record it, with their own perspectives and notions? As Richard Weisberg says “the lawyers ‘create’ Dmitri, they create the motives for the crime, they create the ‘history of a family’”. What is the relationship between the two stories, between “reality” and narrated reality, between a man and his intentions and the creature constructed by the lawyers’ notions and his will or consciousness? Dostoyevsky's text foretells the questions of legal realism, contemporary cognitive psychological studies and narrative jurisprudence. See Weisberg, R.: *The Codification of Western Law and The Poethics of Disclosure*. *Cardozo Studies in L. and Literature*, 6 (1994) 157; Guthrie, C.–Rachlinski, J. J.–Wistrich, A. J.: *Inside The Judicial Mind*. *Cornell Law Review*, 86 (2001) 777; Nagy, T.: *Narratív tematika a kortárs amerikai jogelméletben*. [Narrativity in contemporary American jurisprudence.] *Acta Universitatis Szegediensis, Acta Juridica et Politica, Tomus LXIII., Fasc. 15.*, Szeged, 2003.

<sup>11</sup> Cserjés, K.: *Da capo al fine*. Hajnóczy Péter egy hátrahagyott novellájáról. [Da capo al fine. A short story by Péter Hajnóczy from the bequest.] *Tiszatáj*, 57 (2003) 5, 113–123.

<sup>12</sup> It is my conviction that the impact of the textual world, the language use—its style, expressions, sentence structure, narrative techniques, structure etc.—of certain documents of the law and jurisprudence of Hungarian socialism on Hajnóczy's treatment of text is definitely more pronounced than what has been established by the secondary literature referring to the life-work so far. Perhaps it was János Marno, another writer, who had the most precise feeling with regard to the direct relationship between the texts. “A police report, a document relating to the author's first difficult

era's legal debates can be documented (and placed in the context of the penal reform debates of the dying monarchy present in *In the Penal Colony* or *The Trial*), but it is clear that one of the main points of reference and intertexts for *The Trial* is the *Strafgesetz* of 1852.<sup>13</sup> What's more: the fact that in a secular world the now not originally sinful man's anthropological status includes the presumption of innocence, and thus becomes a part of the contemporary reader's horizon of expectations, and how this fact in turn affects the aesthetic impact of the novel would deserve an independent analysis, just like the question as to how much the "threat that oozes from the kafkian sentence structure"<sup>14</sup> could be lead back to the text and narrative technique of bureaucracy and law—and doing this without dislodging Kafka from the domain of aesthetics and without fulfilling the purpose of kafkology—"replacing Kafka with the Kafkologized Kafka"<sup>15</sup>—under the burden of the curse of Kundera.

In sum: the intertextual signs and references—direct or indirect, that is, through the works of other authors—found in literary texts often lead the reader to the textual world of the law. This of course does not mean that by reading a literary work read through the lenses of law—in the spirit of the "violent" nature and "meaning-killer" practice of law<sup>16</sup>—we wish to exclusively concentrate on the meaning in terms of the law. The intention is just the opposite and aims to find such new interpretations that by reading together the legal and literary text—a synoptic approach, if you like—could enrich the number of possible interpretations as well as our literary and legal knowledge.

*The aversion and distance of the legal science* can also be explained, nevertheless I do not find this approach of mainstream jurisprudence to literature neither wise, nor defensible.

In the United States, ever since its birth with Langdell, the principle aim of legal science and legal theory, a discipline that became independent and thus respectable rather late and only following a lengthy struggle, has always been the connection to and possible influence of the professional legal practice, the actual jurisdiction: in other words, to establish a position, a framework, in which, as "the legislation of legislation and the court

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incident with the Kádár-regime, from 1964. Well, the 'language', concise 'style' of this official report describes, evokes the incident with an infernal humor against which reason basically cannot compete [...]. The heroic text formation of Hajnóczy [...] confronts with the 'psycho-social demons' of both the external nivellation and the internal deconstruction, destruction, by 'following' their strategy and playing on their tone. (Let me add that he could never surpass the 'level' of the police report)". Marno, J.: *Amióta most már egyre inkább* [Ever since it's been more indeed]. *Hítel*, 3 (1990) 5, 56–57. As—let me add yet another example—István Örkény never wrote anything "better" than the text of a police document that bears the title *Jelentés Örkény István író gépkocsi vezetői engedélyéről* [Report on writer István Örkény's driving license], dated 3rd November 1959, Budapest. *Rubicon*, 16 (2004) 8–9, 76. Furthermore, I am also convinced that on the texts of countless literary works from the era of socialism in the former Soviet Bloc countries basically the same impact could be detected.

<sup>13</sup> See Ziolkowski, T.: *op. cit.* 214–240, and 'Franz Kafka: The Trial'. In: *Dimensions of the Modern Novels: German Texts and European Contexts*. Princeton (NJ), 1969. 37–67. Furthermore: Nagy, T.: "A per" mint burleszk, avagy releváns kontextus-e az Osztrák-Magyar büntetőjog? ['The Trial' as burlesque or is Austro-Hungarian criminal law a relevant context?] In: Mezey, B. (ed.): *Jogi kultúrák, processzusok, rituálék és szimbólumok* [Legal cultures, processes, rituals and symbols]. Budapest, 2006. 250–266.

<sup>14</sup> Birnbaum, M. D.: *Esterházy-Kalauz*: [Esterházy-Guide]. Budapest, 1991. 156.

<sup>15</sup> Kundera: *op. cit.* 42.

<sup>16</sup> See Cover, R.: The Supreme Court 1982 Term, Foreword: *Nomos* and Narrative. *Harvard Law Review*, 97 (1983) 4. and Violence and the Word. *Yale Law Journal*, 95 (1985–1986) 1601.

of courts” the normative and—borrowing on the ideal of natural sciences—the predictive features of jurisprudence could succeed.<sup>17</sup> Parallel to this endeavor, members of the American legal academia seemed to deny that tradition of the legal profession and way of thinking in which law and literature were inseparably intertwined and that was called by Robert A. Ferguson the “configuration of law and letters”.<sup>18</sup> The denial of the heritage of the American enlightenment—partly as a counter-effect of the tradition’s strength—brought with itself the abandonment of the viewpoints of literature (and humanities in general) and the relevant theoretical reflection.<sup>19</sup> The interdisciplinary turn<sup>20</sup> of American legal theory in the 1960s did not change this scenario in any meaningful way: from among the numerous “*law and ...*” trends—despite all their institutional popularity (meaning: within the academia and especially the elite universities)—only the economic analysis of the law (“*law and economics*”), with its quasi natural science-like and seemingly objective probings, could reach acceptance.<sup>21</sup> But if we look at legal science as a whole, the dominance of the late 19<sup>th</sup> century ideals and goals (autonomy and commitment to practice) and their tradition, together with a dominance of constitutional legal themes and doctrinal analysis, is still prevalent, despite the fact that a langdellian ‘dream come true’ becomes more and more obviously illusory and impossible.<sup>22</sup>

<sup>17</sup> See for example Schlag, P.: Normativity and the Politics of Form. In: Schlag, P.— Campos, P. F.— Smith, S. D.: *Against the Law*. Durham and London, 1996. 29–99. Richard Posner is even more stern in his criticism of the representatives of American jurisprudence, calling them a bunch of “kibitzers and scolds”. Posner, R.: *The Problematics of Moral and Legal Theory*. Cambridge (MA), 1999. 194.

<sup>18</sup> Ferguson, R. A.: *Law and Letters in American Culture*. Cambridge (MA), 1984. Nagy, T.: Jog és irodalom: kezdetek és eszmények. [Law and literature: beginnings and ideals.] *Iustum Aequum Salutare*, 3 (2007) 2, 57–69.

<sup>19</sup> Certain exceptions aside. With a different emphasis and in different ways, but the following authors also establish a connection between law and literature—and with the same breath, between the American enlightenment and modern “law and literature” research: Wigmore, J.: List of Legal Novels. *Illinois Law Review*, 2 (1908), 574; Cardozo, B. N.: Law and Literature. In: *Law and literature and other essays and addresses*. New York, 1931. 3–52; Fuller, L. L.: The Case of the Speluncean Explorers. *Harvard Law Review*, 62 (1949) 616.

<sup>20</sup> See Posner, R.: The Decline of Law as an Autonomous Discipline. 1962–1987. *Harvard Law Review*, 100 (1987), 761.

<sup>21</sup> Moreover: the objectives of interdisciplinary approaches are not always that clear either. Perhaps the most obvious example of this is the posnerian program of “law and literature”, in which the author seemingly joins one movement, but in such a way that it is at the same time an attempt at a destructive criticism of the very same approach, and—as a latent function of his dissertation—he attempts to realize objectives that stand in clear opposition to the original intentions of these studies, namely the defense of the autonomy of law and legal science (and also the safeguarding of the hegemonic position of the economic analysis of law in the world of interdisciplinarity). See also Balkin, J. M.: The Domestication of Law and Literature. *Law and Social Inquiry*, 14 (1989), 787; Nagy, T.: Néhány eljárás: Kafka-olvasatok a jogirodalomban [A few processes. Kafka-readings in jurisprudence]. In: *Josef K. nyomában (–jogról és irodalomról–)* [The path of Josef K. (–on law and literature–)]. Máriabesnyő–Gödöllő, 2010. 85–121.

<sup>22</sup> Schlag, P.: Normative and Nowhere to Go. In: *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind*. New York–London, 1996. 17–41, and *The Evaluation Controversy*. Id. at 60–76.

As for modern continental legal science—mainly as the result of the heritage of Roman law and German legal science—, it has always been dominated by the dogmatic analysis of statutory law with special regards to the conceptual-analyst and concept-constructionist procedures that revive some of the 19<sup>th</sup> century traditions (and the inherent views about the aims of jurisprudence and the role of legal academics) of the pandectists.<sup>23</sup> Neither these actions of the legal science, nor the major trends of contemporary European legal theory (legal positivism, the Anglosaxon analytical legal philosophy, or the socio-legal [system] theories) do not provide an adequate opportunity to explore the mutual relationship between legal and literary texts. The difference and separateness of law and literature (and the arts in general) is most heavily emphasized by those theories that build on a socio-theoretical basis and that distinguish functional difference as the primary feature of contemporary societies: they show two entirely separate field of social activity, and any relationship between the two can/should only be characterized by “presupposing their existential-functional difference”.<sup>24</sup>

To present such a relationship pattern as the “one and only” not only covers up the elementary mutual dependence of law and narrative(s), explored by Robert Cover in his influential essay,<sup>25</sup> as well as the fact that legal activity—just like literary activity—is primarily an effort to create, explain, and often manipulate texts and the stories they tell, it also leaves in the shade that legal and literary texts—starting from the Bible and several other documents from antiquity, through Cicero, and then two thousand years later the orations of Daniel Webster and the decisions of the Supreme Court, the works of Kleist, Dostoyevsky, Kafka or Hajnóczy—are all parts of a text universe the pieces of which are in constant interaction and dialogue with each other.<sup>26</sup>

<sup>23</sup> This is of course a simplification, but it does not touch the subject of this writing in substance. The same goes for defining “legal dogmatics” as a decidedly practical activity. For the problems with regards to the definition of the notion and territory of “legal dogmatics”, see Szabó, M. (ed.): *Jogdogmatika és jogelmélet* [Legal dogmatics and legal theory]. Miskolc, 2007.

<sup>24</sup> This viewpoint—starting from the “reflected difference-experience”—is stated in: Cs. Kiss, L.: *Megjegyzések a jog és a művészet viszonyához*. [Notes on the connections between law and the arts]. *Iustum Aequum Salutare*, 3 (2007) 2, 13–18. I believe that Cs. Kiss’ questions—reflecting his doubts—do not touch the studies of the intertextual relations between law and literature. If to answer the question as to what kind of products can either law or literature provide through its own function-specific operation for the other as a playing field of legitimate examination, then the answer is simple: texts.

<sup>25</sup> Cover, R.: *op. cit.*

<sup>26</sup> *Not to mention that*: the texts of the law and especially the texts of court decisions are evidently of an intertextual or more precisely, of an hypertextual nature: they become one from stories narrated by witness statements, the texts of high court decisions (themselves hypertextual) and the commentaries of statutes and relevant commentaries. The concept of hypertextuality is applied to literary works by Genette, but I do not see why it could not be used with regards to legal texts as well. He talks of a textual relationship in the framework of which the derivation from hypotext to hypertext is both forceful (an entire B work comes from an entire A work) and—more or less—officially admitted. What hypotext is in literature, the same is the text of the precedent and/or the statute in the textual universe of the law, and the decision later on is the hypertext. See Genette, G.: *Transztextualitás* [Transtextuality]. Trans. Burján, M. *Helikon*, 42 (1996) 1–2, 82–90. Attila József was correct when he stated—*the law: fabric*. Whether it is “always bursting apart somewhere” or not. And this is how the poet becomes once again: *the unacknowledged legislator of the world*.

The analysis of this interaction and dialogue could mostly be the territory of law and literature studies, but it seems, first, that this has only been a partial success so far, and second, that they have not managed to break through the ideas regarding the disciplinary separation of jurisprudence—and to a large extent, they have themselves to blame.

Besides struggling with the general problems of interdisciplinary studies, they are often stuck—as Jane B. Baron remarks<sup>27</sup>—with the same analytical scheme, which in most cases ends up being nothing more than a summary of the plot and the moral of literary works with a legal subject, providing a long line of obsolete or obsolete-prone interpretations. Moreover, not even these research efforts—despite the fact that the experience of marginalization is a constant reality for them in several forms—are entirely devoid of a gesture of exclusion, generally described—when speaking of interdisciplinary approaches—as “colonization” by Jack M. Balkin. One discipline tries to use for its own purposes the perspectives, tools and methods of another, without showing real interest in commencing an actual dialogue.<sup>28</sup> Even legal science and legal theory with an affinity for literature approaches the question with an eye to what it is that lawyers can hope from studying literature (and its theories),<sup>29</sup> but this questioning does not work the other way around—meaning, what it is that the study of legal texts and through them legal science and jurisprudence in general could offer to literary scholars. And I believe that this is one of the main reasons why there has been no creative dialogue between the representatives of the two fields of research so far,<sup>30</sup> and this is also the basis of those viewpoints that—no more than three and a half decades after its birth (or *renaissance*)—talk of the “death of law and literature”.<sup>31</sup>

<sup>27</sup> Baron, J. B.: Law, Literature and the Problem of Interdisciplinarity. *Yale Law Journal*, 108 (1998) 5, 1059. István H. Szilágyi also talks about this problem in his work on the result of law and literature studies. H. Szilágyi, I.: Jog – Irodalom [Law–Literature]. In: *Jog – Irodalom* [Law–Literature]. Szeged, 2010. 89–120.

<sup>28</sup> Balkin, J. M.: Interdisciplinarity as Colonization. *Washington and Lee Law Review*, 53 (1996), 949.

<sup>29</sup> See also the program-defining study of James Boyd White: White, J. B.: What Can a Lawyer Learn From Literature? *Harvard Law Review*, 102 (1989), 2014.

<sup>30</sup> It is an entirely separate issue why most literary scholars—with the exception of Fish, Ferguson, James Boyd White and a few other great names—do not discover on their own the examination of the texts of the law as a possible area of interdisciplinary studies, but I believe that the dialogue should be commenced by lawyers, primarily because it seems that from this side of the field the evidence of the frequent contact between the two bodies of text is more visible, as the legal texts have always been more specific and aimed at a particular meaning, and especially in the era of modernity literary texts “absorb” the legal ones or play on them and it’s not the other way around (as opposed to the Bible, for instance, where the religious-literary text included the legal one).

<sup>31</sup> Heald, P. J.: The Death Of Law and Literature: An Optimistic Eulogy. *The Comparatist*, 33 (2009), 20. Adding that I deeply disagree with Heald’s—in this part optimistic—final conclusion (as well as other conclusions he makes in his work) that law and literature studies can only have a future of any note if the main product of these studies is the application of their moral interpretations of literary works in real life legal decision-making.

## 2. So what?—a short program speech—

“He spoke. And drank rapidly a glass of water”  
*E. E. Cummings*<sup>32</sup>

It could be different. There have been several initiatives—partly conceived as intertextual in their nature—that, if continued, could deepen the dialogue between the two disciplines. Besides the approaches applied by Robert Cover and Robert A. Ferguson—which explore the interaction and interdependence between law and narrated stories, and legal and literary activity and thought process—the research of Theodore Ziolkowski is one that manages to successfully combine the perspectives of the history of law and literature, sociology of law and literature and theory of law and literature, mixing it with observations of the history of ideas, thus opening the possibility for all the representatives of these research areas to get involved in the discourse. Ziolkowski examines, in essence, how the connection between law and literature arches through historic times, with special regard to those in which law entered a crisis to some extent or reached a turning point, and how this reflects in the literary works of the era, from ancient tragedies and eposes through the Icelandic sagas, the medieval German and French fables and the Elizabethan English dramas to the 19th–20th century novel. What really matters from all this—with respect to the objectives of the present writing—is this: *the process*. Ziolkowski’s interpretations are of a double nature: first, as the reality-referential interpretations of the literary works of a certain era, they show how contemporary literary works present the dilemmas of the legal life—its historic practice and theory—of the era in question; second, searching for textual proofs—and finding these—they prove that the era’s legal texts did indeed shape the text of these works. So: on the one hand—in the spirit of referentiality—we can find the fundamentals of such historical legal and literary sociological examinations that can be built on by legal historians, legal sociologists and legal theorists; on the other hand we can witness such an intertextual investigation that may be practiced by literary scholars as well.<sup>33</sup>

I find similarly double-natured those examinations—or more precisely: the possibilities therein—that form a part of socio-legal document-analysis executed by the sociology of law. Document-analysis—be it legal or non-legal documents, as in the case of the latter, literary works, press news and court reports, a product of the fine arts, films, or other products of popular culture<sup>34</sup> (for instance, song lyrics)<sup>35</sup>—as a part of legal sociology examines primarily

<sup>32</sup> E. E. Cummings: “next to of course god america i”. In: *Complete Poems 1904–1962*. New York (NY), 1994. 267.

<sup>33</sup> Ziolkowski does not detail this in the same way, but I find that his analysis follows a similar pattern. The German comparatist author finds his own research in subject-matter to be similar to “law and literature” studies, but with regards to emphasis and objectives (in part) to be different and uses the “literature and law” denomination for those. With regards to difference in emphasis, he remarks that his approach is much more historic than theoretical, and he does not wish to read the dilemmas of neither the modern legal practice, nor the contemporary theory of law into the works of long gone times. His objective is to reconstruct the original legal, legal and socio-historic context of the studied literary works. Thus: his interest is “more substantive than rhetoric” in nature, with special attention paid to the traces of confrontations and conflicts between contemporary law and morals. Ziolkowski, T.: *The Mirror of Justice: Literary Reflections of Legal Crisis*. Note 8 above, xi–xii.

<sup>34</sup> Sherwin, R. K.: *When Law Goes Pop*. Chicago–London, 2000.

<sup>35</sup> For example: Armstrong, E. G.: Gangsta Misogyny: A Content Analysis of the Portrayals of Violence Against Women in Rap Music, 1987–1993. *Journal of Criminal Justice and Popular*

the reality-relevance of the above-mentioned, that is, what kind of image they broadcast of law, jurisprudence, the legal profession or the perceptions members of society harbor with regards to these.<sup>36</sup> Nothing forecloses, however, the possibility that these analyses could from time to time become intertextual in nature: in other words—now applying the experiences of sociolinguistics and the sociology of language<sup>37</sup>—by reading together legal and literary texts they can study and show us how society affects language (analogously the legal *and* the literary language) and the language use of its members, or how language (in this case: the mutually influential legal and literary language) affects society.

### Conclusion—even shorter

*So:* to establish mutual contact between the legal and literary sciences, the partial rehabilitation of the referential interpretations of relevant literary works is not the single option. The—for the moment—dominant trends of contemporary literary thinking seem capable of being in sync more easily with those jurisprudential examinations that start off on the path of intertextuality, that is, consider as their primary task the exploration of the connections and specific forms of such connections of those legal and literary works that influence one another. The obvious purpose of these studies is to make sure that lawyers could also provide important lessons for literary scholars, and thus make the interest (once again) mutual and make the present dialogue more intensive between the advocates of the two fields. This would be the kind of dialogue that is well deserved by the historic connection between law and literature.

*Culture*, 8 (2001) 2, 96–126.

<sup>36</sup> Based on Jean Carbonnier's work, a summary in Hungarian language of these studies can be found in Zombor, F.: Dokumentumelemzés [Document-analysis]. In: Badó, A. et al.: *Bevezetés a jogszociológiába* [Introduction to the sociology of law]. Miskolc, 1997. 99–112., and H. Szilágyi: *op. cit.* 99–100.

<sup>37</sup> See Kiss, J.: *Társadalom és nyelvhasználat. Szociolingvisztikai alapfogalmak* [Society and Use of Language. Socio-linguistic premises]. Budapest, 2002; Wardhaugh, R.: *Introduction to Sociolinguistics*. Oxford, 1997. *On an added note:* for these types of socio-legal documentary analysis I find it important that they should dispose of a literary approach that is at least compatible with the perspectives of contemporary literary studies; and they should leave the magic circle of the romantic genius aesthetics, in which writers and poets are portrayed as seers and prophets, as geniuses, who grab the “matter at hand” with the “instinctiveness of poetic geniality”. The origins of exceptional linguistic competencies are of course impossible to explain, but Dickens and Kafka (and the others as well) were *professionals*. See also Zombor, F.: *op. cit.* 110.

BALÁZS FEKETE\*

## The Dream of Western Law. Legal Layers in Solzhenitsyn's *Gulag Archipelago*

**Abstract.** This essay discusses Aleksandr Solzhenitsyn's *Gulag Archipelago* from the aspect of "law and literature". As a starting point, it argues that its "legal" reading is of a high relevance, since it helps us to better understand both the reality of Soviet law and the achievements of our legal systems. In order to illustrate this, it examines various legal layers embedded in the work: legal history, sociology of the punishment, criminal investigation, organizational sociology and psychology, and legal theory. In addition, the essay also focuses on the role of Western Law as a contrast in Solzhenitsyn's work, and analyzes its metaphorical language about law. To conclude, it argues that this book could caution lawyers of the consequences of a politically-oriented approach to law that disregards the fundamental values of Western law.

**Keywords:** Aleksandr Solzhenitsyn, *Gulag Archipelago*, Soviet law, law and politics, values of Western law, law and literature

"La tâche de l'écrivain ne se borne pas à la propagation d'un système social. La tâche de l'écrivain est de traiter des sujets universel et éternels ..."<sup>1</sup>

### I. Preliminary thoughts

This essay discusses a book which is of both a universal historical value and a manifest literary significance. In addition, its legal dimensions can also be viewed as important. Compared to this unambiguous "law and literature" relevance, it might be slightly surprising that Hungarian scholars, discussing legal questions from a literary point of view,<sup>2</sup> have not taken into account Solzhenitsyn's<sup>3</sup> *Gulag Archipelago* thus far, although it is full of legal problems and law related questions from the outset.

The main aim of this paper is to recommend a law-oriented rereading of this classical book. The legal research of the *Gulag Archipelago* seems to be almost self-evident, as the titles of certain chapters suggest: *The Law as a Child*, *The Law Becomes a Man*, *The Law Matures*, *The Supreme Measure* (Chapters 8, 9, 10, and 11).

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<sup>1</sup> Excerpt from a speech of Solzhenitsyn in 1967. It was held in the Union of Soviet Writers. Source: Alexandre Soljenitsyne, un phénomène nouveau de la littérature soviétique. *Documentation sur l'Europe Centrale*, 11 (1973) 3, 249.

<sup>2</sup> See: Nagy, T.: *Jozef K. nyomában* (Following Jozef K.). Máriabesenyő-Gödöllő, 2010.; H. Szilágyi, I.: *Jog – irodalom* (Law–Literature), Szeged, 2010.

<sup>3</sup> About Solzhenitsyn see the comprehensive work of Scammell. Scammell, M.: *Solzhenitsyn, a biography*. New York–London, 1984. From the aspect of the history of Soviet literature: Loupan, N.: *La littérature soviétique d'après-guerre. Documentation sur l'Europe Centrale*, 14 (1976) 1, 17–31.

What are the main legal points of Solzhenitsyn's book? This essay tries to answer the question by referring to specific sections, but it does not make an attempt at a comprehensive legal analysis. These selected sections can illustrate the richness of the legal elements contained within the entire novel. The reason for this impressionistic approach is rather simple: the abundance of legal elements in Solzhenitsyn's work would require a deeper analysis than this essay tries to achieve. This paper, therefore, does not strive for a general scope, but by analyzing certain excerpts it strives to foster future research.

Furthermore, the author of this paper would like to pay tribute to one of the most important writers of the 20th century. His oeuvre states, in addition to other important things, what a human being can do if he undertakes to represent an elementarily important case, even if he has to work in a completely reticent manner from the very beginning.<sup>4</sup> At this point it should also be emphasized that Solzhenitsyn and his oeuvre had a considerable role in the shading of romantic conceptions about Communism that existed in the public opinion of Western Europe in the fifties and sixties. Together, his documentary work and novels provided invaluable assistance to Western intellectuals who gradually realized a more precise view of the reality of the Soviet world.<sup>5</sup>

## II. Legal layers of the *Gulag Archipelago*

The hypothesis of this essay is that this work of Solzhenitsyn, has numerous legal layers. Therefore, its main aim is to attract attention to the most important ones since their research could also be fascinating to the experts of other fields of study. For a legal analysis the most important part of the three volumes is the first twelve chapters of Part 1, where the reader can discover many associated legal elements. The remaining chapters, generally, have a more reminiscent and commemorative nature.

### 1. *Legal history—towards an unconventional history of Soviet law*

Perhaps the most evident choice, if one wants to learn the legal relevance of the *Gulag Archipelago*, is its analysis from the aspect of legal history. One can easily follow many aspects of Soviet legal history in Part 1 (*The Prison Industry*). For instance, the author presents and analyzes the history of Soviet fake trials from the very beginning by using the

<sup>4</sup> The huge impact of the *Gulag Archipelago* on the Soviet regime can be illustrated with a tiny, however very telling fact. Following its publication (it was firstly published in the West in 1973) the Soviet authorities even deleted the word archipelago from the official Russian dictionary. So, they symbolically declared the non-existence of the entire work. See: La disparition de mot "archipel" du vocabulaire officiel. *Documentation sur l'Europe Centrale*, 14 (1976) 2, 140.

<sup>5</sup> The Western view on Communism is analyzed by Stéphane Courtois, a well-known French historian of Communism, in detail. He also discusses the role of Solzhenitsyn: "In the 1960's and 1980's, Solzhenitsyn's *Gulag Archipelago* and later the 'Red Wheel' cycle on the Russian Revolution produced a quantum shift in public opinion. Precisely, because it was literature, and from a master craftsman, the *Gulag Archipelago* captured the true nature of an unspeakable system". Courtois also mentions Varlam Shalamov and Pin Yathay whose impact can be compared to that of Solzhenitsyn. Courtois, S.: Introduction: The Crimes of Communism. In: Courtois, S. et al.: *The Black Book of Communism. Crimes, Terror, Repression*. Cambridge-Massachusetts-London-England, 1999. 27.

metaphor of waves,<sup>6</sup> furthermore, he also points out the emergence of a special and ordinary criminal justice system.<sup>7</sup> In addition, he offers a complete picture of the practice of courts concerning Art. 58 of the Criminal Code, most usually used for Siberian deportations,<sup>8</sup> as well describes the development of the death penalty.<sup>9</sup> The most fascinating aspect in this legal historical layer, is that Solzhenitsyn presents these problems to the reader not only with an impressive legal and sociological accuracy but also with a scientific accuracy. Moreover, neither the analysis of statistical data nor the legal constructions were unknown fields to him.

A good example of legal historical accuracy is the first part of the chapter which is devoted to the death penalty (11. *The Supreme Measure*). The author provides an overview of the history of the death penalty from the Code of Aleksei Mikhailovic Romanov to 1962. In these pages he also presents many efforts to abolish the death penalty and the crimes sanctioned by this measure. Within the references mentioned in the footnotes, one can even find a monograph dedicated to the death penalty from 1913. The author also cites the Bulletin of the Supreme Soviet of the U.S.S.R. from 1959 that discusses the bases of Soviet criminal justice. Additionally, and this might be the most interesting point, Solzhenitsyn points out the lack of authentic printed information; and this is the reason why he uses the data provided by an “unwritten tradition” stemming from the slaves of the Gulag. Therefore, his analysis, contrary to all efforts, cannot meet all the scientific criteria and cannot be as comprehensive as it would be in the case of a legal monograph.<sup>10</sup>

However, an absolutely different history of Soviet law takes shape, from the imperfect, but extensive data collected and analyzed by Solzhenitsyn, than a law student can get to know from the general manuals of modern legal history. It is a real question whether an interpretation of Soviet legal history based on Solzhenitsyn’s data can overrule this “traditional” and still surviving approach mainly by presenting the “glorious” side of the evolution of Soviet law.<sup>11</sup> It can, however, be an excellent addition to this heavily biased approach. This “unconventional and real Soviet legal history” is legitimized as well as justified by the personal experiences of the author and his fellows and by the sound data collection, contrary to the approach of legal history manuals that are distant to the sociological dimension of law and are also obviously ideologically biased even today.

## 2. *The sociology of the administration of punishment—transformation of the society of Russian prisoners*

It is more than evident that a legal interpretation of the *Gulag Archipelago* cannot stop at the presentation of legal historical dimensions, since Solzhenitsyn’s work also implies countless references to the Soviet system of the administration of punishment. The first volume documents both the history of the Soviet prison system as well as its real

<sup>6</sup> Solzhenitsyn, A.: *The Gulag Archipelago 1918–1956. An experiment in Literary Investigation*. New York, Evanston, San Francisco, London, 1974. 24–60 and 69–92.

<sup>7</sup> *Ibid.* 281–286.

<sup>8</sup> *Ibid.* 60–68.

<sup>9</sup> *Ibid.* 432–440.

<sup>10</sup> *Ibid.* 438.

<sup>11</sup> See Kitekintés a szovjet állam és jog fejlődéstörténetére (An outlook on the development of the Soviet state and law). In: Gönczi, K. et al.: *Egyetemes jogtörténet* (General Legal History). Budapest, 2000. 559–588.

functioning, in detail.<sup>12</sup> It is very interesting, sometimes striking, that Solzhenitsyn contrasts his findings on the everyday life and functioning of Soviets prisons to those of the age of the Tsars. This comparison of the world of Soviet and that of pre-Soviet prisons reveals that the whole prison system of the age of the Tsars, notwithstanding that Communist propaganda tried to depict this political system as fearful and oppressive, was functioning more humanely than the jails of the progressive Soviet system.

The author was familiar with the functioning of this old, Tsarian system through the stories of those leftist prisoners who had personal experience of the reality of the prisons from both ages. Based on these memories Solzhenitsyn formulates an interesting conclusion about the sociology of prisons. During the Tsar regime, those prisoners who were condemned because of obvious political crimes, mainly Esers, Mensheviks, and Communists—in one word: the politicals—, had many privileges making the whole prison life more suitable and easier.<sup>13</sup> However, this privileged situation completely changed in the Soviet era. From the beginning of the twenties, politicals were deprived of all these privileges inherited from the earlier age, likewise the Soviet system also encouraged ordinary criminals to maltreat and misuse them.

Solzhenitsyn's final conclusion is simple and sharp: the society of prisons completely changed in his age compared to the conditions of the Tsarist regimes. The politicals, who were on the top of prison hierarchy, suddenly became the most defenceless group, with whom even ordinary criminals, not only the inspectors of the NKVD, could mistreat at any time. If one accepts that the internal relationships within a prison inform about the given society, since they mirror a radical and polarized picture of the whole society and its mechanisms, then this transformation in which politicals basically lost their top position in the internal life of Russian prisons can infer many interesting features about the real Soviet world. These features may have remained unnoticed without this help.

### *3. Criminal investigation—the psychology of the interrogator and the victim*

Besides the two earlier legal layers, the description of the Soviet criminal investigation procedure is also worthy of attention. These chapters are obviously the most shocking parts of the *Gulag Archipelago*. Solzhenitsyn prepared a broad documentation on the basis of personal memories of the techniques of the Soviet interrogators.<sup>14</sup> Each of them had been designed to extract personal confessions, that is, the accused persons had to voluntarily acknowledge that they had committed the given crime. Or, at least, these practices had to force them to undersign their written confession prepared by the investigative authorities.

The author discusses thirty-one techniques used by the interrogators by dividing them into two main categories: psychological and physical methods. However, he also indicates the relativity of this grouping since both overlap each other in many areas. Therefore, it is simply impossible to precisely distinguish them, as the psychological and physical divisions

<sup>12</sup> Solzhenitsyn: *op. cit.* 456–485.

<sup>13</sup> For example decent food, smoking, gardening, reading, regular walking, the free election of spokesmen, free movement among the cells, sending and receiving letters, and finally the option of hunger strike. About these “rights” the author writes: “They all returned to prison with a consciousness of their rights as convicts and a long-established tradition of how to stand up for them.” *Ibid.* 460.

<sup>14</sup> Solzhenitsyn lists thirty-one different techniques of interrogation from “persuasion in a sincere tone” to “bridling” and also indicates that this long list could even be continued. *Ibid.* 103–117.

can only orientate us.<sup>15</sup> The list provided by Solzhenitsyn is really appalling but also illuminating today. It can precisely show the outcome of a situation which exclusively stems from a powerful and strict hierarchy—the relationship of the prisoner and the interrogator—and has no precise limits or these limits are only nominally defined and everyone, even the prisoner, disregards them.

What is interesting about these inhuman and cruel interrogation methods, is that the author does not stop at their “external” and physical description, but he also discusses in detail the psychological effects on the victims. The reader can clearly see both the process of ‘breaking down the victims’ will and the sophisticated “psychological games” by which the interrogator extracts the personal confessions and their signature. On these pages Solzhenitsyn presents the human soul being under serious pressure and its refined maneuvers:<sup>16</sup> what is a human being thinking when he first appear in front of the interrogator; how can someone attempt to lie in a logical order; how do the different techniques of torture affect the human will; how can someone alleviate his conscience when signing the obviously unfounded and false confession that creates serious trouble for others. The author familiarizes the reader with the psychological drama that is happening during interrogations and tortures.

In these sensitive and many times very personal chapters, the author throws a light on the depths of the psychology of criminal investigation by empathically drafting the mental processes of an accused person as being in a hopeless situation. His final conclusion shows the full understanding of this mental state since he argues that, contrary to all, it is not allowed to condemn anyone who confessed or signed their confession since no one can precisely know what happened in the dark rooms of the interrogators.

In addition, Solzhenitsyn also illuminates the psychological state of the interrogators by analyzing their motives in detail. He points out that even these fearless functionaries cannot be regarded as inviolable, since they “tremble” when meeting a prisoner who has absolutely nothing to lose. These kinds of prisoners only want to save their “spirit and conscience”, therefore they are totally apathetic and indifferent to torture practices that break down human will.<sup>17</sup> Indifference to violence and torture, be it mental or physical, is the weakest point of each officer of the NKVD.

#### 4. *Organizational sociology and psychology—the “Organs”*

Following a swift overview of the first part of *Gulag Archipelago* it is obvious that one of the most infamous terms is the expression “organs”. Solzhenitsyn practically used this term with a universal scope, each department and member of the secret police having very different names—only mentioning some of the well-known ones: cheka, GPU, OGPU, NKVD, KB—during the Soviet era. He implied that everyone included in this term “organs”, had, as their main task, to fight against the internal political enemy. It is, indeed, a metaphor about those who had any role in Soviet internal affairs.

Solzhenitsyn’s relationship with this organization was deeply influenced by the fact that the Komsomol authorities wanted to send him to an NKVD school during his university years, but he refused to enter this school and his friends reacted the same way. He described his reasons for this decision when he wrote that he and his friends were intuitively worried

<sup>15</sup> *Ibid.* 108.

<sup>16</sup> For example *Ibid.* 117–121.

<sup>17</sup> *Ibid.* 130.

about these men, and they rejected the idea of joining this organ due to irrational motives being contrary to their manifest interests. But “it was not our minds that resisted but something inside our breasts”, explains Solzhenitsyn, the irrational element is their decision.<sup>18</sup> This existential experience with its emotional background was obviously further deepened by both the personal “meetings” with the “organs” and the stories told by his fellows.

In order to understand the functioning and behavior of the “organs”, the author focused on a psychological explanation and he also discussed in detail how the “organs” selected their functionaries. The service in the secret police, it is argued by Solzhenitsyn, did not at all require a high level of education or training. In place of these the only thing the “organs” expected from the officers was the ability to carry out precisely the orders coming from their leaders. This was intensified by the fact that these, rather unqualified men, mainly the majority of investigators, were in an environment where their inhuman instincts, for instance, thirst for power or wealth, were reinforced and even encouraged.

At this point the arguments of Solzhenitsyn perfectly meet those of István Bibó, the internationally known Hungarian political thinker, who formulated elementary important thoughts about the nature of power. Bibó convincingly argues that power is simply a poison, especially for those who have already broken their relation with the higher spheres of human existence.<sup>19</sup> This situation in the “organs”, the meeting of an artificially increased thirst for power with rather rudimentary personalities, was completed by a special “official” consciousness. The functionaries and officers of the “organs” understood perfectly that it was absolutely impossible to imagine a situation in which they were not right, that is, there was absolutely no control above them except the realization of orders coming from the higher levels. These orders outlined numbers of detentions, judgments or executions that had to be met. Only the orders and these “numbers” could be regarded as some kind of external pressure and “control” of their activities.

The author also explains that there was only one law that could not be breached in the world of the “organs”: no one could harm others in the organization. This was that very simple psychological and sociological “constitution” on which the administration and functioning of the secret police was based. However, and it must be stressed, this organization determined by such simple principles, ruled the whole Soviet society and the everyday life of the citizens. As a state within the state, it basically meant an independent world.

Solzhenitsyn’s analysis of the “organs” could also be important nowadays, since it helps in the understanding of those external factors that can influence the functioning of institutions created by law. In addition, it also explains how these can bias them and turn to a totally contradictory direction. Moreover, it also warns what will happen if an organization based on force, loses control, so it also attracts attention to the elementary importance of law, and, more specially, that of legal guarantees. Chiefly, this argument illustrates the theory of the separation of powers as formulated by Montesquieu. If the setting of Montesquieu cannot function, only the “organs” remain as a way of the administration of power.

<sup>18</sup> *Ibid.* 161.

<sup>19</sup> Cf. Bibó, I.: Az európai társadalomfejlődés értelme (The reason of European social development). In: Bibó, I.: *Válogatott tanulmányok*. 3. kötet (Selected Studies. Vol. 3). Budapest, 1986. 7–18. and 44.

### 5. *Legal theory—the relativity of truth*

It may be slightly strange at the beginning, but the author implies claims of a legal theoretical nature in the first part. From a different aspect it is not too difficult to understand this philosophical sensitivity. Solzhenitsyn, being a victim of the secret police and the Gulag industry, would have reflected on the general questions of law with special regard to the social role of law and its internal mechanisms.

The most fascinating element of this theoretical reflection is obviously his comment on Vyshinsky's theses about law. The infamous Soviet jurist, Prosecutor General in the darkest Soviet years, formulated crucial theses about the nature of truth stemming from his Marxist-Leninist profession, and the author analyzes these while discussing the formation of the Soviet system of administration of justice.<sup>20</sup> Vyshinsky argued, when he was analyzing the nature of truth, that absolute truth does not exist according to the principles of "flexible dialectics", but the functionaries had to be satisfied with establishing the relative truth. It logically follows from the conceptual impossibility of absolute truth that the courts are able only to establish the relative truth and, therefore, it is absolutely unnecessary to look for absolute evidence, for instance, witnesses or other factual things, during the criminal investigation. In a given case, following the earlier theoretical arguments, the investigator can establish the relative truth with the help of the personal confession or his political consciousness and moral view.

Solzhenitsyn's brief Vyshinsky analysis is really important, because it perfectly points out how political interests are able to bias a theoretical argument in order to achieve their goals. As a final point, the author reminds us that political interests, if all the other conditions are given, can easily distort any philosophical idea even if they seem to be innocent and neutral.

With these earlier theses developed by Vyshinsky the progressive Soviet administration of justice returned to the medieval system of divine ordeals and other irrational practices, argues Solzhenitsyn. So, the Soviet authorities created a premodern and atavistic system of justice which missed all the achievements of modern, formal law. In the eyes of the author only one absolute thing remained in this "unique" system based on political interests: the bullet they used for execution.<sup>21</sup> In conclusion, this theoretical approach unambiguously points out that the Soviet system of administration of justice can be regarded as a brand new type since it established a totally irrational regime by rejecting the tradition of Western Law based on general human rights and procedural guarantees.<sup>22</sup>

### III. Two remarks

Upon discussing these legal layers the essay wants to discuss some questions related to the general features of law. Basically, I aim to formulate certain general conclusions with the help of Solzhenitsyn's thoughts.

<sup>20</sup> Solzhenitsyn: *op. cit.* 100–101.

<sup>21</sup> *Ibid.* 101.

<sup>22</sup> For a psychological and sociopsychological analysis of the premodern and irrational elements of Communist thinking see: Ignatov, A.: *Aspects de la psychologie de la „nouvelle classe”*. Louvain, 1980.

### 1. *Western Law as a contrast*

All the earlier presented legal layers could show that Solzhenitsyn had a solid legal knowledge since his thoughts and findings are consistently precise and they also reflect a sophisticated legal thinking. This considerable legal background is a bit unusual from the very first moment, since he mostly studied mathematics at Rostov State University, then he fought as a battery commander in World War II, and as such had no special relationship with the law or legal sciences. Conversely, his descriptions, analyses, and arguments show a high level of legal knowledge that cannot be compared to that of the ordinary Soviet citizen.

The most fascinating and the most surprising at the same time, is his way of using contrasting—sometimes directly, in other cases indirectly—the Soviet Law to a qualitatively different type of law. That being said, he never discusses certain provisions and mechanisms of Soviet criminal law in itself, but in the analysis and assessment he always contrasts those with the relevant principles or institutions of Western Law. For instance, in discussing Art. 58 he also adds that not only its formulation was very problematic, but its “broad interpretation” was also a source of trouble. Because of this “broad interpretation” this article was an instrument of clear arbitrariness. This statement implies that there are, or should be, such legal systems where the rules of criminal law cannot be “as broadly” interpreted.

In another part he calls attention to the fact that prior to 1922 the judgments of deporting some one to labour camps were based on the “revolutionary legal consciousness” or on special decisions since there was no new Socialist criminal code in effect. One can infer from this remark that it is absurd in the eyes of the author that someone can be condemned without referring to codified legal rules—so the fundamental principle of *nullum crimen sine lege* appears in the background of this remark. Another example the author stresses are the so-called “troikas”<sup>23</sup> an absolutely unique criminal law institution that united almost every phase of the criminal process: detention, investigation, prosecution, judicature, review, and the execution of judgments. This solution, being obviously unconstitutional in a Western sense, could only appear since its creators did not adhere to certain “obsolete formalities of judicature and obsolete norms”. In the term “obsolete formalities” one can easily discover certain critique and irony concerning the refusal of the principle of separation of powers, an underlying element of Western legal cultures, and the system of procedural guarantees being able to discipline the coercive power implied in law. There are other examples, but, the ones mentioned here are enough to illustrate that Solzhenitsyn had a broad and detailed legal knowledge.

This special writing method stemming from the harsh contrast of these two conceptions of law—the Western and the Soviet—can have a twofold interpretation. On the one hand, it can be approached from the aspect of literature. This approach is highly efficient, as the direct or the foreshadowed contrast helps the reader to better understand the absurdity of the whole phenomenon, that is, the functioning of Soviet criminal justice in political cases, than the simple description or data collection. However, on the other hand, there is another explication from a legal point. It may also be inferred that the author had a proper view about what was the normal Western solution in a given case, and he felt that they were convicted because of the lack of rule-of-law and other traditional limits of arbitrariness. So,

<sup>23</sup> Their official name was OSO (Special Board), a board consisting of three men and mostly concerned with counterrevolutionary cases. They were subordinated to the Minister of Internal Affairs, therefore no appeal jurisdiction existed. Solzhenitsyn: *op. cit.* 285.

these contrasts express a certain state of mind in which they felt a strong deficiency in Western solutions and mechanisms. Solzhenitsyn and his fellows perhaps knew, or at least felt, that their cases could have had substantially different outcomes in other legal cultures—and that could be a infuriating feeling for them.<sup>24</sup>

In conclusion, Solzhenitsyn in these contrasts, by juxtaposing the abnormality of Soviet law to the normality implied in the concept of Western law, is capable of effectively showing it to Western readers, too. And, indeed, that might be one of the main reasons why Western readers really understand these chapters.

How could a mathematician and engineer know so much about the principles of rule-of-law and constitutionalism?—can the readers adequately formulate this question? For the answer this paper has only a hypothesis, and it could even be incorrect. However, only on the level of experiment, it is worthwhile discussing it.

In the first part a secondary figure appears, an Estonian lawyer, Arnold Susi. Solzhenitsyn characterizes him as follows:

“Thanks to his horn-rimmed glasses and straight lines above the eyes, his face became severe, perspicacious, exactly the face of an educated man of our century as we might picture it to ourselves. Back before the Revolution he had studied at the Faculty of History and Philology of the University of Petrograd [...]. Later, in Tartu, he had studied law. In addition to Estonian, he spoke English and German, and through all these years he continued to read the London *Economist* and the German scientific ‘*Berichte*’ summaries. He had studied the constitutions and codes of law of various countries—and in our cell he represented Europe worthily and with restraint. He had been a leading lawyer in Estonia and been known as ‘*kuldsuu*’—meaning ‘golden-tongued’.”<sup>25</sup>

It can be easily imagined, however it cannot be exactly proved, that Solzhenitsyn learnt both the basics of criminal law and jurisprudence as well as the main features of Western legal culture from Susi during their discussions in the prison yard.<sup>26</sup> The following quote may strengthen this idea:

“And he would tell me passionately about his own interests, and these were Estonia and democracy. (...) I nevertheless kept listening and listening to his loving stories of the twenty free years (...). I listened to the principles of the Estonian constitution, which had been borrowed from the best European experience, and how their hundred-member, one house Parliament worked. And, *though*, why of it wasn’t clear, I began to like it all and store it all away in my experience.” (emphasis made by the author).<sup>27</sup>

<sup>24</sup> When Solzhenitsyn discusses that interrogators used the personal confessions of the accused persons as the chief proof of guilt he refers to the Fifth Amendment of the US Constitution ordering: “Nor shall (any person) be compelled in a criminal case to be a witness against himself.” Then he repeats “not to be compelled” in italics in order to emphasize the absurdity of the entire thing. (Moreover, he also mentions the Bill of Rights) *Ibid.* 101. Footnote 9.

<sup>25</sup> *Ibid.* 205.

<sup>26</sup> In his monograph Scammel mentions Arnold Susi and acknowledges his personal influence on him. Scammel argues that this was Solzhenitsyn’s first “meeting” with an educated European that is with the European culture. Scammel: *op. cit.* 157.

<sup>27</sup> *Ibid.* 213.

This legal knowledge, which he gradually learnt during these regular conversations, became for him much more unambiguous than their convictions and judgments were contrary to general legal principles and standards. So, he could also realize the scandalous nature of the whole process in Western terms not only in an intuitive way. In conclusion, Solzhenitsyn's contrasting method stems from his unusual knowledge of Western legal culture and its efficiency is related to his writing skills and personal Gulag experiences.

## 2. Solzhenitsyn's language—access to the personal-psychological dimensions of law?

The earlier analysis leads to the last piece of this essay. One should conceive that the author does not only simply describe the mechanisms and stories of the Gulag, but he also demonstrates these with such metaphors which go far beyond the framework of rational cognition.<sup>28</sup>

The author's metaphorical pictures—for instance:

“[the] great, powerful, abundant, highly ramified, multiform, wide-sweeping 58, which summed up the whole world [...] In all truth, there is no step, thought, action, or lack of action, under the heavens which could not be punished by the heavy hand of Art. 58.”<sup>29</sup>

or

“[you can be] one of the little links of in the *Organs*—that flexible, unitary organism inhabiting a nation as a tapeworm inhabits a human body.”<sup>30</sup>

and

“It ought to have examined that glimmering light which, in time, the soul of the lonely prison begins to emit, like the halo of a saint. Torn from the hustle-bustle of everyday life in so absolute a degree that even counting the passing minutes puts him intimately in touch with the Universe, the lonely prisoner has to have been purged of every imperfection [...]”<sup>31</sup>

—affect emotions and other, mostly unconscious, dimensions of the human mind. These are able to exert influence upon human thinking beyond the frame of reason. That being said, by using these pictures, the author highlights the fundamentally non-logical and non-rational dimensions of law being generally out of the scope of professional legal discourse. And, indeed, it must remind lawyers that law is not only a set of simple paragraphs framed in a comprehensive logical structure, but it also psychologically affects human beings. That is, the law can generate serious psychological reactions determining the entire future life of those who had some kind of access to the judiciary. In conclusion, it should be admitted that the law has a personal-psychological dimension besides its existence as a rule with a

<sup>28</sup> In the contemporary literature of sociology Rudolf Rezsöházy argues that rational cognition cannot be regarded as an exclusive way of cognition. Besides science love, faith, art, and moral also offers many options for cognition, and these spheres have their own internal logic, too. Rezsöházy, R.: *Sociologie des valeurs*. Paris, 2006. 131–134.

<sup>29</sup> Solzhenitsyn: *op. cit.* 60.

<sup>30</sup> *Ibid.* 149.

<sup>31</sup> *Ibid.* 483.

general scope and that these two dimensions are strongly interlinked and cannot be dissociated.

From this aspect, one prominent value of the book is easily identifiable. The literary genius of Solzhenitsyn can produce such a picture of Soviet law and the administration of justice which does not lack this personal-psychological aspect, although the precise rules are also broadly discussed and analyzed. Therefore, his work presents those aspects of the reality of Soviet law that would simply be an impossible task by definition for professional legal literature.<sup>32</sup> Subsequently, the merits of Solzhenitsyn cannot be denied in the description of the reality of law, since he puts together data and professional descriptions with this personal-psychological dimension of law. He also provided a much more complete picture of Soviet law than professional legal monographs and papers could have ever done.

#### IV. One lesson

As a closing remark, a general lesson can also be formulated concerning the *Gulag Archipelago*. This work of Solzhenitsyn should caution lawyers of the consequences of such a politically-oriented approach to law that denies the traditional material and procedural guarantees which emerged in Western law. If the sole standard for law is the accomplishment of political goals and the realization of narrow group interests, only one thing can happen: everything that happened to the people deported to the various “islands” of Gulag.

This warning may further shade our picture about our own legal systems. Nowadays, there is a widespread dissatisfaction with the functioning of traditional legal institutions, and—one should also admit it—it has good reasons in the majority of the cases. However, having been familiarized with the legal layers of the *Gulag Archipelago* it seems obvious that the Western legal culture<sup>33</sup> has manifest advantages compared to the alternatives that existed in 20th century. If one contrasts these two approaches to law, that of the Soviet and Western, the predictability and rationality of the Western one will gain predominance. Although, naturally, it cannot be regarded as a perfect one, it can even guarantee such a high level of security for the citizens that it would be impossible in legal systems solely based on the orders and the discretion of the political will.

It highlights that our critiques about the imperfect functioning of our legal systems should endeavor to improve them. Those critical movements that tried swiftly to break down these traditional structures and also aimed to build up a totally new regime were misguided attempts, as the examples of Soviet and Nazi legal regimes show. These approaches turned law away from the generally accepted European values, that is, they made it a slave to political will and intentions.

<sup>32</sup> A similar thesis is also argued by the French historian Stéphan Curtois. He asserts that Solzhenitsyn could describe the reality of Gulag by his literary genius and not by the precise intellectual, logical, and data-based argumentation. And, this literary description shocked mostly the Western public opinion in fact, the discussion of crimes had only a secondary place in the Western understanding of Gulag. Curtois: *op. cit.* 27.

<sup>33</sup> René David, the famous French comparatist argues that the core of Western law is the idea of rule-of-law. See, David, R.: *Existe-t-il un droit occidental?* In: Nadelmann, K. H.–von Meheren, A. T.–Hazard, J. (eds): *XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema*. Leyden 1961. 56–64.

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## A Logic Model of the European Patent System

**Abstract.** In patent law most of the crucial legal questions such as patentability and infringement are linked to the patent claims. The European Patent Office regards patent claims as a set of independent features which are examined separately in a more or less formal way. The author has found that this approach allows for developing a simple logic model which treats patent claim features as logical statements and patent claims as compound statements wherein the individual logical statements are connected by logical connectives. The proposed logic model provides a uniform system for examining various legal questions that are dealt with separately under current case-law, moreover, it allows for examining the logical coherence between the different case-law decisions as well as detecting any hidden logical inconsistencies. The present paper offers an overview of the different legal questions linked to the patent claim and demonstrates the practical application of the proposed model.

**Keywords:** European patent, EPC, patent law, patent claim, Artificial Intelligence and Law, logic model

### Introduction

Patents can be obtained for Hungary in either a national grant procedure governed by Act XXXIII of 1995 on the protection of inventions by patents, or in a European grant procedure taking place before the European Patent Office (hereinafter: EPO) under the legal regime established by the European Patent Convention<sup>1</sup> (hereinafter: EPC). The present paper focuses on the case law of the EPO which is directly only applicable in the European grant procedure, however legal harmonisation of the Hungarian patent law resulted in a very similar national system, which takes into account the legal practice of the EPO.

The scope of legal protection conferred by a patent is defined by the so-called patent claims. In the patent system established by the EPC (hereinafter: EPC system) patent claims are assessed for establishing (i) whether the invention defined by the patent claim is novel and involves an inventive step; (ii) whether an amendment of a patent claim extends the subject matter beyond the contents of the original patent application; and (iii) whether a patent claim can benefit from the priority of an earlier patent application.

In the present paper I propose a novel way of treating the aforementioned patent claim related questions based on my observation that the EPC system allows for a formal logical examination of the patent claims.

Currently decision making in the EPC system relies partly on positive law (mainly the EPC) and partly on case-law (mainly the decisions of the Boards of Appeal and of the Enlarged Board of Appeal<sup>2</sup> as well as customary law laid down in the Guidelines of the

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<sup>1</sup> Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as revised by the Act revising Article 63 EPC of 17 December 1991 and the Act revising the EPC of 29 November 2000.

<sup>2</sup> For case law decisions of the European Patent Office see: <http://www.epo.org/patents/appeals/search-decisions.html>

European Patent Office<sup>3</sup>). There are currently no means for examining the logical consistency between the case law decisions relating to the above-mentioned three different fields of patent claim analysis. Inconsistencies are mostly remedied on a case-by-case basis thus causing case law to remain a divergent set of rules.

The proposed logic model allows for examining the logical coherence of case-law as a whole by connecting the separate fields of patent claim assessment and by making it possible to examine the logical consistency between separate decisions. It further allows for the detection of any hidden logical inconsistency within a single decision and for predicting the situation in which it will surface. The logic model could also assist codification as it is suitable for clearly setting the logical constraints that the legal system must take into consideration.

### 1. Related work

Various attempts have been made to computerise legal reasoning and legal decision making by applying artificial intelligence to the field of law. Some of the most promising research projects are directed to providing case-based reasoning, expert systems and logic models such as neural networks or fuzzy logic.

Case-based reasoning uses existing case law to provide or predict future decisions, for example Ashley's HYPO system<sup>4</sup> comprises a knowledge base of over thirty judicial opinions in the field of trade secret law and allows for establishing similarities between a new case and the precedent cases forming the knowledge base with respect to given factors (e.g. whether plaintiff adopted security measures, whether plaintiff and defendant make competing products, etc.). HYPO compares the factors and determines the most helpful cases to the defendant's or plaintiff's position. This approach is particularly suitable for alleviating the work of legal practitioners operating in a common law system.

Expert systems on the other hand aim to offer the skills of an expert by providing legally relevant questions for generating a legal opinion as Tyree's FINDER<sup>5</sup> or by assisting the formulation of legal argumentation as McCarty's TAXMAN.<sup>6</sup> Expert systems are often combined with knowledge based systems, for example deductive knowledge based systems are based on pre-defined IF-THEN rules for solving specific tasks in a limited legal field.

Neural networks simulate the functioning of a biological network of neurons, in particular that of the human brain. The neural networks comprise a number of interconnected neurons (nodes) some of them serving as inputs and outputs the others forming hidden layers. The structure of the neural network is adaptive, the behaviour of the neurons is defined by mathematical functions and the interconnections can be modified whereby the network can be trained to produce a desired output in response to a given input. Once the learning phase has ended the neural network can be used to find an input pattern similar to

<sup>3</sup> Guidelines for Examination in the European Patent Office, Published by the European Patent Office, Directorate Patent Law 5.2.1, D-80298 Munich (hereinafter: GL).

<sup>4</sup> Ashley, K. D.: *Modelling Legal Argument: Reasoning with Cases and Hypotheticals*. Cambridge (MA), 1990.

<sup>5</sup> Tyree, A. L.: *FINDER: An Expert System* <<http://austlii.edu.au/~alan/auls85.html>> (Last modified: 6 Sept. 2004).

<sup>6</sup> McCarty, L. T.: Reflections on TAXMAN: An Experiment in Artificial Intelligence and Legal Reasoning. *Harvard Law Review*, 90 (1997) 5. 837.

a completely new input and produce the learned output of the similar input. This is practically the scheme of reasoning by analogy.<sup>7</sup>

Fuzzy logic is another mathematical model that can be used to obtain an exact value in situations characterised by a certain level of indeterminacy—this being often the case in legal decision making.<sup>8</sup> For example the exact amount of compensation needs to be decided by a judge based on indeterminate terms such as the degree of negligence.

Other Artificial Intelligence approaches seek only to assist the legal practitioner in argumentation. One of the applied tools is mathematical logic that has been reduced to practice in the form of argument assistants—software applications implementing the rules of logic for supporting argumentative tasks for lawyers. The classical logical argumentation model of Toulmin<sup>9</sup> dates back to the 1950s and allows for drawing conclusions from given premises and warrants (inference licences) taking into account any counter argumentation in the form of a rebuttal. The possibility of rebuttals results in a defeasible argument, new information (counter-reasons, exceptions to a rule, etc.) can overturn a conclusion. Complex logical systems have been developed such as Verheij's Deflog<sup>10</sup> to model further important phenomenon in legal argumentation such as reinstatement, which occurs when an overturned conclusion is held valid again on account of additional information. Argument support software traditionally involve graphical representation of arguments usually consisting of boxes corresponding to the propositional content of the arguments and of arrows expressing the relations between the arguments,<sup>11</sup> while other argumentation management systems such as ArguGuide<sup>12</sup> offer a content-oriented tool incorporating laws, precedents, facts and arguments for supporting legal argumentation tasks such as writing a plea.

Turning to patent law, Nitta et al. have developed an expert system focusing on the procedural aspects of patent law.<sup>13</sup> The KRIP system (Knowledge Representation System for Laws relating to Industrial Property) provides a tool for checking the legality of each patent procedure. In order to achieve this, the procedures defined by patent law need to be identified as well as the relationships between the procedures and the conditions for starting/ending any such procedure. The KRIP system is designed for aiding formalities examination of a patent application, however, it is not adequate to tackle substantive examination of patentability which—for the most part—is linked to the patent claims defining the scope of legal protection.

<sup>7</sup> For proposed application see, e.g. Hollatz, J.: Analogy making in legal reasoning with neural networks and fuzzy logic. *Artificial Intelligence and Law*, 7 (1999), 289–301.

<sup>8</sup> See Philipps, L. et al.: Introduction: from legal theories to neural networks and fuzzy reasoning. *Artificial Intelligence and Law*, 7 (1999), 115–128.

<sup>9</sup> Toulmin, S. E.: *The uses of argument*. Cambridge, 1958.

<sup>10</sup> Verheij, B.: DefLog: on the logical interpretation of prima facie justified assumption. *Journal of Logic and Computation*, 13 (2003) 3, 319–346.

<sup>11</sup> See Schweers, M. et al.: Beyond boxes and arrows: argumentation support in terms of the knowledge structure of a legal topic, Proceeding of the 2007 conference on Legal Knowledge and Information Systems: JURIX 2007: The Twentieth Annual Conference, *Frontiers in Artificial Intelligence and Applications*, 165 (2007), 109–118.

<sup>12</sup> See Verheij, B.: Argumentation support software: boxes-and-arrows and beyond. *Law, Probability and Risk*, 6 (2007), 187–208.

<sup>13</sup> See Nitta, K. et al.: KRIP: A knowledge representation system for laws relating to industrial property. Logic Programming '85. *Lecture Notes in Computer Science*, 221 (1986), 276–286, DOI: 10.1007/3-540-16479-0\_27.

The complexity of patent claims has incited new approaches that are of a linguistic nature directed to simplifying patent claim sentences in order to paraphrase and summarise its contents. A single claim sentence is segmented into clausal discourse units, transformed into complete sentences, co-reference relations are established and a discourse structure is built between the discourse units.<sup>14</sup> Paraphrasing and multilingual summarisation of patent claims are but a few aspects of semantics-based patent processing techniques. These and other applications are incorporated in PATExpert<sup>15</sup> which, as an overall scientific objective, strives to change the current patent processing paradigm of textual processing to semantic processing.<sup>16</sup>

The present paper offers a new approach to assisting legal decision making and legal argumentation in the field of patent law. The proposed model differs from existing models both in substance and form. It relies on conventional, human argumentation and judgement in deciding basic factual questions related to the patent claims. The legal questions, on the other hand, are incorporated in the model itself whereby a complex legal finding can be obtained from the basic decisions.

## 2. The “patent claim feature” approach of the EPO

It is important to understand that over the years the EPO has established an approach that is best described as “patent claim feature” approach. The invention is seen essentially as a set of technical features. The “spirit” of the invention, the “underlying overall concept”, the “inventive recognition” bear but little significance in proceedings before the EPO. Instead the patent claims are examined on a feature-by-feature basis on a purely formal level. The applicant or patentee must succeed in formally limiting the claims from any prior art material, otherwise the EPO will reject the application or revoke the patent. Any such limitation is strongly restricted as the EPO also examines the allowability of amendments on a formal basis.

### 2.1. “Patent claim feature” approach in examining novelty and inventive step

The patent claim feature approach is best illustrated by the EPO’s methodology of performing the examination of patentability. The process can be divided into two clear stages: (1) examination of novelty and (2) examination of inventive step.<sup>17</sup>

A technical invention can only be patented if it is novel (does not form part of the state of the art) and if it involves an inventive step (meaning that it is not obvious to a person skilled in the art having regard to the state of the art). The invention for which protection is sought is defined in a single complex sentence, called patent claim. Such a patent claim

<sup>14</sup> See Bouayad-Agha, N. et al.: Simplification of Patent Claim Sentences for their Paraphrasing and Summarization. *Proceedings of the Twenty-Second International Florida Artificial Intelligence Research Society Conference*, May 19–21, 2009, Sanibel Island, Florida, USA, 2009.

<sup>15</sup> See website of the PATExpert project: <http://recerca.upf.edu/patexpert/>

<sup>16</sup> Bouayad-Agha, N. et al.: Improving the comprehension of legal documentation: the case of patent claims. *The 12th International Conference on Artificial Intelligence and Law. Proceedings of the Conference*, June 8–12, 2007, Barcelona, Spain, 2009.

<sup>17</sup> See Palágyi, T.: Assessment of patentability in the official practice of the European Patent Office. *Industrial Property and Copyright Review*, 107 (2002) 2, 43–48.

sentence is treated by the European Patent Office (hereinafter: EPO) as the set of technical features defining the invention.

To illustrate the denotation of patent claim features let us take a simple example: the inventor recognizes that certain materials, called magnets, interact with the Earth's magnetic field, whereby needles made of magnetic materials can be used as a navigation tool. The inventor files a patent application with the following patent claim:

Claim 1: Navigation tool comprising a needle made of magnetic material.

In the present example the EPO would consider the navigation tool, the needle and magnetic (as the material of the needle) to be features of the patent claim:

A = navigation tool

B = needle

C = magnetic (as the material of the needle)

When comparing the invention (Claim 1) with a prior art solution the EPO would consider whether the object of comparison is used for navigation, whether it comprises a needle, and whether this needle is made of a magnetic material. If all three questions are answered in the affirmative then the patent claim is said to "read onto" the given prior art solution. In this case the EPO will find that the patent claim is not novel. If however at least one of the features is not disclosed in the prior art, then the patent claim is said to be novel.

Hence, in the first stage of examination the EPO will compare the features of a given claim with every relevant state of the art disclosure revealed in the search (or presented by an opposed party) and determine whether or not any of the claim features are novel over the given prior solution. The examined claim need not differ from *all* the relevant prior art in the *same* feature; one feature may establish novelty over one prior art document, while another feature may serve to distinguish the invention from another piece of prior art.

If the claim passes the first stage of examination, i.e. the claim is found to be novel over all relevant prior art, the EPO's examiner will move onto assessing inventive step. According to the Guidelines of the EPO the examiner should normally apply the so-called problem-and-solution approach, which consists of three main stages:

(i) determining the "closest prior art",<sup>18</sup>

(ii) establishing the "objective technical problem" to be solved by determining the distinguishing feature(s) of the examined patent claim over the closest prior art, determining the technical effect of any such distinguishing feature, and formulating the objective technical problem as the aim and task of modifying or adapting the closest prior art to provide the established technical effect,

(iii) considering whether or not starting from the closest prior art it would have been obvious to a person skilled in the art solve the objective technical problem.

The last step is the least formal in the sense that there is no real objective measure for deciding obviousness. The Guidelines give exemplifying indicators of non-obviousness, such as an unexpected technical advantage, bonus effect; long felt need, commercial success; overcoming a technical prejudice; etc. The various considerations applied in the course of examining inventive step are not discussed here (although a decision support

<sup>18</sup> "The closest prior art is that combination of features, disclosed in one single reference, which constitutes the most promising starting point for an obvious development leading to the invention." (GL C-IV, 11.7.1, T 606/89).

system could be envisaged), but the resulting binary decision as to inventive step (inventive/not inventive) can be fitted into the present model.<sup>19</sup>

## 2.2. “Patent claim feature” approach in examining infringement

Infringement is not regulated in the EPC system instead it is left to national law. However, the scope of protection is defined by the EPC, which is the most important requisite to dealing with infringement.<sup>20</sup> According to Art. 69 EPC the scope of protection is determined by the claims. This is a rather vague definition and the EPO has no proceedings in which it were required or entitled to interpret the scope of protection (not even when giving a technical opinion upon request of a competent national court under Art. 25 EPC), hence there is no uniform case law to be followed by the authorities of the Contracting States.

Article 69 EPC does not state clearly whether *all* the claim features need to be embodied in a solution to infringe the patent or if making use of the inventive concept expressed by the claim as a whole could also constitute infringement. A clear example of the interpretational freedom provided for by the EPC is the EPILADY<sup>21</sup> case where the same product was found to be infringing an EPC patent in Germany but not in England.

Although the Protocol on the Interpretation of Art. 69 EPC aims to restrict the interpretational freedom of the Contracting States, still, national authorities are more or less free to apply their own national standards as to how the claims determine the scope of protection.

The present paper aims to show that the patent scope must be assessed on a feature-by-feature basis as well if the conferred protection is to be coherent with the EPO’s case law on the requirements of patentability.

## 2.3. “Patent claim feature” approach in examining amendments

The EPC system is based on the first-to-file principle, from which it follows, that once the patent application is filed the applicant may not improve his position by adding subject-matter that is not disclosed in the original application as filed. This is the underlying idea of Art. 123 EPC prohibiting any amendment to the patent claims, description or drawings that may in any way extend the subject-matter beyond the content of the application as filed. This paper only focuses on the assessment of patent claims; however, the same considerations apply to examining amendments of the specification or drawings.

The EPC does not define “subject-matter”, nor is there an interpretation of “extension”. The case law of the Boards of Appeal explains these terms and lays down the criteria for an allowable amendment. According to decision T194/84 the amendment extends the subject-matter if as a result of the amendment the person skilled in the art is presented with new information which is not directly and unambiguously derivable from the content of the patent application as filed, even when account is taken of the information implicit to the skilled person. This is the so-called *disclosure test*, according to which the “subject-matter”

<sup>19</sup> See Kacsuk, Zs.: Role of the patent claims in patent law (Part I.)—Certain questions of patentability—state of the art, novelty and inventive step. *Industrial Property and Copyright Review*, 5 (115) (2010) 1, 55–83.

<sup>20</sup> Kacsuk, Zs.: Role of the patent claims in patent law (Part IV.)—Scope of protection, infringement and the doctrine of equivalents. *Industrial Property and Copyright Review*, 5 (115) (2010) 4, 5–20.

<sup>21</sup> European patent EP 0 706 376 B1.

of a patent or patent application is none other than all information, which is either explicitly or implicitly contained in the patent application or patent as a whole, although implicit information content is very rarely accepted as the basis of an allowable amendment (see Visser, 2010). Where the amendment is in the form of replacement or removal of a feature from a patent claim the disclosure test is supplemented by decision T331/87, which reflects the same strict patent claim feature approach as discussed in connection with novelty.<sup>22</sup>

#### 2.4. “Patent claim feature” approach in examining a claim to priority

A prerequisite of assessing novelty and inventive step is to determine what forms the state of the art. The general rule is that everything made available to the public before the filing date of the examined patent (or patent application) constitutes state of the art (prior art). However, a patent application may benefit from the priority of an earlier patent application filed by the same applicant in any WTO member state not later than 12 months earlier. In such cases the state of the art is determined by the filing date of the earlier patent application, called the *priority date*. Hence anything made available to the public after the priority date cannot be held against the later patent application claiming priority of the earlier patent application.

A patent application may benefit from any number of priorities as long as all the earlier applications are filed within 12 months of the filing date of the patent application in question. However, only those inventions may enjoy the priority of one or more earlier patent applications which are fully disclosed in the earlier patent application.

The EPC system applies two kinds of priorities. One is defined by a complete, self-contained code of rules laid down in the EPC, while the other system is regulated by the Patent Cooperation Treaty (PCT).<sup>23</sup> The former priority system will be referred to as the EPC priority system. The EPC priority system is applicable in respect of Euro-direct application, i.e. patent applications filed directly with the EPO as opposed to the Euro-PCT applications, which designate or elect the EPO as a regional patent office within the meaning of the PCT.<sup>24</sup> The priority of the Euro-PCT applications is regulated by Art. 8 PCT which adopts the priority rules of Art. 4 of the Paris Convention.<sup>25</sup> The EPC priority system has also taken over the priority rules of the Paris Convention,<sup>26</sup> albeit not the exact wording, which could, theoretically, result in different interpretation of the priority rules for Euro-

<sup>22</sup> For an overview of the criteria for an allowable amendment see Kacsuk, Zs.: Role of the patent claims in patent law (Part II.)—Judgement of amendments extending the scope of protection in the European and the Hungarian patent system. *Industrial Property and Copyright Review*, 5 (115) (2010) 2, 5–15.

<sup>23</sup> Patent Cooperation Treaty (PCT), Done at Washington on June 19, 1970, amended on September 28, 1979, modified on February 3, 1984, and on October 3, 2001.

<sup>24</sup> Article 2 (iv) PCT: “regional patent” means a patent granted by a national or an intergovernmental authority having the power to grant patents effective in more than one State.

<sup>25</sup> Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979.

<sup>26</sup> The main difference between the priority system of the EPC and the Paris Convention is that while the EPC allows for internal priority (claiming the priority of European patent application), the Paris Convention only provides for external priority (claiming the priority of a foreign patent application). See also Visser, D.: *The Annotated European Patent Convention*. 18th revised ed., Veldhoven, 2010.

direct and Euro-PCT applications. However, case law has established uniform interpretation for both regimes.<sup>27</sup>

In the past decades the EPO has adopted the aforementioned strict patent claim feature approach in respect of the validity of a priority claim as well. The keyword to the application of this approach is the term “same invention” as introduced in Art. 87(1) EPC: priority may only be claimed in respect of the same invention. The case law has been somewhat ambiguous on the interpretation of “same invention” until first decision G3/93 then decision G2/98 clarified that in order for a patent claim to qualify as defining the same invention, the patent claim features—separately as well as in combination—must find direct support in the priority application as a whole.<sup>28</sup> G2/98 made it clear that if the patent claim introduces a new feature, removes or replaces a feature as compared to the disclosure of the priority application the claim may not benefit from the priority of the first application. G2/98 also points out that multiple priorities as provided for by Art. 88(2) EPC and Art. 4F(1) of the Paris Convention are only conceivable in respect of OR-claims (disclosing alternative embodiments), whereas AND-claims (requiring the presence of all the claim features simultaneously) may only be entitled to a single priority.

### 3. Logic model of the patent claims

#### 3.1. *Defining the features of a patent claim*

As we have seen in the previous chapter the EPO’s patent claim feature approach involves identifying the features of the patent claim and assessing novelty, infringement, amendments and priority by reading the claim features onto the prior art, the allegedly infringing solution, the content of the patent application as filed or the priority application, respectively.

Starting from the exemplary patent claim of section 2, I will now introduce a logic approach to modelling patent claim features.

As we have seen the EPO treats “navigation tool”, “needle” and “ferromagnet” as patent claim features of the patent claim: “Navigation tool comprising a needle made of a magnetic material”. Such an approach is a good starting point; however, in my model I propose to define the features of a patent claim as logical statements.<sup>29</sup> Accordingly, the patent claim in the example can be broken down into the following logical statements, which will be regarded as the features of the claim:

A = The subject is a navigation tool.

<sup>27</sup> “The EPC—according to its Preamble—constitutes a special agreement within the meaning of Article 19 of the Paris Convention, the EPC is clearly intended not to contravene the basic principles concerning priority laid down in the Paris Convention” (cf. decision T 301/87, reasons point 7.5). Affirmed by G3/93 and G2/98. Thus the priority rules of the Paris Convention are to be interpreted the same way as the priority rules of the EPC. See also Kacsuk, Zs.: Role of the patent claims in patent law (Part III.)—Comparing the Hungarian, European, International and Paris Convention priority systems. *Industrial Property and Copyright Review*, 5 (115) (2010) 3, 5–27.

<sup>28</sup> See Svingor, A.: Claiming of priority according to EPC in the light of two decisions of the Enlarged Board of Appeal, *Industrial Property and Copyright Review*, 108 (2003) 1, 45–49.

<sup>29</sup> For solving an exemplary case with logical statements see Kacsuk, Zs.: The analysis of the European priority law in the practice of the European patent office—or how should we claim the priority of a cooking pan for a plastic glass? *Industrial Property and Copyright Review*, 3 (113) (2008) 6, 69–87.

B = The navigation tool has a needle.

C = The needle is made of a magnetic material.

Ideally, the logical statements should be atomic in the sense that they cannot be broken down into more basic statements. In reality the patent claim features as statements can never be “atomic” because the patent claims are formulated in a natural language and the words of any natural language have a *field* of meaning rather than a precise (singular) meaning. For example the meaning of “magnetic material” will embrace various different materials such as steel, iron, cobalt, rare-earth magnets, etc. Even the sub-categories of magnets will incorporate a range of further materials, e.g. “rare-earth magnet” covers gadolinium, dysprosium, etc.. Instead of the expression atomic I will refer to such statements as “basic”, knowing that depending on the circumstances the basic statements may be broken down to even more basic sub-statements just like “magnetic material” covers steel, iron, cobalt, etc.

In this approach reading a claim feature on the prior art, on an allegedly infringing solution, etc. is carried out by deciding whether the statement is true or false in respect of the object of comparison (prior art solution, allegedly infringing solution, etc.). From the point of view of adjudication the statement is either true or false, there is no third possibility—in grant proceedings, opposition proceedings, revocation proceedings, or infringement law suits the competent authority is compelled to take a decision on whether the claim defines a novel invention, whether any amendments were allowable, whether priority can be acknowledged, whether there is an infringement of the patent.

In logic when two or more criteria need to be satisfied simultaneously the statements describing such criteria are connected by an AND connective. Similarly, if the features of a patent claim are regarded as statements, and the claims are to cover solutions embodying *all* of the claim features, this should be expressed by connecting the statements with the AND connective. In the example of the navigation tool:

Claim 1 = (the subject is a navigation tool) AND (the navigation tool has a needle) AND (the needle is made of a magnetic material) = A & B & C.

### 3.2. Structure of the claims

In order to decide on the nature of the logical connectives that should be applied between the basic statements we need to examine the legal areas where we hope to introduce the formal patent claim model. As I have stated in the introduction, patent claim assessment plays a key role in the examination of (i) patentability, in particular novelty; (ii) infringement; (iii) amendments; and (iv) priority.

In each patent claim assessment category a distinction should be made between questions of law and questions of fact although the latter is often influenced by case law as well. Questions of fact are related principally to the truth evaluation of the basic statements expressing the claim features—the basic statements are either true or false in connection with a prior art solution, the allegedly infringing solution, the content of the application as filed, or that of the priority application. On the other hand questions of law are a matter of positive law (statute—principally the EPC) and case law (principally the case law of the Boards of Appeal and Enlarged Board of Appeal as well as the customary law expressed in the Guidelines).

The EPO’s patent claim feature approach illustrated in the previous chapter implies that the basic statements expressing the claim features must be taken into account in an AND-combination in the formal model:

(i) as regards novelty the patent claim is not novel over a prior art reference if the latter discloses all the claim features in combination (A & B & C);

(ii) as regards infringement, a solution infringes the patent if all the patent claim features (A & B & C) can be read onto it;

(iii) as regards amendments, an amendment of a patent claim is allowable if the subject-matter determined by all the features of the amended patent claim (A & B & C) is directly derivable from the contents of the original application as filed; and

(iv) as regards priority, the priority claim is valid only if the invention defined by the combination of all the patent claim features (A & B & C) is directly derivable from the content of the priority application.

Determining the structure of a patent claim also requires semantic interpretation of the claim as the EPC system allows OR-claims, i.e. claims in which closely related but distinct inventions are claimed at the same time. For example:

Claim 1: Navigation tool comprising a needle made of iron or steel.

(Iron and steel being two types of permanent magnetic materials.) In this case there are four basic statements expressing the claim features:

A = The subject is a navigation tool.

B = The navigation tool has a needle.

C = The needle is made of a iron.

D = The needle is made of a steel.

The OR-type conjunctive particles (“or”, “either”, etc.) of the claims have been interpreted by case law as indicators that the claim embraces more than one inventions the features of which are generally alternatives not to be combined. Thus in the present case the first invention claimed is A & B & C (navigation tool comprising a iron needle), while the second invention is A & B & D (navigation tool comprising steel needle). The whole claim should be expressed as the OR-combination of two distinct claim variants:

Claim = (A & B & C) or (A & B & D).

### 3.3. A logic model of patent claims

In view of the above legal and non-legal considerations and in particular the EPO’s patent claim feature approach I propose to introduce a logic model for describing patent claims, which treats patent claim features as basic statements and allows true/false interpretation of the basic statements as well as the possibility of connecting the basic statements by logical connectives.<sup>30</sup> As we have seen, the structure of the claims (i.e. the logical connectives connecting the basic statements) is determined by positive law and case law, while the truth assessment of the basic statements is primarily a matter of fact to be decided by the competent authority.

The basic statements corresponding to the patent claim features will be denoted with capital letters of the alphabet (A, B, C, etc.). Each basic statement has a truth evaluation—the basic statement is either true or false in respect of the object of comparison (prior art, infringing solution, original patent application, priority application).

The logic model uses three types of logical connectives: the AND connective (&), the OR connective ( $\vee$ ) and the NOT connective ( $\neg$ ) as negation.

<sup>30</sup> For a more strict mathematical formalism see Kacsuk Zs.: The mathematics of patent claim analysis. *Artificial Intelligence and Law*, DOI 10.1007/s10506-011-9107-2, 2011.

The logical connectives are used to connect the basic statements the same way the AND-connectives and OR-connectives were used in the previous chapter to express the relationship between the claim features and thereby define the structure of the patent claim. It should be noted that the OR-connective of the patent claim language is generally an exclusive disjunction, i.e. either one feature or the other, but not both. In the patent claim language the non-exclusive (potentially inclusive) disjunction is nearly always emphasized by writing “and/or” in order to ensure that no court or authority will interpret the claim more strictly by excluding the possibility of the features being present simultaneously.

The patent claim is modelled by a compound statement which is made up of the basic statements corresponding to the claim features (A, B, C) and the logical connectives (&, or, not) defining the relationship between the claim features.

The truth evaluation of the basic statements is used to model the decision of the competent authority who examines whether a claim feature reads onto the object of examination, which is a factual question. The overall legal finding (novel/not novel, infringing/not infringing, etc.) follows from the truth evaluation of the basic statements. For example a compound statement **P** formed of two basic statements connected by an AND connective is true if and only if both basic statements are true, i.e.  $P = A \ \& \ B = \text{true}$  if and only if  $A = \text{true}$  and  $B = \text{true}$  at the same time. A compound statement formed of two basic statements connected by an *exclusive* OR connective is true if one of the statements is true:  $P = A \ \vee \ B = \text{true}$  if either  $A = \text{true}$  and  $B = \text{false}$  or if  $A = \text{false}$  and  $B = \text{true}$ .

#### 4. Application of the logic model

In the following sections I will demonstrate the application of the introduced logic model by way of examples.

##### 4.1. Novelty

A patent claim may exhibit four differences with respect to a prior art disclosure:

- (i) a new feature (i.e. a feature not disclosed in any form in the prior art solution);
- (ii) a generic feature (i.e. a general feature of which a specific example is disclosed in the prior art);
- (iii) a specific feature (i.e. a feature, which is a specific example of a more general feature disclosed in the prior art);
- (iv) a substituting feature (i.e. a feature replacing a prior art feature but not having a generic-specific relation thereto)
- (v) an omitted feature (i.e. the omission of a prior art feature).

I recall that a patent claim determines a novel invention if the claim does *not* read onto the prior art. Hence, in the present logic model a claim is held novel over a prior art disclosure if the evaluation of the claim as a whole is *false*.

##### 4.1.1. New feature

In the present example the examined EPC patent claim is:

Claim **P**: Navigation tool comprising a needle made of a magnetic material.

The basic statements of the examined patent claim **P** are:

A = The subject is a navigation tool.

B = The navigation tool has a needle.

C = The needle is made of a magnet.

Hence the examined claim **P** can be modelled as:  $P = A \& B \& C$ .

The patent claim will be compared with prior art material (**PRA**) disclosing a prior solution which can be modelled by the basic statements:

A = The subject is a navigation tool.

B = The navigation tool has a needle.

Hence the prior art solution can be modelled as:  $PRA = A \& B$ .

The question to be decided for the purpose of examining novelty is whether prior art **PRA** teaches A, B and C features, i.e. whether all three basic statements are true in respect to **PRA**. As postulated **PRA** only teaches features A and B, thus these basic statements are true, while basic statement C is false in respect to **PRA**:

A = true

B = true

C = false

In logic a composite statement made up of basic statements connected by AND connectives is true if and only if all basic statements are true. Hence, in the present situation, since basic statement C is false the logical model renders as result that the patent claim as a whole is false:

$P = A \& B \& C = \text{false}$

In accordance with our expectations the evaluation of claim **P** comprising the novel feature C is false (it does not read onto the prior art) thus claim **P** is considered to be novel over the prior art disclosure **PRA**.

**Conclusion:** In decision T411/98 the Board interpreted the requirement of novelty such that an invention is lacking novelty if all its features are known from the prior art. This practice is consistent with the logical model, which renders the claim novel if at least one of the basic statements is evaluated as false (i.e. if at least one of the features does not read onto the prior art).

#### 4.1.2. Generic feature

As a second example let us consider the same patent claim ( $P = A \& B \& C$ ) as in the previous section, which is compared with a specific prior art solution (**PRA**) modelled by the basic statements:

A = The subject is a navigation tool.

B = The navigation tool has a needle.

C1 = The needle is made of steel.

In the present example patent claim feature C (The needle is made of a magnetic material) is a generalisation of the prior art feature C1. Accordingly, in the logic model C can be written as  $C = C1 \vee (C \& \neg C1)$ . This would translate back to English as

*The needle is made of steel OR the needle is made of a magnetic material but NOT steel.*

The above logic transformation is thus none other than the artificial division of “magnetic materials” into two groups:

1. the group containing steel
2. the group containing all magnetic materials but NOT steel.

The patent claim **P** is thus broken down to two mutually exclusive claim variants as illustrated in Fig 1. Claim variant **P1** comprises the features (basic statements) A, B and C1, while the second claim variant **P2** comprises the features A, B, C and  $\neg C1$  (not C1).

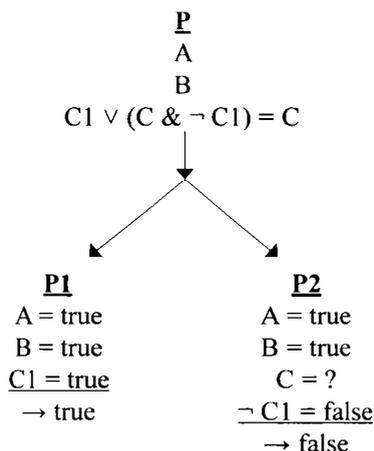


Fig. 1

The basic statements representing the claim features are written under the letters representing the claim and the two claim variants. The statements arranged vertically within the same column are understood to be connected by the AND connective, while the statements connected by any other connective are arranged horizontally with respect to each other and the connective is explicitly indicated. The logic evaluation of the statements reflecting the authority’s evaluation of the corresponding claim feature is indicated next to the statement. The evaluation of the first claim variant **P1** is very simple, the authority will establish that the basic statements A, B and C1 clearly read onto the prior art (all three features are disclosed in **PRA**), thus the logic evaluation of all three statements is “true”. As a consequence the evaluation of the first claim variant **P1** is also true, meaning that the first claim variant **P1** is not novel over the prior art **PRA**.

In the case of the second claim variant **P2** the evaluation of the compound statement **C** remains undecided, however since feature C1 is evaluated as “true”, the evaluation of the negation of C1 ( $\neg C1$ ) is necessarily false (the negation of a true statement is false). Since one of the basic statements forming **P2** is false the evaluation of the second claim variant **P2** as a whole is also false regardless of the evaluation of C. Hence the second claim variant **P2** is novel over prior art material **PRA**.

It rests to decide whether or not patent claim **P** comprising as alternatives patent claim variant **P2** that is novel and a patent claim variant **P1** that is lacking novelty over prior art **PRA** is novel.

The patent claim **P** is composed of the two claim variants such that:  $P = P1 \text{ or } P2$ . As we have seen in the previous section the evaluation of a compound statement formed by an OR-connective is true if one and only one of the two statements is true. In the present case  $P1 = \text{true}$  while  $P2 = \text{false}$ , which results in the patent claim as a whole being true ( $P =$

true). When translated back to the legal language this means that the patent claim **P** reads onto the prior art **PRA**. Thus it is not novel in view of **PRA**.

**Conclusion:** The EPO would make the same finding by applying the “specific vs. generic” rule (see Guidelines C-IV, 9.5): a specific disclosure takes away the novelty of a generic claim embracing that disclosure. Hence, it can be established the “specific vs. generic” rule is not an arbitrary interpretation adopted by the EPO but rather a logically consistent rule which can be fitted into the proposed logic model.

#### 4.2. *Infringement*

As mentioned before the EPC system leaves the interpretation of the scope of protection of an EPC patent up to national law. However, legal certainty of third parties has to be guaranteed by making sure that the intellectual property right does not affect the public domain or third party’s existing intellectual property rights. Hence, if the scope of protection of a patent embraces an allegedly infringing solution (product, method or use) this solution should give rise to revocation (or limitation) of the patent whenever it can be proven that the solution belonged to the state of the art at the time of filing the patent application (having regard to its priority as well).

If we apply the EPO’s patent claim feature approach to decide upon infringement, this criteria is readily fulfilled, which can be easily demonstrated by the present logic model.

When deciding upon infringement, similarly to the assessment of novelty, the authority evaluates whether the basic statements representing the claim features read onto the allegedly infringing solution. The true or false evaluation of the basic statements allow for the logic evaluation of the compound statement representing the patent claim as demonstrated in the previous chapter. If the evaluation is true, the patent claim reads onto the examined solution, thus it infringes the patent protection. If the evaluation is false, the patent claim does not read onto the examined solution, meaning that it lies outside of the scope of protection.

##### 4.2.1. *Extra feature*

When examining infringement the patent claim may exhibit five differences with respect to the allegedly infringing solution (product, method or use): (i) an extra feature; (ii) a more generic feature; (iii) a more specific feature; (iv) a substituting feature; and (v) a feature not embodied in the solution. These five cases correspond to the five cases of the novelty examination.

The first case (an extra patent claim feature) corresponds to the situation examined in section 4.1.1, whereby a similar finding can be made: if the patent claim ( $P = A \& B \& C$ ) contains an extra feature (C) with respect to the allegedly infringing solution (A & B) the logic evaluation of this feature (C) will be false, whereby the evaluation of the patent claim as whole will be false as well:

A = true

B = true

C = false

Resulting in:

$P = A \& B \& C = \text{false}$

**Conclusion:** It can be established from the logic model that in the patent claim feature approach if a claim feature is not present in the allegedly infringing solution this suffices to come clear of the scope of protection. If this were not the case, the user of a prior art

solution would be found liable for infringement, while at the same time the above prior art solution (A & B) could not occasion revocation of the patent claim (A & B & C) based on lack of novelty.

#### 4.2.2. *Generic feature*

The second case relates to the situation wherein a generic feature of a patent claim is embodied in the form of a specific feature in an allegedly infringing solution. Again the same example can be used as for the assessment of novelty in section 4.1.2. The evaluation of claim  $P = A \& B \& C$  with respect to the allegedly infringing solution defined by A & B & C1 is performed in the same way and yields the same result as indicated in Fig n. 1 of section 4.1.2.

As established in section 4.1.2 the claim variant **P1** reads onto the allegedly infringing solution, while claim variant **P2** does not. Patent protection would have no value if the patent claims had to be as detailed as to encompass only one embodiment, instead it is allowed to claim an invention in more general terms, e.g. in the present example C stands for “magnetic material” encompassing “steel” as a possible embodiment of magnetic material. Hence, infringement should be established in the present situation.

**Conclusion:** If the scope of protection is interpreted in line with the EPO’s patent feature approach it embraces all the specific embodiments of a generic feature. This is counterbalanced by the fact that if any such specific embodiment belonged to the state of the art it could constitute a ground for revocation based on lack of novelty. For example in the present situation, if the allegedly infringing solution (A & B & C1) belonged to the state of the art, it would take away the novelty of the patent claim as we have seen in section 4.1.2.

#### 4.3. *Amendments and priority*

In the European patent system amendments and the validity of a priority claim is treated very much the same way.<sup>31</sup> Both questions require the same analysis: on the one hand it has to be asserted that all the patent features find a direct basis in the original application/priority application (i.e. the patent feature may not be novel over the original application/priority application), on the other hand it has to be made sure that all the features are present in the patent claim which have been disclosed in the original application/priority application as an essential feature.

When examining amendment of a patent claim or validity of a priority claim the patent claim features are compared to the content of the original application/priority application as a whole including information implicit to a person skilled in the art.

Again, five types of differences may be distinguished with respect to the original application/priority application (a new feature; a generic feature; a specific feature; a substituting feature; and an omitted feature) of which only the case of a generic feature will be discussed here to illustrate the application of the present logic model. The patent claim features are expressed by the same basic statements as in section 4.1.2.

<sup>31</sup> See e.g. G1/03, G2/03, Reasons for the decision, 4. point: “*In order to avoid any inconsistencies, the disclosure as the basis for the right to priority under Article 87(1) EPC and as the basis for amendments in an application under Article 123(2) EPC has to be interpreted in the same way.*”

The logic model is applied in the same way as in the case of examining novelty. The invention disclosed in the original/priority application is indicated by **P**, while the amended patent claim and the patent claim claiming priority of invention **P**, as the case may be, are indicated by **P'**.

The results are recapitulated in Table 1. As can be seen patent claim **P'** embraces two claim variants **P1'** and **P2'** (relating to “a navigation tool comprising a needle made of steel” and “a navigation tool comprising a needle made of any magnetic material but not steel”). The same logic evaluation can be performed as in the previous sections, the result of which is that the first claim variant **P1'** reads onto the disclosed invention while the second claim variant **P2'** does not.

Table 1. Comparison of examination of amendments and priority

	Amendment	Priority
<b>2. Generic feature</b>	$P' = A \wedge B \wedge C$ compared to $P = A \wedge B \wedge C1$	
Graphical representation:	<div style="text-align: center;"> <math display="block">\begin{array}{c} \underline{P'} \\ A \\ B \\ C1 \vee (C \&amp; \neg C1) = C \end{array}</math> </div>	
Evaluation:	<b>first claim variant:</b> $P1' = A \& B \& C1 = \text{true}$ <b>second claim variant:</b> $P2' = A \& B \& C \& \neg C1 = \text{false}$	
Conclusion:	unallowable amendment	priority of <b>P1'</b> is valid priority of <b>P2'</b> is invalid
Legal background:	T194/84 (disclosure test)	G2/98

#### 4.3.1. Amendment

The legal requirement of an allowable amendment is that it does not extend the subject-matter with respect to the original application. In the present example only the specific feature **C1** (steel) is disclosed in the original application, hence the evaluation of patent claim variant **P2'** comprising the more generic feature **C** (magnetic material) is false, which is interpreted in the legal language such that the subject-matter covered by claim variant **P2'** consists an unallowable extension of the original patent application contravening Art. 123 EPC.

Turning to current case law, according to decision T194/84 an amendment extends the subject-matter if as a result of the amendment the person skilled in the art is presented with new information which is not directly and unambiguously derivable from the content of the patent application as filed (so-called disclosure test). In the present example the same result is reached by applying the disclosure test of decisions T194/84 as with the logic model: the general teaching implies additional information with respect to the original specific teaching.

Former case law applied the so-called novelty test of decision T201/83 for determining the allowability of an amendment. According to the novelty test the amendment is unallowable only if the amended patent claim is novel over the original patent application. The novelty test would be unable to detect extension of the subject-matter in the present example as the generic invention is not novel over a specific disclosure as we have seen in section 4.1.2.

**Conclusion:** This is a clear example of how the logic model would have been able to predict a situation in which the former case law decision T201/83 would have proved inadequate. It can also be established that current case law decision T194/84 is consistent with the logic model.

#### 4.3.2. Priority

In the case of examining priority, the first thing to be noted is that Art. 88(2) EPC explicitly allows for claiming multiple priorities in respect of a single patent claim. Accordingly, the validity of the priority claim in respect of each patent claim variant should be examined independently.

The first claim variant **P1'** corresponds to the invention **P** disclosed in the priority application, it may thus benefit from the date of priority. However, the second claim variant **P2'** does not read onto the priority application, and the priority claim is invalid in respect of **P2'**. This is reflected by the evaluation of the two claim variants: **P1'** = true while **P2'** = false.

In former case law decision T828/93 the Board of Appeal found that the possibility of claiming multiple priorities for a single patent claim is only available in respect of OR-claims (claims containing explicit alternatives). Thus T828/93 is unable to handle the present situation where the patent claim feature **C** takes the form of a generalisation with respect to the specific feature **C1** disclosed in the priority application.

In decision G2/98 the Board expanding the concept of OR-claims and drew the conclusion that a generic term or formula encompassing specific features may also benefit from different priorities in respect of the different specific embodiments falling within the scope of the generic patent claim.<sup>32</sup>

**Conclusions:** The logic model makes it clear that a generic claim describes alternatives in the same way as OR-claims do. The present model could have helped recognise the inadequacy of the guidelines given in T828/93 and could have pointed to the more complete rule of G2/98.

<sup>32</sup> "(...) where a first priority document discloses a feature A, and a second priority document discloses a feature B for use as an alternative to feature A, then a claim directed to A or B can enjoy the first priority for part A of the claim and the second priority for part B of the claim. It is further suggested that these two priorities may also be claimed for a claim directed to C, if the feature C, either in the form of a generic term or formula, or otherwise, encompasses feature A as well as feature B" (G2/98, Reasons of the decision, point 6.7).

## 5. The hidden logic behind the EPO's case law

The EPO established the patent claim feature approach as an objective method for assessing the patent claims in a self-consistent way. Former divergent interpretations, which would not fit into the present logic model, were found to be logically inconsistent (see all the non-uniform case law calling for the decisions of the Enlarged Board of Appeal) or to be unsatisfactory for regulating all aspects of a certain question (e.g. the novelty test was inadequate for screening out all types of amendments that would extend the subject-matter). Over the past decades the EPO's case law has gradually turned to the presently applied patent claim feature approach, the logical consistency of which is apparent from the fact that it can be modelled by a logic model. Albeit, minor inconsistencies may remain, but the trend indicates that the EPC system is self-regulating in the sense that it allows for over turning logically inconsistent decisions.

Although the EPO's patent claim feature approach can be regarded as a product of the grant procedure dealing with practical issues related to the patentability of an invention, I am going to demonstrate that this approach is equivalent to stipulating that the scope of protection should be interpreted on a feature-by-feature basis.

A patent is a right *in rem*, i.e. a right competent, or available, against all persons. Accordingly, when granting a patent, when examining the validity of a patent and its priority claim, as well as when enforcing a patent the central issue is always the legal position of the patentee with respect to third parties. The legal position is defined by the scope of protection, hence

(i) the purpose of examination as to novelty is to ensure that the scope of protection does not encompass the state of the art (which either belongs to the public domain or to somebody's private intellectual property);

(ii) the purpose of deciding on infringement is to enforce the patentee's intellectual property rights against unauthorized use of any embodiment of the invention (and possibly equivalent variations thereof) falling within the scope of protection;

(iii) the purpose of examining any amendment of a patent application is to ensure that the scope of protection is not broadened beyond the subject-matter disclosed in the original application as filed in order not to give unwarranted advantage to the applicant, while the purpose of examining any amendment of a granted patent is to ensure that the scope of protection is not broadened in an absolute sense for the legal certainty of third parties;

(iv) the purpose of examining priority is to draw a clear line between what constitutes the state of the art which may not be encompassed by the scope of protection, and any later disclosure or intellectual property right, which should not invalidate the applicant's/patentee's claim to patent protection.

It is interesting to note that all four aspects of patent claim assessment relate to the scope of protection, the interpretation of which, however, is not within the EPO's jurisdiction. I will now demonstrate that the EPO's patent claim feature approach applied for the examination of novelty, amendments and priority amounts to the postulation that the scope of protection is assessed on a feature-by-feature basis as well in accordance with the EPO's patent claim feature approach.

When assessing novelty the competent authority must ensure that any solution belonging to the state of the art will not fall within the scope of protection. In the feature-by-feature patent scope approach the prior solution is covered by the examined patent claim if each and every claim feature reads onto the solution. In the latter case the authority must declare the patent claim non-novel in order to bar the intellectual property right from

coming into force as that would lead to privatization of the public domain or to collision with a third party's prior rights. Hence assessment of novelty means assessing whether or not the prior solution falls within the scope of protection of the examined patent claim. If the scope of protection is determined by the EPO's patent claim feature approach, so must novelty be.

As regards amendments, an amendment must not result in the scope of protection modified so as to encompass embodiments potentially belonging to the public domain or to a third party's property rights. The EPC system does not bar the applicant from altering the desired scope of protection, consequently, up to grant all embodiments disclosed in the patent application (and not already belonging to the state of the art) may potentially form the basis for a claim to patent right—third parties are expected to respect this and refrain from exploiting any such embodiments before grant. When the patent is granted the limits of the associated intellectual property right are also set. Rights associated with embodiments falling within the scope of protection form part of the patentee's intellectual property rights, whereas all embodiments lying outside of the scope of protection become part of the public domain. Hence the requirement in respect of amendments is twofold. Before grant the scope of protection may not be altered so as to encompass anything lying outside of the subject-matter disclosed in the original application as filed, since any undisclosed embodiments may have become part of the public domain or of a third party's property rights since the filing date. The grant has for effect that the public domain is expanded by any subject-matter disclosed in the original application as filed but not encompassed by the scope of protection of the claims as granted, hence on the one hand an amendment of a granted patent may not extend the scope of protection to any such subject-matter originally disclosed but having been abandoned to the public domain and on the other hand to undisclosed subject-matter. In order to ascertain the allowability of an amendment the authority is required to examine whether as a result of the amendment the scope of protection extends to new subject-matter (originally not disclosed) or subject-matter abandoned to the public domain by virtue of the grant. If the scope of protection is determined based on the patent claim feature approach, consequently the examination of pre-grant or post-grant amendments should be carried out in the same spirit.

Validity of a priority claim is a preliminary question to defining the state of the art for the purpose of examining novelty of the patent claim. An invalid priority claim leads to the patent claim being refused or revoked only if there is relevant prior art or prior right falling within the intermediate period between the priority date and the filing date. If the scope of protection of a patent claim embraces embodiments that were not present in the priority application it may occur that such an embodiment became part of the public domain or a third party's intellectual property before the filing date of the examined patent application. The embodiment having become prior art or prior right may no longer be monopolized as a result of a subsequent filing. Thus priority can only be acknowledged in respect of patent claims the scope of which only embraces embodiments that were already disclosed in the priority document. Since we postulated that the scope of protection should be assessed based on the patent claim feature approach, the same approach must be applied for assessing the validity of the priority claim, too.

In view of the legal role of the patent claims, the true meaning of the EPO's patent claim feature approach is the assumption that the scope of protection should be interpreted on a feature-by-feature basis. The EPO has no direct influence on the interpretation of the scope of protection, however, by imposing the application of the patent claim feature approach in assessing the validity of a patent consistency of the EPC system requires that

the scope of protection be assessed on a feature-by-feature basis in patent infringement law suits as well. In other words, whatever standards are applied in the grant phase these should be taken into account when enforcing the resulting intellectual property right.

## 6. Conclusion

In the present paper I have introduced a logic model for the legal examination of European patent claims and shown its application in four different fields (assessment of novelty, infringement, allowability of amendments, and validity of a priority claim). I have shown that while findings based on case-law require the application of various decisions of the Boards of Appeal and Enlarged Board of Appeal, the proposed logic model provides for a common approach in all three fields of patent claim examination.

The logic model is based on mathematical logic and yields—in the illustrated situations—the same result as case-law would dictate. This indicates that current case-law has evolved into a logically highly coherent system. There are however, particular situations (not discussed here) wherein the logic model is in conflict with the current case-law. In such situations the results obtained from the logic model can help detect hidden inconsistencies of the case-law. I have shown a few specific examples where earlier case-law has been overturned by more recent decisions reflecting the logical requirements that could have been revealed by the logic model in advance.

This paper cannot endeavour to discuss every possible situation that may arise under each field of patent claim examination; however, I have applied the logic model to other situations as well obtaining various interesting results. In my view a logic approach to patent claim assessment would be desirable for reviewing current case-law as well as for assisting future decision making possibly in the form of a computerised expert system based on the logic model. The logic model is not designed to substitute the patent professionals nor will it eliminate subjective considerations, it is merely a supporting tool as is mathematics in all fields of technology and natural sciences.

## KALEIDOSCOPE

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### The Hungarian EU Presidency– A Newcomer’s Experience in a Novel Institutional Framework

#### I. Introduction

In the first half of 2011 Hungary held the rotating Presidency<sup>1</sup> on top of the Council for the first time since joining the EU. The exercise of the presidential functions was influenced by the fact that the Treaty of Lisbon significantly reshaped the position of the rotating Presidency in the architecture of the European Union. The Spanish-Belgian-Hungarian Trio Presidency has been already carried out within the revised institutional framework which required a new style to accomplish the proper function of the Presidency. That means an entirely different approach which enables the successful cooperation of the country holding the presidency with the new leaders on the floor, namely with the permanent President of the European Council and with the High Representative for Foreign Affairs and Security Policy (HR).

These institutional changes effectuated by the Treaty of Lisbon as well as the Hungarian Presidency itself make sense of an analysis with respect to the new institutional model; moreover to the challenges and achievements of the Hungarian Presidency. For that reason the following article describes the institutional background along with the most important functions of the presidency, which is followed by an overview of the Hungarian Presidency’s work and the main conclusions.

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<sup>1</sup> The institution in question was called initially as “Presidency of Council of Ministers”, nowadays the Treaty of Lisbon applies the term “The Presidency of Council configurations”. The unofficial wording uses also other forms, e.g. “rotating Presidency”, “Council Presidency”, “EU Presidency” etc. Even if the informal terminology do not reflect on the new institutional framework set down by the Treaty of Lisbon and can lead to misunderstandings because of its easily confusable character with the European Council’s permanent President, we apply the before mentioned formulations as synonyms.

## II. The EU Presidency model after the Treaty of Lisbon

1. In general sense, the EU presidency serves to carry out the leadership model of the European Union,<sup>2</sup> but it is noteworthy that the EU as a “sui generis” organisation is standing out from the traditional models of international organisations regarding leadership functions. In the traditional organisations the leadership and the management functions are completed within separate institutional frameworks, however in the Community model designed by *Jean Monnet* these functions institutionally could not be detached from each other. Both leadership and management functions—as classic and general political leadership tasks—have fallen into the competence of the Member State holding the actual rotating Presidency. Thanks to this unique institutional approach the centre of these functions was the Council of Ministers as well as the European Council which were led by the rotating Presidency for decades.

But the tasks and competences of the Presidency were quite larger than the general leadership and management over the Community institutions. As a result of the Community’s development, the expansion of its activity as well as the enlargement of its competences to new domains, the rotating Presidencies should take progressively more and more administrative and managerial tasks in hand, as a consequence of which the Presidency became a general “administrator” whilst it should also take responsibility for determining the political agenda of the EC (later of the EU). This “double undertaken”, i.e. the administrative as well as the political overload of the Member State chairing the Council brought to surface several problems which could not be tackled by adequate institutional solutions until the Treaty of Lisbon. This Treaty reform has changed fundamentally the role of the rotating Presidency in view of the fact that the Lisbon Treaty has introduced new players on top of the European Union.

2. In this perspective the most substantial amendment of the Lisbon Treaty was the setting up of a permanent President of the European Council.<sup>3</sup> The President has been appointed for a two and a half year term in a qualified majority vote of the European Council. The President’s work is mostly administrative, as she or he is responsible for coordinating the work of the European Council, hosting its meetings and reporting its activities to the European Parliament after each meeting and at the beginning and end of his or her term.<sup>4</sup> In other words most of the tasks relating to the European Council which was exercised earlier by the Member States holding the Presidency, came under the influence of the permanent President. Therefore the rotating Presidency obviously lost its power in that level. The most significant and visible change concerned the role of the Prime Minister or Head of the Member State holding the rotating Presidency. It is because, till the Treaty reform she or he was entitled to prepare and to lead the meetings as well as to coordinate the activities of the European Council but all these competences were undertaken by the new permanent President of the European Council following the Lisbon amendments.

<sup>2</sup> In general, see: Hayes-Renshaw, F.–Wallace, H.: *The Council of Ministers*. London, 1997; Tallberg, J.: *Leadership and Negotiation in the European Union*. Cambridge, New York etc., 2006; Vörös, I. (ed.): *Az EU-elnökség [The EU-Presidency]*. Budapest, 2010; Westlake, M.: *The Council of the European Union*. London, 1999.

<sup>3</sup> Article 15 Para. 5 of Treaty on European Union (TEU). For this position, Herman van Rompuy has been appointed in 2009.

<sup>4</sup> Cf. with Art. 15 Para. 6 TEU

The other essential change has occurred in the position of the rotating Presidency regarding the foreign and security policy matters. The power of the Council Presidency in this field of external policies was already touched upon by the European Political Cooperation (EPC) introduced in the ‘70s and as a result, the Presidency came to give the common voice for the EC/EU at international level until the Treaty of Lisbon entered into force. Under the modified Treaty, the permanent President—not the rotating Presidency—is to provide general external representation to the Union, although these tasks and functions are shared with the High Representative of the Union for Foreign Affairs and Security Policy (HR).<sup>5</sup> This “new-old” position which has been commonly likened to a “foreign minister” for the EU,<sup>6</sup> gives the power in hand of a strong player. The HR is appointed by the European Council acting by qualified majority and it may end his term of office by the same procedure. Following the Treaty of Lisbon, the HR conducts the Union’s common foreign and security policy and contributes by his or her proposals to the development of that policy. The position is assisted by the European External Action Service<sup>7</sup> and the HR plays also important role within the Council of Ministers and the European Commission. Namely, she or he presides over the Foreign Affairs Council and sits in the Commission as one of its Vice-Presidents.

That “double hat” arrangement arising from the Lisbon amendments serves the institutional fusion of the foreign policy which helps to ensure the consistency of the external action at the whole Union level. At first sight, an institutional model which is able to bring the Commission’s operation into line with the activity of the Council, makes a definite contribution to ensure more efficiency in the field of the external policies. However, it cannot be overlooked, that linking personally the Commission and Council together can be a point of great nicety from the legal perspective. It can be said that the High Representative has the right to propose in the field of external relations, and as the HR chairs also the Foreign Affairs Council, apart from certain exceptions, has also influence on deciding about these proposals, and finally, the Council may empower the HR in order to implement these decision. In other words, some aspect of preparation, deliberation or decision and implementation is concentrated in HR’s hand. It is difficult to deny that the operation of the HR is determined by not only legal, but dominantly by political factors, and the personal association of these institutions can make the EU’s political decision-making in the field of external policy fields more efficient. Even if it would have positive effect from the point of efficiency, the power concentration in the hands of HR can be detrimental to the normative legitimacy of EU’s external action.

As regards the organizational background, it can be stated that neither the Treaty of Lisbon gives the status of “Union institution” to the presidency. The TEU refers to the

<sup>5</sup> Article 18 TEU. The position is currently held by Catherine Ashton.

<sup>6</sup> The predecessor for this position—frequently called as “Mrs/Mr CFSP”—was introduced by the Treaty of Amsterdam. Javier Solana held the post for ten years until he was replaced with Catherine Ashton within the new institutional framework. The term “foreign minister” can be derived from the draft European Constitution under which this position was titled “Union Minister for Foreign Affairs”. The Treaty of Lisbon shaped out the institutional face identical to the rules of the European Constitution, but its title, on British initiative, has been changed.

<sup>7</sup> The setting up of the Service was launched in December 2010.

presidency among the rules on the Council only with laconism. According to the Treaty, the “Presidency of Council configurations”, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation.<sup>8</sup>

### III. Main Functions of the EU Presidency

#### 1. *Leadership function: governing the Council*

As it was set out above, the Member State holding the Presidency has suffered the major power loss in relation to the role of an EU wide political leader. In this respect the Presidency is obliged to cooperate with the above-mentioned permanent President of the European Council as well as with the High Representative. Consequently, the scope of the Presidency’s leadership function is already limited to the Council of Ministers.

The EU Presidency conducts and organises the operation—including the day-to-day business—of the Council. The Council configurations, Coreper and preparatory bodies of the Council are chaired by the delegate of the Member States holding the Presidency, except in cases where the leading of the body in issue falls within the competence of the HR. Among the directed bodies, the General Affairs Council is highly important for the reason that this organ is responsible for coordinating the efforts made by the Council configurations. The General Affairs Council has to deal with the horizontal questions regarding the EU institutions as well as horizontal policy matters which extend over more Council configurations’ competences. Besides the General Affairs Council, also the Coreper is a crucial forum responsible for the preparation of the decisions. The Coreper is lead by the permanent representative or her/his deputy of the Member State holding the rotating Presidency. The realising of the leadership function requires the Presidency’s sophisticated abilities to trouble-shooting, problem-solving, as well as consensus-making.

#### 2. *Function of proposing: setting out the priority objectives and drawing up the agenda*

In line with the function of proposing, the Presidency is capable of influencing the main direction of the Council’s work as well as the developing tendency of the whole European Union. On account of the specific institutional structure of EU, the function of proposing can be interpreted in this term rather political capacity than legal competence, because the function of proposing, from legal perspective, lies within the competence of the European Commission. The Member State holding the rotating presidency is able to determine the half year programme, to set down the chief priorities. And more concretely, the Presidency decides on the agenda of Council meetings and in cooperation with the permanent president, it may have influence on establishing the political agenda of the European Council.

In a broad view, the specification of the EU’s main objectives is framed with a three level programming which sets a limit to the Presidency’s playing field. The highest level is the Union’s multiannual programme which establishes the fundamental tendencies. The General Affairs Council should ensure consistency and continuity in the work of the different Council configurations in the framework of this long-term multiannual programmes.<sup>9</sup>

<sup>8</sup> Article 16 para. 9 TEU.

<sup>9</sup> Cf. Art. 3 of European Council 2009/881/EU decision on the exercise of the Presidency of the Council.

The 18 months programme of the Presidency “trio” marks the next level of the programming. According to the present practice, the Trio Presidency programme is worked out by the Member States of the trio, and they should present it in consolidated document at latest one month to the term of the actual trio presidency. As a final point, the half year term programme of the Member States holding the rotating presidency should fit in these before mentioned framework, i.e. in the multiannual as well as in the Trio Presidency programme. Practically, it means that the Presidency which is to hold office in the relevant period should establish draft agendas for Council meetings, for each Council configuration, scheduled for the next six-month period, showing the legislative work and operational decisions envisaged.<sup>10</sup> These draft agendas shall be established at the latest one week before the beginning of the relevant six-month period.

In line with these general programming frameworks, the Presidency is able to exercise its capacity directly in order to determine the concrete, daily agenda of the Council, and, only implicitly, can put pressure on setting up of the agenda of the European Council. Regarding the Council’s agenda, the function of proposing becomes visible in the preparation of the Council’s meetings, consequently this function manifests in the activity, operation of the ministers and their staff responsible for preparing and chairing the meetings of the Council configurations. As a result of the amendments of the Lisbon Treaty, however, the Presidency’s ability to put items on the agenda of the European Council has become indirect. The permanent President is responsible for setting up the agenda of the European Council, but it is required to enter into negotiation with the General Affairs Council on this issue. In other terms, the Member State holding the EU presidency can practise influence on the agenda only within these negotiations, but the content of the provisional agenda is to be finalized by the permanent President of the European Council. Nevertheless, this influence capacity of the EU presidency should not be underestimated. If the Council of Ministers cannot bring certain legislative proposal to decision, the disputed topic can be referred to the European Council in the expectation that the head of states and governments will be able to reconcile the questionable points and make a consensus at higher political level. That is why the permanent President should always take into consideration the impulses arising from the Council, namely the proposals made by the General Affairs Council which is in fact chaired by the Member State holding the actual rotating presidency. Consequently, the obligation to initiate negotiation with the General Affairs Council is not only a formal rule.

### *3. Function of representation: mediation of the Council’s position*

The function of representation implies tasks with internal as well as external aspects. This function means in a general approach that the EU presidency speaks for the Council in internal relations within the Union’s organisation and on the other hand, the Presidency should practise also certain competences for representing at international level within the external relations.

As regards the internal side, it can be stated that the highest responsibility is undertaken by the Presidency for the co-operation with other institutions. Accordingly, the Presidency is involved in the decision-making procedures in which the Council is obliged to co-operate and consult with other institutions; moreover the daily work of the Council demands certain formal as well as informal negotiation with other bodies of the EU. More concretely, the

<sup>10</sup> Article 2 para. 7 of Council’s Rules of Procedure. Adopted by Council 2009/937/EU decision.

Council is responsible for preparing and ensuring the follow-up to meetings of the European Council and for this reason it should confer with the Commission (besides the permanent President). Moreover, the Council bears the same consultative obligation with the Commission regarding the preparation of its six month draft agenda.<sup>11</sup> Concerning the external representation, the Treaty of Lisbon resulted in substantial loss of power of the Member State holding the six-month long Presidency. Prior to that, the external representation on the field of foreign and security policy matters fell within the competence of the rotating EU Presidency. Contrary to that, after the Treaty reform the Member States have been relegated to background in this respect. The High Representative became the most dominant player of the foreign policy and the Member State chairing the Council is bound to close co-operation with the person holding this post.

#### *4. Administrative function: managing and operating the Council's work*

The administrative function refers to the most general and widest administrative tasks of the Presidency, but in all probability, the workload caused by administering the day-to-day work of the Council remains quite unknown to the publicity.

This function can be taken to mean the administrative tool behind the above described main functions. In other words the administrative function is linked subsidiarily to the other main functions, it ensures the administrative background of managerial, proposing and representative duties of the Presidency, from preparation of decisions through deliberations to their publication. It can be mentioned that the configurations of the Council meet when convened by the President (and also its members as well as the Commission may propose the meeting of the Council).<sup>12</sup> In this respect the Presidency should synchronise the Council's schedule also with the meetings of the preparatory bodies and the Coreper. The chairing of the Council meetings includes also administrative tasks. The president of the Council configuration—in fact the minister of the Member State holding the Presidency—initiates the voting as well as the president is required to open a voting procedure on the initiative of a member of the Council or of the Commission, if it is backed by the a majority of the Council's members.<sup>13</sup> Among the organisational tasks of the president it can be mentioned that he or she has to check that there is a quorum when the vote is taken. In this regard the president can rely on the assistance of the General Secretariat none the worse for the complexity of the voting rules laid down by the Treaties.<sup>14</sup>

But in addition, as a consequence of the Presidency's growing administrative workload, it is generally essential to establish a harmonious cooperation between the Presidency staff and the General Secretary, because the Secretary as a neutral, professional background institution can give security for the smooth continuity of the subsequent rotating Presidencies. The Council's Rules of Procedure lays down general obligation to cooperation, since the Council shall be assisted by a General Secretariat.<sup>15</sup> Besides that, the Secretary should undertake several technical tasks as well, for example, the Secretary organises the written decisions making procedures; it issues the passes to admission to meetings of the

<sup>11</sup> Article 2 para. 7 of Council's Rules of Procedure.

<sup>12</sup> Cf. with Art. 217 of Treaty on the Functioning of the European Union (TFEU).

<sup>13</sup> Article 11 para. 1 of Council's Rules of Procedure.

<sup>14</sup> Article 11 para. 4 of Council's Rules of Procedure.

<sup>15</sup> Article 23 para. 1 of Council's Rules of Procedure.

Council; or the minutes of meetings should be signed by the Secretary-General (or in case of delegation, by the Directors-General of the General Secretariat); etc.

It can be concluded that the General Secretariat is closely involved in organising, coordinating and ensuring the coherence of the Council’s work. Furthermore, it is also in Council Presidency’s own interest because as the experiences from the previous Presidencies’ terms show, the excellent teamwork with the staff of the Secretary can give partly the clue to a successful Presidency term.

#### **IV. The Council Presidency in Practice: the Hungarian EU Presidency**

The Spanish-Belgian-Hungarian Presidencies made “Trio Presidency” become the first “institutionalized” presidency by the Treaty of Lisbon, and which since the entry into force of the Treaty of Lisbon at the end of 2009 not only had to provide a kind of continuity for the Union, but also the Spain-Belgium-Hungary formed group had to perform next to new institutional actors, as mentioned and analysed before. As a member of the trio, Hungary’s first Presidency faced challenges, which represented the largest European risk of the first half year: the indebtedness problem of the EU Member States, the unprecedented difficulties in economic situation,<sup>16</sup> the weakening of the euro-zone and the efforts for strengthening the economic governance. Furthermore, almost as an answer to the Presidency’s “Strong Europe” motto, the events regarding the “African Spring” and the Japanese earthquake had to be faced as well, not to mention the criticism and debates in the European Parliament about Hungarian internal affairs, namely about the new media law and the new constitution.

##### *1. Preparation of the Hungarian Presidency and the priority of the program*

The three Presidency Bureau established the so-called “EU Trio” Committee, which organized the eighteen-month-long European agenda under the direction of the presiding state. The 18 months-long cooperation of the Trio Presidency was detailed in a Trio Presidency program<sup>17</sup>: the first part of the program, the strategic framework, consisted of main priorities and long-term goals, while the second part, the operative program gave full particulars about the first part.<sup>18</sup> In the frame of the Hungarian Presidency, the successful arrangement of the nearly 260 Hungarian events<sup>19</sup> was organized with the help of about 800 officials under the aegis of the Ministry of Foreign Affairs. Furthermore, to ensure the background and the close cooperation with other EU institutions, the Permanent Representation in Brussels has been strengthened and the personnel of the ministries have been increased by 225 people. As the Ministry of Foreign Affairs was responsible to coordinate the EU related work, it has grown the most.

Other changes made were that the EU State Secretariat of the Ministry of Foreign Affairs has been enlarged by three new temporary departments, and the government

<sup>16</sup> Jose Manuel Barroso about the challenges of the Hungarian EU Presidency. In: *Az EP elfogadta a magyar elnökségi programot* [The EP approved the presidency-program]. Brüsszel, 2011. január 19. <http://bruxinfo.hu/cikk/20110119-az-ep-elfogadta-a-magyar-elnoksegi-programot.html> (10.10.2011)

<sup>17</sup> See Friedery, R.: Spanyol elnökség [Spanish Presidency]. In: Vörös (ed.): *op. cit.* 183.

<sup>18</sup> <http://www.eu2010.es/en/presidencia/trio/> (10.10.2011)

<sup>19</sup> The Presidency’s budget totaled HUF 23,78 billion, which is around EUR 85 million. <http://www.eu2011.hu/hu/az-elnokseg-koltsegvetese> (10.10.2011)

appointed two government commissioners, one for the operational management and another one for coordinating Hungarian government activities in connection with the EU Strategy for the Danube Region.<sup>20</sup>

## 2. *Main targets–main achievements*

The Hungarian Presidency put a variety of economic issues, common policies, enlargement targets into its program which was built around top four priorities:

1. growth and employment for preserving the European social model,
2. stronger Europe,
3. citizen friendly Union,
4. enlargement and neighbourhood policy.<sup>21:22</sup>

1. The first above-mentioned priority of the ambitious program had the important task to make steps in the reinforcement of the economic policy co-ordination, and in connection with this Hungary launched the first European Semester, a new economic policy co-ordination. Already during the Belgian Presidency, a Council working group has been set up for the coordination of the Member States' economic policy, which started the discussions on creating the legal bases, the so-called six pack of the EU economic governance. The Hungarian Presidency had the main part of the work, the lion share in the negotiations, and though agreement was reached in the March Ecofin<sup>23</sup>, the Parliament postponed the vote because they could not agree about an important voting technique until the end of the Hungarian presidency.

Still in this priority-group, the presidency introduced a new issue, namely to start EU discussion about European-level measures in the field of integration of the around 12 million Roma-people of the EU. It was not all without reason because Hungary has significant number of Roma people, too. The success was reached thanks to the integration of the sometimes quite diverse positions of the Member States. Thus, the Council of Social Ministers adopted a final document about the Framework for Roma Strategy, which was based on the Commission's Communication "An EU Framework for National Roma Integration Strategies up to 2020" of 5 April 2011. Council conclusions have been reached about the EU-framework of national Roma integration strategies until 2020, where Member States work out their action programmes that will be monitored annually by the Commission and the results reported to the Parliament and the Council.

A major step could be made regarding competition policy, in the issue of the unitary patent. After decades-long debates, again with the help of intense negotiation, the Presidency could find thirteen more Member States next to the original twelve who had initially requested for the enhanced cooperation. With twenty-five members, an agreement could be sealed on allowing in the future (from 2014) the use of a new European patent system.

2. One of the main issues of the "Stronger Europe" priority, and personally important to Hungary, was the European strategy on the development of the Danube-region, whose model was the successful Baltic Sea Strategy. As it could be finished in time according to the preliminary program negotiations, the result of several years of preparatory work and

<sup>20</sup> <http://www.eu2011.hu/hu/magyar-elnokseg-strukturaja> (10.10.2011.)

<sup>21</sup> *Program-Az Európai Elnökség Tanácsának Magyar Elnöksége* [Program-The Hungarian Council Presidency]. 2011. január 1–június 30. A Magyar Köztársaság Külügyminisztériuma, 2011.

<sup>22</sup> <http://www.eu2011.hu/hu/magyar-elnokseg-prioritasai> (2011.10.10.)

<sup>23</sup> Economic and Financial Affairs Council, see more Vörös (ed.): *op. cit.* 226.

consultations paid off, hence it has been approved at the closing summit meeting. Obviously, the adoption strengthens the future role of the macro-regional approach, too: the Council conclusion approving the strategy called on the Member States to work with the Commission to continue the improvement of the macro-regional co-operation, specifically referring to the Adriatic and the Ionian Sea region as the future target area of next macro-regional cooperation.<sup>24</sup>

In the field of energy policy, it was the first time that during a Presidency energy debate on the level of heads of states and governments took place. The Energy Council adopted conclusions on energy infrastructure priorities, on the overview of energy efficiency directive, on the realization of internal market completed by 2014. In June, Member States approved a draft compromise proposal presented by the Hungarian Presidency, aiming to close the negotiations with the European Parliament on the Regulation on energy market integrity and transparency. The Council also started negotiations on the EU External Energy Policy thus for the better coordination of EU and Member States’ external energy policies.

Also, an extraordinary Energy Council meeting was held in March, where the challenges of the Japanese nuclear developments, and as its consequences the issue of energy security, global energy sector, as well nuclear energy was discussed. Thanks to the flexible reaction of the Presidency, after two months work the adoption of nuclear stress test criteria for the European nuclear plants could be agreed.

3. Regarding citizen-friendly Union, the Council approved the regulation on the European Citizens’ Initiative, with detailed conditions under which citizens can take the initiative at the European Commission to make legislative proposal towards a joint EU action.

Another issue was the Schengen membership of Romania and Bulgaria. For Hungary, it was another personally very important target to reach. However, some Member States were not convinced, and hesitated about their preparedness of joining the Schengen-area, therefore only (or at least) a political declaration could be achieved about the technical preparedness of these two states.

We should mention the important steps made during this Presidency toward the Common European Asylum System, with the amendment of the long-term residence directive, which extended the scope of the directive to beneficiaries of international protection and with the compromise achieved with the European Parliament regarding the qualification directive (except for one horizontal political question, the correlation tables).<sup>25</sup>

4. As for enlargement and neighbourhood policy, next to holding the chair on the Western Balkans Forum, the other main priority, the closing of the accession negotiation with Croatia was successful. Also, steps were made in the accession negotiations with Iceland, namely four chapters were opened and two were already temporarily closed. In connection with the North-African events, after the Lisbon Treaty the Hungarian presidency was the first Presidency when the European Foreign Service as the foreign policy decision-making body of the EU has come into action: on this ground the foreign minister of the

<sup>24</sup> See Horváthy, B.: *A Duna Régió Stratégia a magyar uniós elnökség tükrében* [The Danube Strategy in the Light of the Hungarian EU Presidency]. *Jogi iránytű*, 2011/3. on [http://www.mta-ius.hu/jogi\\_iranytu/iranytu.html](http://www.mta-ius.hu/jogi_iranytu/iranytu.html) (2011.10.10.)

<sup>25</sup> See more Friedery, R.: *A huzamos tartózkodási jogállásról szóló 2003/109/EK irányelv hatályának kiterjesztése a nemzetközi védelmet élvező személyekre* [Amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection]. *Jogi Iránytű*, 2011/2. on [http://www.mta-ius.hu/jogi\\_iranytu/iranytu.html](http://www.mta-ius.hu/jogi_iranytu/iranytu.html)

actual Presidency has only a complementary and supporting role. Besides this, the Presidency has activated, on Member States' request, the EU Civil Protection Mechanism in co-operation with the Commission for Libya and for Japan, which supports and facilitates the mobilisation of emergency services to meet the immediate needs of countries.<sup>26</sup>

Thus, as we can observe, one must conclude that in every top four declared priorities a very important issue could be achieved.<sup>27</sup>

## Conclusion

At first sight, the presentation of the institutional background and the functions of the Presidency suggests that with the Lisbon Treaty generated reform the Presidency loses its influence in the leading role for the benefit of the permanent president and the High Representative of Foreign Affairs and Security Policy.

There is no doubt that during the exercise of specific functions, for example in the case of the external representation tasks, the loss of role of the Presidency towards the direction of the Foreign Service is perceptible, but on the whole the overall change in the position of the Presidency should rather be evaluated more as a shift in emphasis.

The realization of the Spanish-Belgian-Hungarian Trio Presidency clearly showed that this requires a new kind of role-perception from the Member States holding the Presidency which is based—and thus is a key to success—on the effective co-operation of the new institutional actors.

Regarding the concrete results of the Hungarian presidency, as objective standards, the completed cases, the legislation adopted can be mentioned. In this regard, it can be stated that in the difficult period of the EU, in total 103 files have been solved, out of these 43 OLP legislative files with the European Parliament (20 in 1st reading, 6 in 2nd reading and 1 in 3rd reading) and 60 Council or Presidency conclusions have been adopted.<sup>28</sup>

Although because of the European Parliament's summer break the sealing of the legislative six-pack and the vote shifted to the Polish Presidency, but can be mostly regarded as one of the largest Hungarian results, because a large part of the Council agreement as well the Parliament agreement was achieved during the Hungarian Presidency.

Another big success was that despite some anti-enlargement Member States, the accession of Croatia has been completed which is, regarding the stability of the Western Balkans, a major step forward strengthening the future European role of Western Balkans. Although being important for the Presidency, in the issue of the Schengen enlargement no political decision was taken, but the completion of the technical preparations could be recorded. Other success of great importance was that a new important issue appeared on the European agenda, namely the economic and social integration of the significant number of Roma living in Europe.

It should be pointed out that diplomatically it has been seen as a great success when only the Hungarian Embassy operating in Tripoli represented the European Union, and co-

<sup>26</sup> N. Rózsa, E.: *Libya and the Hungarian EU Presidency*. Gyorselemzés, 2011/14. on <http://www.hia.hu/pub/displ.asp?id=TVYBGH> (2011.10.10.)

<sup>27</sup> <http://www.consilium.europa.eu/moresearchresultsregistry?search=council%20conclusion&lang=en>

<sup>28</sup> [http://www.eu2011.hu/files/bveu/documents/HunPR\\_49\\_-\\_27\\_06\\_2011\\_-\\_Summing-up\\_the\\_Hungarian\\_Presidency\\_0.pdf](http://www.eu2011.hu/files/bveu/documents/HunPR_49_-_27_06_2011_-_Summing-up_the_Hungarian_Presidency_0.pdf)

ordinated between the Member States during the Libya events. We should add that the Presidency put great emphasis on portraying cultural diversity, to this end, it organized many high-quality cultural programs, setting an example for future presidencies, because before no other presidency organized so much events during a half-year period.

Next to the positive achievements it should be also noted that the postponement of the second Eastern Partnership summit (the EU with Ukraine, Belarus, Moldavia, Armenia, Georgia and Azerbaijan), which was scheduled as the main foreign-policy event of the Presidency, is seen by many as a failure. An explanation for this can be that around the time a culmination of other unexpected events such as the African ones with their effects were in the centre of the EU attention. We can add to this that it cannot be regarded as a disappointment, because the emphasis was on other events with worldwide importance (including the G8 or the OECD summit). In addition, another failure seen was the common agricultural policy, where no agreement could be achieved in contrast to the cohesion policy, where Presidency conclusions set up the future principles of the Common Agricultural Policy.

Of course, every first-time Presidency's plan is to show off some impressive results at the end of its half-year period. In this case, the first Hungarian presidency responded well to the unexpected events and managed to reach some personally important targets, too.

However, not only the Hungarian but the first Trio Presidency performed well, too: often the preparatory work made by one Presidency resulted the success of the following presidency's (as in the case of the regulation on the European Citizens' Initiative (ECI) where the major part of the preparatory work was done during the Belgian Presidency, but the Hungarian Presidency signed it, or in the case of the six-pack, which was closed during the Polish presidency and also the vote took place thanks to the work of the Hungarian Presidency), thereby ensuring for which the Trio Presidency was established: continuity for the EU.



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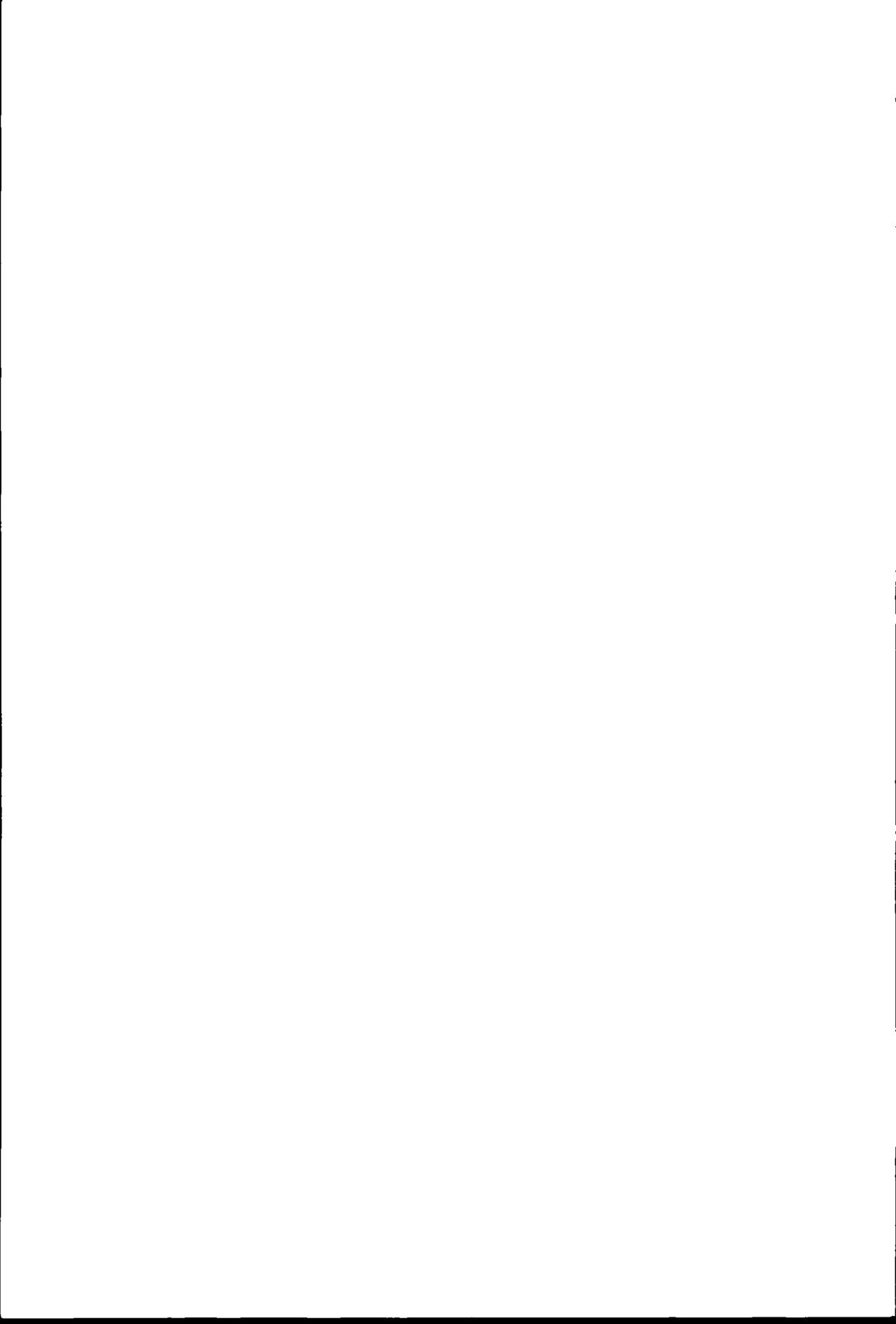
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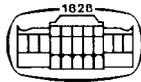
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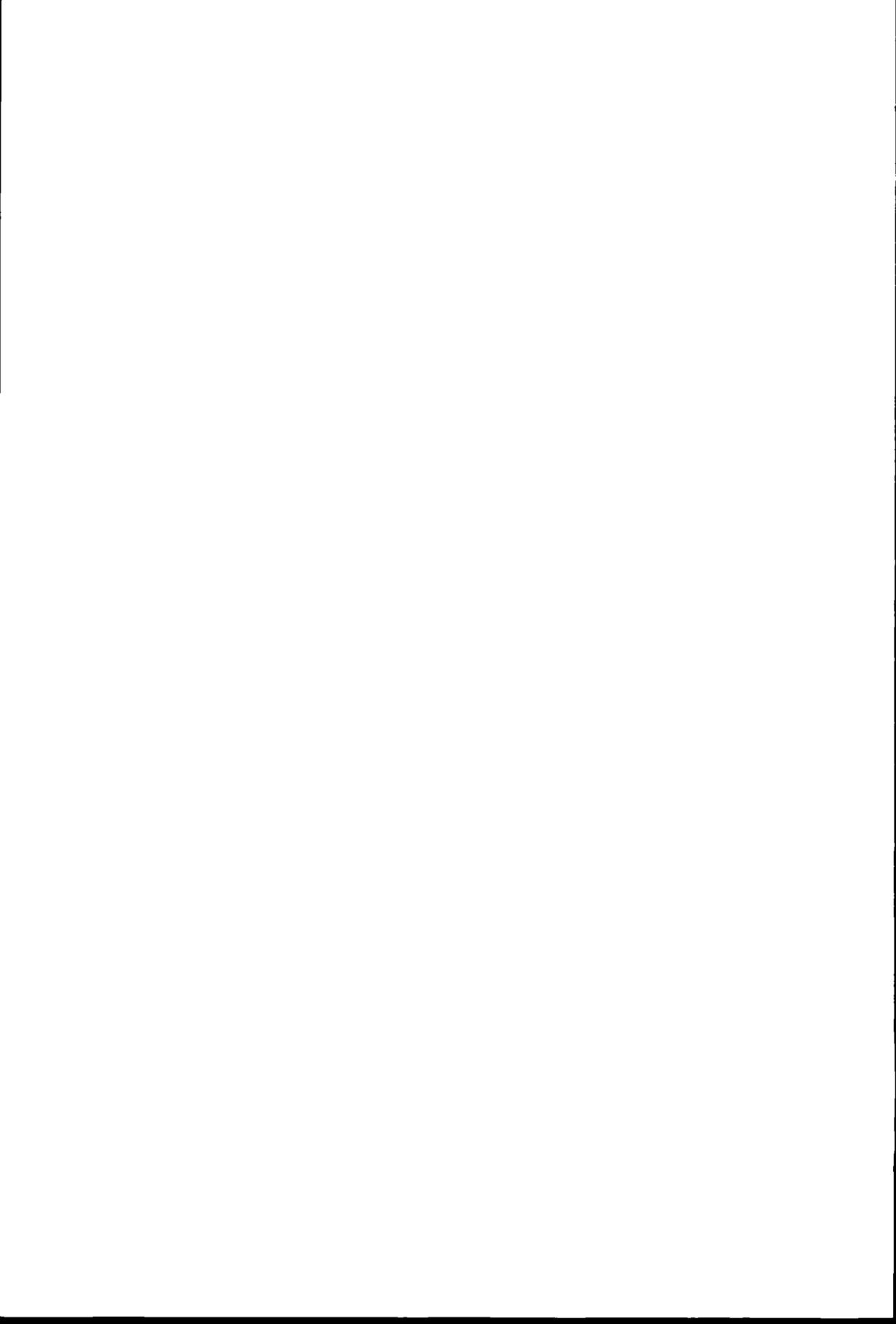
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ISTVÁN BALÁZS\*

## Eastern Europe in Transition, the Case of Hungary

### *The Readjustment of Public Administration,<sup>1</sup> Programs and Aspects of the Transformation of Public Administration in Hungary between 1990–2002*

**Abstract.** The result of circumspect and considerate preliminary work, by 1990, the system of public administration characteristic of bourgeois, democratic and constitutional states was established in Hungary. The transformation of public administration is still far from complete, since fundamental reforms encompassing both structural and functional measures, and also the unified regulation of public sector human resources, urgently need to be effectuated. The continuous and rapid transformation exhausted public administration after a period and the reform programs with low efficiency discredited the ideas promoting the necessity of reforms themselves. Public administration weary of the reforms itself became gradually not supportive of, but passively resistant to the cause of the reforms, which merely reinforced the philosophy of NPM based on a neoliberal conception of the state implying that public administration cannot be reformed from within. In certain cases Hungary was under an excessive illusion concerning both NPM and EAS, it was more responsive to them than the other countries concerned. Today, however, as a party both to the European Union and EAS, Hungary with its specific experiences can contribute to the development of European public administration.

Currently running complex program of the development of public administration alludes to a more considerate and subtle approach, which related to the consideration of international experiences sets forth that “any solution originating abroad or in the market may be applied exclusively with proper criticism and the examination of its effects.”

**Keywords:** transformation of public administration, European public administration, European Administrative Space, the reforms of public administration, regulation of public sector human resources

### 1. The First Phase

In a summary of the above-mentioned facts, we must establish that despite undeniable achievements, an unbalanced system evolved in Hungarian public administration by 1992, in which a complex and reformed, co-ordinately functioning system of local government was accompanied by an under-regulated, hierarchically organised system of state administration, the latter of which, furthermore, developed in an unsystematic manner and overgrew in some areas. By the mid-session of the first post-transformation government, it became evident that the efficient public administration indispensable for a well-functioning constitutional state required that both major sub-divisions of public administration, in order that they can provide democratic and professional services for citizens, should develop comparatively and coherently, since neither division can function self-sufficiently. In the interest of the accomplishment of this purpose, Government adopted the complex program

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<sup>1</sup> See Lamm, V. (ed.): *Transformation in Hungarian Law*. Budapest, 2007.

of the development of public administration under Decree no. 1026 of 1992 (V. 12.), the complete implementation of which, however, was unfeasible by reason of the expiration of the government session.

1.1. The subsequent Government attached great importance to the modernisation of public administration, for the realisation of which, it appointed a Government Commissioner who was put in charge of the elaboration of the medium-range reform program of modernisation within the framework of the “Bokros Scheme”, which radically limited involvement on the part of the state. The elaborated program adopted under *Government Decree no. 1100 of 1996 (X. 2.)* was forwarded to all organs of public administration as a special edition and it was published in professional / scientific journals as well. The before-mentioned law, however, did not include the program in its normative part specifying the due assignments for 1996, whereas, in its Addendum, it provided the main guidelines of medium-range reform duties under 21 points, which were specially scheduled for the government session under Government Decree no. 2039 of 1997 (II. 12.).

1.2. The objectives of the medium-range reform were formulated under *Government Decree no. 1100 of 1996 (X. 2.)*. The fundamental objective of the main guidelines specified under the Addendum was to promote

A) the consolidation of the framework and of the basic institutions of the new system of public administration established in 1990, which necessitated

- a) the recodification of the rules of administrative procedures,
- b) the reform of the system of regional organs of state administration,
- c) the elaboration of the legality supervision mechanism of local governments, etc.

These constitute elements of the stabilisation of the structure for an inefficiently and professionally functioning public administration, so that it can provide high-quality services.

B) streamlining and modernising the functioning of public administration via

- a) increasing efficiency
- b) improvement of the quality of work,
- c) elaboration of the servicing character of functioning.

The stabilisation of the structure and the modernisation of functioning were designed to promote the establishment of a properly supervised system, which proceeds more lawfully and is capable of the enforcement of its administrative decisions by adequate sanctions.

C) the establishment of the prerequisites of

- a) contingent intervention by leading officials in cases of manifestations of bureaucratism,
- b) the employment of a dependable and professional personnel, which, as to its number, is proportionate with its duties and utilises state and local government monetary assets (public funds) austerely.

The attainment of these objectives was deemed adequate to form the basis of the upgraded system of public administration.

1.3. Government that entered office in 1998 consistently affirmed that the preparation of schedules for the promotion of the purposeful development of public administration was necessary, consequently, it formulated the main duties for the years 1999–2000 under *Government Decree no. 1052 of 1999 (V. 2.)* and under *Government Decree no. 1057 of 2001 (VI. 21.)* for the years 2001–2002. Whilst, new priorities, duties and measures were also stipulated under the Commentaries of the latter laws, the projected, multifaceted concrete measures were in the main encompassed by the main guidelines formerly specified under the *Addendum of Government Decree no. 1100 of 1996 (X. 2.)*.

1.3.1. The public administrative strategy of Government for the years 1999–2000 was defined by the priorities included in the Government Program, by the experiences of public administration since the political transformation and by the obligations deriving from the envisaged accession to the EU. The relevant prospective and concrete duties for the years 1999–2000 were formulated under *Government Decree no. 1052 of 1999 (V. 21.)* (hereinafter: GD), according to which, the strategic objectives of the development of public administration were as follows:

- a) Reinforcement of the servicing character of state and local administrative organs,
- b) Establishment of a citizen-friendly, efficient and transparent system of civil service,
- c) Establishment of an achievement-oriented, firm and politically-neutral system of civil service based on professional expertise,
- d) Establishment of the basic conditions of a system of public administration, which is more apt to enforce the points of views and interests of Government, and,
- e) Guaranteeing constitutional, transparent, expeditious and professional public administrative procedures.

As the above indicate, in this period, besides the scheduled continuation of structural reforms, the necessity of the gradual upgrade of the functioning of public administration was again prioritised, which, however, also required the improvement of the strategic preparation of government decisions, the co-ordination of the implementation of decisions and of the supervision of implementation. In the following, we will itemise the major guidelines stipulated under GD:

A) *Restructuration of state administration*, which necessitated the systematic review of the scopes of duties and powers of state administrative organs.

a) In the scope of deregulation, in areas where intervention by the state was deemed unnecessary or could be effectuated by other, non-administrative instruments, the authority of state administration should be abrogated.

b) As to further maintained state administrative duties, in the scope of decentralisation, their accomplishment should be so far as possible transferred to a level closer to the relevant clients, to be administered by regional or local administrative organs or by public public as local organs of central administration. State administrative duties and powers, whenever possible, should be transferred to local governments.

c) Ministries should be exempt from the administration of concrete, specific matters of state administration, instead, they were designated to focus on strategic planning, co-ordination, provision of information, control and legal regulation.

d) The review of the barely understandable, very differently functioning and disproportionate system of the 54 central administrative organs functioning in non-ministerial form mainly as authorities, should be continued. The reinforcement of the autonomy and professional functioning of the organs in this scope was deemed necessary, whereas, their control was assigned to a Minister or to the Prime Minister in the interest of the potential effective enforcement of personal liability. (N.B., these organs gained importance in the process of accession to the EU and subsequently became clearly defined.)

e) The number of regional organs of state administration, the most important organs of the authority of state administration, decreased by a third by 1998, however, superfluous parallelisms could not be eliminated and their spheres of activity were not harmonised. Therefore, the improvement of the control and harmonisation of the functioning of regional organs of state administration by county (metropolitan) administrative offices, and thereby, the establishment of the conditions of the integrated functioning of regional state administration, were formulated as objectives.

B) In compliance with the demands of a market economy and modern public administration, the major procedural rules of the functioning of state administration needed to be revised and re-codified, so that they could supersede AGRSAP which at that time had been effective for more than forty years. The objective was to attach an adequately regulated system of legal redress to the transparent, expeditious and professional basic procedure, through a new regulation with the purpose of proper and effective sanctioning of those who infringe laws enforcing community interests.

C) A further objective consisted of the development of information and customer care systems necessary for the reinforcement of a service-oriented style of public administration, as well as in the programmatic and unified management of the information technology involved in public administration.

D) The role of the human factor in implementing public administration was deemed decisive, therefore, the array of diverse legal regulations for the legal status of the more, than 800,000 employees of the public sector was designated to be revised and potentially unified. The development of the requirements concerning the employees of the civil service was projected, so that expertise and efficiency determined the promotional system and employment security, furthermore, it was envisaged that the program for life-long civil service would be elaborated. For the purposes of guaranteeing elegant and high-standard work and intervention against corruption, it was planned that an Ethical Code of Civil Service and the institutional system required for its enforcement would be elaborated. Thereby, the establishment of such a system was envisaged that relied on a personnel in number proportionate with its duties, capable of professionally implementing its duties.

E) Further steps were intended to be taken to ensure the efficient functioning, further decentralisation and proper control (in the public interest) of the time-honoured system of local government.

a) Within that disintegrated system consisting of more than 3,100 local governments, a more efficient and professional system for the performance of duties within reasonable bounds was projected to be elaborated by way of adequate legal regulation, organisational and financial incentives. These objectives were envisaged to be attained without the infringement of the basic rights of local government via the differentiated assignment of powers and duties dependent on their respective capacities and via the encouragement of the establishment of small regional partnerships. Accordingly, the performance of state administrative duties were envisaged to be concentrated in district centres, which were to be established on the basis of the districts of public guardianship authorities (harmonised with record office centres).

b) By way of the transformation of the system of financing local government, duty and program financing was intended to be instituted, thereby, the ratio of local revenues in the total revenues of local government ought to have been increased. The compensatory support of disadvantaged local governments was envisaged to be more emphatic.

F) Finally, the elaboration of the concept of a regional system of public administration was formulated as an objective, in the framework of which, the potential future roles of county governments were to be determined with a view to the unified development of state administrative and self-governmental regions.

Since the ambitious objectives outlined above could not be implemented, they needed to be reformulated in the program for the development of public administration elaborated for the years 2001–2002, which was adopted under *Government Decree no. 1057 of 2001 (VI. 21.)*.

## 2. The Second Phase

2.1. Government that took office in June, 2002 committed to further the cause of a regional administration relying on small-regions,<sup>2</sup> also affirmed under *Government Decree no. 2305 of 2002 (X. 10.) on the Actual Tasks of Regional Development*, pursuant to which, preliminarily elaborated regional and county development programs were adopted as the basis of further planning. Under *Government Decree no. 1113 of 2003 (XI. 11.) on the Program of Modernisation of Public Administrative Services*, the major objectives of *Government Decree no. 1100 of 1996 (X. 2.)* and of GD were mostly reformulated.

Within the purview of *Government Decree no. 2198 of 2003 (IX. 1.)* on the Tasks of Modernisation of the System of Public Administration.

2.2. In compliance with the reform conceptions, the legal regulation pertaining to multi-purpose small-regional partnerships of local government was adopted in 2004.<sup>3</sup> Whereas, in the absence of a political consensus, attempts made to establish regional governments were destined to failure.

2.3. Further pertinent law adopted during government session 2002–2006, with the objective of compliance with the requirements of the modern *Rechtsstaat*, was Act 140 of 2004 on Public Administrative Procedures and Services, which replaced the former legal regulation that had been valid for nearly 50 years. As a consequence of its coming into effect, public administrative procedures are now regulated in an even more transparent manner than under the former legal regulation, and exemplary in a European context since it more powerfully underlines the function of the executive power to provide services, considerably relieves the procedural burdens of clients and facilitates expeditious and unproblematic administration of public matters. Due to the new regulation, functioning according to EU standards can be ensured, thereby, it promotes direct co-operation with foreign authorities and the extension of international co-operation. Experiences of the first year of the application of the act, which took effect as of 1st November, 2005, are encouraging, but further correction is likely to be necessary.

2.3.1. Within the purview of the act, new institutions guaranteeing the protection of clients' rights are specified, such as

a) notification of the commencement of the procedure, extension of the scope of administrative decisions that can be subject to judicial review, e.g. taking action against interim decisions,

b) electronic management of procedures,

c) admissibility of the use of native language,

d) exemption of clients from most procedural obligations.

a) According to former rules, the client did not have to be notified of the institution of the procedure in the majority of cases, therefore, it could not exercise its rights specified by law in the initial phase of the procedure. Since the particular procedural rules prescribed the obligation of notification very rarely and only exceptionally, the client was notified of the commencement of the procedure exclusively in cases specified by law. Therefore, to safeguard clients' rights, mandatory notification was stipulated under the newly effective law. Obviously, this institution has rational limitations, i.e. the notification of the client is

<sup>2</sup> See Lamperth, M.: *Az önkormányzati rendszer továbbfejlesztése (Further Development of the System of Local Governments)*. *Magyar Közigazgatás*, (2002) 11.

<sup>3</sup> Cf., Act 107 of 2004 on Multi-Purpose Small Regional Partnerships of Local Governments.

unnecessary, if a decision on the merits is promptly made in an unproblematic case, or, if notification would endanger the efficiency of the procedure.

b) Since all administrative decisions may be judicially contested, former exceptions were revoked under the act. Two new forms of legal redress are specified, such as reopening and equity procedures. In the scope of reopening the procedure, the client is permitted to initiate reopening the procedure, if, within 6 months of reaching the final detrimental decision, the client has learnt a new fact, datum or evidence, as a result of which, a more favourable decision could have been passed. A major prerequisite is that the new fact, datum or evidence had existed before the specific administrative decision was passed (but the client learnt about it subsequently). Equity procedures may be instituted, if the enforcement of the decision for a reason that occurred after passing the decision would incur grave drawbacks for the obligor. Such a reason may be the considerable deterioration of the social situation of the client.

c) The challenges of the 21st century require the insurance of a modern, adaptable and appropriately flexible system for the management of procedures. Therefore, the institution of electronic procedures and electronic communication within authorities, as well as the operation of electronic client information-systems, are admitted under the act. Accordingly, citizens may proceed electronically from their homes; however, in consistence with a non-discriminative policy, traditional, paper-based administration is sustained without imposing extra charges on the parties concerned. In fact, two options of electronic procedures are positively provided, that is, making appointments electronically with the authority and the provision of electronic information services. For that purpose, administrative organs shall operate Internet web-sites for the information of citizens about their pending affairs subject to the competence of the administrative authority.

d) In view of our EU-membership, re-grounding the rules of the use of language in procedures is a prominent element under the law. Therefore, authorities shall guarantee *ex officio* that foreign clients will not be disadvantaged by reason of the non-comprehension of Hungarian language. Hungarian citizens belonging to a national or ethnic minority as well as citizens of EU member states settled in Hungary shall be privileged, since they will be entitled to use their native language in administrative procedures.

e) It is stipulated that the client may not be obligated to obtain permission issued by other authority or the statement of the special authority for the purpose of the conduct of procedure. These obligations shall lie with the authority proceeding the basic case. Pursuant to the act, the proceeding authority may not request the verification of data not registered by the specific authority, and, for the purpose of relieving clients' procedural expenses, it is further set forth that the client may not be obligated to verify data stored in the legally prescribed register of any administrative organ functioning in Hungary.

### 2.3.2. Optional new institutions and binding rules pertaining to procedures by administrative authorities

Administrative procedures can be considered efficient, if the decisions of the authority are enforceable, and, if they take effect within a proportionate lapse of time. The objectives of framing the act included the increase of the efficiency of the enforcement procedure, however, its attainment is considerably curtailed by the limited number of experts specialised in enforcement, and occasionally, by the reluctance of the apparatus to apply force *vis-à-vis* the local population. For the purpose of increasing efficiency, enforcement services were prescribed to be established, in which expertise and public financial resources are concentrated. As a further solution, the admissibility of the establishment of authority

partnerships by local governments for the effectuation of enforcement is also stipulated under the act.

According to the general practice applied in the public administrative systems of developed Western-European democratic states, the authority does not negotiate with clients from a power position, but they mutually attempt to find a joint solution in a specific case. Conventionally, several European states successfully resort to the legal institution of authority agreement based on joint benefits, which is more efficient than an enforceable authority decision. The advantages of an authority agreement is that it is both implementable and judicially challengeable.

The admissibility of recourse to an intermediary provided by the authority is specified in compliance with the relevant recommendations of the Council of Europe and with the solutions effective in France, Sweden and Germany. Intermediaries shall perform mediation among clients, the applicant and the authority in procedures involving several parties by way of seeking the most adequate solution, provision of authentic information for clients and making proposals for the applicant and the authority for the optimal implementation of investment with due regard to the interest of the population. In most cases, the expertise of intermediaries is drawn in on matters related to environmental protection and industrial investments. Of course, the intermediary from the authority qualifies neither as a client, nor as an attorney of the clients, therefore, it shall not exercise the rights of clients or the procedural rights of attorneys and shall not be conferred the powers of the authority. Recourse to the intermediary is not mandatory, since the proceeding authority may freely adjudge its necessity in each specific case, if it is permitted under the regulations of the specific branch of law.

The observance of the terms of procedures is stipulated as an emphatic element, since legal consequences shall be attached to repeated default by the authority. Measures by reason of default are applicable *vis-à-vis* the head official of the administrative organ, grounded on the liability of the head official for the organisation and the effective completion of duties on schedule.

As opposed to prevailing practice in most EU member states, where administrative courts adjudge competence disputes, these shall be adjudged by the Metropolitan Court of Appeal departing from the former regulation. Thereby, the competence of special authorities is upheld and further reinforced.

2.4. In the two phases surveyed above, eleven government decrees pertaining to the reform of public administration were framed; however, no major breakthrough was achieved in areas apart from the above-mentioned ones.<sup>4</sup> According to these programs and the conception elaborated in 2003,<sup>5</sup> the projected transformation of Hungarian public administration should have been completed by 2006 on the basis of the system of legal conditions to be determined in 2004.

### 3. The Third Phase

3.1. In compliance with the conception adopted in 2003, the Government that took office in June, 2006 endeavoured even more firmly to conclude the reform of public administration. Therefore, it submitted bills on the establishment of regional governments thus amending

<sup>4</sup> Cf., Act 107 of 2004 on Multi-Purpose Small Regional Partnerships of Local Governments.

<sup>5</sup> Cf., Act 107 of 2004 on Multi-Purpose Small Regional Partnerships of Local Governments.

the Constitution, and also on the amendment of the Act on Local Governments (ALG), however, Parliament did not pass these in void of the required qualified majority.

Framing the bills was motivated by the intention to establish regions for local government, which could have realised decentralisation by the transfer of a significant scope of duties and powers and of assigned resources from central organs to that level of public administration. Simultaneously, currently functioning county governments aligned with towns of county rank would have been abrogated. The latter one would have been replaced by cities as a prior settlement category. Albeit, while both the parties in Government and in opposition agreed with the principles of decentralisation, the opposition would endeavour to realise these on the basis of county governments with millennial tradition, rather than by way of new regional governments to be established on the basis of seven statistically planned regions.

Nonetheless, according to the government, professional and political negotiations necessary for the establishment of regional governments will recommence in 2007 on the basis of the rejected bills. For the interim period, *Government Decree no. 2118 of 2006 (VI. 30.) on Organisational Transformation Promoting the Effective Administration of Public Revenues and Substantiating Measures*, among its various provisions, ordered the establishment of bases of regional state administration, since its adoption did not require a qualified majority in Parliament. In this scope, the general areas of competence of the regional administrative organs (with the exception of agricultural special administrative organs) will be divided into seven statistically planned regions, and each of those regional offices shall also have an area branch office in every county seat of their region.

3.2. Act 57 of 2006 on Central Organs of State Administration and the Legal Status of Members of Government and Secretaries of State was adopted on the basis of decisions reached during the preceding government session,<sup>6</sup> and accordingly, the Constitution was accordingly amended under Act 64 of 2006.

3.3. Furthermore, Government has also set up a State Reform Committee, which is assigned the task of the elaboration of the coordinated reform of state and public administration, including the preparation and implementation of necessary decisions. The comprehensive reform of public sector human resources will also be accomplished by this committee, as prepared under Act 72 of 2006 amending the Statutes on Employment Relations in the Public Sector. Intended measures encompass the reform of extensive funding systems and of the administration of public revenues.

#### 3.4. Overview of the 1990–2006 period

In a summary of the above-mentioned facts, we can assert that as a result of circumspect and considerate preliminary work, by 1990, the system of public administration characteristic of bourgeois, democratic and constitutional states was established in Hungary, constituted, on the one hand, by hierarchic state administration, and on the other hand, by co-ordinately functioning local administrative organs of local government controlled by locally elected bodies. Nonetheless, in the scope of the purposeful work targeting transformation, the attention devoted to specific areas was unbalanced, that is, state administrative organs, and also the functioning and human resources of public administration, were sketchily regulated, whilst the system of local government was grounded on meticulous regulation. The establishment of local government as the basic

<sup>6</sup> See Sárközy, T.: *Gondolattörések a kormányzás modernizálásáról* (Fragments on the Modernisation of Government). *Magyar Közigazgatás*, (2006) 3–4.

institution of local democracy was reasonably granted priority by politics, since the replacement of the previous local administration based on the council-system, a peculiarity of the functioning of the socialist state, was imperative. This was also formulated as a requirement by the Council of Europe under its Charter of Local Self-Government, the rules of which were almost entirely transplanted into the effective ALG. As to state administration, the political variant and professional standard structure were established in the central administration and Ministries, while ALSCS, instituting civil service based on a career-structure, was adopted by 1992 and as a consequence of deregulation the prevailing law governing public administration crystallised and became more transparent by the end of the foundational period of 1990–1992.

As we have seen, the direction of the further development of the new system has been determined by the reform programs elaborated by the successive governments. The work of Government in session between 1994–98 was marked by corrective work demarcated by the Home Office and based on operational experience. In this period, the necessity for the reform of the functioning of state administration was emphatic and related to the medium-range reform of local government administration (pursuant to the amendment of ALG in 1996, public administrative offices were transformed into regional organs of central administration). It was the establishment of this system of institutions for regional development, the development of information technology for public administration and the adoption of the medium-range reform program of local government administration that supervened in this period.<sup>7</sup> In comparison, the following Government in session between 1998–2002, did not effectuate major reforms of public administration, whereas in the most recent period between 2002–2006, the reform of the system of administrative procedures was remarkable.

We must conclude, though, that the transformation of public administration is still far from complete, since fundamental reforms encompassing both structural and functional measures, and also the unified regulation of public sector human resources, urgently need to be effectuated.

#### **4. The Features of the Changes in Hungarian Public Administration from 2006 to Our Days**

##### **4.1. The Trends of the Changes**

Since mid-2006 the trends of the development of public administration have been shaped highly peculiarly in Hungary. Namely, following our accession to the European Union the enforcement of the very disputable requirements—especially those related to regionalisation—of the European Administrative Space (hereinafter: EA<sup>8</sup>) wouldn't have been coerced externally, however, this became one of the major trends.

On the other hand, by this period the application of New Public Management (hereinafter: NPM) had been considerably abandoned in the developed countries of the world, whereas, in Hungary it was reinforced and became almost exclusive at that time.

<sup>7</sup> See Verebélyi, I.: *A magyar közigazgatás reformjának programja* (The Program of the Reform of Public Administration.). *Magyar Közigazgatás*, (1996) 11.

<sup>8</sup> Verebélyi, I.: *Válságban a magyar középszintű közigazgatás – hogyan tovább?* (The Hungarian Medium-Level Administration in Crisis—How to Go On?) In: *Jobb közigazgatás* (Better Public Administration). Budapest, 2009. 96–122.

Therefore, it may be a principal aspect of our examination why this phase delay in comparison with other countries ensued? It is easier to explain the insistence on regionalisation with reference to EAS, since it was primarily motivated by political, not by professional administrative considerations. This issue was principally determined by the elective basis of large parliamentary parties and its prospective evolution, which was directed at the territorial transformation of the division of powers.

Regional governments did not have antecedents in Hungary either in a political or economic sense. The formation of regions can be principally connected to the EU nomenclature of regional development, which targeted the administrative adjustment to the level of NUTS-II. However, the economic and political decentralisation would have primarily limited the central power of the state, which would have created a decent space for withdrawal of the then governing parties to be forced into opposition, which was distinctly anticipated following the two government sessions. Therefore, it was not supported by the parties in opposition at that time and rising to power in 2010.

The professional rationality of the regionalisation of state administration was higher, since the scope of action of the majority of regional state administrative organs operating then overreached the boundaries of the general territorial administrative division of the country, scilicet, of the counties. It is also true that the most frequent cases requiring administration close to the clients were managed by state administrative organs operating in smaller territories than the regions. Therefore, a situation emerged in which regional development and state administration would have required regional operation, whereas, local governments would have required counties by reason of the maintenance of institutions providing public services.

Nevertheless, regional identity had not developed among the population, therefore, this did not enjoy great social support. As regards the belated but all the more radical application of NPM, it was substantiated by political reasons rather than by administrative development. Namely, the then social-liberal government had a mere narrow majority in Parliament, in which the intention of the smaller, liberal governing party was overrated. One of the main objectives of the governing party professing a neo-liberal conception of the state was denationalisation and the constraint of the power of the state in public administration. The already aggravated economic situation in Hungary substantiated these endeavours as means to discharge the budget, the rational contestation of which was difficult. It turned out only later that privatisation and outsourcing served individual and party interests in many cases and led to corrupt procedures still underway. This logic was perceivable in every respect, but it was seemingly less manifest in the dissolution of the traditional framework of civil service based on career structure.

However, the resistance of the qualified civil service with vocation in public administration was considerable in the face of the implementation of objectives extraneous to the system, therefore, it needed to be announced that the transformation of public administration from within was not possible, but it had to be updated by external elements. To achieve this, the regulation based on closed career-structure had to be amended, whereas, it became necessary to focus on performance assessment and measurement, which was promoted by the economic associations of the competitive sector via orders financed from the budget. Therefore, it is not accidental that the application of NPM was especially manifest in the transformation of the civil service system.

#### 4.2. The Changes in Civil Service

In Hungary, the Government taking office in 2006 changed direction radically *in re* the reform of civil service, as well. While before 2006 the objectives consisted in the

modernisation of the closed civil service based on career structure and the unification of the ramified regulation pertaining to the public sector, after 2006 the decentralisation of the closed system of civil service under labour law took place.

In the spirit of the considerate domestic application of NPM, the conceptions until 2006 would have narrowed down the performance-based scope besides the reinforcement of the elements connected to guarantee, but later the efforts with an effect until 2008 targeted the complete liberalisation of the system of fees and connected it to performance. The radical relief of the regulation pertaining to the closed system of civil service was commenced at the beginning of the 2006 government session via the rapid amendment of the act on the legal status of public servants.

Great steps were taken towards a regulation affected by labour law via the relaxation of the controls over discharge, the aggravation of the rules pertaining to work during the period of discharge, to the payment of salaries and severance pay, via the extension of the withdrawal of the assignment to management to the termination of the legal relation of civil service.

The institutional background of the transformation of civil service also changed since besides the competent State Reform Committee a separate under-secretary of state from the competitive sector was also appointed for the tasks related to civil service. For the purpose of the reinforcement of the reform, the governmental duties related to civil service and the competent office was transferred to the Prime Minister's Office from the dissolving Ministry of the Interior. The objectives formulated in the governmental program related to the transformation of civil service were the following: "Higher performance requirements shall be posed to employees working in civil service and the rules of their application will be more flexible. High-standard performance will be rewarded by more appreciation, human resource management will be modernised and the employment of young, competent experts will be encouraged." By this and the guarantee of the person of the under-secretary arriving from the competitive sector attempts were made at the belated, but all the more radical application of NPM in civil service.

Upon the motion of the Government taking office in May 2010, Parliament adopted new law (Act 58 of 2010) pertaining to civil servants working in state administration and converted this group into government officials. This concerned the majority of 116,000 civil servants, i.e. 70,000 persons. In the new regulation, we must highlight the institution of the discharge of public servants without justification and the attachment of the nomination of ministerial management to the approval of the administrative under-secretary of the ministry for governmental coordination, which in line with other similar modifications constituted a shift towards civil service with a more open system of positions, what is more, with a spoils system.

Although, the institution of discharge without justification was annulled by the Constitutional Court, "the reason of the loss of confidence" in replacement made the shift towards the spoils system even more emphatic.

The so-called Magyary Program containing the medium-range reform of Hungarian public administration determines a peculiar direction of development for civil service by stipulating that "The most important issue is the determination of the values according to which the new civil service career-model should be shaped... The choice of values should be based on the mixture of a career-principle representing stability and predictability and of the values of efficiency and performance presuming flexible adjustment to changes ... Such a career-model is needed which maintains the advantages of the career-structure, but at the same time facilitates flexible adjustment to changes. Flexible adjustment can be achieved

by focusing the thinking of human resource management gradually on the sphere of activity.”

Of course, this duality is not a Hungarian peculiarity, since we can find its signs among the conceptions of development in other countries, as well, with the exception of the institution of the discharge of public servants subject to discretion.

#### 4.3. The Effects of New Public Management and Regionalisation

It is clear from the above that among the international trends of the development of public administration in recent years mainly “New Public Management” and regionalisation have had the greatest effect on Hungarian public administration in the spirit of EAS.

These, however, were erroneous reference points already at the outset. Namely, in our view EAS as a point of reference has never marked out unequivocal trends of development, but it endeavoured to enforce requirements according to the shared values of the public administration of EU member states for the purpose of the establishment of the administrative capacity necessary for the operation of the countries concerned by the Eastern expansion as member states. Admittedly, once there were cautious attempts at the application of certain elements of NPM in the EU in this framework, but the result was essentially restricted to the modest application of the CAF system, i.e. the evaluation framework applied in the area of quality management at an EU level.

Apart from this, it is undeniable that in Europe the application of the NPM guideline was offered the largest scope in civil service, which began to undermine besides the systems of appraisal and remuneration, the complete traditional regulation of civil service based on career-structure. Furthermore, the almost halting, what is more, regressing process of NPM was put in new light by the impact of the financial-economic depression discernible since 2008 on the public sector.

According to our standpoint, the major cause of this was the persuasive rhetoric of NPM. Namely, in our view one of the causes of its evolution was the growth of the organisation, personnel and budget of public administration in every developed country, the increasing burdens of which the competitive sector did not intend to and couldn't finance in the interest of the maintenance of its competitiveness. Therefore, the objective was set that public administration should function at least with the same efficiency, performance and at the same standard as the competitive sector. In view of that, it should constrain its activity via the elimination of the superfluous elements, via the involvement of the civil or the competitive sector in the performance of the necessary tasks, via the measurement and accountability of the performance of the invariably remaining administrative tasks and via making them more transparent in the interest of efficiency and quality.

These endeavours affected the organisation, activity and personnel of public administration equally. In this scope, human resource management as the most expensive element of the system of public administration has been distinctly highlighted. In the developed countries, the distinctively prevalent civil services based on career-structure were artificially raised from the labour market and they operate according to the comparative advantages guaranteed by law, i.e. not at the market value of the accomplished work, but on the basis of the social recognition of work carried out during the entire professional career in the interest of the public. These firm, predictable and guaranteed elements could jointly secure a balance in the labour market in the long term, on the basis of which the choice between the competitive and public sectors presented a real alternative.

With reference to EAS, the other international trend of the development of public administration affecting Hungarian public administration most was regionalisation. In the post-millennial years, the problems of medium-level public administration in Europe were

determined by the questions whether regionalisation can be a general trend or other solutions are also available for decentralisation and the shift of the spatial structure of public administration meeting economic demands? Several disciplines deal in-depth with regionalisation and/or the problems of regionalism applying diverse approaches, as a result of which we abound in both international and Hungarian scientific technical literature.

At the same time, we are short of concrete analyses based on genuine empirical data, especially of those which examine the results and changes of legal regulations and factual operation in process broken down by countries. The Council of Europe has dealt with the subject-matter of regionalisation for a long time and the concept of regional autonomy has been defined under the "Helsinki Principles" of the Council of Europe. According to the respective report of the Council of Europe, we need to differentiate regionalisation from regionalism in order to assess the regionalising processes underway in Europe. Regionalisation is a method of the territorial organisation of the state, while regionalism is political philosophy decentralising state power to a regional level. The various manifestations of regionalism conform to diverse inner content and sets of values including the principles of separatism and democratism as well as those promoting political principles colliding with human rights. The relation between territoriality and identity needs to be treated very carefully. It may occur that the same person bears strong regional and national identities at the same time. Regionalisation as a form of the organisation of the state is actually widespread in Europe and it can take very different forms in its different countries. The European debate about regionalisation clearly demonstrates that the phenomenon is not one-directional in the specific countries and does not occur with the same intensity. We can infer from the analysis of the practice of Council of Europe member states that the transformation of medium-level governments and of other elements of public administration is continuous, but its concrete manifestation is so diverse that we cannot claim the existence of a determining European regional tendency in our days.

Nevertheless, we can assert that at least at the level of endeavours the demand for the revision of the territory of the existing medium-level governments in the spirit of the formation of larger units has prevailed even in European unitary states since the mid-1990s. In the federal states the respective attempts have been forestalled by the fact that the member states are generally historical formations, the territories of which are protected constitutionally.

The other distinct tendency is shuffling tasks between the central level and medium-level governments: in this case not only the one-directional decentralisation, but recentralisation also prevail (e.g. Denmark).

On the basis of the surveys and documents of the Council of Europe we can set forth that regionalisation is not an objective, but a potential instrument in the development of the public administration of the democratic *Rechtsstaat* in most countries. The specific circumstances of a certain country and the opinion of the concerned population determine its concrete form and its schedule. Consequently, directives such as "The Europe of Regions" was a favoured instrument applied by the Committee of Regions as to the distributional and operational system of structural funds in the functioning of the EU, however, it did not expand to become a movement towards a federal Europe based on regions. Therefore, it is not accidental that based on the Helsinki Recommendation of the Council of Europe framed as a result of compromises almost all traditional democracies accommodate medium-level governments between the central and local governments, which fit the concept of region regardless of their denominations. In this broad scope, any regional government classified under six categories included in the Recommendation can be

defined as region. Nevertheless, neither the document nor current European thought settles the case when several levels of regional governments obtain in a country: the relation among the levels shall be settled by domestic legislation and the document refers merely to the observance of the European Charter of Local Self-Government and the principle of subsidiarity.

According to the above, we may infer that the management of the complex process of regionalisation at the medium level is a task to be solved on a national level with regard to local governments and we cannot allude to an explicit international tendency in this direction. The situation is slightly different as to state administration and the regional state administrative organ of the government.

Namely, in this respect we can set forth that the representation of the state and the governments is reinforced in the regions under area development but not via the centralisation of former general administrative powers (e.g. authority matters, legal supervision), but the reinforcement is rather due to new roles based on social-economic real processes. Nevertheless, this role is motivated by the current government policy, which as an expectation is more and more reflected in the assignment mechanism of the heads of offices leading towards political discretionary assignments.

As a matter of course, the traditional administrative roles are still important in the regional representation of governments, the attendance to which mostly remains the task of public servants and they are invariably administered at a regional level closer to the clients where multiple regional levels obtain. On the basis of the new scopes of tasks, a new regional partnership is emerging between the regional organs of governments and local governments and in this partnership the regional representatives of governments play an increasingly important role.

The newly evolving sphere of action consists frequently in operative organisational work based on partnership affecting regional social and economic processes. The role of the regional representatives of governments is changing and increasing in the long run *in re* EU relations, since the progressive role in the regional social and economic real processes cannot be operative without EU connections. The central power has commenced to curtail or reinforce its regional economic and social role.

These new activities are integral to the evolving multi-level government proclaimed by the EU. This essentially concerns what the new assignment of the organs involved in the performance of administrative tasks will be (state administration, local governments etc.) under the circumstances changed by the financial and economic crisis, i.e. what the new division of labour will be like with a view to the accomplishment of common European and national objectives.

In June 2006 the Government formed in Hungary under the conditions described above targeted the reform of public administration based essentially on the new trends of regionalisation and NPM more firmly than before. In favour of the reforms, the Constitution was amended and at the beginning of the government session, Parliament adopted new law on Parliament and central organs of administration, a decision was made on the radical regionalisation of state administration and on the introduction of market methods into the regulation of civil service. The Hungarian Government tabled draft law on the amendment of the Constitution and of the Act on Local Governments required for the foundation of regional governments in the absence of adequate political and parliamentary support, therefore, the motion was rejected by Parliament for lack of the required two-thirds majority. The tabled motions targeted the establishment of governmental regions effectuating decentralisation so that significant scopes of duties and powers and earmarked resources

would have been transferred to this level of administration from central organs. In parallel, current county governments as well as the towns of county rank would have dissolved. The latter one would have been replaced by the large city as a privileged settlement category.

The governing parties and the opposition agreed on the principles of decentralisation, but the then opposition would have implemented that on the basis of the millennial county governments, not via the new regional governments to be established in the 7 statistically planned regions. According to the purposes, the measures of the state reform would have encompassed the revision of state duties and the reform of the large service providing systems and state finances. Two most controversial measures of the reform conceptions manifest in the amendment of pertinent law were the regionalisation of the regional level of state administration and the transformation of the system of civil service to be implemented in the spirit of the application of NPM.

Although, it can be appreciated that the central administrative organs were comprehensively regulated by law for the first time, its actual provisions (especially the termination of the office of the administrative under-secretary) were vaguely considered and not elaborated according to scientific requirements. Namely, these measures such as the general regionalisation of regional state administration were not preceded by systematic scientific preparation at all or if they were (such as the proposals of the codification committee established for the regulation of central administrative organs and *in re* the regionalisation of metropolitan and county administrative offices), these were finally disregarded by Government upon its decisions. The restructuring of the administrative spatial structure into small areal and regional levels in the absence of professional, political and social consensus could not be implemented in the administration at local level and it was only partially successful in state administration managed by Government.

Furthermore, the regionalisation of metropolitan and county administrative offices performing the legal supervision of local governments was adjudged unconstitutional by the Constitutional Court. The correction of the unconstitutional failure in void of proper consensus was not effected until the change of government in 2010, therefore, the legal supervision of local governments was suspended for one and a half years in the absence of operative administrative offices as regional organs of government.

Since the spatial-structural changes remained in torso, the functioning of regional administration became non-transparent and wearisome, its efficiency and quality deteriorated and local civil service became unreliable. Meanwhile, with the involvement of the competitive sector and EU funds, Government deployed great forces in order to radically revise the duties performed by the state and local governments constituting the state and to transform the system of the performance of duties. Nevertheless, the intentions to change were not supported by social or professional consensus, consequently, the political resolutions were not followed by implementation.

Following the second half of 2006, the external, professional and scientific system of the preparation of governmental decisions changed fundamentally. The resources available were utilised centrally by the State Reform Committee, which endeavoured to integrate primarily the competitive sector into the elaboration of reforms, therefore, the professional staff of the portfolios could participate exclusively if they were related to these programs. However, the work done by organisations less familiar with the closed system of public administration (including the before-mentioned so-called revision of public duties) did not lead to appreciable results.

From 2006, the conception that public administration cannot be reformed from within prevailed invariably. Whereas, the measures based on extraneous proposals and producing

conflicting effects many times did not improve either the efficiency, effectiveness or the quality of public administration discernably, but usually further impaired them. At the same time, the reform endeavours made great demands on social resources and the uncritical and coerced application of the instruments of NPM destroyed the institutions functioning well previously (e.g. the Hungarian Institute of Public Administration) and subverted the traditional set of values of public administration and civil service, while it could not create anything new.

At the same time, the professional capacity of the prestigious representatives of the domestic and foreign science of public administration was not utilised for the reforms, or if it was, that was rare and unilateral (the supporters of the current political conceptions). The changes supervening in the world (the continuous expansion of the neo-Weberian state and public administration, loss of the importance of regionalisation etc.) were not regarded upon decision-making, although they had been elaborated in the Hungarian science of public administration. The “results” were that public administration became thoroughly destabilised, its set of values was subverted, its efficiency regressed, which challenged even the achievements of the previous one and a half decades after the change of regime expounded in parts 4.1–4.3.

#### 4.4. Current Changes

Following from the above it may not be surprising that subsequently to the change of government in Hungary in 2010 we could almost instantly discern the intention to change public administration radically. The main trend consisted in the reinforcement of the spheres of action of the state and of public administration. Instead of regionalisation, the government program targeted the reintroduction of integrated state administration on the basis of county governmental offices. This implies the peculiar application of the ideology of NPM otherwise not favoured by the new government, according to which county governmental offices with several thousands of staff as mega organisations will be established on the basis of the large and inevitably fused offices.

These conceptions are supplemented by centralisation efforts affecting the system of local governments besides the nationalisation of a significant part of the tasks performed and powers exercised formerly on this level, the aggravation of the financing system and the completion of the instruments of legal supervision.

These reform endeavours are expanded by the changes affecting civil service outlined above as continuity of doubtful value between the bashful approach of former governments to civil service shifted towards a plunder-system and the radical and explicit assumption of these endeavours. These have been substantiated by the Basic Law functioning as a new Constitution, which in comparison with the former one as a skeleton law provides great flexibility for the implementing fundamental laws for the transformation of not only public administration, but also of the complete state organisation.

The efforts expounded so far also indicate the difficulties related to the termination of the confusion of the set of values of public administration established formerly. The diversely motivated and not properly harmonised conceptions of development may give rise to or reinforce conflicting processes, therefore, in our view exclusively the acceptance and consistent implementation of a complex medium-range program elaborated and supported on an extensive basis similarly to the program of 1996 could provide real solution in our unstable public administration and civil service.

The “Magyary Zoltán Program for the Development of Public Administration”, elaborated during the functioning of the current Government in June 2011, provides theoretical opportunity for the solution, but its content is unfolding merely gradually, so any judgement concerning its adequacy would be premature.

## 5. Conclusions

5.1. Determinations and National Peculiarities in the Former Two Decades of the Development of Public Administration in Hungary. The changes in public administration described in the previous chapters rightly raise the question whether they mark a peculiar “Hungarian way” or that is the common fate of Central-Eastern-European countries in transition. At any rate, the framework for development was the same, namely, the outset with the Soviet-type public administration before the change of regime as well as the international programs, especially the EU PHARE and the OECD SIGMA Programs promoting its transformation were common. The concept of the European Administrative Space directed at the determination of a common European set of values in public administration also derived from the Eastern expansion of the EU.

Hungary was at the cutting edge of the transformation of public administration in the Central-Eastern-European region at the beginning of the 1990s. This manifested itself primarily in the rapid establishment of the local governments system and in laying the foundations of a career civil service system. Nevertheless, urgency led to a lack of balance among the various areas of public administration and the structural reforms were not followed up rapidly by a change in functioning. It was a recurrent question whether we adapt the administrative solutions prompted by EAS adequately and how they can be enforced under particular Hungarian conditions.<sup>9</sup>

The experiences of more than two decades and current problems may jointly justify the answer, which must be inevitably differentiated. In the period directly preceding the change of regime the requirements of EAS had not been formulated yet. Therefore, we applied the convention of the Council of Europe to the local government system, which was a kind of skeleton law, so we needed to draw primarily on the former experiences of our public administration upon the detailed regulation. The bilateral development programs-in-aid originating principally in traditional European democracies arrived subsequently to the entry into effect of the new regulation, therefore, they could provide assistance merely to the perfection of its functioning, furthermore, they contributed to retraining the staff of public administration, which was very important.

The OECD PUMA and SIGMA Programs promoted primarily the development of the system of civil service as well as deregulation. However, what prevailed in the approach of the programs was NPM as an alternative to former classical public administration, the domestic application of which caused not only trouble but also a confusion of values in the absence of adequate conditions.

In other Central-Eastern-European countries in transition the reforms generally commenced later and were implemented more carefully than in Hungary. In this respect it was a positive feature that we took the lead, nevertheless, the downside of this was that we could not rely on the experiences of other countries, whereas, the governments of the

<sup>9</sup> Balázs, I.: A XXI. század közigazgatásának kihívásai (The Challenges of Public Administration in the 21st Century). *Magyar Közigazgatás*, (2000) 7.

countries concerned were edified both by our achievements and failures. The continuous and rapid transformation exhausted public administration after a period and the reform programs with low efficiency discredited the ideas promoting the necessity of reforms themselves. Public administration weary of the reforms itself became gradually not supportive of, but passively resistant to the cause of the reforms, which merely reinforced the philosophy of NPM based on a neoliberal conception of the state implying that public administration cannot be reformed from within.

Meanwhile, the European Union in need of OECD support in the development of public administration was obliged to frame the requirements concerning public administration for the countries intending to accede, i.e. the shared values of the public administration of member states, which had not been sought for institutionally previously. However, the document of the European Administrative Space was conceived already in the spirit of NPM, which was reflected in its content and its development.<sup>10</sup> Since the subject-matter of this work does not include the examination of the development of EAS, we will disregard its detailed elucidation, whereas, we cannot contest its impact on the development of the public administration of Hungary and the countries of the Eastern region. This impact, however, is not unambiguously positive, since under its auspices we could find abundant examples and especially grounds for reference for the uncritical and coerced application (in the absence of the necessary conditions) of the principles of NPM supported by underlying European principles.

Although, this process emerged as a framework of conditions attached to the Eastern expansion, it obliged the EU before the 2004 expansion to deal with the shared values and development of European public administration even if public administration was a domestic issue of the member states overreaching the scope of EU regulations. Nevertheless, the capacity of public administration is a determining element of social and economic development, the expansion of which has absolute priority.

In certain cases Hungary was under an excessive illusion concerning both NPM and EAS, it was more responsive to them than the other countries concerned. Today, however, as a party both to the European Union and EAS, Hungary with its specific experiences can contribute to the development of European public administration. Whereas, the above-mentioned, currently running complex program of the development of public administration alludes to a more considerate and subtle approach, which related to the consideration of international experiences sets forth that “any solution originating abroad or in the market may be applied exclusively with proper criticism and the examination of its effects.”<sup>11</sup>

<sup>10</sup> Orta, C.: *Quel avenir pour l'Espace Administrative Européenne?* Maastricht, 2003.

<sup>11</sup> Magyary Zoltán Program for the Development of Public Administration (MP11.0). Ministry of Public Administration and Justice. Budapest, June 2011.

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## A Realistic Perspective on International Legislation

**Abstract.** The status of “international law” is examined critically. In the first section, the basis of (national) legislation is described. This consists of an inquiry into a credible meaning of “natural law”. It is focused on the question whether universal principles exist and, if so, of what kind. Section 2 deals with the issue of enforcement. National legislation invariably realizes this, but this is not obvious at the international level. Section 3 deals with human rights. It is discussed whether their presence points to the existence of “international law”. To this end, a possible reason for these rights to have developed is expounded.

**Keywords:** natural law, enforceability, international legislation, international politics, human rights

### Introduction

The political developments over the period after World War II have led to a considerable number of rules and views at the international level, the complex of which is now recognized as “international law”. In this article, the domain as such, rather than a specific part of this whole, is inquired from a meta-legal perspective. The meaning of “international law” is concerned here; how should this be qualified?

In order to ascertain this, a general analysis of the basis of positive law (i.e. the law as it is established) is useful. To that end, I will indicate in section 1 how “natural law” may be interpreted. The ideas of “natural law” and “international law” are, after all, often connected. In section 2, the way in which rules at the international level operate is dealt with; it will be shown how these are observed and whether they may be enforced. Finally, in section 3, the topic of human rights is discussed, because of its connection with cross-border legal issues. The question comes to the fore to what extent human rights are relevant to this subject matter.

### 1. The legal basis at the national level

It is important to determine which elements are constantly (implicitly) present in national law. In this way, a possible contrast with the rules at the international level can come to light. Because of the general theme of this article, I cannot treat any possible perspective on natural law; I will merely deal with the most important positions for the present discussion.

I mention the term “natural law”; the approaches of two philosophers in particular, Herbert Hart and Thomas Hobbes, are clarifying with regard to this matter. A familiar interpretation of “natural law” is the “classical” approach; it consists of a standard indicating that a natural law exists in an absolute, immutable sense and should (morally) be

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acknowledged as the directive for actual legislation,<sup>1</sup> the truth or rectitude being the same for all and equally known to all insofar as the collective principles of reason are involved.<sup>2</sup>

It may accordingly be said that “every posited human law contains the rationale of the law to the degree in which it is derived from the law of nature. If it, however, in any way, discords with the natural law, it will no longer be a law, but a corruption of law.”<sup>3</sup> The right to a fair trial, e.g. could in this perspective be taken to exist before it is laid down by a (human) legislator.

This perspective differs from Hart’s. He argues that any social organization must contain a “[...] *minimum content* of Natural Law [...]”,<sup>4</sup> consisting of “[...] universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims [...]”.<sup>5</sup>

This means that basic rules (according to Hart even “truisms”) have to be present in order for human coexistence to be possible. There has to be “approximate equality”, for example: people must be approximately equally strong, since some exceptionally powerful individual might easily dominate the others, without observing the law.<sup>6</sup> “Natural law” is clearly given a different meaning from the usual one mentioned above; Hart connects this with the laws of nature, such as the law of gravity.<sup>7</sup>

The second philosopher who should be mentioned here is Hobbes. For him, “natural law” means no more or less than the way in which one acts, on the basis of reason.<sup>8</sup> In this sense, there are natural laws, such as the most important one that one should attempt to live together peacefully with others as far as possible, and can resort to war if this should turn out to be unattainable.<sup>9</sup> Hence, there is a significant agreement between Hobbes’s viewpoint and Hart’s.

Although Hart’s minimum content of natural law regards circumstances which apply independently of agents whereas Hobbes focuses on reason and, consequently, the agent, both make it clear that actual circumstances are the issue. Natural law is transposed into positive law; the contents are even alike: “The Law of Nature, and the Civill Law, contain each other, and are of equall extent. For the Lawes of Nature [...] are not properly Lawes,

<sup>1</sup> Aquinas, Th.: *Summa Theologiae*. [1274]. Complete Works, vol. 7: 1a2ae Summae Theologiae a quaestione 71 ad quaestionem 114. Rome, 1892. 1a2ae, q. 90, art. 2 (p. 150); q. 93, art. 3 (p. 164); q. 94, art. 2 (pp. 169, 170); q. 94, art. 5 (pp. 172, 173).

<sup>2</sup> *Ibid.* 1a2ae, q. 94, art. 4 (p. 171).

<sup>3</sup> “[...] omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur. Si vero in aliquo a lege naturali discordet, iam non erit lex, sed legis corruptio.” *Ibid.* 1a2ae, q. 95, art. 2 (p. 175).

<sup>4</sup> Hart, H. L. A.: *The Concept of Law*. Oxford, 1961, 189.

<sup>5</sup> *Ibid.* 189.

<sup>6</sup> *Ibid.* 190, 191.

<sup>7</sup> *Ibid.* 184.

<sup>8</sup> The (subjective) “right of nature” is not specified (as, e.g. the right to life) as Hobbes defines the liberty that is part of this right negatively as “the absence of external Impediments” [*Leviathan*, 91 (Chapter 14); cf. 145 (Chapter 21)].

<sup>9</sup> Hobbes, Th.: *Leviathan* [1651]. Ed. by R. Tuck. Cambridge, 2007. 91, 92 (Chapter 14). His premise in this respect is similar to Hart’s when he emphasizes the (approximate) equality between people [Hobbes: *Leviathan. op. cit.* 86, 87 (Chapter 13)].

but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before [...].”<sup>10</sup>

Both thinkers provide an important contribution to determining the basic elements in law. If someone should, e.g. be capable to subject all others to himself, it may be argued that the existence of legislation would be irrelevant to him. After all, it would not be in his interest to submit to rules which impede him.

Is this approach to natural law the most credible one? As I said, the treatment of this topic must be summary, but it is in order to pay some attention to an alternative. This consists in positive law being ideally modelled after “classical” natural law, or natural law in the narrow sense, as it may be called. This alternative is adhered to by many, amongst whom Hugo Grotius is an important exponent. He argues that natural law follows from human nature,<sup>11</sup> but specifies this differently than (for example) Hobbes, by indicating that it is inherent to natural law to keep one’s promises<sup>12</sup> and that people would also have sought out each other if a mutual dependence weren’t the case.<sup>13</sup> It is important that not merely reason is involved here, but “right reason”.<sup>14</sup>

It is difficult to make it clear how natural law would compel in this case, as Hobbes observes<sup>15</sup>—who doesn’t, incidentally, oppose Grotius but Aristotle, who exhibits a similar account of human nature<sup>16</sup> (people can, in Hobbes’s view, only live together firmly if the state of nature is abolished and a sovereign is present<sup>17</sup>), and, so, a specific part of the latter’s political philosophy. In section 2, this topic, the enforceability of law, will receive attention.

As for the question whether this opinion is tenable, it is difficult to ascertain how the existence of natural law in the narrow sense may be maintained. Natural law in Hart’s and Hobbes’s sense can be defended empirically, but the alternative’s claims exceed the means of its proponents to justify them. It is at least possible to describe a system of law without involving this sort of natural law. Even if this isn’t criticized on its contents, an important criticism can thus be exercised<sup>18</sup> of positions that argue its existence. It cannot be refuted, but its presence can be shown to be redundant.

<sup>10</sup> *Ibid.* 185 (Chapter 26).

<sup>11</sup> Grotius, H.: *De Iure Belli ac Pacis*. [1625] (On the right of war and peace). Aalen, 1993, 9 (Prolegomena, § 8).

<sup>12</sup> *Ibid.* 11 (Prolegomena, § 15). Hobbes also promulgates this [*Leviathan*. 100 (Chapter 15)], but not in the same way as Grotius, namely on the basis of a “social appetite” [Grotius: *De Iure Belli ac Pacis*. 8 (Prolegomena, § 7)]—since without a sovereign to preserve the peace, people don’t (stably) unite [*Leviathan*. 88 (Chapter 13)]—but on the basis of self-interest [e.g. *Leviathan*, 93 (Chapter 14)].

<sup>13</sup> Grotius: *De Iure Belli ac Pacis*. *op. cit.* 12 (Prolegomena, § 16).

<sup>14</sup> “Natural law is the dictate of right reason.” (“Ius naturale est dictatum rectae rationis [...].”) (Grotius: *De Iure Belli ac Pacis*. *op. cit.* 34 [Book 1, Chapter 1, § 10]). The phrase “right reason” is also used by Hobbes (*Leviathan*, 32 (Chapter 5), for whom the notion lacks the moral connotation it has with Grotius.

<sup>15</sup> Hobbes: *Leviathan*. *op. cit.* 471 (Chapter 46).

<sup>16</sup> Aristotle: *Politica*. [± 350 BCE]. Opera, vol. 2. Ed. by I. Bekker. Darmstadt, 1960. 1253a.

<sup>17</sup> Hobbes: *Leviathan*. *op. cit.* 88 (Chapter 13) (cf. *supra*, note 12).

<sup>18</sup> By means of the approach known as Occam’s razor, after an interpretation of part of William of Occam’s epistemology [de Ockham, G.: *Scriptum in Librum Primum Sententiarum Ordinatio* [± 1319]: *Distinctiones* 19–48. Opera Philosophica et Theologica: Opera Theologica, vol. 4. Ed. by G. Etzkorn and F. Kelley. St. Bonaventure University, (NY) 1979, *Distinctio* 30, *Quaestio* 1 (p. 317), *Quaestio* 2 (p. 322); cf. *Distinctio* 27, *Quaestio* 2 (p. 202)].

The situation Hart and Hobbes describe is a valuable starting-point to qualify the national domain. The question arises whether this applies to the international domain as well. With respect to the “approximate equality”, e.g. it is obvious that this is not found between states. In section 2, the consequences of this state of affairs are expounded.

## 2. Enforceability as a necessary element in a system of law

In the previous section, some problems with natural law in the narrow sense were pointed out. Accordingly, it does not seem to provide a viable basis to argue the existence of “international law”. In this section, the issue is approached from a different perspective, by inquiring into the relevance of enforceability. I will start again with the analysis at the national level; this time, the contrast with “international law” will receive more attention than it did in the first section.

It is characteristic, among other things, for *national* legislation that it can be enforced. To provide an example at that level: art. 310 of the Dutch Penal Code, which makes theft punishable, has no value if a perpetrator of this felony cannot be tried before a court of law. How is this settled internationally? If one wants to summon a state before the International Court of Justice, this state must itself have recognized the jurisdiction of the Court (art. 36, section 2 of the Statute of the International Court of Justice). The same rule applies to a situation in which parties appear before the International Criminal Court (art. 12, section 2 of the Rome Statute of the International Criminal Court).

The International Court of Justice and the International Criminal Court lack, in this way, the unconditional authority of national courts of law, whose decisions can actually be executed, irrespective of the will of the parties involved (cf., e.g. art. 553 of the Dutch Criminal Proceedings Act for the Dutch situation). A sovereign at the international level is lacking, the consequences of which are evident: there is no instance to which parties have transferred their competences and the judge, accordingly, merely rules in the cases that are willingly submitted to his discretion. One may wonder whether this state of affairs may be deemed a practice of law.

In this case, of course, it is not the (supposed) *basic* contract on the basis of which, in Hobbes’s model, the contracting parties appoint a sovereign<sup>19</sup> which is involved but the fact that rules must be enforceable. Hart distinguishes between primary and secondary rules; the first sort of rules indicate what one must do or is forbidden to do, while rules of the second sort determine, besides the coming about and changing of the primary rules, in the form of “rules of adjudication”, that judges are given the power to judge.<sup>20</sup> This has no merit without the additional possibility of imposing sanctions.

Hart resists the idea that the sovereign is above the law.<sup>21</sup> In his model, moreover, the position of a sovereign is not a central issue, because of the following: “There are [...] two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition

<sup>19</sup> Hobbes: *Leviathan. op. cit.* 120 (Chapter 17).

<sup>20</sup> Hart: *The Concept of Law. op. cit.* 94.

<sup>21</sup> *Ibid.* 218.

specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.”<sup>22</sup>

If these conditions are indeed met, a sovereign may not be required (although it should still be possible to sanction a transgression of the rules). At the international level, this situation doesn't apply, as appears from the behavior of some (powerful) states. There, the lack of a sovereign is severe: there is license. It turns out that there is only a conditional relation at this level: parties agree on something and accept that a judge may render a verdict.

The fact that there is a judge seems nonetheless to imply the presence of law. Still, how should this be appraised? The following from the Charter of the United Nations is illustrative: “If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council [...]” (art. 94, section 2 of the UN Charter). Since the permanent members have the right of veto (art. 27, section 3 of the UN Charter), in a number of cases there will be no legal enforcement.<sup>23</sup>

This also applies to possible sanctions imposed by the Security Council: members of the United Nations “[...] may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council.” (art. 5 of the UN Charter) and “[...] may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.” if they haven't acted in accordance with the principles of the Charter (art. 6 of the UN Charter). Those who are permanent members may prevent sanctions issued against them. This already points to an important given: some states being more powerful than others, which is, as described in the previous section, not a decisive factor at the national level, impedes the enforcement of decisions or renders these impossible.<sup>24</sup> It is not without reason that countries such as Japan attempt to acquire permanent membership, while it would at the moment probably be unrealistic to expect countries such as Belgium, Finland and Estonia to fulfill this role.

The status of the member states appears to be decisive for the position they occupy. Similar issues may present themselves at the national level, but in those cases they are excesses. If a national court of law punished a successful businessman differently than a beggar (*ceteris paribus*), this would be considered unacceptable. At the international level, by contrast, the perspective that one state is more powerful than another is not only accepted, but evidently one of the (established) principles.

As for disputes about judgments by the International Criminal Court: these are, insofar as they don't concern the judicial functions of the Court, if states cannot come to an understanding amongst themselves, referred to the International Court of Justice (art. 119, section 2 of the Rome Statute of the International Criminal Court), so that the problem just observed occurs here as well.

This is also apparent at the European level. If a Member State doesn't adhere to an obligation which is incumbent on it on the basis of the Consolidated version of the Treaty on the Functioning of the European Union, the Commission may, having summoned the Member State to take the appropriate measures, bring the case before the Court of Justice (art. 258 of the Consolidated version of the Treaty on the Functioning of the European

<sup>22</sup> *Ibid.* 113.

<sup>23</sup> Hart considers this to be an important objection (*The Concept of Law. op. cit.* 227).

<sup>24</sup> Cf. Hart: *The Concept of Law. op. cit.* 191, 214.

Union). If the Court rules in favour of the Commission, the Member State in question is to take the necessary measures to comply with the Court's judgment (art. 260, first section of the Consolidated version of the Treaty on the Functioning of the European Union).

This is still a straightforward practice. Should the Member State, however, subsequently fail to comply with the Court's judgment, nor pay the "lump sum or penalty payment" the Court can impose on it (art. 260, second section of the Consolidated version of the Treaty on the Functioning of the European Union), there are no further legal means to induce the Member State. There are, of course, political ways through which to maneuver, but these already exist, irrespective of the rules, so that an appeal to them doesn't enhance the status of European legislation. The provisions in the Consolidated version of the Treaty on the Functioning of the European Union directed at the Member States may be invoked by individuals before a national court of law, but this shifts the crucial element to a nation, so that, via a detour, national law is concerned: European legislation is there accepted and applied.

It is not just the position of the judge that is illustrative for the dubious position of international legislation. An organ of the executive of the United Nations, the Security Council (mentioned above), appears not to be able to operate on its own. This is clear from the fact that five of the fifteen members had to be given the status of permanent member (art. 23, section 1 of the UN Charter) (which, moreover, as was remarked above, acquired the veto right), apparently because they would not have adhered to decisions that contravene their interests. This pragmatic solution is commendable, but in this way politics are decisive and there seems to be no room for a (separate) domain of law.

It is, then, difficult to demonstrate that international law exists. Agreements have been made, but it cannot consistently be inferred from the behavior of states that they acknowledge these as legal. Problems don't often ensue since issues are involved in which it is to states' advantage that the agreements are met, or since one wants to prevent political difficulties to arise,<sup>25</sup> but that doesn't indicate a recognition of international rules as law.

Hegel points to the problems at the international level as a result of a lack of enforceability: "There is no magistrate; there are at best arbitrators and mediators between states, and these merely coincidentally, i.e. according to specific wishes."<sup>26</sup> Although many supranational organizations have been erected, this observation still seems to be correct. In Hegel's view, there can only be a command ("Sollen") to obey the rules;<sup>27</sup> the problems might be resolved through moral standards.<sup>28</sup> For Hegel, moreover, positive law and natural law coincide.<sup>29</sup>

<sup>25</sup> The latter situation may account for behavior which seems to be at odds with the thesis that international law is observed by states if this seems to conflict with their interests [Scott, S. V.: *International Law as Ideology: Theorizing the Relationship between International Law and International Politics. European Journal of International Law*, 5 (1994) 1, 314.]

<sup>26</sup> "Es giebt keinen Prätor, höchstens Schiedsrichter und Vermittler zwischen Staaten, und auch diese nur zufälligerweise, d.i. nach besondern Willen." Hegel, G. W. F.: *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* [1821]. Stuttgart-Bad Cannstatt, 1964, § 333, Anmerkung (p. 443).

<sup>27</sup> *Ibid.* § 333 (p. 443).

<sup>28</sup> Such a way out doesn't suffice, in my opinion, but I won't elaborate on that here.

<sup>29</sup> There is, in Hegel's perspective, only positive law [*Grundlinien der Philosophie des Rechts*, § 3 (p. 42)], but this merely follows from the fact that there is no difference between positive law and natural law [*Grundlinien der Philosophie des Rechts*, § 3, Anmerkung (pp. 42, 43)].

Similar characteristics pertain to the current situation: “A clear weakness of international law [...] is that the enforcement mechanisms of international law continue to be unsatisfactory and the Security Council does not offer an adequate substitute.”<sup>30</sup> This is not all there is to say on this issue; international law may originate in the same manner as national law. Once international law is realized, it is abided by because the enforceability is a given. Accordingly, it is not in the nature of international law that it could not exist; it would be more apt to say that it must follow the same course as national law in order to function. Franck rightly points out that incidental noncompliance is not decisive; even at the national level, this is manifested;<sup>31</sup> a crucial difference, however, is that actors at the national level that do not observe the law can be punished against their will.<sup>32</sup>

It may be objected that in the preceding no definition was given of “law” or of “right”. This is not only difficult but perhaps even impossible. To this predicament one may add that “[...] there is no such thing as an intrinsically ‘proper’ or ‘improper’ meaning of a word.”,<sup>33</sup> and that “[...] the idea of a true definition is a superstition”,<sup>34</sup> so that the matter whether “international law” is law is merely verbal<sup>35</sup> and needs to be abjured<sup>36</sup> (no pun intended). These observations have merit. A definition is in many cases an inadequate tool in setting up an argumentation, viz., if one coins a definition and subsequently inquires what follows from it. Various lines of thought may thus arise that are not mutually compatible or consistent; they may even conflict. Alternatively, a definition may be used (in common) if it is justified, such as that of a triangle.

The question is, then, which of these two situations (one starts with a definition and constructs a line of thought on this basis, or uses a definition justifiedly) applies. In my opinion, it is the second, so that Williams’s remarks are enervated, at least with regard to *this* issue. To illustrate this, I point to the way the word “law” is used. If someone were to say that the *Corpus Iuris Civilis* is law at present, he would have a hard time explaining why, whereas it would be easy to argue that (part of) it *was* law during the 6th century A.D.<sup>37</sup>

This approach does not entirely entail that “international law” is not law, of course: there are people who use the word “law” to refer to “international law” (indeed, otherwise

<sup>30</sup> Carty, A.: *Philosophy of International Law*. Edinburgh, 2007. 81.

<sup>31</sup> Franck, Th. M.: *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*. *American Journal of International Law*, 100 (2006) 1, 91; cf. D’Amato, A.: *International Law: Process and Prospect*. 9. Irvington (NY), 1995.

<sup>32</sup> As Hobbes puts it: “[...] if any man had so farre exceeded the rest in power, that all of them with joynd forces could not have resisted him, there had been no cause why he should part with that Right which nature had given him [...]” Hobbes, Th.: *De Cive* [1651] (the English version), entitled in the first edition *Philosophicall Rudiments Concerning Government and Society*. Ed. by H. Warrender. Oxford, 1983, Chapter 15, § 5 (p. 186).

<sup>33</sup> Williams, G. L.: *International Law and the Controversy concerning the Word “Law”*. *British Yearbook of International Law*, 22 (1945), 148.

<sup>34</sup> *Ibid.* 159.

<sup>35</sup> *Ibid.* 157.

<sup>36</sup> *Ibid.* 163.

<sup>37</sup> The legislation was initially limited to the Eastern Roman Empire; upon the recapture of the provinces of the Western Roman Empire that had fallen to the Ostrogoths, it was introduced there as well. The restored unity did not last, however, as the empire was invaded by the Lombards in 568 A.D. It is doubtful whether the legislation was predominant even before 568 A.D., inter alia since it did not compose a systematic whole.

the present article would largely be moot). This usage appears to result from an unwarranted expansion of the domain to which “law” may be said to refer. One easily introduces the political process to the discussion when referring to the international domain, thus confounding politics and law: “[...] assurances for securing compliance with [customs, principles, and norms that function as rules to regulate conduct by persons in their mutual relations as members of a political community] need not be predicated on the assertion of force or the promise of swift, certain punishment of wrongdoers. In the international dimension, guarantees of law for regulating states remain primarily couched in international public opinion and the political will of governments to make the law work in their national interest.”<sup>38</sup> If such a position is opted for, the discussion comes to an end prematurely, since “international law” is then supposed to include international politics, which evidently do exist.

In any event, it seems to be clear that the obligations that the law imposes need to be enforceable; its lack of permissiveness is characteristic for the law. D’Amato presents an admirably nuanced view in dealing with the matter with regard to the international level, but his interpretation of “enforcement” seems too broad; pointing out that not all punishments are physical (e.g. a monetary fine), it is concluded that “[...] when we think of legal enforcement, we need not imagine the use of physical force against the person of the law violator, although, of course, in some cases physical force is appropriate.”<sup>39</sup> Yet (physical) force is invariably needed if the initial punishment is not effective (if a monetary fine is not paid, enforcement will still be necessary). So even if force is not always immediately required, its presence in the form of a back-up is needed.

Does this mean that the state of nature, for the time being at least, continues to exist between states? Hobbes affirms this.<sup>40</sup> This doesn’t entail, according to his line of thought, that actual battle need arise, for he distinguishes between war and battle: “[...] WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known [...]”<sup>41</sup>

The objection that the differences between states are greater than those between individuals, which is sometimes offered as evidence that Hobbes’s depiction of the state of nature doesn’t apply to the international level,<sup>42</sup> is not decisive as various reasons may exist why countries don’t attack other countries, e.g. because of the danger that they will, in turn, be attacked themselves by countries that have a special interest in retaliatory measures, or because they value the economic interests that can be satisfied peacefully more than the gains that may result from an act of aggression.

Here, Grotius’s position is no realistic alternative, either. He, too, emphasizes the role of enforcement: it is the law that enforces.<sup>43</sup> The power to sanction flows, in his opinion, from natural law itself;<sup>44</sup> sovereigns impose sanctions, but this is rather a result of natural law than of their positions as rulers;<sup>45</sup> natural law itself lacks force, but is still effective

<sup>38</sup> Joyner, C. C.: *International Law in the 21st century*. Lanham (MD), 2005. 5, 6.

<sup>39</sup> D’Amato, A.: *International Law: Process and Prospect*. *op. cit.* 14, 15.

<sup>40</sup> Hobbes: *Leviathan*. *op. cit.* 90 (Chapter 13); 163 (Chapter 22).

<sup>41</sup> *Ibid.* 88 (Chapter 13).

<sup>42</sup> Yurdusev, A. N.: *Thomas Hobbes and International Relations: From Realism to Rationalism*. *Australian Journal of International Affairs*, 60 (1996) 2, 316.

<sup>43</sup> Grotius: *De Iure Belli ac Pacis*. *op. cit.* 34 (Book 1, Chapter 1, § 9).

<sup>44</sup> *Ibid.* 511 (Book 2, Chapter 20, § 40).

<sup>45</sup> *Ibid.* 509 (Book 2, Chapter 20, § 40).

(“Neque [...] quamvis a vi destitutum ius omni caret effectu.”)<sup>46</sup> Natural law would then, in the absence of an authority to take action, have to “force”, which is difficult to make insightful without an appeal to a (presupposed) human nature (cf. *supra*, note 11).

Hart points out that the law can't be reduced to “[...] general orders backed by threats given by one generally obeyed [...]”,<sup>47</sup> but the enforceability which, as was indicated, is characteristic for the national level is a necessary condition to distinguish between rules of law and requests or commandments<sup>48</sup> as long as the law has not been internalized by the subjects of law (or rather prospective subjects of law). Hart does not want to infer that international law doesn't exist from the fact that there is no enforceability at the international level,<sup>49</sup> but he doesn't make it clear what this would mean. A reference to the fact that states actually keep to the rules is not sufficient here, since they do this on the basis of self-interest.

In this regard, one may argue that states, acting only if gains are to be expected,<sup>50</sup> are not bound in the same way individuals are at the national level. The conclusion that “[t]here is no easy or clear way to distinguish international law from either politics or mere norms.”<sup>51</sup> seems justified, with the caveat that this implies the conceptual existence of separate domains of “international law” and “norms”. The difficulty of the former I have attempted to expound above; the problems with the latter requires a treatment that would lead to too great a digression. Still, in the last section a relevant issue will be discussed that borders on this.

### 3. The import of human rights

In the foregoing, it was shown that it is difficult to demonstrate the existence of international law owing to a lack of enforceability at the international level. Yet the existence of universal human rights seems to point to international law. Many treaties have been signed to protect human rights, among which the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Should the presence of international law, even if one grants the enforceability issue, not be concluded on this given?

Those who contend that international law has been settled in these documents seem to overlook an important factor. They are indeed universal treaties, in that they focus on the rights of human beings around the entire world. On the other hand, the universality is obviously limited: they are universal treaties on *human* rights. There are principles which transcend the systems of law of countries, such as the principle that a punishable fact should be legally laid down, which is established in both national legislation and in international treaties, e.g. in art. 15 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>46</sup> *Ibid.* 13 (Prolegomena, § 20).

<sup>47</sup> Hart: *The Concept of Law. op. cit.* 24.

<sup>48</sup> Apart from the Ten Commandments, which are not supposed to be without consequences if not obeyed.

<sup>49</sup> Hart: *The Concept of Law. op. cit.* 215.

<sup>50</sup> Cf. Guzman, A. T.: *How International Law Works. A Rational Choice Theory.* Oxford, 2008. 121, 180.

<sup>51</sup> *Ibid.* 217.

Does this imply the presence of an international domain of principles, to be codified by legislators, or is there another basis of law than the universal human rights?

In virtually every society there seems to be a basic set of standards (cf. section 1). One may even call this into question.<sup>52</sup> (I won't deal with the opinions of those who argue a fundamental relativism in this respect. This can't be refuted a priori, but is more radical than what I put forward here. If such a position is accepted, it will only have even more extensive consequences for the appraisal of law.)

There seem to be (or to have been) primitive societies where certain fundamental norms are (or were) not maintained, but what is the relevance of this? It is unclear whether one may really call this a society. This depends on the scope of one's definition of "society". To what extent does a bond justify utilizing the idea of society? If one merely associates at times of mutual dependence, an atomic whole (one does not consider oneself, or at least not primarily, to be a part of a greater whole) remains the background for each relation.

At any rate, the fact that societies acknowledge basic standards independently of each other is no proof for the existence of natural law in the narrow sense. One can point to—besides the minimum content of natural law (Hart; cf. *supra*, note 4) or the laws of nature (Hobbes; cf. *supra*, note 7), in which the domain for positive law to have a breeding ground at all is made explicit (cf. section 1)—a number of values, such as the right to life (art. 6 of the ICCPR) and a fair trial (art. 14 of the ICCPR), which are indeed necessary conditions. If one should, e.g. not deem one's life protected properly by (the enforcers of) the law, anarchy might be imminent. From this it may be concluded that the basic rights and laws which appear in each system of law owe their existence to their being required for a system of law to be possible at all.

This can be illustrated by a (global) description of the development of the rights of individuals. Those who could exert the greatest power in society could, once rights had been established, determine which rights would be concerned and to whom they would be allotted. It may be argued that gender and race were pivotal factors in this development, which is clear from, e.g. the respective moments women received suffrage in Europe and the U.S.A. and the subordinate position of minorities in various places.

At some time (various moments) the rights of women and minorities were acknowledged. One may wonder whether universal principles were then transmitted into positive law. This would mean that it was recognized that these groups of people should not be disfavoured, which is difficult to uphold. It seems more likely that the position of these groups could no longer be ignored as they gained power, partly because of their ability to unite. To deny them their rights would undermine the system of law.

This is, of course, not the only possibility to explain the rise of these rights. One may, alternatively, appeal to human life as being "of intrinsic importance"<sup>53</sup> or it may be advanced that in some cases reason was acknowledged as a criterion. As to the first possibility: it will be difficult, if not impossible, to make it clear what this means,<sup>54</sup> and, apart from that, why, even if it is acknowledged to be correct, it does not extend to other beings than human

<sup>52</sup> Cf. Winch, P.: *Ethics and Action*. London, 1972. 57; Winch himself doesn't deny, incidentally, that a pattern can be discerned (*Ethics and Action*. 58).

<sup>53</sup> Dworkin, R.: *Is Democracy Possible Here?* Princeton (NJ)—Oxford, 2006. 35.

<sup>54</sup> Dworkin does not, in any case, succeed in doing this, appealing merely to a principle (the "principle of intrinsic value") that "almost all of us" are said to share (*Ibid.* 9). This does not seem to be more than an appeal to common sense, which cannot, in my opinion, serve as a basis.

beings. In the second case (an appeal to reason), one may grant reason as the criterion, but maintain that this is only the case because certain rights could no longer be withheld. If a being apparently endowed with reason were not granted the basic rights, the grounds for the rights of those already in possession of them would come under discussion. Reason would no longer serve as a standard and would have to be replaced by another one. This is, however, lacking, which is why this issue was brought up in the first place. It is reasonable beings who maintain reason as a criterion,<sup>55</sup> since this is an element shared by them (and through which they can distinguish themselves in relevant aspects from other beings), a factor that continually serves as a minimum condition in order to claim a particular right. In this case it is important to discern being able to use one's reason in establishing rights on the one hand and acknowledging reason as a criterion for attributing certain rights on the other. That this distinction is not always made doesn't detract from its merit.

It is decisive that reasonable creatures are the ones formulating the rights and norms. They separate a specific domain for themselves and those like them, where more rights can be appealed to than elsewhere. Only they, by the way, are of course able to accomplish this. Animals (apparently) not only lack the intelligence to reach the level of abstraction required to draft laws, but are even unable to realize the systematic organization that serves as a prerequisite for a forum to produce laws. As far as they are concerned, it seems, there is merely a community. This may be quite large, as seems to be the case in a number of species of bees. There is no need, then, to realize legislation: the mutual competition which is characteristic for humans is absent, for one reason because these creatures don't (or even can't) observe a difference between private and public interests.<sup>56</sup>

At any rate, what is at stake is not that it is acknowledged that the rights of reasonable beings ought to be respected, in accordance with natural law in the narrow sense, but that a minimum domain can be isolated, where one is safe; the beings that don't have access to this domain can't appeal to these rights. In this way, one may, if one, moreover, in fact also acts on this basis (and doesn't oneself act from the conviction that natural law in the narrow sense applies, which is also possible, though I would not, as said, concur with this view), withhold basic rights to beings deemed not to dispose of reason.

The difficult matter what reason is and which beings may be said to dispose of it is not explicated here; this is not necessary as only the factual situation is considered (i.e. what "reason" has been taken—roughly—to be), although what it has been thought to be may have been prompted (perhaps indeliberately) by a desire to find a distinguishing feature. The need for a specific domain mentioned above would in that case have an even more fundamental precursor here.

Animal rights have been laid down in legislation rudimentarily.<sup>57</sup> Fundamental rights are in some places recognized—the German Constitution contains these, for instance (in art. 20a)—but in these cases only very general rights are concerned. Many rights are irrelevant to animals, such as the freedom of expression. The most important ones, such as the right to

<sup>55</sup> Schopenhauer already points to this (Schopenhauer, A.: *Die beiden Grundprobleme der Ethik* [1840]. Sämtliche Werke, Band 4. Wiesbaden, 1950. 162).

<sup>56</sup> Cf. Hobbes: *Leviathan. op. cit.* 119–120 (Chapter 17).

<sup>57</sup> If one opines, perhaps on the basis of an account similar to the one described above, the criterion whether a being can suffer, which Jeremy Bentham famously advances as the pivotal issue [*An Introduction to the Principles of Morals and Legislation* [1789]. The Works of Jeremy Bentham, vol. 1. Ed. by J. Bowring. New York (NY), 1962. 143 (note)], decisive, animals' suffering is to be avoided, at least to some degree.

life, however, are of importance. Perhaps some animal rights will eventually be established structurally.

An ever greater number of rights may in this way be laid down, so that the domain of subjects of law gradually expands from white men to human beings to sentient beings. It cannot be inferred from this that universal principles would function as a driving force as it is unclear how the process in which an increasing number of rights are acknowledged develops and why. If the way in which an insight into this process is possible is not clear, only the actual development can be observed.

The same consideration as the one mentioned in section 1 is relevant here. It was argued there that the absence of natural law in the narrow sense cannot be demonstrated, which did not prove to be a decisive objection. The present section adds that it can't be proved that universal principles exist. Of course, this is not the challenge; on the contrary, it is up to those who maintain natural law in the narrow sense to demonstrate to what extent these *would* exist. Accordingly, the issue revolves around the question whether it is more credible for such principles to serve as a basis in establishing human rights, or whether these should rather be considered to be generalizations made in hindsight; a top-down-versus a bottom-up-approach. I have indicated above that the second approach seems to me to be the more persuasive.

What does this entail for the matter whether international principles are decisive for law? Rules at the international level are no indication for the existence of natural law in the narrow sense. In international relations, one does not suppose that certain principles of natural law in the narrow sense should be transposed into positive law. If this plays any role, it merely points to a possible justification of natural law in the narrow sense, but if it *doesn't* play any role, the debate is concluded even sooner.

## Conclusion

In this article, I have outlined a number of aspects of the domain referred to as "international law" and on that basis problematized the idea that "international law" exists. In the first section, it was indicated which are the minimal conditions for a system of law to be considered as such. I pointed out the characteristics that can be found in any system of law. Especially the fact that none of the subjects of law is able to ignore the rules is important.

In section 2 this was elaborated upon; it was also described what this means at the international level. It turned out that hard questions issue from the fact that a great number of rules can't be enforced at that level. If a state can simply ignore certain rules, it is difficult to maintain that there is law, particularly if this situation is compared with the one at the national level, where a relatively clear process of law can be discerned.

Human rights, finally, which were discussed in section 3, exhibit international patterns. It doesn't follow from this, however, that international principles are concerned. It is more credible to argue that one is motivated by one's own needs; people appear to want to optimize their position and can only realize this (seemingly) credibly by respecting the rights they want to have bestowed upon themselves of others as well.

This article's purport is primarily academic: problems at the international level are often—pragmatically—resolved by means to which many parties can assent. That this is nevertheless not a merely theoretical issue is clear from the fact that those solutions are invariably of a political nature. If a relatively powerful state acknowledges the authority of

the International Court of Justice, e.g. it does so because this renders more favourable results (economically or politically) than the alternative of not acknowledging its authority.

In order to resolve this state of affairs, conglomerates were formed, such as Europe, but this doesn't produce a consistent solution and leads to *ad hoc*-approaches. This situation—international politics are decisive instead of alleged 'international law'—will remain until a supranational system of law emerges modeled after those in developed countries. Whether this will in fact appear is difficult to predict.

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## An Appraisal of the Socio-Legal issues Involved in Trafficking of Nigeria Women and Children

**Abstract.** Trafficking in humans has been described as the third most lucrative criminal enterprise in the world after trade in illicit arms and drugs with an estimated profits between US \$7–10 billion annually. The main aim of this paper is to discuss how Nigerian women and children are trafficked to Italy for prostitution with the impression that they will make a living through effortless earnings in Europe. Though no society is immune from trafficking but studies have shown that most Nigerian women and children who are trafficked to Italy for the purpose of prostitution is as a result of their gullibility to make easy life in Europe and they end up being trapped in a trafficking ring of Nigerian and Italian mafias. Hence this paper will examine the “*An Appraisal of the Socio-Legal Issues Involved in Trafficking of Nigeria Women and Children*” by taking into consideration the factors responsible for the trafficking and the legal approaches adopted by the government of Nigeria to address the problem over the years.

**Keywords:** children, legal, Nigeria, social, trafficking, women

### Introduction

Trafficking in Nigerian Women and Children started in the mid-1980s expanding into a multi-billion industry in the early 1990s with new trafficking crime gang joining the network, which has made prostitution deeply embedded in everyday life of some states in the country due to the huge and easy money being derived from the industry.<sup>1</sup> Nigeria is a country of origin, transit and destination. As a country of origin, Nigerian women and children are trafficked to Europe, Middle East, North African and West and Central African countries, too. It is a transit country for West African women and children to Central African Countries, Europe particularly Italy and United Kingdom which are the most common destination of Nigerian women and children. Furthermore, internal trafficking takes place in Nigeria. Nigeria has been reported by the United Nations (UN) to be one of the top 10 countries of origin for trafficking in the world.<sup>2</sup> Though for the pupose of this research Nigeria will be considered as a country of origin and Italy as the destination.

### 1. Definition of Trafficking in Persons

The Nigerian Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2003 defines *trafficking* as including “all acts and attempted acts involved in the recruitment, transportation within or across Nigerian borders, purchase, sale, transfer, receipt, or

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<sup>1</sup> Uzoma, K.: Hand-Out on the Smuggling in Nigerian Women and Girls (Kenny Uzoma, Social Communication Expert). Available online <http://www.update.dk/cfje/VidBase.nsf/ID/VB01731407> visited on 16 February, 2012, 1.

<sup>2</sup> “UN Maps Human Trafficking”, *Associated Press*, 14 October, 2011.

harboring of a person involving the use of deception, coercion, or debt bondage for the purpose of placing or holding the person, whether for or not in involuntary servitude (domestic, sexual, or reproductive) in forced or bonded labour, or in slavery-like conditions.”<sup>3</sup> The Palermo Protocol defined “trafficking in persons” to mean “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.<sup>4</sup> This is the first internationally agreed upon definition of human trafficking.

## 2. Trafficking of Women and Children Within Nigeria Borders

Nigerian children are trafficked internally from areas such as the states of Akwa Ibom, Cross River, Ebonyi, Imo, and Kwara to big cities such as Abuja, Lagos, Kano, and Kaduna, where their labour is exploited. Children from Ekor and Nko in Cross River state in southern Nigeria are trafficked to the western states of Ondo and Ogun. According to Police report, in 2001, about 50,000 Nigerian girls engaging in the sex trade have been stranded in the streets of Europe and Asia, most of who come from Nigeria’s southern states of Edo, Delta and Lagos. This excludes thousands of those girls scattered across the world neither do they include the dead or those wasted by diseases such as HIV/AIDS.<sup>5</sup>

The Nigerian Immigration Service (NIS) discovered new trafficking routes in the northwest region of the country. Traffickers and smugglers have changed their route from the traditional Lagos-Ogun axis to the northern fringes of the country in order to reach Algeria, Libya, Morocco, and Niger *en route* to Italy, Spain, and other European countries.<sup>6</sup>

In March 2002 at a seminar organized in Lagos by the International Federation of Women Lawyers (FIDA), WOTCLEF reported that there are about 20,000 Nigerian women involved in the sex industry in Italy. Again the Daily Champion of 12 July, 2002 reported that 80% of foreign prostitutes in Italy were Nigerian women.<sup>7</sup>

<sup>3</sup> Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2003, Section 50.

<sup>4</sup> United Nations: Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children Supplementing the UN Convention Against Transnational and Organized Crime. Palermo-Italy. UN/General Assembly [UN. Doc. A/55/383 (2000) Annex II]. Eleventh Session, adopted by Resolution 55/25, 12–15 December, 2000. Article 3(a)

<sup>5</sup> “40 Nigerian Girls Deported from Guinea”, Xinhua News Agency, Beijing, China. August 19, 2001.

<sup>6</sup> “Nigeria Intensifies Crackdown on Human Trafficking”, *Xinhua General News Service*, Beijing, China. 23 March, 2003.

<sup>7</sup> Osita, A.: Corruption and Human Trafficking: The Nigerian Case. *West African Review*, 4 (2003) 1, 7. Available online at [http://www.childtrafficking.com/Docs/agbu\\_2003\\_corruption\\_and\\_t.pdf](http://www.childtrafficking.com/Docs/agbu_2003_corruption_and_t.pdf) Visited on 18 February 2012. See also Oyagbola, H.: *Human Trafficking: The Nigerian Woman an Endangered Species*. Available online at [http://beliefassembly.com/papers2005/oyagbola\\_eng.htm](http://beliefassembly.com/papers2005/oyagbola_eng.htm) Visited on 18 February 2012, 4.

### 3. A Panoramic View of Trafficking in Nigerian Women and Girls to Italy for Prostitution

The trafficking of Nigerian women and young girls into Italy for prostitution began in the second half of the 1980s following the increasing economic problems caused by structural adjustment programmes (SAP) imposed at the time by the Nigerian government on orders of the International Monetary Fund.<sup>8</sup> Women and girls started leaving Nigeria for Europe on promises of fantastic well-paying jobs to be obtained in factories, offices, and farms. They arrived in Italy only to find them lured into prostitution and sold into sexual slavery to pay off debts, which they were told they incurred in being “helped” to come to Europe. A number of those who came to Italy during the 1980s ended up as madams who later perpetuated the sex trade by becoming exploiters of their countrywomen.

Beginning from 1995 and 1996, many women and girls trafficked to Italy were often aware that they were unlikely to work in a regular job and might be involved in the sex industry. However, most of these Nigerian women had no idea what prostitution really meant because the majority of them had never been in prostitution in Nigeria. Most of them had no understanding of the conditions under which they would have to work, nor the violence that prostitution entails. However, because many of the women knew that they might have to engage in prostitution, traffickers claim that they were approached by their victims, therefore they did not force or coerce the women into prostitution.<sup>9</sup>

Most victims are induced to travel abroad by the promise of high effortless earnings in a short time period. Most Nigerian victims of trafficking are illiterate and have never had any experience of urban life before they find themselves in the enormous city centres of Turin, Milan, and Rome. When they arrive at their destinations, they are told what they are expected to do and how much money they must pay to regain their freedom. Only then do they realize they are in some form of bondage to their traffickers when it is usually too late and almost impossible to refuse or run away. They find themselves having to cope with a new situation, country, language, and social context without any friendly or family support network. They are subjected to violence, exploitation, and an existence that they never imagined. Nigerian women and girls are made to believe that they have been sponsored to come to Italy to work. They are told that the “madam” who paid for the trip is in Nigeria, whereas the person they are to stay with in Italy is an acquaintance of the madam who is giving them hospitality. The reality is that the “madam” in Nigeria and the hostess in Italy are accomplices in trafficking and prostitution. Most “madams” are women once enslaved as victims of trafficking who, when they succeed in paying their debt, continue in prostitution and earn enough to buy a girl who becomes their slave. The girl or young woman is obliged to prostitute and pay the “madam” a fixed amount of money exactly as the “madams” themselves were made to do. However, the Nigerian victims believe that their exploiters are extending a helping hand to take them out of the misery in which they had been living. Only when they are subjected to violence and degrading acts, stripped of their clothing, money, and dignity, and made to endure physical hardship and beatings do they realize that the deprivation they had lived with in Nigeria was better than the violence, humiliation, and misery they are subjected to on a daily basis in Italy.

<sup>8</sup> Aghatise, E.: Trafficking for Prostitution in Italy: Possible Effects of Government Proposals for Legitimization of Brothels. *VIOLENCE AGAINST WOMEN*/October 2004, 1129, Available online at [www.prostitutionresearch.com/pdf/AghatiseVAW.pdf](http://www.prostitutionresearch.com/pdf/AghatiseVAW.pdf) visited on 16 February 2012.

<sup>9</sup> *Ibid.* 1129.

#### 4. Modus Operandi of the Traffickers

##### 4.1. Oath Taking and Juju Rites as a Tool to obtain Psychological Submission, to the Traffickers

The traffickers, usually men who transport women and girls on commission for the “madams”, or who traffic their own set of women and girls, sell them to the highest bidder. When the girls and women are sold, they are made to undergo specific magic *juju* rites, during which they swear never to reveal the identity of their traffickers and madams to the police and to pay their debts without creating problems. *Juju* practices are black magic rites in which intimate clothing, body tissue, fragments, or fluids of the women (e.g. pubic or head hair, finger nails, or menstrual blood) are taken and placed before traditional shrines. Sometimes, prostitution is induced by magic rites and potions in which women and girls are forced to drink the water used to wash a dead person’s body as part of the ritual. The young women are made to swear an oath not to disclose the origin of their trip abroad, pay their debts (usually not stated at the moment of stipulating the blood contract), and never to report to the police. These rites have great significance for the victims because they strongly believe that harm would come after them or their families if they do not repay their debts. The Italian police have noted that Nigerian women and girls require much less physical control from their exploiters compared with other foreign women and girls trafficked into prostitution because the rites they are made to undergo impose psychological control on them.<sup>10</sup>

##### 4.2. Debt Bondage by Traffickers as a Tool for Continued Exploitation of Victims

The debts, imposed by the traffickers when victims arrive in Italy, are large amounts that range from about €31,000 to €62,000. In recent times, these sums have doubled. Trafficked victims are now required, in most cases, to pay between €62,000 and €124,000 to obtain their freedom. The debts have to be paid in a matter of a few months, at the risk of violence being used against them or their families in Nigeria. It should be noted that men who buy women for sex pay an average of €10.00 to €15.00 per session and at times, as little as €5.00. Moreover, victims are also required to make an advance payment each month of minimally €516.00 to rent the roadside spot where they work. Victims must also pay a weekly sum of €36.00 for food, purchase expensive provocative clothing for prostituting that is usually sold to them by the madam or by her friends, and buy regular and expensive gifts for their madams each month.<sup>11</sup> Another source stated that the madam handles the girls and keeps them in almost slavlike conditions. They are held until they can pay off their debt of €40,000 to €50,000 plus costs for their room and board and any other fees the traffickers tack onto the debt. Girls are usually housed under direct control of the “mama”, who keeps in touch with the criminal organizations and passes on a percentage of the earnings to those organizations. Girls brought into the sex industry often earn up to €3,000 (Euros) a month for their bosses in Italy.<sup>12</sup>

<sup>10</sup> *Ibid.* 1130–1131. See also Aghatise, E.: *Research and Case Studies on the International Trafficking of Nigerian Women and Girls for Prostitution in Italy (La prostituzione Nigeriana in Italia)*. Unpublished Report, Turin, Italy, 2001, 43.

<sup>11</sup> *Ibid.* 1131.

<sup>12</sup> “Nigeria: Agreement Signed with Italy to Combat Human Trafficking”, *Africa News*, Nairobi, Kenya, 13 November 2003.

### 5. Factors Contributing to the Growth of Trafficking in Nigeria

The factors responsible for the growth of trafficking in women and children in Nigeria are economic, social, cultural, gender discrimination and marginalization, corruption and organized criminal networks.

(a) *Economic Factors*: Causes of trafficking in Nigeria include economic hardship, a weakening of family networks, low levels of education, few employment opportunities, a strong desire to emigrate in search of economic and social betterment, a high demand for trafficked persons in Europe, involvement of international organized criminal groups, limited border control, and poor reporting and monitoring of trafficking cases by law enforcement.<sup>13</sup> According to Uzoma, “a young woman prostituting in Europe can earn in few months with less efforts what she would make in twelve years working in a farm, private or public entities in Nigeria”.<sup>14</sup>

(b) *Social Factors*: Due to the high cost of education since the mid-1980s occasioned by the Nigeria’s adoption of the Structural Adjustment Programme (SAP) it became increasingly difficult for poor families to sponsor their children especially in tertiary institution.<sup>15</sup> Thus, there is a strong correlation between the trafficking of women and girls for prostitution and low levels of education, inadequate training and educational opportunities. For instance, in Nigeria a considerable number of trafficked victims for prostitution have only completed primary school or have dropped out of secondary school. In addition to having low-level qualifications, they do not have access to vocational training. Hence they cannot be absorbed by the formal economy because of the economic down turn in this country and their educational limitations. Most of them do not have access to capital and so they become easy prey to traffickers who entice them with the possibility of a better life.<sup>16</sup>

Given the patriarchal nature of the Nigerian Society, girls normally become victims as they drop out of school because their families can no longer afford to pay their fees. Many of these girls that drop out of school are trafficked to destination countries for prostitution.

(c) *Cultural Factors*: The magnitude of the problem of child trafficking and labour exploitation in a given geographic area also depends on family and community hierarchies and cultural traditions and values that encourage gender discrimination<sup>17</sup> and a disregard for children’s rights. The demand for particular types of children which is also often related to cultural, ethnic, and/or socio-economic status find expression in trafficking. Children belonging to marginalized ethnic groups, subservient castes or dysfunctional families (war or disaster affected, for example) are often target for trafficking. Again many cultures have a long tradition of children labouring to help their families at home or in the fields. This traditional attitude that children should work, to help their families sometimes result in the inadvertent placement of a child in a situation of exploitative labour from which it is then very difficult to escape.

<sup>13</sup> Ume-Ezeoke, J.: Desk Review for the Programme of Action against Trafficking in Minors and Young Women from Nigerian to Italy for the Purpose of Sexual Exploitation. Rome, United Nations Interregional Crime and Justice Research Institute, February 2003, 24.

<sup>14</sup> Uzoma, *op. cit.* 1.

<sup>15</sup> *Ibid.* 1.

<sup>16</sup> ILO: *Combating the Child Trafficking: At the Heart of the ILO Values*. Geneva, 2002, 26.

<sup>17</sup> Section 42(1) of the Constitution of the Federal Republic of Nigerian 1999.

In many African countries like Nigeria, for instance, sending children to work in faraway places is seen as socially acceptable and often occurs in the context of family dysfunction related to large family size or an inability to care for a child (or children) because of a death in the family, displacement, severe economic stress or other factors. Associated with this wide acceptance of children leaving home for work, is the admissibility of payments to families, intermediaries, agents and other middlemen who can “make a cut”. This practice underlies the widespread interchange of children among African countries, with the result that they easily disappear from parental or other view and are more easily exploitable.<sup>18</sup>

Polygamy is still being practiced in most parts of the country, furthermore, given the patriarchal nature of the Nigerian ethnic groups, boys are valued more than girls and this leads to girls who believe that they have nothing to offer but to sell their bodies so they easily become victims of trafficking. When the head of a household dies the inheritance passes to the male child, who should support the females but often does not do so.<sup>19</sup>

(d) *Marginalisation and Discrimination on the Basis of Gender:* Gender is an issue in trafficking on both the supply and demand sides of the equation. Girls are often seen as expendable, and laws and law enforcement not to mention some cultural and traditional contexts provide them unequal protection. Girls in many societies are expected to sacrifice their education and security and take on responsibilities towards parents and siblings. It is also recognized that one day they would marry and leave, bringing little or no money to the parental home. In such situations, girls are seen as a relatively “poor investment”, and sending them away to work may seem a viable option. The placement of girls in domestic service is often linked to perceptions that domestic service is a good preparation for marriage, and that girls’ families might raise their dowries by putting them to work. General ignorance of the exploitative nature of much of the work is common since many families are illiterate and exposed only to hearsay evidence from recruiters or returnees.<sup>20</sup>

(e) *Corruption:* Nigeria, has witnessed the development of a vast system of institutionalized political corruption sometimes emanating from the very top and pervading all governmental institutions with perverse influence on the rest of society. Systemic corruption, sometimes also referred to as entrenched corruption, occurs where bribery, on a large or small scale is routine. However, it is in terms of the effects of corruption on a society that a clearer link is established between corruption and human trafficking.<sup>21</sup> Thus corruption and bad governance, severely restricted economic growth and development, thereby creating a supply of needy women and children vulnerable to traffickers.<sup>22</sup> Again, corruption among officers at European and other African consulates is said to facilitate obtaining transit visas for trafficking victims. Visas are often obtained through brokers, who are Nigerian citizens with “good” connections in diplomatic missions.<sup>23</sup>

<sup>18</sup> ILO, *op. cit.* 27.

<sup>19</sup> Uzoma, *op. cit.* 1.

<sup>20</sup> ILO, *op. cit.*, 28.

<sup>21</sup> Osita: *op. cit.* 4–5. See also Osita, A.: *Re-visiting Corruption and Human Trafficking in Nigeria: Any Progress?* Available online at [www.ungift.org/docs/ungift/pdf/vf/.../OsitaAgbu\\_1.pdf](http://www.ungift.org/docs/ungift/pdf/vf/.../OsitaAgbu_1.pdf) visited 17 February, 2012, 3.

<sup>22</sup> Ayua, I. (ed.): *Proceedings of the National Conference on the Problems of Corruption in Nigeria.* 26–29 March 2001, Abuja. 15.

<sup>23</sup> di Cartemiglia, L.: *Programme of Actions against Trafficking in Minors and Young Women from Nigeria into Italy for the Purpose of Sexual Exploitation.* Desk Review, United Nations Interregional Crime and Justice Institute, Rome, January 2003, 5.

(f) *Organised Criminal Network*: Organized criminal networks from Nigeria manage trafficking rings throughout Africa.<sup>24</sup> Nigerian criminals maintain a strong presence in Italy, especially in Turin. They are involved in the commercial sex industry, clandestine immigration, counterfeiting of documents and money, illegal currency export transactions, and trafficking of drugs and persons. The absence of clashes between Nigerian and Italian criminal groups indicates the existence of complicity. For example, there is evidence that an Italian criminal group will rent out prostitution areas to a Nigerian group.

Most Nigerian trafficked victims for sexual exploitation come primarily from the southern part of the country and belong to the Bini, Edo, Igbo, and Yoruba tribes. They are usually between 17 and 30 years of age, although they are getting younger, and the number of trafficked minors appears to be increasing.<sup>25</sup>

## 6. Psychological Consequences of Being Trafficked

Victims suffer many psychological consequences from being trafficked and prostituted. Many of them end up having serious psychological problems as a consequence of the magic *juju* rites and the mental and physical violence to which they are subjected. Because they believe that they are being helped by those who traffic them, the realization that their helpers are exploiting them in vicious ways is often the cause of great psychological suffering. Exploiters use various and cruel forms of violence: verbal and physical abuse; rape; burning women and girls with hot irons if they refuse to prostitute; making them continue prostituting on the road even when they are ill, menstruating, or pregnant; forcing them to undergo abortions without anaesthetics; forcing them to risk their lives by having unprotected intercourse; taking away their children as leverage to make them submissive; and attacking their families in Nigeria as a way of pressuring them to continue prostituting. As part of the psychological pressure, victims are told lies, such as stories of how the Italian police shoot at girls without residence permits. The list of humiliations and violence is endless.

Records have shown that there are about 19,000 to 25,000 foreign prostitutes in Italy and approximately 2000 of them have been trafficked.<sup>26</sup> Rome is the concentrated region for trafficked Nigerian women brought for the purpose of prostitution.<sup>27</sup> Between 25 October and 12 November, 1999, eighty-four young Nigerian girls were deported from Italy to Nigeria. Seventy-one were from Edo State, nine from Delta, two from Ondo State and one from Enugu and Imo States each. Between December 3rd and 8th another eighty-seven predominantly female deportees arrived Nigeria from Italy. In all, well over 180 Nigerian girls aged between 16 and 25 years have been deported from Italy within a period of three months (October to December 1999) and 90 percent of them are from Edo State Nigeria. This deportation has been a source of embarrassment to both the Federal and Edo, State

<sup>24</sup> "Sex-Slave Trade in Kids' Thriving", *South African Press Association*, 5 September 2000. See also Southern Africa: Organized Gangs Lead Wave of Child Sex Trafficking. *United Nations Integrated Regional Information Network*, Nairobi, Kenya, 22 November, 2000.

<sup>25</sup> *Ibid.*

<sup>26</sup> International Organization for Migration (IOM) Migrant Information Programme: *Trafficking in Women for sexual exploitation in Italy*. Rome, June, 1996.

<sup>27</sup> European Race Audit Bulletin, No. 25, London, 25 November 1997.

governments.<sup>28</sup> It should be noted that deportation of Nigerian women and girls who are trafficked for the purpose of prostitution to Europe is a regular phenomenon though Italy is a destination country for almost 90 percent of them and that is why records deportations there are more accessible as there make news in Nigeria. A Rome study stated that nine million Italian men regularly use prostitutes.<sup>29</sup> But as clients get tired of the same woman, gangs often trade slaves to neighbouring countries at knockdown prices. In extreme cases slaves are murdered, especially if gangs suspect that a woman is going to escape. In the early 1990s the number of foreign women murdered in Italy mainly, Albanian and Nigerians accounted for six percent of all murders. By the year 2000 till recent, the figure have risen to twenty-three percent.<sup>30</sup>

## 7. Legal Efforts at Curbing Trafficking in Nigerian Women and Children

Nigeran governments have made positive legal efforts to curb trafficking in women and children especially through legislation and prosecution and conviction of traffickers. These legislation are as follows: Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003; Criminal Code as Amended by the Criminal Code (Amendment) Law 2000; Penal Code; the Immigration Act, the Nigerian Labour Act, Constitution of the Federal Republic of Nigeria 1999 and the African Charter on Human and Peoples Rights.

### 7.1. *Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2003*

In 2003, Nigeria passed the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act. Section 1(1) of the Act established the National Agency for Prohibition of Traffic in Persons and Other Related Matters.<sup>31</sup>

The National Agency for the Prohibition of Trafficking in Persons (NAPTIP) was established by an Act in 2003, (amended in 2005), partly in fulfillment of Nigeria's international obligations under the Trafficking in Persons Protocol Supplementing the United Nations Transnational Organized Crime Convention, to address the scourge of trafficking in persons and its attendant human rights abuses. The functions of NAPTIP include (a) the coordination of all laws on trafficking in persons, (b) the adoption of measures to increase the effectiveness of eradication of trafficking in persons, (c) the enhancement of the effectiveness of law enforcement agents to suppress trafficking, (d) the strengthening and enhancement of effective legal means for international cooperation in criminal matters for suppressing the international activities of traffic in persons, and (e) counseling and rehabilitation of victims of trafficking, etc.<sup>32</sup>

The Act provides that "anyone who exports from Nigeria or imports into Nigeria a person less than 18 years of age", "with intent that such person, or knowing it to be likely

<sup>28</sup> Bolaji, T.: "Afro-Nets", *Guardian on Saturday*, 18 December 1999, 14–15.

<sup>29</sup> Simon, M.: "Perspective-Slavery in Our Times", *Australia News-Future-Survivors of the Sale* Yard. 4 June 2001.

<sup>30</sup> *Ibid.*

<sup>31</sup> Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2003, Section 1(1).

<sup>32</sup> United Nations General Assembly: *National report submitted in accordance with paragraph 15 (a) of the annex to human rights council resolution 5/1 Nigeria*. Human Rights Council Working Group on the Universal Periodic Review, fourth session, Geneva, 2–13 February 2009, 9.

that such person, will be forced or seduced to prostitution” is subject to punishment of imprisonment for life.<sup>33</sup> Section 12, provides that “inducing a person less than 18 years of age by means of deception, coercion, or debt bondage into prostitution is punishable by imprisonment for 10 years. The same punishment applies to leading away such a person, even with the person’s consent”,<sup>34</sup> and Section 13(1) states that “anyone who, having the custody of a person less than 18 years of age, causes or encourages prostitution of such a person, commits a crime punishable by imprisonment for 10 years.”<sup>35</sup>

The Act also states that, “procuring a person less than 18 years of age to have unlawful carnal knowledge with other person or persons in or outside Nigeria is an offence punishable by imprisonment for 10 years”. The same punishment applies to anyone who procures such a person to become a prostitute in or outside Nigeria, to leave Nigeria to become a prostitute, and to leave such a person’s place of abode with the intent to engage in prostitution.<sup>36</sup>

The Act punishes procuring, using, or offering a person for the production of pornography or pornographic performance by imprisonment for 14 years. The same punishment applies to anyone who “traffics in persons for the purpose of forced or compulsory recruitment use in armed conflict.”<sup>37</sup>

The Act criminalises sex tourism by providing for a punishment of imprisonment for 10 years for “any person who organizes or promotes foreign travel which promotes prostitution of any person or encourages such activity.”<sup>38</sup>

Under the Act, “the detaining of a person less than 18 years of age for the purposes of being unlawfully carnally known by any man is punishable by imprisonment for 10 years”.<sup>39</sup> Section 18 provides punishment that; “procuring a person less than 18 years of age by threats, intimidation, or false pretenses to have carnal connection in or outside Nigeria is punishable by imprisonment for 14 years or a fine”. The same punishment applies to anyone who administers any drug to stupefy or overpower such a person to enable any man to “have a carnal knowledge of such a person”<sup>40</sup> while section 19(a) and (e), provides that, “anyone who unlawfully takes or entices a person less than 18 years of age out of the custody of the lawful guardian, unlawfully conveys such a person outside Nigeria,<sup>41</sup> forcibly or fraudulently takes away or detains such a person, or receives or harbours a child knowing that a child has been detained or taken away<sup>42</sup> is subject to punishment of imprisonment for 14 years”.<sup>43</sup>

<sup>33</sup> Section 11.

<sup>34</sup> Section 12.

<sup>35</sup> Section 13(1).

<sup>36</sup> Section 14.

<sup>37</sup> Section 15.

<sup>38</sup> Section 16.

<sup>39</sup> Section 17(2).

<sup>40</sup> Section 18.

<sup>41</sup> Section 19(1)(a).

<sup>42</sup> Section 19(1)(e). According to Section 19(2), a person is deemed to detain any person under section 19(1)(e) when “the person is in or brought upon any such premises with a view to such person being so carnally known, or to detain such person in such premises with intent to compel or induce such person to remain in or upon the premises, he withholds from such person any wearing apparels, other property belonging to such person, or the person’s traveling documents”.

<sup>43</sup> Section 19(1)(a) and (e).

Under the Act; “compelling any person to go from any place by force or by any deceitful means is punishable by imprisonment for 10 years or a fine.<sup>44</sup> The same punishment, without the option of a fine, is applied to anyone who unlawfully takes an unmarried person less than 18 years of age out of the custody or protection of parents”.<sup>45</sup>

The Act states that; punishment or imprisonment for 5 years, a fine, or both can be imposed on anyone who “confines or detains another person in any place against his or her will or otherwise unlawfully deprives another person of his or her liberty.”<sup>46</sup> It is an offense to buy, sell, hire, let, or otherwise obtain possession or dispose of any person less than 18 years of age with intent of employing or using such a person for immoral purposes. Punishment is imprisonment for 14 years”.<sup>47</sup> Again, “using a person for forced labour is punishable by imprisonment for five years, a fine not exceeding N100,000.00, or both fine and imprisonment. The same punishment is imposed on anyone who permits “any place outside of Nigeria to be used for forced labour”.<sup>48</sup> While Section 23 provides that, “importing, exporting, removing, buying, selling, disposing, trafficking, or dealing in any person as a slave, as well as accepting, receiving, or detaining a person as a slave is punishable by imprisonment for life”.<sup>49</sup>

The Act provides that any person who deals or trades in, purchase sells, transfers or takes any person in order that such person should be held or treated as a slave,<sup>50</sup> places or receives a person in servitude as a debt whether due or owing, or to be incurred or contingent whether under the name of a pawn or by whether other name such person may be called or known,<sup>51</sup> conveys or induces any person to come within the limits of Nigeria in order or so that such a person should be held, possessed, dealt with or treated in, purchased, sold or transferred as a slave or be placed in servitude as a pledge or security for debt<sup>52</sup> and holding or possessing a person as a slave,<sup>53</sup> are punishable by imprisonment for life.<sup>54</sup> In addition, imprisonment for life is imposed on anyone who enters into a contract or agreement to perform any of those offences.<sup>55</sup>

The Act states that, “any person, after serving a sentence outside Nigeria for an offense related to trafficking, is liable to be tried in Nigeria for bringing the image of Nigeria into disrepute,” and if convicted, he “forfeits his assets to the Federal Government in addition to serving a term of imprisonment not exceeding two years”.<sup>56</sup>

Under the Act, any resident of Nigeria who encourages prostitution of a person less than 18 years of age,<sup>57</sup> keeps a brothel,<sup>58</sup> permits a defilement of person less than 18 years

<sup>44</sup> Section 19(1)(b).

<sup>45</sup> Section 19(1)(d).

<sup>46</sup> Section 19(1)(c).

<sup>47</sup> Section 21.

<sup>48</sup> Section 22.

<sup>49</sup> Section 23.

<sup>50</sup> Section 24(a).

<sup>51</sup> Section 24(b).

<sup>52</sup> Section 23(c).

<sup>53</sup> Section 24(d).

<sup>54</sup> Section 24.

<sup>55</sup> Section 24(e).

<sup>56</sup> Section 25.

<sup>57</sup> Section 26(1)(a).

<sup>58</sup> Section 26(1)(b).

of age on his premises,<sup>59</sup> allows such a person to be in a brothel,<sup>60</sup> or trades in prostitution<sup>61</sup> and is subject to punishment of imprisonment for ten years<sup>62</sup>. The same punishment applies to any resident of Nigeria who “procures, uses, or offers a person for the production of pornography or for pornographic performance.”<sup>63</sup> An alien who commits any of these offences is subject to deportation after serving a term of imprisonment in Nigeria.<sup>64</sup> Any person who attempts to commit any of the crimes under the act is subject to punishment of imprisonment for 12 months or a fine of N50,000.00 or both.<sup>65</sup>

The Act provides that, “If a corporate body commits an offence under the Act, the Act makes a distinction as to criminal liability”.<sup>66</sup> First, the Act imposes a punishment of imprisonment for 3 years, a fine, or both on a director, manager, secretary, or anyone claiming to act in his or her capacity if it is proven that an offence has “been committed on the instigation or with the connivance of or is attributable to any neglect on the part of” any one of them.<sup>67</sup> Secondly, “where a corporate body is convicted of a crime under the Act, the corporate body itself is subject to a fine of N2 million naira in addition, the court may issue an order to wind up the body and have its assets and properties forfeited to the Victims of Trafficking Trust Fund.”<sup>68</sup>

The Act punishes a commercial carrier<sup>69</sup> that knowingly carry a person in violation of the Act by imprisonment for 2 years or a fine of N2,000,000.00 instead thereof, in addition to any other penalty under any other laws.<sup>70</sup> The Act imposes a specific obligation on tour operators, travel agents,<sup>71</sup> and airline companies<sup>72</sup> to combat trafficking in persons. The Act provides for forfeiture of a passport to the Federal Government of Nigeria of anybody convicted of an offence under the act.<sup>73</sup>

The Act provides for criminal immunity for victims of trafficking; it states, “Where the circumstances so justify, trafficked persons shall not be detained, imprisoned, or prosecuted

<sup>59</sup> Section 26(1)(c).

<sup>60</sup> Section 26(1)(d).

<sup>61</sup> Section 26(1)(d).

<sup>62</sup> Section 26(1).

<sup>63</sup> Section 26(1)(e).

<sup>64</sup> Section 26(2).

<sup>65</sup> Section 27.

<sup>66</sup> Section 28.

<sup>67</sup> Section 28(1).

<sup>68</sup> Section 28(2).

<sup>69</sup> Section 29. Note that Section 50 defines a commercial carrier as “any person or any public, private, or other entity engaged in transporting persons, goods, or mails for remuneration, hire, or any other benefit.”

<sup>70</sup> Section 29(1).

<sup>71</sup> Section 30.

<sup>72</sup> Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2003 (Section 31). These obligations are to “promote through every possible means public awareness of the guiding principles of this Act in-flight magazines, ticket jackets, Internet units and video on long lane flights.”

<sup>73</sup> Section 35. This Article reads, “The passport of any person convicted of an offence involving traffic in persons under this Act shall be forfeited to the Federal Government and shall not be returned to that person unless or until the President directs otherwise, after the grant of a pardon or on exercise of the Constitution of the Federal Republic of Nigeria.”

for offences relating to being a victim of trafficking, including non-possession of valid travel stay or use of false travel or other documents.”<sup>74</sup>

The Act establishes a trafficking victim’s right “to institute civil action against a trafficker and any other person, including a public officer, who have exploited or abused him”.<sup>75</sup> Also, a victim of trafficking “is entitled to compensation, restitution, and recovery for economic, physical, and psychological damages, to be met from the assets of the convicted trafficker”.<sup>76</sup>

## 7.2. *Trafficking in Persons (Prohibition) Law Enforcement and Administration (Amendment) Act, 2005*

This Act is an Amendment of the National Assembly of the Federal Republic of Nigeria, (of 7 December, 2005). It provides sundry amendments to the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003, No. 14 to expand its scope from investigation to prosecution of traffickers, seizure of properties and forfeiture of proceeds to the Victims of Trafficking Trust Fund.<sup>77</sup>

The Act deals with forfeitures after conviction in certain cases and provides that, “(1) A person convicted of an offence under the Act shall forfeit to the Victims of Trafficking Trust Fund; (a) all the properties and Assets and properties which may or are the subject of an interim order of the court after an attachment by the Agency as specified in Section 40 of this Act.”<sup>78</sup> The Act further addressed the issue of Forfeiture of Property and provides that; “All properties of a person convicted of an offence under this Act and shows to be derived or acquired from such illegal act which are already the subject of an interim order shall be forfeited to the Victims of Trafficking Trust Fund”.<sup>79</sup>

In dealing with foreign Assets of the traffickers the Act states that; “(1) Where it is established that any convicted person has assets or properties in a foreign country, acquired as a result of such criminal activity, such assets or property subject to any treaty or agreement with such foreign country, shall be forfeited to the Victims of Trafficking Trust Fund.”<sup>80</sup>

<sup>74</sup> Section 37.

<sup>75</sup> Section 38(a).

<sup>76</sup> Section 38(b).

<sup>77</sup> Section 14 of the Act deals with insertion of new Sections and provides that the Principal Act is amended- (a) by inserting immediately after the existing Section 34, to be numbered as Sections 35 to 48.

<sup>78</sup> Section 35 (1), (2) and (3).

<sup>79</sup> Section 36.

<sup>80</sup> Section 37(1) and (2). See Section 39 (a), (b) and (c) for types of forfeitable assets under the amended Act viz: “(a) all means of conveyance including vehicles or vessels which are used or are intended for use to transport or in any manner, facilitate trafficking or any person”. (b) All monies, negotiable instruments, securities, (c) all real property, including any right, title, interest (including any leasehold interest) in the whole or any piece or parcel of land appurtenances which is used or intended to be used under this Act...”.

### 7.3. Criminal Code and Penal Code Provisions Prohibiting Trafficking in Persons

#### (a) Criminal Code as Amended by the Criminal Code (Amendment) Act 2000

Several provisions of the “Criminal Code” and the “Penal Code” apply to trafficking, this is because Nigeria operates two codes of criminal law.<sup>81</sup> Under Section 222 (A) of the Criminal Code, anyone who having lawful custody of a girl less than 13 years of age, “causes or encourages the seduction, unlawful carnal knowledge or prostitution of, or the commission of an indecent assault upon such a girl” is subject to imprisonment for seven years or a fine.<sup>82</sup>

The Criminal Code prohibits procurement,<sup>83</sup> which includes procurement of a girl who is less than 18 years of age for the purpose of unlawful carnal knowledge with another person.<sup>84</sup> It also includes procurement of a woman or girl with the intent that she become a common prostitute either in Nigeria or elsewhere,<sup>85</sup> that she leaves Nigeria and possibly become an inmate of a brothel elsewhere,<sup>86</sup> or that she leaves her usual place of abode for the purpose of prostitution.<sup>87</sup> The punishment is imprisonment for 14 years.<sup>88</sup>

The Code provides that “anyone who procures a woman or a girl by threats, intimidation, or false pretences is subject to punishment by imprisonment for 2 years. The same punishment applies to anyone who with the intent to facilitate unlawful sexual relations in or outside of Nigeria, administers stupefying or overpowering drugs on a woman or a girl”.<sup>89</sup> It criminalises trading in prostitution, which includes living on the earnings of prostitution, soliciting, or importing for immoral purposes in a public place.<sup>90</sup> The punishment for an offence of living on the earnings from prostitution of others is imprisonment for 2 years and a fine.<sup>91</sup>

The Criminal Code provides that conspiracy to induce a woman or a girl by fraudulent means to have unlawful sexual intercourse is punishable by imprisonment for 3 years.<sup>92</sup> Unlawful deprivation of liberty by confinement or detention is an offence punishable by imprisonment for 2 years under Section 365.<sup>93</sup> The Code prohibits keeping a brothel<sup>94</sup> and the unlawful detention of a woman or girl against her will in a brothel.<sup>95</sup> It also prohibits a person who has the custody or care of a girl who is less than 16 years of age from causing or encouraging the seduction or prostitution of that girl. Punishment is imprisonment for 7

<sup>81</sup> Nigeria has two codes of criminal law. The Criminal Code governs all States in the Southern part of Nigeria. The Penal Code governs all the States in the Northern part of Nigeria. The Criminal Code was first promulgated as an ordinance on 1 June 1916.

<sup>82</sup> Criminal Code, Cap. C 38 Vol. 4, Laws of the Federation of Nigeria (LFN) 2004; Section 222(a).

<sup>83</sup> Section 223.

<sup>84</sup> Criminal Code, Cap. C38 Vol. 4, LFN 2004 (Section 223(1)).

<sup>85</sup> Section 223(2).

<sup>86</sup> Section 223(3).

<sup>87</sup> Section 223(4).

<sup>88</sup> Section 223(4).

<sup>89</sup> Section 224.

<sup>90</sup> Section 225(A).

<sup>91</sup> *Ibid.*

<sup>92</sup> Section 227.

<sup>93</sup> Section 365.

<sup>94</sup> Section 225(B).

<sup>95</sup> Section 226.

years.<sup>96</sup> Similarly, the Code prohibits such a person from allowing a child or young person to reside in or frequent a brothel.<sup>97</sup> Punishment for the offense is a fine or imprisonment for up to one year or both.<sup>98</sup>

The Code penalises any person who “sponsors a girl or woman by giving her any financial, physical, or material assistance to enable her to travel out of Nigeria for the purpose of becoming a prostitute or to carry out any immoral act”.<sup>99</sup> It also penalises any person who “administers any oath on a woman or girl or performs any fetish ritual in order to enable her to travel out of Nigeria for the purpose of becoming a prostitute or to have unlawful carnal knowledge with any person”.<sup>100</sup> Punishment for the offense is a fine, imprisonment for 10 years, or both.<sup>101</sup> Any man who patronises prostitutes is subject to punishment by imprisonment for 2 years and a fine.<sup>102</sup> The Criminal Code provides that a person cannot be convicted of any of the procurement offenses on the uncorroborated testimony of one witness.<sup>103</sup> It also prohibits slave trading. The punishment is imprisonment for 14 years.<sup>104</sup>

(b) *Penal Code*: Sections 271 and 272 of the Nigerian Penal Code imposes a punishment of imprisonment for up to 10 years and a fine for kidnapping<sup>105</sup> and abduction<sup>106</sup> of a minor. While Section 277 provides that, any person who induces a girl less than 18 years of age “to go from any place or to do an act with the intent that such girl would be or is likely to be forced or seduced to illicit intercourse” is subject to punishment by imprisonment for up to 10 years.<sup>107</sup>

The Penal Code imposes a punishment of up to 10 years and a fine on anyone who “buys, sells, hires, lets to hire, or otherwise obtains possession” of a person less than 18 years of age with the intent of using such a person for “prostitution or other unlawful or immoral purposes.”<sup>108</sup> It also imposes a punishment of imprisonment for up to 14 years and a fine for an offense of slave dealing<sup>109</sup> and Section 280 of the Code further punishes forced labour with a fine and imprisonment for one year.<sup>110</sup> The Code provides that, procurement of a woman or a girl for immoral purposes is punishable by imprisonment for up to 7 years and a fine.<sup>111</sup>

The Penal Code specified the punishment for slave trading and forced labour. While the Criminal Code imposes a fine and punishment of one year imprisonment for forced

<sup>96</sup> Section 222.

<sup>97</sup> Section 222(B).

<sup>98</sup> *Ibid.*

<sup>99</sup> Criminal Code Act, Cap. C38 Vol. 4, LFN 2004. Section 223(A), as Amended by the Criminal Code (Amendment) Act 2000.

<sup>100</sup> Section 223(A).

<sup>101</sup> *Ibid.*

<sup>102</sup> Section 223(C).

<sup>103</sup> See Sections 223 and 224 of the Criminal Code.

<sup>104</sup> Section 369.

<sup>105</sup> Penal Code (Northern States) Federal Provision Act, Cap. P3, Punishment of Offences Committed in Northern States, Vol. 13, LFN 2004.

<sup>106</sup> Section 272.

<sup>107</sup> Section 277.

<sup>108</sup> Section 278.

<sup>109</sup> Section 279.

<sup>110</sup> Section 280.

<sup>111</sup> Section 281.

labour, the Nigerian Labour Act provides that such persons shall be guilty of an offence and on conviction shall be liable to a fine not exceeding one thousand naira or to imprisonment for up to 2 years, or both. The Penal Code did not provide punishment for actions committed by associations or companies with respect to forced labour but the Nigerian Labour Act provides for a fine of not exceeding two hundred naira or to imprisonment for a period not exceeding six months, or both. While the provisions of the Penal Code are applicable in the northern parts of Nigeria, the provisions of the Criminal Code is applicable in the southern parts of Nigeria.

*7.4. Immigration Act No. 6 of 1963 (Now Cap. 11, Vol. 7. Laws of the Federation of Nigeria 2004)*

The Immigration Act<sup>112</sup> deems the following persons under Section 18(1) to (3) to be “prohibited immigrants” persons who may not be admitted into Nigeria and are subject to deportation: any prostitute,<sup>113</sup> any person who is or has been a brothel keeper,<sup>114</sup> a householder permitting the defilement of a young girl on his or her premises,<sup>115</sup> a person allowing a child less than 13 years of age to be in a brothel,<sup>116</sup> a person causing or encouraging the seduction or prostitution of a girl less than 13 years of age,<sup>117</sup> a person trading in prostitution,<sup>118</sup> or a procurer.<sup>119</sup>

<sup>112</sup> Immigration Act of Nigeria, Law No. 6 of 1st August, 1963. (Cap. 11, Vol. 7 LFN, 2004).

<sup>113</sup> Section 18(1)(g).

<sup>114</sup> Section 18(1)(h)(i). According to section 18(3)(a), a brothel keeper includes “any person who appears, acts, or behaves himself as the owner of or the person having the care, government, or management of any premises or room or set of rooms in premises, kept for the purposes of prostitution”.

<sup>115</sup> Section 18(1)(h)(ii). According to section 18(3)(b), for such purposes such a householder is “any person who, being the owner or occupier of any premises or having or acting or assisting in the management or control thereof, inducing or knowingly suffers any girl under the age of 13 years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man for any lewd purpose”.

<sup>116</sup> Section 18(1)(h)(iii). According to section 18(3)(c), a person allowing another under 13 years of age to be in a brothel is “any person having the custody, charge, or care of a child or young person who has attained the age of 4 years and is under the age of 13 years, who allows that child or young person to reside in or frequent a brothel”.

<sup>117</sup> Penal Code Laws of Northern Nigeria, Cap. P3, Vol. 13, LFN 2004. Section 18(1)(h)(iv). According to section 18(3)(d), a person causing or encouraging the seduction or prostitution of a girl under 13 years of age is “any person having the custody, charge, or care of a girl under the age of 13 years who causes or encourages the seduction, unlawful carnal knowledge, or prostitution or commission of an indecent assault upon that girl”.

<sup>118</sup> Section 18(1)(h)(iv). According to section 18(3)(e), a person trading in prostitution is “(i) a male person who knowingly lives wholly or in part on the earnings of prostitution or who, in any public place persistently solicits or importunes for immoral purposes, or (ii) a female who, for the purpose of gain, exercises control, direction, or influence over the movements of a prostitute in such a manner as to show that such female is aiding, abetting, or compelling her prostitution with any other person or generally.” Section 18(3)(2) states that prostitution includes “the offering by a female of her body commonly for acts of lewdness for payment although there is no act, or offer of an act, of ordinary sexual connection”.

<sup>119</sup> Section 18(1)(h)(vi). The term *procurer* refers to the trafficker. As defined in section 18(3)(f), it includes any person “who (i) procures or attempts to procure any female under 21 years of age,

### 7.5. *Constitution of the Federal Republic of Nigeria, 1999*

The Constitution of Nigeria, 1999; provides that “Every individual is entitled to respect for the dignity of his person and accordingly: (a) no person shall be subjected to torture or to inhuman or degrading treatment; (b) no one shall be held in slavery or servitude”<sup>120</sup> and “no person shall be required to perform forced or compulsory labour.”<sup>121</sup>

### 7.6. *Labour Act 1971 (Now Cap. L1, Vol. 8. Laws of the Federation of Nigeria, 2004)*

*Forced Labour:* Under Section 73(1) of the Labour Act, any person who requires or permits any other person to perform forced labour in contravention to the prohibition of forced or compulsory labour under Section 34 (1) (c) of the Constitution of the Federal Republic of Nigeria<sup>122</sup> shall be guilty of an offence and on conviction shall be liable to a fine not exceeding one thousand naira or to imprisonment for up to 2 years, or both.<sup>123</sup>

*Young Persons:* Section 59(a) of the Labour Act prohibits child labour.<sup>124</sup> The Act specifies that a child younger than 14 years of age may be employed only on “a daily wage, on a day-to-day basis and so long as he returns each night to the place of residence of his parents or his legal guardian.”<sup>125</sup> The Act prohibits employment of a child less than 15 years of age in any industrial undertaking: provided that this subsection shall not apply to work done by the young person in technical schools or similar institutions, if the work is approved or supervised by the Ministry of Education or (a corresponding department of government)

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not being a common prostitute or of knowing immoral character, to have unlawful carnal connection either within or without Nigeria with any other person, or (ii) procures or attempts to procure any female to become either within or without Nigeria a common prostitute, or (iii) procures or attempts to procure any female to leave her usual place of abode (such place not being a brothel), with the intent that she may, for the purpose of prostitution, become an inmate of a brothel, either within or without Nigeria”.

<sup>120</sup> Constitution of the Federal Republic of Nigeria 1999. Chapter IV, Section 34(1) (a) and (b) Cap. C38, Vol. 3, Laws of the Federation of Nigeria (LFN) 2004.

<sup>121</sup> Chapter IV, Section 34(1)(c).

<sup>122</sup> The Constitution referred to under the Labour Act, (Section 31(1) (c) is the defunct 1963 Republican Constitution which was the Constitution Nigeria was operating at the time of the enactment of the Labour Act but the new position now is the Constitution of the Federal Republic of Nigeria 1999. Chapter IV, Section 34(1)(c).

<sup>123</sup> Labour Act of Nigeria (1st August, 1971). (Cap. L1, Vol. 8, Laws of the Federation of Nigeria, 2004).

<sup>124</sup> Section 59(a): “No child shall be employed in any capacity except were he his employed by a member of his family in light work of an agricultural, horticultural, or domestic character approved by the Minister or, (b) be requires in any case to lift, carry or move anything so heavy as to be likely to injure his physical development.”

<sup>125</sup> Section 59(3) provided that, save as may be otherwise provided by regulations made under Section 65 of this Act, this subsection shall not apply to young persons employed in domestic service. Section 65 provides that the Minister may make regulations providing for: (a) the engagement, repatriation or supervision of domestic servants; (b) the employment of young women and young persons as domestic servants, and (c) the housing accommodation and sanitary arrangements of domestic servants; and (d) the conditions of domestic service generally.

of a state.<sup>126</sup> In addition, no child younger than 16 years of age is allowed to work underground,<sup>127</sup> or on machine work,<sup>128</sup> or on a public holiday.<sup>129</sup>

The Labour Act provides that no young person shall be employed in any employment which is injurious to his health dangerous or immoral; and where an employer is notified in writing by the Minister (either generally or in any particular case) that the kind of work upon which a young person is employed is injurious to the young person's health; dangerous; immoral or otherwise unsuitable, the employer shall discontinue the employment without prejudice to the right of the young person to be paid such wages as he might have earned unto the date of discontinuance.<sup>130</sup> It further provides that no young person under the age of sixteen years shall be required to work for a longer period than four consecutive hours or permitted to work for more than eight hours in any one day: provided that they are safe as may be otherwise provided by any regulation made under Section 65 of this Act. This subsection shall not apply to persons employed in domestic services.

The Act demands every employer of young persons in an industrial undertaking to keep a register of all young persons in his employment with particulars of their ages, the date of employment and such other particulars as may be prescribed and shall produce the register for inspection when required by an authorised labour officer.

The Labour Act provides for punishment and states that "any person who employs a child in contravention of these provisions, as well as any "owner and manager of any undertaking in which a child is employed" and any parent or legal guardian of a child who allows the child to be employed in contravention of these provisions, commits an offence and is subject to a fine".<sup>131</sup>

### *7.7. The African Charter on Human and Peoples Rights*

Nigeria is a signatory to the African Charter on Human and Peoples Rights<sup>132</sup> and the African Charter guarantees the same right in Article 5 as follows; "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

<sup>126</sup> Section 59(2).

<sup>127</sup> Section 59(5)(a).

<sup>128</sup> Section 59(5)(b).

<sup>129</sup> Section 59 (5)(c).

<sup>130</sup> Section 59(6) Subsection (7) provides that no person shall continue to employ any person under the age of sixteen after receiving the notice either orally or in writing from the parent or guardian of the young person, that the young person is employed against the wishes of the parent or guardian. Section 59(7) provides that this subsection shall not apply to a young person employed under a written contract entered into with the approval of an authorised labour officer.

<sup>131</sup> Section 64.

<sup>132</sup> African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct 21, 1986. (Article 5).

## 8. Recommendations on Curbing the Menace of Trafficking in Nigeria

1. Nigeria should effectively implement the international legal instruments already ratified with the aim of protecting human rights and combating human trafficking, these include the following: Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000) and there should be effectively implement all of the ratified international laws and regulations, in particular the Palermo protocol (2000), the UNCRC, the ILO Convention No. 182 and the CEDAW, in order to provide an environment conducive to the elimination of human trafficking in Nigeria. The focus must be on all forms of trafficking including trafficking in children, and not limited to trafficking for prostitution and sexual exploitation.<sup>133</sup>
2. Implement the Memorandum of Understanding signed between the Federal Government of Nigeria and transit and destination countries. Continue regional and international cooperation between NGOs and government institutions and honour the existing bilateral agreements to uphold international human rights.
3. Adoption and implementation of the Child Rights Act of 2003 in all Nigerian States. Revise anti-trafficking measures and laws so as to address all forms of trafficking as well as the protection of trafficked persons. Replace anti-migratory policies with policies that inform and empower citizens migrate safely.<sup>134</sup>
4. There should be security collaborations between Nigeria law enforcement agencies and Interpol when dealing with the more complex problems associated with human trafficking so that the culprits can be apprehended even if there have absconded from Nigeria.
5. Nigerian government should carry out more policy-oriented research on the various manifestations of human trafficking in Nigeria, in particular on socio-cultural factors increasing vulnerability.
6. There should be developed concerted and clearly articulated strategies to combat human trafficking in Nigeria along with a national plan of action and reliable information from data base on trafficking with the active collaboration of all strategic stakeholders such as the government, NGOs, international agencies, as well as representatives from urban and rural communities.
7. Government has to create anti-trafficking watchdog committees in rural areas across Nigeria. Such efforts should require the cooperation of community based organizations (CBOs) and law enforcement agents such as the Police and Immigration Departments.
8. Adequate funds should be given to all anti-trafficking agencies including NAPTIP, the Police and Immigration Department to support their actions and improve efficiency, this measure would enable NAPTIP to ensure speedy prosecution of trafficking cases.
9. Government should establish witness protection programmes to encourage and protect trafficked persons who act as witnesses. Set up policies to create jobs for young graduates and school dropouts in Nigeria. Resource centers should also be created by different states in Nigeria for skills acquisition of rescued trafficked persons. Develop facilities and social services for the reception, protection and reintegration of trafficked persons to prevent as much as possible the re-trafficking of the trafficked persons.

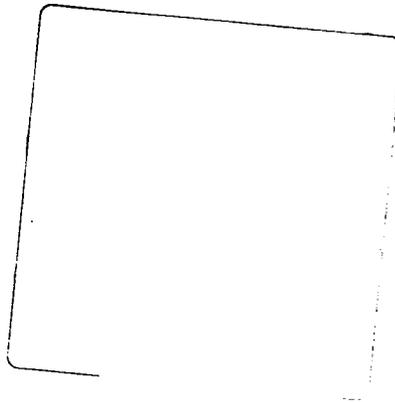
<sup>133</sup> Olagbegi, B. A. et al.: Human Trafficking in Nigeria: Root Causes and Recommendations. *UNESCO Policy Paper Poverty Series*, No. 14.2 (E) Paris 2006, 56–60.

<sup>134</sup> *Ibid.*

10. Governments should invest in education and provide alternative economic opportunities for children and the youth. This will greatly reduce the number of those that will be available for trafficking. A collaborative approach that brings together anti-corruption and anti-human trafficking measures should be devised.

### **Conclusion**

Nigeria as a nation with over 150 million people, the most populous country in Africa, no doubt is a major supply chain for trafficking in women and children for prostitution worldwide. It has been discovered that economic, social, cultural, gender discrimination and marginalization, corruption and organized criminal networks are factors promoting trafficking of Nigerian Women and Children to Italy for sexual exploitation. This research work shows that Nigerian government over time has put a number of legal mechanisms in place to curb the menace of trafficking in Nigerian women and children for prostitution whether in Nigeria or abroad. This climaxed in 2003, with the enactment by the National Assembly of the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act, 2003 and the amendment of 2005.



CSABA VARGA\*

## The Law's Homogeneity

### *Challenged by Heterogenisation through Ethics and Economics*

**Abstract.** The Atlantic civilisation has over the past centuries been composed of two definitely diverging ethos and social philosophical inspirations, differing also by their very foundations. The contrasts are perhaps most conspicuous today as to be seen in the difference between approaches to *life as a struggle* and to *law as a game* within it. No doubt, on the one hand, there prevails the rest of (1) a *European Christian tradition*, characterised by communal ethos, with provision of rights as counter-balanced by obligations, in which priority is given to the peace of society and a traditional culture of virtues is promoted to both circumvent excesses and acknowledge human rights, with a focus on prevention of and remedy to actual harms. It is such an environment within which *homo ludens* as a type of the playful human who is at the same time dutiful and carefree—entirely joyful—constitutes a limiting value. If and insofar as struggle appears at all on the scene, it is mostly recognised as a fight for excellence. As a pathologic version, the loneliness of those staying away from participation may lead to psychical disorders which require subconscious re-compensation, the symbolic sanctioning of which was once accomplished by the psycho-analysis. On the other, there has also evolved (2) an *Americanised individualistic atomisation of society*, expecting order out of chaos, with absolutisation of rights ascribed to individuals, all closed back in loneliness. As an outcome, obligations are circumvented by entitlements, and unrestrained struggle becomes a part of any normal course of life with the deployment of human rights just to neutralise (if not disintegrate) community-centred standards. “Life is struggle”—the hero of our brave new world enunciates the words as a commonplace with teeth clenched, convinced that life is barely anything but fight against anybody else (as an improved version, hailed as civilisatory advancement as re-actualising—under the pretext of maximising the chances of—the ominous *bellum omnium contra omnes*, formulated once in early modern England). Starting from the common deployment of some symbolical “cynical acid” in foundation of modern formal law but developing through differentiated ways of how to search for reason and systemicity in law, the conceptual and methodical effect of this very division is shown in the paper within the perspectives for curing malpractice in law and also in the role of ethics in economy.

**Keywords:** modern formal law, Europeanism, Americanisation, malpractice, ethics in economy, tendential unity

### 1. The Formalism of Law in Modernity

Justice Oliver Wendell Holmes of the Supreme Court of the United States, one of the classics of the formative years of American legal realism, defined his programmatic stand almost one hundred and fifteen years ago as follows: legal notions have to be washed with “cynical acid” so that they can serve as genuinely legal concepts, stripped of theological and moral (etc.) overtones.<sup>1</sup> Because, as he saw it, “[m]oral predilections must not be allowed to influence our minds in settling legal distinctions”.<sup>2</sup> Thus the question arises: is someone calling for cynicism inevitably cynical himself?

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<sup>1</sup> Holmes, O. W.: *The Path of the Law* [1897]. In Holmes, O. W.: *Collected Legal Papers*. New York, 1920. 167–202 on 174.

<sup>2</sup> Holmes, O. W.: *The Common Law*. London–Cambridge, Mass., 1882. 148.

We know that such approach was called *functionalism* at that time. It held as a basic tenet that each and every component of the social complex has to serve with full strength in its own place, as it is just its specific particularity as distinguished from anything else that may have motivated its coming into a separate existence.

It is the ideal of functionalism in law, which modern formal law was invented and developed to institutionalise. Historically, this was the product of the European bureaucratism (which gained strength from the early 19th century) that began to assimilate the state structure to its organisatory needs with a previously unheard-of efficiency.<sup>3</sup> As its first step, law was thoroughly formalised to develop its particular homogeneity. In return, law became *autonomous*; with *distinguished* particularity;<sup>4</sup> to function in a *specific* way. This necessitated its own responsibility in overall co-operation, with interactions in any direction regarding any complex.<sup>5</sup>

Thereby, functionalism is also expressive of an *instrumental tendency*, which is a theoretical conclusion of the fact that, from now on, modern social existence can only be explained as the self-realisation of straightforward co-operation of partial totalities, relatively separated yet thoroughly connected on the plane of the whole totality. This is what George Lukács and his circle once described as the domination of homogeneous autonomies developed on the terrain of undivided heterogeneity emerging in everyday existence, in which each and every complex (which has separated out from the total complex by advancing its particularities) becomes both specified and, operating according to its own criteria as one given *homogeneity*, relatively independent from the total complex (while facing the risk of confrontation).<sup>6</sup> On the field of macro-sociological theory-building, Niklas Luhmann, too, arrived at a similar conclusion one decade later, formulating the category of *Ausdifferenzierung* as a theoretical foundation stone, to indicate separation and isolation, in the course of which the specific operation of law would appear with a binary code, responding with the exclusive alternative of either “lawful” or “unlawful”.<sup>7</sup>

All this anticipated the chance of dysfunctionality in actual operation, running against the values originally designed to be implemented. For, as has been long known, scholarship has considered such occurrences to be mere mistakes, marginal in practice.<sup>8</sup> At the same

<sup>3</sup> Cf., e.g. Gladden, E. N.: *A History of Public Administration*. I–II. London, 1972. and Finer, S. E.: *The History of Government*. I–III. Oxford, 1997.

<sup>4</sup> For the qualifying term “distinctively legal”, see Selznick, Ph.: *The Sociology of Law*. In Sills, D. L. (ed.): *International Encyclopaedia of the Social Sciences*. New York, 1968. 51.

<sup>5</sup> Cf. Varga, Cs.: *Moderne Staatlichkeit und modernes formales Recht*. *Acta Juridica Academiae Scientiarum Hungaricae*, 26 (1984), 235–241.

<sup>6</sup> In philosophical elaboration of an initially aesthetical origin, see, by Lukács, G.: *Über die Besonderheit als Kategorie der Ästhetik*. Neuwied am Rhein–Berlin, 1967, *Über die Besonderheit als Kategorie der Ästhetik* [1957]. In Lukács, G.: *Probleme der Ästhetik*. Neuwied–Berlin, 1969. 537 et seq., *Die Eigenart des Ästhetischen*. 1–2. Neuwied am Rhein–Berlin–Spandau, 1963. as well as *Zur Ontologie des gesellschaftlichen Seins* (ed.: Benseker, F.). Darmstadt, 1984–1986. From the circle of disciples, see also Heller, Á.: *Everyday Life*. London, 1984.

<sup>7</sup> From Niklas Luhmann, e.g. *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie*. Frankfurt am Main, 1981.

<sup>8</sup> It is by far not a mere chance that Marxism was the first in the modern age to develop a theory of alienation, addressing it as a core issue of social scientific thought. Cf., among others, Israel, J.: *Alienation. From Marx to Modern Sociology: A Macrosociological Analysis*. Atlantic Highlands, New Jersey, 1979, as well as, by Varga, Cs.: *Chose juridique et réification en droit*. *Archives de Philosophie*

time, however, theoretical description has defined the ontological result by some *mutuality in operation*, forming a “*tendential unity*”, which is a *sine qua non* of the operability of—and, as such, will at any time determine—the total whole. This Lukácsian recognition is also expressed by the fact that in his social ontology, language and law are from the outset distinguished from the rest of the complexes of social being (taken as the total operation of the total complex consisting of partial complexes). Or, language and law are held to be mere intermediators that do not operate with their own values, for they exclusively mediate among values taken from other (non-mediatory) complexes. By the help of instrumental values, they may operate as wedged in the process, at most strengthening the efficiency of their mediatory role. Of course, inspired by historical materialism rooted in economic determinism, Lukács presumed a component able to play an over-dominant role in the total process *hic et nunc*. But having arrived at social ontology from Bolshevik revolutionism, the aged Lukács had already realised that hegemonic determination through any complex becoming totally dominant (e.g. the economy in general, or politics in transitory or pathological states, in the shadow of which no further partial complex could any longer play the proper role to be played) would inevitably harm and distort the whole totality,<sup>9</sup> with lasting effect on most of its occurrences.<sup>10</sup>

## 2. Intertwining: A Case Study

Let us raise the question: what practices may arise in our day from such and similar recognitions? If we consider only the alternatives of medical law, i.e. of making malpractice a subject of civil action, one of the three solutions that follow may emerge in principle: no responsibility and no justiciability in practice (as was once practised under the aegis of the “actually existing system of socialism” in Hungary and the entire region); or responsibility made almost absolute (as evolved as a result of the self-assertion of lawyering in the United States of America); or personal or institutional responsibility enforceable via specific media made up by the medico-legal profession (idealised as a perspective for Hungary after the fall of Communism).

Well, assessing the field from such extreme poles (with some sensitivity to our domestic traditions<sup>11</sup>) within such a threefold perspective of past, present, and possible

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*du Droit*, 25 (1980), 385–411. and »Thing« and Reification in Law. In Varga, Cs.: *The Place of Law in Lukács' World Concept*. Budapest, 1985 (1998). Appendix, 160–184.

<sup>9</sup> Cf., by Varga, Cs.: Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology). *Rivista Internazionale di Filosofia del Diritto*, 60 (1983), 127–142 and in: *Filosofia del Derecho y Problemas de Filosofía Social*. X. México, 1984. 203–216 and <<http://www.bibliojuridica.org/libros/3/1051/20.pdf>>, as well as Autonomy and Instrumentality of Law in a Superstructural Perspective. *Acta Juridica Hungarica*, 40 (1999), 213–235.

<sup>10</sup> Cf., e.g. by Varga, Cs.: *Transition to Rule of Law. On the Democratic Transformation in Hungary*. Budapest, 1995. and <<http://drsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>> and *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central and Eastern Europe*. Pomáz, 2008. and <<http://drsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law-%E2%80%93-constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/>>.

<sup>11</sup> A balanced middle-of-the-road stand is presented by, e.g. Kapocsi, E.: Az orvosi hivatás autonómiájának etikai vonatkozásai [Ethical aspects of the autonomy of the medical profession]. *Lege Artis Medicinae*, 10 (2000), 358–364. Cf. also Kövesi, E.: Orvosi etika és gazdaságosság –

future, we can take the following consequences into account in light of today's procedures and of prospects they will become further Americanised:<sup>12</sup> (1) the assumption of responsibility enforced by lawsuits will be built as an auxiliary cost into the expenses of health care, which must result in the overall rise in its budget; (2) the actual accrual of health costs will be taken from the proper field of health care, only to be divided among suing clients and the lawyerly caste; in response to which (3) on the part of both the health supplier and the client, further juridifying mechanisms (mediations and formalisations) alien to the original ethos and inherent rationality of health care will be subsequently wedged in the previously purely health-centred processes, a condition that may shake its very foundations through a parasitical intrusion. With legal safety becoming a consideration in focus, new practices (eliminating procedures and risky choices once generally accepted in practice) may be introduced. Finally, all this (4) further professionalises the practices of the medical profession, cutting up traditional treatment processes into artificially isolated partial processes. That is, the medical profession will reduce both frustration and predictable damages by deploying additional (cost-increasing) staff with professional "mind-healing" (psychological) specialisations in the process (as the paradoxical after-effect of the sheer artificiality and exaggerated bureaucratisation that arises from the depersonalisation of the entire procedure while in fact worsening the patient's prospects to heal)—while needless to say, having no genuinely positive effect as to the overall destination of the whole undertaking in question.

In the final analysis, all this will not in the slightest degree increase the actual (and morally reasonable) responsibility to be borne by social healthcare for actions that are achievable within the given society's tolerance and funding limits.

Or, all it equals to saying that this is probably the most costly outcome both financially and also regarding its erosive effect on the medical ethos, and will result in an external control of health care, alien to it and unduly overcoming it, driven solely by lawyerly arrivism and profiteering as guided by professional imperialism. Yet, at the same time this proves to be the least effective solution. All that notwithstanding, it still seems to step by step subdue the entire medical organisation, whereas this course has by no means been necessary. Two decades ago, at the beginning of our transition from communism, its feasibility and acceptability was still an open issue in Hungary, at a time when external pressure by a professional push—accompanied by an internal agitation to introduce and tolerate an American-type lawyerly rule—first became perceptible in the country.<sup>13</sup>

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összefüggés-e vagy ellentmondás? [Medical ethics and economicalness: are they in correlation or contradiction?] *Valóság*, 39 (1996) 9, 26–29; Dósa, Á.: Felelősség vagy biztosítás? [Liability or insurance?] *Lege Artis Medicinae*, 6 (1996), 262–265 as well as Balázs, P.: Orvosi etika és gazdasági realitások [Medical ethics and economic facts]. *Valóság*, 40 (1997) 4, 16–28. For an international background, see also Hennekeuser, H.-H.: Zwischen Ethik und Wirtschaftlichkeitsgebot: Der leitende Krankenhausarzt im Spannungsfeld von Patientenbetreuung und Ökonomie. In: *Jahrbuch für Wissenschaft und Ethik*, 3. Berlin–New York, 1998. 141–147. As a Hungarian legal and medical specialist's stand, see Dósa, Á.: Az orvos kártérítési felelőssége [The doctor's liability for damages]. Budapest, 2004.

<sup>12</sup> Cf. *Archives de Philosophie du Droit*, 45: »L'américanisation du droit«. Paris, 2001. and *L'américanisation des droits suisse et continentaux*. Zürich, 2006.

<sup>13</sup> As a member of the Prime Minister's Advisory Board in the administration of József Antall, I initiated repeated informal debates about the issue, while our legal experts from academies and universities, including American advisors and Hungarian scholars of American studies, all kept quiet

With homogeneity heterogenised, external intervention dissipates the well-balanced configuration and very substance of the structure and systemically self-reproducing framework of the profession it touches upon.

### 3. Diversity of Approaches

Considering all this both as a danger and warning<sup>14</sup>—when research is so exhaustive as to have a call even to devoting attention to cultural anthropological investigations of tribal communities of a few hundred members surviving sporadically<sup>15</sup>—, we might at last take notice of the fact that Atlantic civilisation, so clearly determining our near future, has been composed over the past centuries of two definitely diverging ethos and social philosophical inspirations, which differ by their very foundations. The contrasts are perhaps most conspicuous today in the difference between the approaches to *life as a struggle* and to *law as a game* within it.

No doubt, on the one hand, there prevails a *European Christian tradition*, characterised by a communal ethos, with the provision of rights as counter-balanced by obligations, in which priority is given to the peace of society, and a traditional culture of virtues is promoted to both circumvent excesses and acknowledge human rights, with a focus on prevention and remedy of actual harms. It is in such an environment that *homo ludens* as a type of playful human who is both dutiful and carefree, i.e. entirely joyful, constitutes a limiting value.<sup>16</sup> If, and in so far as, struggle appears on the scene at all, it is mostly recognised as a fight for excellence. As a pathological version, the loneliness of those who avoid participation may lead to disorders of the psyche that require subconscious re-compensation, the symbolic sanctioning of which (typically in the stale and excited Vienna of the turn of 19th and 20th centuries and by a psychologist of middle-class women shut into self-consuming idleness) Sigmund Freud accomplished. On the other hand, there has also evolved an *Americanised individualistic atomisation of society*, expecting order out of

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about the risks. Examining the spirit of those days with the easy wisdom of hindsight, C. Dupré—*Importing the Law in Post-communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity*. Oxford–Portland Oregon, 2003. 57.—characterised the image of the West formed by the domestic Left (having turned to libertinism [next to nihilistic anarchism] after the fall of Communism) by concluding that there was “a glorified and idealised vision of the West and of liberal law” also referring to the writing of the Lukácsian Budapest-school in-exile-representative, Fehér, F.: *Imagining the West. Thesis Eleven*, (1995) 42, 52–68, which “did not correspond much to the reality”.

<sup>14</sup> Not by chance, there are intermediary proposals for solution today. Cf. the initiatives by Nagy, L.–Kahler, F.: *Közvetítő (mediátor) felállításának szükségességéről az állampolgárok és a gyógyító intézmények (orvosok) közötti vitás kérdések peren kívüli megoldására* [On the necessity of involving a mediator for the extra-judicial solution of conflicts between citizens and medical institutions]. *Magyar Jog*, 42 (1995), 229–231 and Heuer, O.: *Konfliktuskezelés a betegjogi sérelmeknél: Az egészségügyi közvetítő eljárásokról* [Conflict management in cases of the violation of patients' rights: on mediatory processes in health care]. *Lege Artis Medicinae*, 11 (2000), 80–83 and <<http://www.lam.hu/folyoiratok/lam/0101/11.htm>>.

<sup>15</sup> See, e.g. as the field work of a tribal legal anthropologist, deceased at an early age, Akalu, A.: *The Nuer View of Biological Life. Nature and Sexuality in the Experience of the Ethiopian Nuer*. Stockholm, 1989.

<sup>16</sup> Huizinga, J.: *Homo ludens. A Study of the Play-element in Culture* [Proeve eener bepaling van het spel-element der cultuur, 1938]. London, 1949.

chaos, with absolutisation of rights ascribed to individuals, all closed back in loneliness. As an outcome, obligations are circumvented by entitlements, and unrestrained struggle becomes a normal course of life with human rights deployed to neutralise and disintegrate community-centred standards. “Life is struggle”–the hero of our brave new world enunciates it as a commonplace with teeth clenched, convinced that life is hardly anything but a fight against anybody else (in an improved version, hailed–under the pretext of maximising chances–as civilisatory advancement by re-actualising the ominous *bellum omnium contra omnes*, formulated by Thomas Hobbes in early modern England). Following such examples, feminist self-reliance may stand for a contemporary pathological ideal type, struggling herself back into unhappy loneliness by engaging in the fight with her jaw and the further abilities she has targeted.

It is mostly such and similar stimuli that nourish our uneasy experience of the globalised present, with ideals of order, standards and cultural patterns that transform status struggles (based on gender, colour, etc.) into struggles in law, and which, under the aegis of law, support disproportionate financial indemnification for alleged psychological injuries so as to gain material fortune, and which thereby replace collective solidarity by individual arrivism and disintegrate cohesive forces by growing societal atomisation.

Is it really such an outcome that we have wanted in our nation building through the centuries? Is it really this that is worth searching for now, when we are freed to shape our fate, given the chance to change the past regime?

For want of other points of reference in our spiritually emptying world (almost without unconditional respect for, and adherence to, values), let me recall a few lessons taught by historical legal anthropology<sup>17</sup> and the millennial message of legal philosophy,<sup>18</sup> while referring uniformly to the significance of the moment of trust in the mechanisms of feedback and the necessity of complexity in social existence. Well, both in early Jewish, Islamic (etc.) traditions and even nowadays in surviving autochthonous cultures (which lack in resources and, therefore, stipulate maximum efficiency as the condition for survival), we can observe the compulsion through two sorts of axiomatism with clearly ideological operation, which organise human choices into a framework unquestionably ready-made from the outset.<sup>19</sup> One of these perspectival optima is the idea of *proportionality* with *self-moderation*, based on the priority of public good. This spread first as *shalom*, or the precedence for public peace to protect societal integrity, which, later in Roman development, was formulated as the dilemma of formalism expressed by the *adage* of *summum ius*,

<sup>17</sup> Cf., e.g. Varga, Cs.: Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures. In: *Law in East and West. On the Occasion of the 30th Anniversary of the Institute of Comparative Law*. Tokyo, 1988. 265–285 and »Law«, or »More or Less Legal«? *Acta Juridica Hungarica*, 34 (1992), 139–146. As a thoroughly theoretical outline, cf. also Lampe, J.: *Grenzen des Rechtspositivismus. Eine rechtsanthropologische Untersuchung*. Berlin, 1988.

<sup>18</sup> Cf., as a call to natural law, e.g. Varga, Cs.: Legal Philosophy, Legal Theory–and the Future of Theoretical Legal Thought. *Acta Juridica Hungarica*, 50 (2009), 237–252 and in <<http://akademiai.om.hu/content/0318830q86810656/fulltext.pdf>>.

<sup>19</sup> Cf., e.g. with some of the papers collected in Varga, Cs. (ed.): *Comparative Legal Cultures*. Aldershot and New York, 1992, as well as H. Szilágyi, I. (ed.): *Jog és antropológia* [Law and anthropology]. Budapest, 2000.

*summa iniuria*,<sup>20</sup> which was recognised from the Middle Ages on as the virtue of *temperantia*.<sup>21</sup> The other is the ideal of *natural law*.

As to the latter, it has presumed human responsibility (in forms developed in East-Asia and Latin America, as well as in Christianity and Islam) for our environment as inherited exclusively for our temporary use, to be handed down to following generations safely *in toto*; defined (in its Christianised Greek–Roman version) minimum conditions (suitable to a formulation in sets of principles, rules, and exceptions from rules) as a comprehensive framework for social life in a symbolic expression of the created (or, profanely, the somehow organised) order: first, representing the whole cosmos; then, the humanly observable world; later on, society; and finally, the individual (with responses echoed by both theology and politics, aetiology and cultural anthropology).

Eventually, in our secularised age, this ideal was first replaced by endowing the ideal of natural law, unchanged in principle as transcendent to human existence, with changing (i.e. developing) contents [*Naturrecht mit wechselndem Inhalte*] at the end of the 19th century,<sup>22</sup> then, by its institutionalisation as “the nature of things themselves” [*Natur der Sache; nature des choses*] by the jurisprudence of continental European countries with Latin or German roots after World War II,<sup>23</sup> in order to provide guidance for the desirable harmony among functions in conflict, as derivable through pondering upon all circumstances of the issue in question.

#### 4. Ideal Models and Mixed Reality

Returning to the foundations of the philosophy of science, the first and primary task of human thinking is to delineate the frameworks, boundaries and limits within which human action may have a context, which prompted our ancestors to search for methodological ways of thought. In fact, from the age of René Descartes, European civilisation reduced that which may be thought of at all to that which can be deduced from some unquestionable truths through logical (re)construction. This has led to a kind of naturalism, reminiscent of

<sup>20</sup> In a fictional elaboration, see, e.g. von Kleist, H.: *Michael Kohlhaas. Aus einer alten Chronik* [1810]. Hofffeld, 1998 and in English translation Gearey, J. (ed.) New York, 1967. For its theoretical treatment, Varga, Cs.: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999. para. 2.3.1.8.

<sup>21</sup> At Cicero (*Tusculanes*. III, 16–18), *sôphrosunê* may be equally realised as *temperantia*, *moderatio* and *modestia*, which he sums up as *frugalitas*. Cf. Labarrière, J.-L.: *Sagesse et tempérance*. In: Canto-Sperber, M. (dir.) *Dictionnaire d'éthique et de philosophie morale*. Paris, 1996. especially at 1325.

<sup>22</sup> Stammler, R.: *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung. Eine sozialphilosophische Untersuchung*. Leipzig, 1896, 184–188.

<sup>23</sup> As first outlines, see, above all, Villey, M.: *La nature des choses*. In Villey, M.: *Seize essais de philosophie du droit*. Paris, 1969. 38–59; Larenz, K.: *Methodenlehre der Rechtswissenschaft*. 6. neu bearb. Aufl. Berlin, etc., 1991. para. 5.4.b [“Rechtsfortbildung mit Rücksicht auf die »Natur der Sache«”], 417. et seq.; and Coing, H.: *Grundzüge der Rechtsphilosophie*. 5. Aufl. Berlin–New York, 1993. para. IV.1; as well as *La »nature des choses« et le droit*. Separate issue of *Annales de la Faculté de Droit de Toulouse*, 12 (1964) 1; Noguchi, H.: *Die Natur der Sache in der juristischen Argumentation*. In: Yasaki, M. (ed.): *Law in East and West. Legal Philosophies in Japan*. Stuttgart, 1987. 139–147; and Tzitzis, St.: *Controverses autour de l'idée de nature des choses et de droit naturel. Rechtstheorie*, 24 (1993), 469–483.

naive realism patterned on the wisdom of *lex mentis est lex entis*,<sup>24</sup> presuming parallelism, as well as correspondence, between thought and reality. Conversely, in early times, even the created nature of the world was conceived of in a geometrical order according to a mathematical ideal, inspired by the Biblical exposition “[b]ut you have disposed all things by measure and number and weight”.<sup>25</sup> As a result, human thought was also confined to a *mathesis universalis*, posited as mere conceptual arithmetic within the presumption of an all-pervasive natural systemicity that could be notionalised. Through the Enlightenment’s combatant materialism, modelling cognition upon the pattern of reflection was developed in depth, which survived, among other things, as the central epistemo-ontological pre-supposition of Marxism, summarised and simplified as the notorious Leninist theory of reflection.<sup>26</sup> Most of the unconditional hegemony of rationalism survived from all of this until today, haunting and questioning otherwise normal thought processes all through, up to pushing them to their self-dissolving extremities.<sup>27</sup> This is the dogma according to which only that which is rationally justifiable can become the subject of theoretical reconstruction—ignoring the brutal fact that, as a side-effect of modern scientific revolution, such a mind-set can only contribute to depriving man of his further qualities; for man, with his inborn *facultases*, is significantly richer in emotional, intuitive, transcendent (etc.) life than is claimed by the idea that reduces his complexity (when assessing his self-positioning in the world) to one single, exclusive quality, that of alleged—and necessarily apparent—rationality.<sup>28</sup>

This is the pattern with which the very concept of “social science” complies: in its origins, it is a typically American leftist idea (originating from the same source as Marxism, namely, the longing for scientific positivism), according to which science regarding society can be built on thoroughly factual foundations with empirical methodology, enabling social engineers to draw necessary conclusions by measuring given attitudes (etc.) to predict future behaviour (etc.). Well, using “sterile morphology” (which flourished from the interwar period up to the 1950s, as marked by Talcott Parsons’ a-historically universalised analytical system of concepts) has today proved to be a dead end,<sup>29</sup> re-admitting the old

<sup>24</sup> Patsch, F.: Dogmatikai kijelentések hermeneutikai fejlődése. (Egy »fundamentál-hermeneutikai dogmatika« vázlata) [Hermeneutical development of dogmatic statements: outlines of a »fundamental-hermeneutical dogmatics«]. In: Rokay, Z. (ed.): *Egység a különbözőségben. A 60 éves Bolberitz Pál köszöntése* [Unity in diversity: Essays in honour of Pál Bolberitz on the occasion of his 60th birthday]. Budapest, 2002. 117. et seq., especially para. 1.

<sup>25</sup> The Book of Wisdom. 11:20. In: *The New American Bible*. see <[http://www.vatican.va/archive/ENG0839/\\_PLS.HTM](http://www.vatican.va/archive/ENG0839/_PLS.HTM)>.

<sup>26</sup> Cf. Varga, Cs.: Cultivating Scholarship under Communism. (A Case Study on Marxism and Law.) *Central European Political Science Review*, 13 (2011) 44. {Forthcoming}.

<sup>27</sup> As a distorted outcome in law, cf. Varga, Cs.: Rule of Law? Mania of Law? On the Boundary between Rationality and Anarchy in America. In: Nótári, T.–Török, G. (eds): *Prudentia Iuris Gentium Potestate. Ünnepi tanulmányok Lamm Vanda tiszteletére* [*Prudentia Iuris Gentium Potestate – Studies in Honor of Vanda Lamm*]. Budapest, 2010. 492–504.

<sup>28</sup> In overview, cf. Varga, Cs.: Önmagát felemelő ember? Korunk racionalizmusának dilemmái [Man elevating himself? Dilemmas of rationalism in our age]. In: Mezey, K. (ed.): *Sodródó emberiség. Tanulmányok Várkonyi Nándor »Az ötödik ember« című művéről* [Mankind adrift: on the work of Nándor Várkonyi’s »The Fifth Man«]. Budapest, 2000. 61–93.

<sup>29</sup> Bell, D. In: Bullock, A.–Woodkings, R. B. (eds): *The Fontana Dictionary of Modern Thinkers*. London, 1983. 580. Cf. also Andreski, St.: *Social Sciences as Sorcery*. London, 1972.

ideal of the Humanities, while admitting that when we approach the specifically human, something more is at stake than rational codifiability alone.

Obviously, even more is at stake when we encounter the claim (rejuvenated after the failure of the one-time attempt to axiomatise ethics)<sup>30</sup> that we should negotiate moral and social psychological issues on the pattern of classical analysis taken as conceptual mathematics, absolutising a methodology according to which—of course, for the sake and within the bounds of the given conceptual system—only that which can be rationally concluded and justified is thinkable at all, while forgetting that human reflection is by far more complex than that.<sup>31</sup>

Therefore, as against a mechanical world-concept symbolised by the ancient clockwork's metaphor,<sup>32</sup> our existence is nonetheless a total whole throughout: a totality resulting from the constant competition of interactions by practically unlimited sets of uninterrupted processes, (re)generated in *autopoiesis*, which inseparably closes its ontological and epistemological determinations and partial processes back into its total process. If we do not raise the issue as a theologically founded query (or if we reject, in the spirit of Occam's classical methodological razor, the teleological moment that could be raised from the outset), then it remains an insoluble enigma whether or not that which we think of as a limit in terms of values in such processes can at the same time also be regarded as objective. Or, formulated as a paradox, is "objectivity" available at all when one insists on "pure" scholarship?<sup>33</sup>

## 5. The Ontological Necessity of Heterogeneity in Action

Returning again to economy, we have to conclude that without a vision of man in his entire complexity (including the theological, anthropological, ethical and psychological aspects as well), not even *economy* can be fully explained. Obviously, ethics is also necessary for economy as a *desideratum* in order to construct mentally and posit ontologically it. In other words, economic rationality is certainly at its proper place in previous calculation when we consider probabilities or take it into account as one of the criteria in managing conflicting situations, but it certainly cannot be the exclusive motivation to rely on in the operation of the overall complex. Or, ethics is by far not just a corrective, complementary factor in economy. This is of a foundational significance, giving it a framework so that the issue of economic rationality itself can be raised at all.

As we have already remarked, in legal regulation the concept of a system (formulated by, e.g. Hugo Grotius at the dawn of the modern age), built up exhaustively and seamlessly in (natural) law and formed according to the ideal of *mos geometricus* as broken down into individual positivities according to logical necessity, was later replaced by the mere definition of basic principles and (somewhat as an added exemplification) their arrangement

<sup>30</sup> Moore, G. E.: *Principia Ethica*. Cambridge, 1903.

<sup>31</sup> Such a methodology can indeed be approved of in fields depending upon positivation that is, aimed at some strictly delimited and exclusively theoretical modelling that selects from the whole arbitrarily, but according to human purposes. If over-extended or extrapolated, then it also becomes problematic on its own terms.

<sup>32</sup> Cf. Varga: *Lectures...* [note 17]. 84–85. Note 109.

<sup>33</sup> See Hermerén, G. (ed.): *Proceedings of the Symposium on Scientific Objectivity*. Copenhagen: Munksgaard 1978. = *Danish Yearbook of Philosophy*, 14 (1977).

in rules and exceptions from rules, so that the various situations in life can be judged according to principles in a patterned but individualised way, bearing their total complexity in mind. Likewise in economy, morality serves as an ethos defining a general direction, while in individual situations it helps in balancing conflicts of values by mediating amongst diverging interests mutually considered, leading finally to compromise solutions. Consequently in economy, at the level of *macro-processes*, morality is an ontic component to serve as a foundation that makes economic rationality reasonable and also socially interpretable; while in *micro-processes*, it has also to be taken cognisance of in the background, aware of the fact that it almost never makes recourse directly and one-sidedly but through reconciliatory processes, in order to solve conflicts and reach compromises by balancing, mediating, and mutual consideration.

It is exactly such a duality that opens up to both further requirements and additional wide-ranging prospects that may prove to be useful in our procedures at any time, for in *macro-relations* (e.g. in patterns proposed by medical law), it is exactly ethical considerations that generate the alternative models that we can endow, through strategic planning and a series of tactical decisions, with a definite patterning function, standardised as comprehensive social policies, after their harmonisation with prevailing economic and legal policies is accomplished; while in *micro-relations*, we have to provide for its exemplary operations through education, socialisation, and case analysis, caring for the diverse particularity of individual situations with proper empathy, after our ultimate goals are also taken into account.

With this, we have opted for the demand for human entirety, encouraged to avail ourselves of the potentialities offered by specialisation and homogenisation in our complex age with good conscience, but at all times in such a way as not to miss the ultimate goal, the intention—desirably a guide for all our human actions—of effectively implementing fundamental values in practice.<sup>34</sup>

<sup>34</sup> For earlier attempts at outlining a theoretical framework, see Varga, Cs.: *Doctrine and Technique in Law. Iustum Aequum Salutare IV* (2008), 23–37 and <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>> and <[www.univie.ac.at/R1/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba\\_Phil/Csaba\\_Phil.doc](http://www.univie.ac.at/R1/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc)> as well as Varga, Cs.: *Buts et moyens en droit*. In: Liodice, A.–Vari, M. (eds): *Giovanni Paolo II. Le vie della giustizia: Itinerari per il terzo millennio. (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato.)* Roma, 2003. 71–75 and *Goals and Means in Law: or Janus-faced Abstract Rights*. [Tikslai ir priemonės teisėje.] *Jurisprudencija* [Vilnius: Mykolo Romerio Universitetas] (2005) 68(60), 5–10 and <<http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf>>.

## KALEIDOSCOPE

MARY SABINA PETERS\*–MANU KUMAR\*\*

# Why International Oil Companies Choose to Enter into Joint Operating Agreement

### Introduction

This essay brings forth the nature of Joint Operating Agreement's (JOA) and its key features. The key features of JOA answer the question so as to why do powerful players as international oil companies choose to enter into such agreements. JOA's are used in capital intensive resource industries by those companies who want to restrict their exposure, particularly in limiting cost or liability. Investmental forethought necessitates a mix of participants who contributes towards financing, intelligence, access to market and access to project itself.

The usual form of association establishing the framework within which exploration for, and exploitation of, resources takes place is the JOA which is often considered to be a form of joint venture. The JOA can be considered the joint venture *par excellence* as its structure is found in most contractual joint ventures.<sup>1</sup>

Joint ownership of an oil and gas interest can be created through several factual scenarios.<sup>2</sup> The most common is when owners of respective oil and gas leases pool their interests<sup>3</sup> to meet a standard spacing unit that is legislatively prescribed.<sup>4</sup> Furthermore, another common reason for joint ownership is the economic risk of an unprofitable well.<sup>5</sup> Mineral depletion has required investors to drill deeper than ever before to obtain production.<sup>6</sup> This type of drilling operation is an expensive undertaking.<sup>7</sup> As a result of these costs even the largest companies will seek a joint investor to share the risk and cost of

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<sup>1</sup> Bean, G. M. D.: *Fiduciary Obligations and Joint Ventures*. Oxford, 1995. 3–4.

<sup>2</sup> Kuntz, E. O. et al.: *Oil and Gas Law: Cases and Materials*. St. Paul (MN.), 3rd ed., 1999. 622. (providing a basic overview of joint ownership and the issues created as a result of multiple ownership).

<sup>3</sup> Lowe, J. S.: *Oil and Gas Law*. Eagan (MN), 3rd ed., 1995. 437–438.

<sup>4</sup> *Ibid.*

<sup>5</sup> Kuntz: *Oil and Gas Law... op. cit.* 622.

<sup>6</sup> Hazlett, G. W.: *Drafting of Joint Operating Agreements*. *Rocky Mountain Mineral Law Institute*, 3 (1957), 277.

<sup>7</sup> Kuntz: *Oil and Gas Law... op. cit.*

drilling.<sup>8</sup> These risks are often leveraged by sharing them through joint development agreements, the most common being the JOA.<sup>9</sup> When investors or operators are considering entering into a JOA there are numerous issues to be considered.<sup>10</sup> A well designed JOA will clearly define each of these issues and will cater to the individual needs of the parties.<sup>11</sup> Examples of issues that need to be addressed include: who will act as the operator, what acreage will be covered by the agreement, the distribution of production profits, and how the costs of exploration will be divided among the parties.<sup>12</sup> Failure to properly address any of these important issues could mire the parties of the JOA in expensive and lengthy litigation.<sup>13</sup> One oil and gas author has cautioned drafters by stating that the cost of correctly drafting “a thousand different agreements may be nominal in comparison to the cost to their client of a major deficiency” leading to litigation.<sup>14</sup>

JOAs are commonly created on a standardized form that the parties modify.<sup>15</sup> The American Association of Petroleum Landmen (A.A.P.L.) first developed a model form operating agreement in 1956.<sup>16</sup> This standardized form was created in an attempt to give basic guidance to the attorneys that are involved in negotiation of the development agreements between operators and non-operators.<sup>17</sup> Generally, the operator will be responsible for the day-to-day production duties and the non-operator will only share in the costs and profits from the production.<sup>18</sup> The operator traditionally is a sophisticated party with extensive experience in the oil and gas industry. Therefore, the JOA will generally grant the operator broad rights in production decisions.<sup>19</sup> Typically, operators have a large financial investment in the development and production process.<sup>20</sup> Thus, they will commonly make decisions that will benefit both parties.<sup>21</sup> It is when the interests of the operator and the non-operator diverge that the issue of duty arises between the parties.

## 1. Scope of the JOA

JOA typically involves two or more legal persons combining property and expertise to carry out a single business enterprise in which they have a joint proprietary interest a joint right to control and share profits and losses.<sup>22</sup> Conceptually, a JOA comprises the “constitution”

<sup>8</sup> Hazlett: Drafting of Joint Operating Agreements. *op. cit.* at 277.

<sup>9</sup> *Ibid.*

<sup>10</sup> Kuntz: *Oil and Gas Law... op. cit.* at 622.

<sup>11</sup> Hazlett: Drafting of Joint Operating Agreements. *op. cit.* at 279–280.

<sup>12</sup> Eyring, H. J.: Comment, The Oil and Gas Unit Operator’s Duty to Nonoperating Working Interest Owners. *Brigham Young University Law Review*, (1987), 1293, 1294–1297.

<sup>13</sup> *Amoco Prod. Co. v. Wilson*, 976 P. 2d 941, 941 (Kan. 1999). When one considers the attorney fees and legitimate costs that were expended by all of the parties to this litigation, it readily shows the importance of properly drafting a joint operating agreement.

<sup>14</sup> Hazlett: Drafting of Joint Operating Agreements. *op. cit.* at 279–281.

<sup>15</sup> *Ibid.* at 278.

<sup>16</sup> Kuntz: *Oil and Gas Law... op. cit.* at 623.

<sup>17</sup> Hazlett: Drafting of Joint Operating Agreements. *op. cit.* at 278–280.

<sup>18</sup> Eyring: Comment, The Oil and Gas Unit Operator’s Duty... *op. cit.* 1293.

<sup>19</sup> Kuntz: *Oil and Gas Law... op. cit.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Maliss v. Bankers Trust Co.*, 717 F 2d 683 (1983).

which governs the joint venture, akin to partnership or to the “Memorandum and Article of Association” of a company.<sup>23</sup> JOA’s is typically specific that among the parties the relationship is one of tenants in common and not one of partnership.<sup>24</sup> JOA is a specified project hence it is clearly defined and limited in scope.<sup>25</sup> A JOA is often preceded by a joint binding agreement or an area of mutual interest agreement (AMI) such agreement seeks to facilitate co-operation between oil companies and prevents them from undertaking activities with others. The area of mutual interest is often incorporated as a term of JOA.<sup>26</sup> Moreover, the limited scope of a JOA is vital in setting limits to the co-ventures’ potential fiduciary duties.<sup>27</sup>

## 2. The parties to a JOA

JOA can only fully exist when there is a degree of surrendering of control. For that reason the choice of co-ventures’ is very vital. The free choice of a partner is important because it involves the trust and confidence of other parties; this is called *delectus personae*.<sup>28</sup> This free choice of associates in JOA is very significant as it involves a longterm relationship and enormous amount of financial contributions by each member. Pertinently, JOA’s places restrictions on the sale of interests in the venture to outsiders. This type of *delectus personae* forms the basis of mutual trust which in turn gives rise to the collaborative fiduciary relationship and corresponding fiduciary responsibilities on the co-venture.<sup>29</sup> Furthermore, this kind of participation in management of the venture brings to light the abilities and performance of each co-venturer. Moreover, under JOA it is the percentage of interests which determines each party’s entitlements to ownership and benefits, liability to cost, expenses and risks.<sup>30</sup>

## 3. Property Interest

Common ownership of assets is a feature of joint venture, it amplifies the sharing of risk, makes the relationship more intimate. In an incorporated joint venture, corporation is owned by the co-ventures’ and they own the assets indirectly whereas in a contractual joint venture the assets are owned as tenants in common.<sup>31</sup> A co-venturer has different proportional interest in the assets and they arrange separate funding of its interest in the JOA, and also

<sup>23</sup> Taylor, M. P. G.–Winsor, P. P.: *The Joint Operating Agreement: Oil and Gas Law*. London, 1989.

<sup>24</sup> Model Clause 42 (5) Petroleum (Production) (seaward Areas) Regulations 1976 (S.I 1976/1129).

<sup>25</sup> Harding Boulton, A.: Finance in the “single venture” Consortium. *Journal of Business Law*, 1961, 368.

<sup>26</sup> *Great Northern Petroleum and Mines Ltd. v. Merland Explorations Ltd.* (1983) 43 AR 128, 130 (Alta. Sc).

<sup>27</sup> Bean: *Fiduciary Obligations and Joint Ventures. op. cit.* at 12.

<sup>28</sup> Shaw, S.: Joint Operating Agreements. In: David, M. R. (ed.): *Upstream Oil and Gas Agreements*. 1996. chapter 2, 16.

<sup>29</sup> Bean: *Fiduciary Obligations and Joint Ventures. op. cit.* 11.

<sup>30</sup> *Maliss v. Bankers Trust Co. op. cit.*

<sup>31</sup> *BP Exploration Co (Libya) Ltd. v. Hunt* (No. 2) (1982) 1WLR 925.

give security to its lender over its interest in the assets.<sup>32</sup> Pursuant to JOA, co-venturers' have interest in the mutual undertakings which form choose in action.<sup>33</sup> Under jurisdictions where co-venturers' agree not to *partition* their interest strengthens the ties between the co-venturers' and the *delectus personae*.<sup>34</sup> A joint venture entails common ownership where in the parties contribute to the venture both in terms of services and finances which are used for production purposes, which creates mutual reliance and keeps the contribution forthcoming.<sup>35</sup>

#### 4. The Operator

The Operator is in regard to other joint ventures than joint operating agreements often known as the manager. In a JOA, the parties will appoint an Operator to act on the behalf of the joint venture. Efficiency demands that one person conducts the operations rather than each exercise its separate rights.<sup>36</sup> The Operator plays a key role in taking the work forward by proposing budgets and plans and running meetings. *Also it acts* as the agent of the parties in relation to third parties, including government liaison with the consent of the other parties.<sup>37</sup> As a party to the JOA, the Operator has the liabilities as the other parties; i.e. its percentage interest share of joint obligations.<sup>38</sup>

#### 5. The Operating Committee

The committee exercises over all control of, the joint operations in four stages: exploration, appraisal, development and production.<sup>39</sup> It is composed of co-venturers or their representatives.<sup>40</sup> Decisions are usually made on the bases of majority votes, the percentage is specified in the JOA.<sup>41</sup> A co-venturers voting right is in proportion to its interest. The Authorization for Expenditure (AFE) is granted by the committee. The collaborative fiduciary relationship levy's fiduciary constrains on co-venturers in voting, thus where such constrains apply co-venturers are to act honestly and in best interest of the venture. The courts determine this requirement by taking into consideration the motivations of the co-venturers'.<sup>42</sup>

<sup>32</sup> Willoughby, G. D. M.: Financing the Development of the North Sea Oil Fields. *Law Society Gazette*, 72 (1975), 10.

<sup>33</sup> Bean: *Fiduciary Obligations and Joint Ventures*. *op. cit.* at 13.

<sup>34</sup> Forbes, J. R. S.–Lang, A. G.: *Australian Mining and Petroleum Laws*. 2nd ed., Sydney, 1987. para. 1907.

<sup>35</sup> *Page One Records Ltd. v. Britton* (1968) 1 WLR 157.

<sup>36</sup> *Jefferys v. Smith* (1820) 1 Jac. and W 298, 302-3:37 ER 389, 390–391.

<sup>37</sup> *Maliss v. Bankers Trust Co.* *op. cit.*

<sup>38</sup> *Ibid.* 17.

<sup>39</sup> Taylor, M. P. G.–Tyne, S. M.: *Taylor and Winsor on Joint Operating Agreements*. 2nd ed., London, 1992.

<sup>40</sup> *Ibid.*

<sup>41</sup> Bean: *Fiduciary Obligations and Joint Ventures*. *op. cit.*

<sup>42</sup> *Ibid.* at 17.

## 6. Fiduciary Duties

When the operator in trust for the parties makes profit for the parties or performs a job, the operator shall be subject to fiduciary obligation.<sup>43</sup> It is pertinent to note that a fiduciary relationship affects the relationship of that other person in a legal or practical sense.<sup>44</sup> Consequently under the JOA the operator has the following obligations:<sup>45</sup> to disclose any personal interest that he may have in the property, account for the money invested, to exercise the account procedure in accordance with the principles of JOA, to protect and maintain the property without misuse and finally not to misuse the information imparted.

## 7. Default Clause

In a JOA a project is funded by the operator making calls upon the co-venturers to advance their respective shares of the expenditure in accordance with the terms of their agreements.<sup>46</sup> Where a party fails to meet a call and causes a default, JOA provides that non-defaulting parties take up the short fall pro rata.<sup>47</sup> Various sanctions can be applied on the defaulter including loss of voting rights or of product rights and ultimate abetment or more drastically, forfeiture of its interest.<sup>48</sup>

## 8. Sole Risk and Non-Consent provisions

Joint ventures are seldom an association of equals.<sup>49</sup> Therefore leaves enough room for diverging opinions. In order to avoid such conflicts "Sole Risk" and "Non-Consent" clauses are included in the JOA. A participant who has voted for a program but has been overruled by the majority and still wishes to proceed with the program represents the classic "Sole Risk" situation. The second situation where a dissenting participant does not wish to participate in the majority approved program—is generally referred to as "Non-Consent". The function of these clauses is to allow those co-venturers' who wish to proceed with certain work to do so without dissenters. Effectively, a sole risk project redefines the scope of the venture. The wells developed under this clause fall into the ambit of a sub-venture, the venture consist of those who join in it. So, also a non-consent operation can be treated as a sub-venture of a larger kind. The sole risk parties share the risk, costs and rewards of the operation between themselves in proportion to their interest in the sole risk venture. On occasions when such a venture is successful others can join upon paying a substantial premium, whereas under a non-consent venture late participation is possible with or without the payment of premium, depending on the provisions of the JOA.

<sup>43</sup> *Reading v. R*, 2KB 232 (1949).

<sup>44</sup> *Hospital Products Ltd v. United states Surgical Corporation and others*, 55 ACR 417, 454. (High Ct. Australia 1984.)

<sup>45</sup> *Boulting v. Actat*, 2QB 606 I All.E.R 716 (1963).

<sup>46</sup> Smith, E. E.: International Petroleum Development Agreements. *Journal of Natural Resources and Environmental Law*, 8. (1993), 62.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Mosaic Oil NL v. Angari Pty Ltd*. (No. 2) (1990) 20 NSWLR 280 (NSW SC).

<sup>49</sup> See Black, A. J.—Dundas, H. R.: Joint Operating Agreements: An International Comparison from Petroleum Law. *Journal of Natural Resources and Environmental Law*, 8 (1992).

## Conclusion

Joint venture embodies an agreement between the parties for an enterprise created for a single project, involving a sharing of project risk. Together with the participation in the management and control of the venture, the co-venturers' contribution creates a common interest in the success of the project. The JOA is widely used as a legal structure for natural resource exploration and development.<sup>50</sup> There is co-ownership of property of the venture and input in its management. The fact that the venture is limited to a defined geographic area as it sets the boundaries of relationship between the co-venturers'. The JOA's main difference from the joint venture is the possibility of sub-ventures being formed through the sole risk and non-consent operations. JOA's are the contractual nexus balancing exploration and production expectation interests against conflict with a particular regulatory regime. JOA is a flexible document that can be moulded to meet expectations and desires of parties. It encourages exploration and development, while neither forcing a party to participate inexpensive risk venture non-prohibiting a party from prospering and conducting ventures when the requisite operating committee pass mark vote is not attained. JOA offers the oil and gas industry a flexible, well written document to govern international oil and gas operations.

<sup>50</sup> Reagan, P. W. O.–Taylor, T. W.: Joint Ventures and Operating Agreements. *Victoria University of Wellington Law Review*, 14 (1984), 85, 87.

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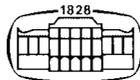
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ÁDÁM BOÓC\*

## Observations on the Definition of Public Policy (Ordre Public) in Swiss Arbitration Law

Motto: „*Ein Schiedsgericht thront nicht  
über der Erde, schwebt nicht in der Luft,  
es muss irgendwo landen,  
irgendwo erden.*” (Raape)

**Abstract.** This study deals with the notion of public policy (*ordre public*) in Swiss international arbitration. The paper analyzes the relevant paragraphs of IPRG, the Swiss Act on Private International Law. Based on legal authorities one can read about the distinction between procedural and substantive public policy in Swiss law. The paper describes several cases, in which the awards of the Court of Arbitration for Sport (Tribunal Arbitral du Sport) were challenged at the Federal Tribunal of Switzerland based on the alleged breach of public policy. The author discusses the question whether there can be a supra-national, universal interpretation of the notion of public policy in Swiss law, which is based on the fundamental legal and moral values of the civilized nations.

**Keywords:** international commercial arbitration, challenge of award, public policy, Switzerland

It is a well-known fact that one of the main advantages of arbitral dispute resolution is speed, expedition, the single instance nature of the procedure and the exclusion of an appeal, as a result only the challenge of the arbitral award may be initiated, exclusively under special conditions.<sup>1</sup> In many cases the arbitral award may bring significant drawbacks for the unsuccessful party, which makes it likely that one may want to seize every opportunity in order to initiate the challenge of the arbitral award.<sup>2</sup>

One of the possible ways to challenge an arbitral award is on the grounds of public policy.<sup>3</sup> In the present study we wish to examine how the Swiss arbitration law defines, interprets the definition of public policy, and what positions have been developed by the

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<sup>1</sup> For this see Gellért, Gy.: Új törvény a választottbíráskodásról (New Law on Arbitration). *Magyar Jog*, 45 (1995), 451–452; Boóc, Á.–Hegyi, A.–Sándor, I.–Szűcs, B.–Török, G.: *A követelések érvényesítésének jogi eszközei* (The legal means of enforcing claims). Budapest, 2005. 260; Boóc, Á.: A kereskedelmi választottbíráskodás egyes kérdései (Certain dilemmas of commercial arbitration). In Balogh, M.: *Diszciplinák határain innen és túl. Fiatal Kutatók Fóruma 2.* (Beyond and above the borders of Disciplines. Forum of Young Researchers 2). Budapest, 2007. 111–112.

<sup>2</sup> In relation to the invalidation of an arbitration verdict, Hungarian language summary, see Horváth, É.–Kálmán, Gy.: *A nemzetközi eljárások joga, különös tekintettel a választottbíráskodásra* (The procedures of international law, particularly with regard to arbitration). Budapest, 2003. 121–126.

<sup>3</sup> For this summary see Kiss, K.: *A Választottbíróság ítéletének érvénytelenítése közrendbe ütközésre való hivatkozással. A hazai és a nemzetközi gyakorlat összehasonlítása* (The invalidation of the arbitral tribunal judgments with reference to public policy conflict. A comparison of domestic and international law). *Gazdaság és Jog*, 13 (2005), 10–14.

judicature in connection with this notion. As is well known, Switzerland is a popular venue for international arbitration procedures, which can be explained by numerous historical and legal historical reasons.<sup>4</sup> In light of this the explanation of the definition of public policy is likely to result as useful experience for both domestic and international arbitration.

Our investigation in the present study shall be limiting its review to how the Swiss law on international commercial arbitration proceedings makes it possible for the arbitral award to be revoked on the legal basis of collision with public policy.<sup>5</sup> Apart from this—briefly—refer to the international private law interpretation of public policy in Swiss law.<sup>6</sup>

## I.

It signifies the intense relationship between the Swiss international arbitration and the Swiss international private law that the basic rules applying to them are found in the same statute accepted on 18 December 1987 Federal Statute on Swiss international private law (*Bundesgesetz über das internationale Privatrecht vom 18. Dezember 1987*, hereinafter referred to as: IPRG). International commercial arbitration rules can be found in the 20th chapter of the IPRG. With reference to the work of French Yves Derains on the correlation of applicable law during public policy and arbitration process, it is important to highlight that throughout international commerce certain collision problems may arise during the arbitration procedure, therefore the rules of international private law may play an important role in arbitration procedures.<sup>7</sup>

It is essential to stress that the current form of the IPRG is a result of an approximately ten-year long process, after review of many drafts and amendments.<sup>8</sup>

The IPRG—neither in the private international law or international commercial arbitration part—does not define the concept of public policy, leaving it to a large extent to jurisprudence or case law to determine. In Arts 17, 18 and 19 of the IPRG we shall see the concept of public policy accepted in international private law, whereas in Art. 190 Para. 2 e) it is used as a phrase for grounds of revoking the arbitral award.

<sup>4</sup> Swiss arbitration law in Hungarian language summary, see Boóc, Á.: *Nemzetközi kereskedelmi választottbíráskodás. A választottbíró megválasztása és kizárása* (The international commercial arbitration. The voting and exclusion of a judge). Budapest, 2009. 51–60. For the development of Swiss private law see Hamza, G.: *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römischrechtliche Tradition*. Budapest, 2009. 236–256.

<sup>5</sup> With regard to the Swiss national arbitration—which is primarily ruled by the accepted intercantonal convention on 27th of August 1969, named *Interkantonale Konkordat vom 27. März 1969 über die Schiedsgerichtsbarkeit*—we do not address. In relation to the Intercantonal Convention in detail see Bratschi, P.–Briner, R.: *Bemerkungen zum Konkordat über die Schiedsgerichtsbarkeit*. *Schweizerische Juristen-Zeitung*, 72 (1976), 101.

<sup>6</sup> The public policy in private international law and arbitration proceedings established the concept of the new Hungarian literature summary see: Burián, L.: *Gondolatok a közrend szerepéről* (Thoughts on the function of public order). In: Kiss, D.–Varga, I. (eds): *Magister artis boni et aequi. Studia in Honorem Németh János*. Budapest, 2003. 99–122.

<sup>7</sup> See Derains, Y.: *Public Policy and the Law Applicable to the Dispute in International Arbitration*. In: *Comparative Arbitration Practice and Public Policy in Arbitration*. ICCA Congress Series, No. 3. New York, 1986. 227–256.

<sup>8</sup> For this in detail see Blessing, M.: *Introduction to Arbitration—Swiss and International Perspectives*. Basel, 1999. 170–180.

Article 17 of the IPRG states that the application of foreign law is excluded if it would lead to the outcome of incompatibility with Swiss public policy (*ordre public*).<sup>9</sup> According to the provisions of Art. 18, the provisions of Swiss law must be applied in case specific goals make it necessary, regardless of the fact that the rules of the IPRG would impose the application of other laws, therefore here the present Article is capable of overwriting the law-prescribing function of collision laws. Art. 19 provides that provisions of another act may be considered if according to the Swiss legal mentality a party deserves to be protected and his clear interest requires so, provided that the case is closely linked to another legal field.

These provisions are primarily considering the meaning and functions of public policy from the viewpoint of international private law, but- as it will be shown in detail later on- are in close relation with the meaning of public policy that relates to the invalidation of arbitral awards. In connection with this we must refer to Art. 190 of the IPRG, which contains the rules for revoking of the arbitral award and which- having regard to our topic- it seems appropriate to quote verbatim:

*Art. 190. IX. Endgültigkeit, Anfechtung*

*1. Grundsatz*

*1. Mit der Eröffnung ist der Entscheid endgültig.*

*2. Der Entscheid kann nur angefochten werden:*

*a. wenn der Einzelschiedsrichter vorschriftswidrig ernannt oder das Schiedsgericht vorschriftswidrig zusammengesetzt wurde;*

*b. wenn sich das Schiedsgericht zu Unrecht für zuständig oder unzuständig erklärt hat;*

*c. wenn das Schiedsgericht über Streitpunkte entschieden hat, die ihm nicht unterbreitet wurden oder wenn es Rechtsbegehren unbeurteilt gelassen hat;*

*d. wenn der Grundsatz der Gleichbehandlung der Parteien oder der Grundsatz des rechtlichen Gehörs verletzt wurde;*

*e. wenn der Entscheid mit dem Ordre public unvereinbar ist.*

*3. Vorentscheide können nur aus den in Absatz 2, Buchstaben a und b genannten Gründen angefochten werden; die Beschwerdefrist beginnt mit der Zustellung des Vorentscheides.*

According to Art. 190 of the IPRG the enactment of the arbitral award shall be of legally binding and final. The arbitral award may be invalidated in the event of:

a) if the single judge or the selection of the arbitration panel was not drawn up according to the applicable rules;

b) if the tribunal was mistaken in finding its jurisdiction or the refusal of its jurisdiction;

<sup>9</sup> „Die Abwendung von Bestimmungen eines ausländischen Rechts ist ausgeschlossen, wenn sie zu einem Ergebnis führen würde, das mit dem schweizerischen Ordre public vereinbar ist.“ This Clause shows similarity with The Hungarian International Private Law Codex, Decree Law 13 of 1979 like force Clause 7. subpara. 1. In connection with this see Burián, L.-Keckés, L.-Vörös, I.: *Magyar nemzetközi kollíziós magánjog* (Hungarian International Private Law). Budapest, 1997. 137–143.

c) if the content of the tribunal's award went beyond the request provided, or failed to decide on issues that were included in the application;

d) if the principle of equal treatment of parties, or the principle of hearing of the Parties was injured;

e) where the award of the tribunal was incompatible with public policy (in German and French text: *ordre public*, the Italian text: *ordine pubblico*).

It is essential to note that the invalidation of the interim arbitral award may only be applied for in the case of a) and b) cited above. In case of Art. 191 the Swiss Federal Court (*Schweizerische Bundesgericht*) is competent to invalidate a foreign arbitral award. There is a 30-day long deadline for the submitting of the invalidation petition starting on the day of the conveyance of the award. In the international arbitration proceedings, the arbitration award may be considered conveyed if it has been delivered to the parties, except if the given arbitration rules require otherwise. However, in the Swiss domestic arbitration proceedings—unless otherwise agreed upon by the parties—the arbitration award shall be deposited with the competent court according to the seat of the arbitration court, which will notify the parties of the award.<sup>10</sup>

Although this study does not deal with the Swiss domestic arbitration, it is essential to emphasize that the Swiss domestic arbitration unlike the international commercial arbitration provides further opportunities to invalidate the arbitration award since invalidation is possible to be sought on the grounds that the award is arbitrary, based on obviously incorrect facts or on the clear breach of the law.<sup>11</sup>

## II.

The details of the IPRG that are found in separate places in relation to public policy are in close contact with each other in case we examine the role of public policy played in the arbitration proceedings. Although Art. 190 of the IPRG mentions conflict with public policy, in relations with the revoking of the arbitration award and the New York Convention on the recognition and enforcement of arbitration awards signed on the 10th of June 1958 (The New York Convention) mentions public policy in the second paragraph of subparagraph b) of the V. Article in relation with the recognition and enforcement of the arbitral award, the concept of public policy—as it is also pointed out by Karl-Heinz Böckstiegel—starts long before the arbitration proceedings begin, for example, because it serves as a limit of the parties self autonomy to which cases are judged via arbitration, and therefore the lack of settling disputes via arbitration (*lack of arbitrability*) can often play a large role in the public policy clause.<sup>12</sup>

<sup>10</sup> See Segesser, G. V.–Jolles, A.: Switzerland. In: Rowley, J. W.–Mendelsohn, Mc. B. (eds): *Arbitration World. Jurisdictional Comparisons*. London, 2006<sup>2</sup>. 372.

<sup>11</sup> Article 33 of the Intercantonal Convention pays attention to the question of invalidation of a domestic arbitration award. The comparison of this with international arbitration proceedings see in specific Walter, G.–Bosch, W.–Brönnimann, J.: *Internationale Schiedsgerichtsbarkeit in der Schweiz. Kommentar zu Kapitel 12 des IPR-Gesetzes*. Bern, 1991. 225.

<sup>12</sup> See Böckstiegel, K. H.: Public Policy as a Limit to Arbitration and its Enforcement. In: IBA *Journal of Dispute Resolution. Special Issue*, 2008. The New York Convention—50 years. 123.

(Taking account of public policy—and the international private law meaning ascribed to it—during the arbitration process is of the utmost importance, because failure to provide it may serve as a very good argument that the substantive part of the award shall be invalidated by reference to a conflict with public policy.)

The established view in the case law is that this is an exceptional provision to be used, which may be relevant in cases where the violation of law and justice exceeds a level, which is contrary to law in its Swiss concept.

For example, the negative public policy clause contained in Art. 17 of the IPRG shall not prevent the application of Saudi Arabian law, which prohibits the imposition of interest.<sup>13</sup>

It is essential to point out—as Francesco Tezzini does—that while the Art. 17 of the IPRG uses the concept of Swiss public policy (*schweizerische Ordre public*) while reading the concept of public policy contained in Art. 190 of the IPRG on invalidation of arbitration awards we come across “merely” the concept of public policy without any reference to Switzerland.<sup>14</sup> This will have particular importance during the interpretation of Art. 190 Para. 2 e) of the IPRG.

By contrast Arts 18 and 19 of the IPRG shall be considered as a kind of positive public policy clause, since in this case we can find an essential a public policy interest that requires a particular application of the law, as opposed to the public policy exclusion clause in Art. 17 of the IPRG. This is particularly important in the Swiss case law in case of the application of prevailing legal standards of a state are cogent. In the case of Switzerland, this clearly occurs in cases where any of the European Community law would be applied.

The Swiss Federal Court in a famous decision made in the *Gamma vs SA. Sigma SA* case on the 28th of 1992 defined important criteria in this issue. In this case, the parties stipulated Belgian law ruling in their contract and by that included European Community antitrust laws as they are a part of Belgian law. The Federal Court held that it would be a violation of public policy of the European Community if an arbitration award would be inconsistent with Art. 81 (ex-Art. 85) of the Treaty of Rome. Accordingly it is an obligation of the arbitrators to examine the agreements before them in order to avoid the decisions made that are incompatible with community law.<sup>15</sup> The position established in this case by the Federal Court has been further refined in a decision made on the 13th of November 1998. According to the facts of the case the parties entered into a licensing agreement, in which Swiss law was governing, but under the contract some of the deliverables were to be accomplished in the territory of the European Community.

During the arbitration proceedings neither party referred to a possible breach of the EU’s competition rules—Art. 81 of the Treaty of Rome—the arbitrators themselves did not investigate this aspect of the matter. The Federal Court held that it is an obligation of the arbitrators to examine the contract under Art. 81 of the Treaty of Rome—even if the parties deemed Swiss law governing—in case when at least one of the parties referred to the contract

<sup>13</sup> See Vischer, F.: *IPRG Kommentar*. (Heini, A.–Keller, M.–Siehr, K.–Vischer, F.–Volken, P. eds), Zürich, 1993. Art. 17, N. 1, 7.

<sup>14</sup> See Trezzini, F.: The Challenge of Arbitral Awards for Breach of Public Policy according to Art. 190 para. 2 lit e) of the Swiss Private International Law. In: *Three Essays on International Commercial Arbitration*. Lugano, 2003. 127.

<sup>15</sup> See: DFT 118. II. 193. In relation with the decision see Trezzini: *op. cit.* 135–136. See further Blessing: *op. cit.* 247–248.

being invalid during the judicial or arbitral proceedings.<sup>16</sup> According to this perception in case if the arbitrators cannot do that, then the decision may be invalidated based on Art. 190 Para. 2 e) of the IPRG, according to which the tribunal erred in finding or denying jurisdiction. A specific trait of this decision is that such a strong standpoint was drawn up by the supreme court of a non-EU member state.

The interpretation of the above-quoted Arts 17 and 18 of the IPRG was raised in the Federal Court decision made in Lausanne on the 28th of March 2001, too. Here, the question was whether a treaty condemning the Swiss law governing, that breaches foreign mandatory rules—the UN resolution on a weapons embargo in the territory of the former Yugoslavia—, may be contrary to Art. 20 of the Swiss OR on good faith.<sup>17</sup> The decision held the contract was in breach of good faith, but by no means by the direct application of the UN resolution, but by the breach of public policy. As you can see, that in this decision Arts 17 to 19 and Art. 190 Para. 2 e) of the IPRG are jointly applied.

### III.

The following is an overview of the interpretation which the Swiss arbitration practice has developed of Art. 190 Para. 2 e) of the IPRG that is the basis on which the invalidation of an arbitration award may be claimed if the judgment is contrary to public policy. With regard to the fact that this provision—as it has been mentioned previously—concerns international commercial arbitration, it is essential to compare this rule with the New York Convention cited above, of which subparagraph Art. V. paragraph 2 b) states the following:

*2. The recognition and enforcement of an arbitration award may also be refused if the competent authorities of the country in which recognition and enforcement is sought finds that: b) The recognition or enforcement would be contrary to public policy in this country.*<sup>18</sup>

In comparison of the provisions of the New York Convention and the IPRG, a striking difference is that the IPRG makes the invalidation of the award possible if it is contrary to public policy while the New York Convention allows the invalidation of the award on the grounds of it being contrary to the public policy of the state recognizing and implementing the award.<sup>19</sup> The question is instantly raised what the difference is between the concept of a country's public policy and the international concept of public policy.

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<sup>16</sup> See DFT 13.11.1998. See further Trezzini: *op. cit.* 138. Trezzini emphasizes that according to some authors the members of the tribunal should take into consideration Art. 81 of the Treaty of Rome if neither party referred to the cases relations with competition law. See further Blessing: *op. cit.* 247–248.

<sup>17</sup> The first paragraph of Art. 20 of the Swiss OR defines the breach of good faith by contracts as such: „*Ein Vertrag, der einen unmöglichen oder widerrechtlichen Inhalt hat oder gegen die guten Sitten verstösst, ist nichtig.*”

<sup>18</sup> The New York convention was implemented into Hungarian law by Decree–Law No. 25/1962.

<sup>19</sup> It is an important part of the cited article of the New York Convention that recognition for states is not compulsory and that the question of denial of enforcement on grounds of violation of public policy is at the discretion of the court.

Although the wording of the New York Convention is clear about the public order of the country given, due to the international nature of the arbitration proceeding it—the concept of international aspects of the subject—makes it essential to be aware of the international aspects of public policy.<sup>20</sup> In some countries the case law also places great emphasis on the investigation of this issue. The manual of Martin Hunter-Alan Redfern refers to a specific case in India. The Supreme Court of India in the case of *Remusagar Power Co. Ltd. v. General Electric Co.* made the following stance:

*“This raises the question of whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law. The Court held that the narrower view should prevail and that enforcement would be refused on the public policy ground if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”*<sup>21</sup>

According to the Supreme Court of India a narrower concept of public policy should be applied when the recognition and enforcement of arbitration awards are concerned, but throughout the detailed discussion of this matter explains that the recognition and enforcement of an arbitration award on the grounds of it being contrary to public policy may be possible if it is contrary to the fundamental policy, the interests of India, or the concept of morality and justice. As one might see this public policy clause has a somewhat broader interpretation than the concept of international public policy due to the position held by the Supreme Court of India.

In Swiss case law in Art. 190 Para. 2 e) of the IPRG the substantive law meaning and the procedural law meaning of public policy is clearly distinguishable. The essence of the procedural law public policy is that each party should be granted the right to an irrespective judgment that is an appropriate procedure, the adequate portrayal and evaluation of facts. The substantive law public policy means firstly the fundamental principles of the rule of law, the intrinsic values which all arbitration awards must respect.

During the interpretation of the procedural public policy several notable cases can be found in the Swiss case law. It was held that the mere fact that an arbitration award has no justification is not a procedural violation of public policy. In reference to the independence of the experts used by the tribunal independence, used by experts for the Swiss Federal Court has thus held a position that, until an expert has no personal interest in the outcome of a legal proceedings there can be no talk about violations of public order.<sup>22</sup>

The Swiss Federal Court came to a very interesting conclusion in relation to the procedural public policy in another case. In the event that the tribunal gives an opportunity for certain facts to be considered as evidence, but later on lets the parties know that these facts were not portrayed in an appropriate way (and therefore will not consider them), we may talk about the violation of procedural public policy. However, if the tribunal gives the

<sup>20</sup> In relation to this see Carbonneau, T. E.: *Alternative Dispute Resolution. Melting the Lances and Dismounting the Steeds*. Chicago, 1989. 66–67.

<sup>21</sup> The case of *Remusagar Power Co. Ltd. v. General Electric Co.* was quoted by Redfern, A.–Hunter, M.: *Law and Practice of International Commercial Arbitration*. London, 2004<sup>4</sup>. 473.

<sup>22</sup> In connection with this see Müller, Ch.: *International Arbitration. A Guide to the Complete Swiss Case Law (Unreported and Reported)*. Zürich–Basel–Geneva, 2004. 180–181.

authorization for the attachment of such evidence, then later on—the Federal Court ruled that—without the breach of good faith without prejudice to its decision may not arbitrarily change it. The Federal Court also points out that by doing so the tribunal violates the contractual legal relationship existent between the tribunal and the parties and that is contrary to the theory *pacta sunt servanda*.<sup>23</sup>

In my opinion, this case is very interesting in two respects. Firstly, the argument mentioned above is good at relating the concept of procedural and substantive public policy also highlighting the fact that there is a kind of contractual relationship between the parties, because the parties subjected themselves to the tribunal's decision, instructed the tribunal to make a judgment in the matter and due to this analogy the tribunal also bears certain obligations.<sup>24</sup>

As far as the substantive public policy concept is considered, here the acting tribunal—that is the Swiss Federal Court—is responsible for considering for specific matters whether there has been a secondary offense, which is contrary to the fundamental principle of the rule of law.

Based on the available case law of the *pacta sunt servanda* principle, a serious violation of the principle of good faith, the prohibition of the abuse of power, that is in fact the violation of a principle with an apparently significant moral content of private international law may justify the violation of public policy from the substantive point of view.

The Federal Court in a case held that it may be viewed as the violation of good faith with particular attention to the violation of *culpa in contrahendo*—and shall therefore be considered as basis for the invalidation of an arbitration award for the violation of public policy—if either party during the contracting process fails to provide all necessary information that the other party did not know about and could not have known about that was needed for the other party to make an informed decision.<sup>25</sup> The view of the Federal Court is of fundamental importance that the violation of good faith and the abuse of power materialised so that the arbitration award may be invalidated on the grounds of it being contrary to public policy shall be examined via the second article of the Swiss OR.<sup>26</sup>

<sup>23</sup> In connection with this see Müller: *op. cit.* 190.

<sup>24</sup> It seems appropriate to refer to the fact that this quality of modern day arbitration shows much relation to the concept of arbitration in Roman Law, where the *receptum arbitrii* known as *pactum* also emphasizes the contractual nature of the legal relationship. For the concept of *receptum arbitrii* see Földi, A.—Hamza, G.: *A római jog története és institúciói (The History and Institutions of Roman Law)*. Budapest, 2009<sup>13</sup>. 542. For the arbitration in Rome see Roebuck, D.—De Loynes de Fumichon, B.: *Roman Arbitration*. Oxford, 2004. For the legal nature of the arbitration contract see Ujlaki, L.: A választottbírószági szerződés jogági elhelyezettsége és tipológiája (The legal position and typology of the arbitration agreement). *Jogtudományi Közlöny*, 46 (1991), 216–225.

<sup>25</sup> See Müller: *op. cit.* 191.

<sup>26</sup> Article 2 of the OR points out that „*Haben sich die Parteien über alle wesentlichen Punkte geeinigt, so wird vermutet, dass der Vorbehalt von Nebenpunkten die Verbindlichkeit des Vertrages nicht hindern solle. Kommt über die vorbehaltenen Nebenpunkte eine Vereinbarung nicht zustande, so hat der Richter über diese nach der Natur des Geschäftes zu entscheiden. Vorbehalten bleiben die Bestimmungen über die Form der Verträge.*”

Therefore the good faith procedure demanded at the creation of contractual obligation prescribed by Swiss private law acts as a canon during the invalidation process of an arbitration award on the grounds of it being contrary to public policy.<sup>27</sup>

#### IV.

In Swiss case law/practice the *Court of Arbitration for Sport*, CAS (*Tribunal Arbitral du Sport*) plays a unique role in the viewpoint evolved in relation to the invalidation of an award on the grounds of collision with public policy. The CAS was founded by the International Olympic Association. The CAS is based in Lausanne it is an arbitrary institution judging cases involving international legal matters under Swiss law.<sup>28</sup>

Numerous requests for the invalidation of the decision on the grounds of it being contrary to Swiss public policy made by the CAS have been submitted to the Federal Court also based in Lausanne. The Federal Court has rejected all requests based on the decision being in conflict with substantive public policy.<sup>29</sup> The Federal Court in sports-law cases held that the concept of conflict with public policy shall be viewed as an international concept rather than a domestic one, which in essence prohibits the recognition and enforcement of judgments that are incompatible with fundamental legal or moral principles established in civilized countries.

In the case of *Marc Biolley v. Association Turkish FA* in 2007 the Federal Court held that an award is contrary to substantive public policy if it breaches such fundamental rules of substantive law that by doing so it becomes incompatible with the present rule of law and system of values. In the interpretation of the Federal Court such is the prohibition of the abuse of law and what is even more substantial in sports law questions the prohibition of discriminating provisions and the protection of incapacitated persons.

Several requests for invalidation have been submitted against rulings by the CAS of the grounds of them being contrary to the principle of good faith and the equal treatment and are therefore contrary to Swiss public policy.

It is worth referring to the case of *Raducan v. IOC* in the year 2000 Sydney Olympic Games, acting under the CAS ad hoc arbitration tribunal found that Romanian female gymnast, Andreea Raducan, who had admittedly taken a pill containing a banned ingredient had committed a doping violation. Andreea Ruducan later on based her request for invalidation on the fact that there was an inexplicable difference in the quantity of the urine sample provided by her during the doping test (100 ml) and the urine sample examined by the laboratory (62 ml) and due to this the arbitration body should not have judged the claim

<sup>27</sup> In connection with good faith in Swiss law see Földi, A.: *A jóhiszeműség és tisztesség elve. Intézménytörténeti vázlat a római jogtól napjainkig* (The principle of good faith and honesty). History of Institution from Roman times till today). Budapest, 2001. 48–52. The second Article of the ZGB for the concept of good faith uses the expressions *Treu und Glauben*, *bonne foi*, and *buona fede*.

<sup>28</sup> The quite informative website of the CAS is: <http://www.tas-cas.org/> In connection with the functions of the arbitration besides the regulation and certain decision on the website see in detail Blackshaw, I. S.–Siekmann, R. C. R.–Soek, J. (eds): *The Court of Arbitration for Sport: 1984–2004*. The Hague, 2006.

<sup>29</sup> In connection with this see Mitten, M. J.: *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations. Marquette University Law School Legal Studies Research Paper Series*, (2009) 9–14, 9. see <http://ssrn.com/abstract=1376317>.

as it has done previously in another case where the integrity of the urine sample was not sufficiently justified the examined sports fellow was not condemned and according to the Romanian gymnast her conviction was violation of the principle of equal treatment.

According to the Federal Court that fact that Andreea Raducan made a statement during the process that resulted in her admitting to taking the pill containing a banned ingredient makes this case completely different to the one referred to in the request for invalidation and therefore we may not speak of the violation of equal treatment.<sup>30</sup>

From the point of view of our topic it is even more interesting to take into account the fact whether the seat of the CAS arbitration is always seen as Lausanne—regardless of where geographically speaking the Arbitration Board's proceedings are actually conducted—and whether the procedure is governed by Swiss law. Thus the CAS arbitral judgments—except in Switzerland—may be viewed as a foreign arbitration award, which in case of recognition and enforcement of judgments is to be considered under the public policy clause of the New York Convention subpara. e) of Article V.

In the case law of the United States we can experience in several cases that the judgment made by the CAS was applied for to be invalidated on the grounds of collision with public policy.

It is worthwhile mentioning the case of *Slaney v. International Amateur Athletic Federation*.<sup>31</sup> According to the facts of the case a medium distance runner female sports fellow had an increased ratio of testosterone to episterone of 6:1. According to the rules of the International Amateur Athletic Federation this increased ratio suggests that the athlete was using a banned substance for doping which presumption may be rebutted by the athlete submitting clear and convincing evidence, demonstrating that the increase was due to a physiological or pathological state. During the process Mary Slaney failed to produce such evidence.

Her intention was to invalidate the judgment on the grounds that it is in collision with the public policy of the United States of America that the conviction relies on a test which is scientifically invalid and is discriminative against female athletes. The *Second Circuit* Court of the USA denied her request pointing out that the recognition and enforcement of an arbitration award may only be denied on a small scale of the public policy clause of the New York Convention. This is only possible in the case of when the judgment would be in violation of the fundamental concepts and the enforcement of the judgment would be contrary to a paramount principle of law. According to the viewpoint of *Second Circuit* the rules above-mentioned and the procedures for determining may in no way be viewed as one that is in accordance with the conditions of the application of the public policy clause.

In connection with this Matthew J. Mitten—in light of the position held by the Swiss Federal Court and the courts of the USA—draws the conclusion that the public policy clause in connection to the recognition of arbitration awards in connection to the Olympic Games and international sports instead of individual national approaches shall be interpreted throughout a transnational concepts of universal *lex sportiva*.

This approach according to Mitten actually meets the objective set by Judge Pierre Coubertin which states that it is an important goal for the olympic movement to respect the fundamental ethical principles.<sup>32</sup>

<sup>30</sup> In detail see Mitten: *op. cit.* 11–12.

<sup>31</sup> For summary of the case see Mitten: *op. cit.* 15–16.

<sup>32</sup> In connection with this see Mitten: *op. cit.* 17.

As a counter example Matthew J. Mitten—and with a critical opinion—refers to a judgment made by the European Court in 2006. In the case of *Meca-Medina and Majcen v. Comm'n of European Communities* the European Court of Justice allowed two Slovenian swimmers to contest an arbitration award by the CAS.<sup>33</sup> The arbitration tribunal in its judgment moderated the suspension of doping misdemeanor at the Brazil swimmers world cup from four years given by the International Swimmers Association (*Federation Internationale de Natation*, FINA) to two years. The European Court of Justice allowed the case to be retried with the conditions to view if the two year suspension was proportionate in light of the provisions ordering the freedom of competition and services in the Treaty of Rome. According to the European Court of Justice these sports law provision by prohibiting the swimmers from part-taking in professional swimming and challenges have a distinct economic impact on the swimmers and it should be investigated if these doping rules are compatible with the above-mentioned principles of the European Community law.

It is of the utmost importance to note that the European Court of Justice found that the criteria defined in the doping rules are adequate and the sanctions are not disproportionate, not excessive, that is not contrary to European Community competition law, but it seems that the European Court of Justice in this case appears to have taken into account other considerations than just those defined in the New York Convention or the Swiss IPRG in the decision of invalidating of the CAS arbitration award.

According to Mitten the opinion set out in the above-cited case is unlucky because it might result in the suppression of the evolution of cohesive legal interpretation of international Olympic games and international sports whereas according to Mitten's opinion the achievement of such an international sports legal system would be salutary in which the achievement of a homogenic interpretation of public policy should be achieved.<sup>34</sup>

## V.

In order to understand whether the Swiss case law considers the concept of public policy international or transnational it is expedient to refer to a judgment made by the Swiss Federal Court in 1995 that the manual of Hunter-Redfern describes in detail.<sup>35</sup> According to the justification of the judgment during the recognition and enforcement of a foreign arbitration award in—when clearly implied that the international aspects of public policy must be borne in mind—a Swiss court has a very narrow margin. In view of the Swiss Court if the recognition and enforcement should be denied on grounds of a procedural error then this is possible only in the case if the procedural error is contrary to the fundamental principles of the Swiss jurisdiction or is in serious violation of the sense of justice.

In another case the Federal Court came to the guiding position that Art. 190 Para. 2 e) of the IPRG should be interpreted by taking into consideration of the universal concept of public policy which is independent from the dispute and applicable substantive law.

<sup>33</sup> See the whole case at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:224:0008:0008:EN:PDF>

See the bulletpoints of the case at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-02/cp060065en.pdf>

<sup>34</sup> In connection with this see Mitten: *op. cit.* 19.

<sup>35</sup> See Redfern-Hunter: *op. cit.* 473.

The violation of public policy is distinguishable if the judgment is contrary to the ethical values of the civilized countries, which values are therefore to be valid above at an above all nations.<sup>36</sup>

The above-quoted Trezzini summarizes the respected Professor Pierre Lalive's opinion that invalidation on grounds of the public policy clause has three known levels. Firstly one may speak of the domestic public policy concept which arises as a result of national provision and may prevail in domestic conditions. Secondly one may mention the Swiss public policy which is of national origin but is applied in the international dimension and thirdly the supranational and transnational and really may refer to the international public policy which is not the product of the national jurisdiction but the public policy concept which may be derived from the civilized countries and the perception and attitude of international commerce.<sup>37</sup>

From those mentioned above the conclusion can be drawn that in the dimension of international arbitration the application of the transnational concept of public policy is salutary. In case of this public policy concept—as it may be seen from the case cited above—the strict distinction between the concept of substantive and procedural public policy seems artificial. However, it is important to conclude that when defining the concept of international public policy covered by *sacrosanctus* legal values it is almost impossible to proceed without the implantation of individual countries, legal cultures and morals.

<sup>36</sup> See Müller: *op. cit.* 171.

<sup>37</sup> See Trezzini: *op. cit.* 131. See further Lalive, P.: *Ordre Public transnational ou réellement international et arbitrage international. Revue de l'Arbitrage*, 1986. 329 sqq.

TAMÁS DEZSÓ CZIGLER\*

## Choice-of-Law in the Internet Age—US and European Rules

**Abstract:** With use of the Internet, a new form of contract has appeared: the electronic contract, which is concluded online. Most of these involve a relationship of two parties: a consumer who is in a relatively vulnerable position, and a business entity. There are numerous examples of such transactions: youngsters downloading music from a website and paying for it—as they would in a music store. Many physical goods can also be purchased online—e.g. even though they live in Europe, the authors of this article regularly purchase books from the US. There are numerous ways such transactions can take place: one of the most obvious ways is buying goods on Amazon or eBay, on the website of a company, or purchasing goods using e-mail communication. The article attempts to summarize the choice of law rules affecting electronic contracts in the US and in Europe—i.e. to give an overview of which country’s or state’s law would apply to a contract concluded online, what the limits are on such a transaction and which state’s laws can protect us in case of a breach.

**Keywords:** Private international law, internet law, choice-of-law, electronic contracts, consumer sales, Rome I. Regulation, U.C.C., Restatement (Second) of the conflict of laws

### I. Introduction

With widespread usage of the Internet, a special field of private international law has emerged (hereinafter referred to as: “PIL” or, using its US name, “*conflict-of-laws*”), growing strongly over the last decade: the law of electronic contracts. Consumers conclude contracts through the Internet in developed countries every day: they buy goods, reserve hotel rooms and other services, download paid music from websites, etc. In such transactions, choice-of-law clauses are used regularly. Reviewing the latest developments, we discover numerous cases and statutes in the United States dealing with this topic, with a similar situation in the European Union.

In this area of private international law, we believe that both Europe and the US have a lot to learn from each other. In general, the US leads with proactive thinking in applying new technologies and in reflecting the latest developments in the world. On the other hand, Europe has a tradition—continuously eroding, but still existing—of making clear rules with the public can become relatively easily acquainted. Furthermore, consumer law is traditionally at the centre of EU commercial law and additionally, there is currently an on-going wave of consumer legislation activity. A new law for consumer contracts was adopted

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at the end of 2011,<sup>1</sup> and a separate proposal was also made for a common European sales law,<sup>2</sup> all indicative of the continued importance of the field.

In this paper we wish to focus on the rules of e-sales and not on provisions related to other contract types. We will be dealing with the laws of consumer contracts; laws governing other kinds of private contract may contain different provisions. Importantly, we will only deal with the problem of applicable law, and will not discuss substantive law, jurisdiction and other related issues.

## II. The parties' choice of law

### 1. General rules

The question of which law to apply to a contract has an elementary effect on remedies for any breach, since there are enormous differences between the Anglo-Saxon and European continental legal approaches affecting contracts.<sup>3</sup> On the other hand, with the unification efforts of the EU, some parts of the problem in Europe appear to have been resolved. As with substantive law, we rarely find specific, written rules targeted at electronic consumer contracts—in this regard the US and the EU systems are similar. Thus we must consider the general landscape of consumer law and contract law. Equally for applicable law, we need to have a broad view of the general rules in order to consider special cases.

Reviewing the laws applicable to contracts, we discover only small differences between US and EU rules: on both sides of the Atlantic Ocean, the law chosen by the parties must by default be applied to an e-sales contract. In the US, the Second Restatement on conflict-of-laws<sup>4</sup> expresses this idea, and even though it is not a law with binding force, the approach is followed by all states. Article § 187 of the Restatement states the following:

“(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not

<sup>1</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance. OJ L 304, 22.11.2011, 64–88. Cf. Micklitz, H.-W.–Reich, N.: Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights. *Common Market Law Review*, 46 (2009) 2, 471–519; van Boom, W. H.: The Draft Directive on Consumer Rights: Choices Made & Arguments Used. *Journal Of Contemporary Research*. 5 (2009) 3, 452–462.

<sup>2</sup> Proposal for regulation of the European Parliament and of the Council on a common European sales law. COM (2011) 0635 final.

<sup>3</sup> Smits, J. M.: Diversity of Contractual Law and the European Internal Market. In: Smits, J. M. (ed.): *The Need for a European Contract Law—Empirical and Legal Perspectives*. Groningen, 2005. 156–163; Lando, O.: Performance and Remedies in the Law of Contracts. In: Hartkamp, A.–Hesselink, M. et al. (eds): *Towards a European Civil Code*. Dordrecht–London–Boston, 1994. 201–222; Tallon, D.: Breach of Contract and Reparation of Damage. In: *Towards a European... op. cit.* 223–237.

<sup>4</sup> Restatement (Second) of Conflict of Laws § 187 (1)–(2) (1971).

have resolved by an explicit provision in their agreement directed to that issue, unless either

- (a) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or
- (b) Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
- (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.”

We find similar provisions in the Uniform Commercial Code (hereinafter referred to as: “U.C.C.”). The U.C.C. cannot be considered a black letter law since it was published as a uniform model act by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). However, since it is built into each state’s law and is applied similarly throughout the US, it has a key role in US sales law. U.C.C. § 1–301 2003 asserts the following:

“Territorial Applicability; Parties’ Power to Choose Applicable Law

- (a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.
- (b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state.
- (c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:
  - (1) Section 2- 402
  - (2) Sections 2A- 105 and 2A- 106
  - (3) Section 4- 102
  - (4) Section 4A- 507
  - (5) Section 5- 116
  - [(6) Section 6- 103]
  - (7) Section 8- 110
  - (8) Sections 9- 301 through 9- 307.”

In Europe, Art. 3(2) of the Rome I Regulation on the law applicable to contracts (hereinafter referred to as: “*Rome I Regulation*” or “*Rome I*”)<sup>5</sup> grants the parties the right

<sup>5</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 2008.07.04, 6. Cf. Callies, G.-P. (ed.): *Rome Regulations*. Alphen aan den Rijn (The Netherlands), 2011, 17–353; Ferrari, F.–Leible, S. (eds): *Rome I Regulation*. München, 2009; Leible, S.–Lehmann, M.: Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht (“Rom I”). *Recht der Internationalen Wirtschaft*, 54 (2008), 528–543; Mankowski, P.: Die Rom I-Verordnung–Änderungen im europäischen IPR für Schuldverträge. *Internationales Handelsrecht*, 7 (2008), 133–152; Pfeiffer, T.: Neues Internationales

to make such a choice.<sup>6</sup> The regulation or, to be more precise, Art 6 thereof clearly expresses that the parties may choose the law applicable to a contract.

## 2. Limitations of choice

In all legal systems, the parties' choice of law for a contract, and especially for a consumer contract has limitations. Firstly, in the US, the law chosen must have a substantial relationship with the contract.<sup>7</sup> In Europe—in our personal opinion—this is not a requirement.

Secondly, in all jurisdictions including Europe and the US, the application of a law can be rejected if it is in conflict with some important provisions that the forum has to validate. Two types of such rules can be distinguished. Above all other issues, the public policy of the forum may contain such important rules.<sup>8</sup> Art. 9(2) and (3) of Rome I states that nothing in the regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. According to the legal literature, is a reference to the most essential, imperative laws of a country, for example laws protecting consumers and employees.<sup>9</sup> Along with these rules, the overriding mandatory provisions of the law of the country may also be give effect where the obligations arising out of the contract have to be or have been performed, when those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to such provisions, regard shall be

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Vertragsrecht—Zur Rom I-Verordnung. *Europäisches Zeitschrift für Wirtschaftsrecht*, 19 (2008), 622–629; Plender, R.—Wilderspin, M.: *The European Private International Law of Obligations*. London, 2009. 93–434; Stone, P.: *EU Private International Law*. London, 2010. 287–346; von Armbrüster, Ch.—Ebke, W. F.—Hausmann, R.—Magnus, U.: *Staudinger Kommentar zum Bürgerlichen Gesetzbuch—Einleitung zu Rom I-VO*. Berlin, 2011; von Armbrüster, Ch.—Hausmann, R.—Magnus, U.: *Art. 1–10 Rom I-VO*. Berlin, 2011; Magnus, U.—von Armbrüster, Ch.—Ebke, W. F.—Hausmann, R.: *Artikel 11–29 Rom I-VO; Artikel 46 B, C Egbgb*. Berlin, 2011; Wagner, R.: Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung)—Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung. *IPrax-Praxis des Internationalen Privat- und Verfahrensrechts*, 28 (2008), 377–386.

<sup>6</sup> Cf. Tang, Z. S.: Parties' Choice of Law in E-Consumer Contracts. *Journal of Private International Law*, 3 (2007) 1, 113–136.

<sup>7</sup> See the above-mentioned Sections. Cf. Hay, P.—Borchers, P. J.—Symeonides, S. C.: *Conflict of Laws*. 5th ed., St. Paul, 2010. 1090–1098; Weintraub, R. J.: *Commentary on the Conflict of Laws*. New York, 6th ed., 2010. 517. et seq.; Rühl, G.: Party Autonomy in the Private International Law of Contacts. In: Gottschalk, E.—Michaels, R.—Rühl, G.—von Hein, J. (eds): *Conflict of Laws in a Globalized World*. Cambridge—New York, 2007. 160. et seq.

<sup>8</sup> For the US rules cf. Healy, J. J.: Consumer Protection Choice of Law: European Lessons for the United States. *Duke Journal of Comparative and International Law*, 19 (2009), 537. et seq.

<sup>9</sup> Bonomi, A.: Mandatory Rules in Private International Law—The Quest for Uniformity of Decisions in a Global Environment. In: Šarčević, P.—Volken, P.—The Swiss Institute of Comparative Law (eds): *Yearbook of Private International Law*. Vol. 1, 1999. 215–248; Wojewoda, M.: Mandatory Rules in Private International Law—With Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations. *Maastricht Journal of European and Comparative Law*, 7 (2000) 2, 183–213; Dickinson, A.: Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu? *Journal of Private International Law*, 3 (2007) 1, 53–88; Benzenberg, E.: *Die Behandlung ausländischer Eingriffsnormen im internationalen Privatrecht. Eine studie unter besonderer Berücksichtigung des internationalen Schuldrechts*. Jena, 2008.

had to their nature and purpose and to the consequences of their application or non-application.

Moreover, in certain instances, the law of the consumers' habitual residence also has relevance. In Europe, the rule is expressly stated in Rome I: according to Art. 6(2), the parties may not "lower" the level of consumer protection the consumer would have in the absence of such a choice.<sup>10</sup> There's a similar problem with EU consumer law: its provisions cannot be overridden by the choice of the parties.<sup>11</sup> In the US, the situation is more complicated. According to § 187(2)(b) of Restatement (second) of conflict of laws, the law chosen by the parties cannot be applied in case the "[...] application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which [...] would be the state of the applicable law in the absence of an effective choice of law by the parties." We can see that the status of the law which would protect the consumer in the absence of a choice by the parties is governed as a public policy issue. Moreover—surprisingly and strangely for Europeans—the state interest consideration has to be applied to ascertain whether the state has a greater interest in order for the provisions to apply. It is also important to emphasize that in Europe, the only substantive provisions that may be set aside are those that would harm the consumer. In sharp contrast with this, in the US the whole choice becomes invalid. However, since in most cases the results will be the same this is only a theoretical difference.<sup>12</sup>

It can be ascertained that "[...] the American courts have been inconsistent in protecting consumers by enforcing the laws of their home states".<sup>13</sup> In several cases, fundamental public policy was recognized by the court of a foreign jurisdiction. In most cases, the law of the consumer's habitual residence either precludes any choice of law or prohibits waivers under the substantive rules.<sup>14</sup> In certain cases, however, contrary to the general rule, courts have ruled otherwise.<sup>15</sup>

Beyond the above, it is important to mention that an earlier version of the U.C.C. in its § 1–301 also contained provisions for some time that provided protection for consumers in a similar way to how it is done in Europe. In 2001, the U.C.C. was amended, but since the states—except for the Virgin Islands—did not promulgate the amendment, the NCCUSL later (in 2007) reverted to the previous legislation.<sup>16</sup> According to the 2001 revision, in general, parties would have had more freedom to choose a law, even one with no connection to a contract. However, this did not apply to consumer contracts, where the requirement for a

<sup>10</sup> Article 6(2) Rome I Regulation.

"Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable [...]"

*cf.* Healy: *op. cit.* at 536 *et seq.*

<sup>11</sup> Numerous provisions on this issue can be found in consumer law directives. Therefore we only cover their main goal here without deeper analysis.

<sup>12</sup> Rühl: *op. cit.* at 170.

<sup>13</sup> See Healy: *op. cit.* at 536 *et seq.*

<sup>14</sup> Rühl: *op. cit.* at 169.

<sup>15</sup> For such cases see Healy: *op. cit.*

<sup>16</sup> For background see Graves, J. M.: Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1–301 and a Proposal for Broader Reform. *Seton Hall Law Review*, 36 (2005), 535; Weintraub, R.: *Commentary On The Conflict Of Laws. op. cit.* 513 *et seq.*

reasonable relation remained.<sup>17</sup> Yet consumers were also expressly protected, since the chosen law was not allowed to vary legislation of the state or country in which the consumer resided.<sup>18</sup> As already mentioned, this legislation was not well received and was revoked in 2007.

### 3. *Special rule for software*

Beside the Second Restatement and the U.C.C., we must also consider the rules of the Uniform Information Transaction Act (UCITA). The National Conference of Commissioners on Uniform State Laws (NCCUSL) voted to approve the Uniform Information Transaction Act (UCITA)<sup>19</sup> on July 29, 1999. The Act was intended to become a modification, a new Article 2B of the U.C.C. At an early stage, the American Law Institute also supported this work but eventually, the document was adopted solely by NCCUSL. The Act created special rules for software licenses and transactions. By the time of writing, it has only been adopted by two states, Maryland and Virginia.<sup>20</sup> In 2003, following harsh criticism,<sup>21</sup> the NCCUSL withdraw UCITA from consideration for endorsement by the American Bar Association. Please note that the provisions of UCITA were generally made for software licenses but its scope also covers the sale of software. In a mixed transaction, where computer software and physical goods (e.g. a computer) are sold together, UCITA may be only applied to the software part of the transaction unless the primary subject matter is the sale or licensing of software.<sup>22</sup> Regarding choice of a law, UCITA § 109 states that “the parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply [...] in the absence of the agreement.”

<sup>17</sup> U.C.C. § 1-301(3)(1) (2003).

<sup>18</sup> U.C.C. § 1-301(3)(2) (2003).

“Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement: (A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or (B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.”

<sup>19</sup> The original text as adopted in 1999 available at <http://www.law.upenn.edu/bll/archives/ulc/ucita/ucita200.htm>. Later, in 2000 and in 2002 it was modified. Cf. Ballon, I. C.: *E-Commerce and Internet Law* (Volume 2, 2001). West, 2009, 20–17. *et seq.*; Delta, G. B.–Matsuura, J. H.: *Law of the Internet*. Aspen, 2011. 13–97 (§ 13. 07) *et seq.*

<sup>20</sup> On the other hand, more than a dozen states have introduced versions of UCITA, but they never got adopted. D. Hart, J.: *Internet Law: A Field Guide*. Arlington, 2008. 501.

<sup>21</sup> “Writing a law which makes it almost impossible to sue software publishers for defects is a poor way to manage the escalating level of software customer dissatisfaction with bad software and bad support.” Kaner, C.–Pels, D. L.: *Ucita: a bad law that protects bad software*. *Network World*, 1999 available at <http://www.badsoftware.com/networld.htm>

<sup>22</sup> Delta–Matsuura: *op. cit...* at 13–99 (§ 13. 07).

### III. The law applicable in the absence of a choice

#### 1. Europe

In the EU, in the absence of any choice of law made by the parties, Art. 4(1)(a) Rome I Regulation, in theory dictates that the law of the habitual residence of the seller should be applied.<sup>23</sup> However, this does not hold in our case, since in order to protect<sup>24</sup> the consumer, Art. 6(1) Rome I Regulation reverses the rule for consumer contracts: in such cases, the habitual residence of the consumer must be applied.<sup>25</sup> Though a condition for this rule is that the professional (the business entity) must conduct activity in the country of the consumer.

The law applicable to contracts for downloading software, music and films over the Internet is generally the law of the country where the consumer has his or her habitual residence, provided that is the location of the download process and that the site presents a request to conclude a contract.<sup>26</sup> A passive website through which concluding a contract is not possible, cannot be considered to be activity in that country.<sup>27</sup> The situation is similar with respect to third states (non-MSs). If a company from a third state maintains a website and contracts can be concluded through the website, the habitual residence of the consumer will likely have relevance. If someone concludes a consumer contract with a New York based company and buys goods from New York via the Internet, the contract may be a consumer contract according to Art. 6 of Rome I, and the general rules of the Regulation<sup>28</sup>—which would lead us to the law of the seat of the company, i.e. to New York law—cannot be applied. Of course, in order to reach this conclusion, the term “directed activity” has to be interpreted, taking into consideration all circumstances of the case (the targeted activity test).<sup>29</sup> In the test, anything may have relevance: the offer on the website, shipping conditions, the e-mails the parties sent each other, etc. A good question is what should happen if the website is passive, but the consumer writes an email to the company in order to purchase something. In this case too, all circumstances of the sale may have relevance: the advertisements on the company’s website offering worldwide delivery, where the contract was concluded, where the parties were based, where the computer was, where the goods were to be delivered, where payment took place, the place of breach, etc.<sup>30</sup> The application of this test merits some criticism, since some vagueness remains in most of the cases after reviewing the circumstances.<sup>31</sup>

<sup>23</sup> “[...] a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence”.

<sup>24</sup> For the scope of protection see Tang: *op. cit.* 213–229.

<sup>25</sup> Dicey, A. V.–Humphrey, J.–Morris, C.–Collins, L.: *The Conflict of Laws—Fourth Cumulative Supplement to the Fourteenth Edition*. Oxford, 2011. 393–394; Leible–Lehmann: *Die Verordnung...* *op. cit.* at 537.

<sup>26</sup> Gillies, L. E.: *Electronic Commerce and International Private Law*. Hampshire–Burlington, 2008. 141.

<sup>27</sup> Ragno, F.: *The Law Applicable to Consumer Contracts under the Rome I Regulation*. In: Ferrari, F.–Leible, S. (eds): *Rome I Regulation*. *op. cit.* 147.

<sup>28</sup> *Esp.* Art. 4(1)(a) Rome I Regulation.

<sup>29</sup> Callies: *op. cit.* at 124–155.

<sup>30</sup> Fawcett, J.–Harris, J. M.–Bridge, M.: *International Sale of Goods In The Conflict of Laws*. Oxford, 2005. 1221 *et seq.*

<sup>31</sup> Gillies: *Electronic Commerce*, *op. cit.* 141.

## 2. USA

Contrary to the European solution, where there are unified rules, the situation in the US is by far more challenging. Even though the parties' right to the choice of law is granted by all states, the other rules of the Restatement (second) of conflict-of-laws is respected only by approximately half of them (23 jurisdictions).<sup>32</sup> The other states employ different approaches: this is one of the reasons why American choice-of-law rules seem quite chaotic for Europeans. Among these approaches we may find the following main principles as well as combinations thereof:

- The classic “place of contracting” principle (12 states take this approach)<sup>33</sup>
- Centre of gravity test (significant contact approach, used by four states and Puerto Rico)<sup>34</sup>
- Better law approach
- Governmental interest approach (applied, e.g. in California)<sup>35</sup>
- Law of the forum
- Place of performance
- Purpose of the agreement<sup>36</sup>

§ 188 of the Second Restatement uses the following choice-of-law principles:<sup>37</sup>

- The law of the state/country that has the most significant relationship to the transaction and the parties. Under this principle, factors considered are the place of contracting, negotiations and performance, the location of the subject matter of the

<sup>32</sup> Symeonides, S. C.: *The American Choice-of-Law Revolution: Past, Present, Future*. Leiden, 2006. 88; Symeonides, S. C.: Choice of Law in the American Courts in 2002: Sixteenth Annual Survey. *American Journal of Comparative Law*, 51 (2003) 1.

<sup>33</sup> Hay–Borchers–Symeonides: *Conflict of Laws, op. cit.* at 1159 *et seq.*

<sup>34</sup> *Ibid.* at 1175 *et seq.*

<sup>35</sup> The court “must search to find the proper law to apply based upon the interests of the litigants and the involved states”. Reich and Purcell, 67 Cal. 2d 551, 553, 63 Cal. Rptr. 31. 33 (1967)

<sup>36</sup> Hay–Borchers–Symeonides: *Conflict of Laws, op. cit.* at 1164 *et seq.*

<sup>37</sup> Restatement (Second) of Conflict of Laws § 188 (1971)

“(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) The place of contracting,
- (b) The place of negotiation of the contract,
- (c) The place of performance,
- (d) The location of the subject matter of the contract, and
- (e) The domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.”

contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.

- The place of negotiations and the place of performance, if they fall in the same state. Clearly, for international e-commerce transactions this principle is not applicable.

By comparison, the U.C.C. states in its § 1–301(b) that “in the absence of an agreement [...] the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state”. The term ‘appropriate relation’ is not defined in the U.C.C. However, it “should be interpreted to mean the ‘most significant relationship’; the term should not be regarded as merely inviting the courts to apply their non-UCC rules”.<sup>38</sup> In this sense, it is similar to Restatement the second.

Surprisingly for European scholars, we do not find specific rules for consumer or e-consumer contracts. In this regard two circumstances may have significance. In certain cases, American courts employ the “public policy trick” to apply the laws of the consumer’s habitual residence.<sup>39</sup> There is also relevant new case law: the court in *Boudreau v. Scitex Corp.*<sup>40</sup> held that because the e-mails and other communications concerning the contract were received in Massachusetts, the law of that state should be applied. Such case law can be rooted in the legal thinking of an old landmark case, the Chinese hair case, in which a New York based buyer and a Chinese seller concluded a sales contract. The exact location where the parties concluded the contract could not be identified. In that case, because the place of performance was New York, the court applied NY law.<sup>41</sup> However, in other cases it was emphasized that the place of performance (i.e. of delivery) cannot alone constitute a connection to apply the law of the state in which it took place.

Summarizing the above, we may ascertain that if the place of performance and the consumer’s residence are in the same state as in most e-commerce transactions, we may assume that the law of the consumer’s habitual residence will be applied, just like in Europe. However, as in Europe, in an e-contract all circumstances may have relevance. In the US, protection is granted with reference to public policy.

#### **IV. Some other relevant provisions—territorial limits in the US and the country of origin principle in the EU law**

##### *1. Territorial limitations in the US*

Besides choice-of-law rules, there are some very important provisions that may also have an effect on the law to be applied. A good example can be found in New York State law.<sup>42</sup> Here, the courts held in several instances that the New York General Business Law (G.B.L.),

<sup>38</sup> *Anderson on The Uniform Commercial Code*. West, 1981. § 1–105:24 363.

<sup>39</sup> Rühl: *Party autonomy...*, *op. cit.* at 169.

<sup>40</sup> For the US interpretation of the term “place of contract” in e-commerce transactions see Street, F. L.—Grant, M. P.: *Law of the Internet*. Charlottesville, 2004. 3–83 § 3.04 *et seq.*

<sup>41</sup> *Xuchang Rihetai Human Hair Goods Co. v. Hanyu Intern. USA Inc.*, 2001 WL 883646, 45 U.C.C. Rep. Serv. 2d 1077 (S.D.N.Y. 2001).

<sup>42</sup> A well-structured compendium of New York consumer law cases collected by Justice Thomas A. Dickerson (Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court) available on the internet year to year. For the last year (2011) see <http://www.nysba.org/Content/NavigationMenu21/CommitteePages/ClassAction/CONSUMERLAW2011.pdf> (February 1, 2012)

which contains some important provisions for consumers, prescribes in §349 that the transaction in which the consumer is deceived must occur in New York. “Following this latest interpretation of ‘territorial reach’ by G.B.L. § 349, the court in *Truschel v. Juno Online Services, Inc.*, a consumer class action suit alleging misrepresentations by a New York based internet service provider, dismissed the G.B.L. § 349 claim because the named representative entered into the internet contract in Arizona. Notwithstanding the [...] territorial limitation, the Court in *Peck v. AT&T Corp.*, consumer class action involving cell phone service which improperly credited calls causing (the class) to lose the benefit of weekday minutes included in their calling plans, approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut.”<sup>43</sup> It was emphasized that “it would be a waste of judicial resources to require a different class action in each state [...] where the defendants have marketed their plans on a regional [basis]”.

## 2. *The country of origin principle in Europe*

In the EU as well, there is a serious problem with electronic contracting, involving the country-of-origin principle<sup>44</sup> used in the directive on electronic contracting (hereinafter referred to as: “Directive”).<sup>45</sup> According Art 3 of the Directive,

“1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.”

This complicated text in practice means that the service provider “brings” its laws to another state, and may have the same benefits as domestically. Consequently, in a case where a corporate website (*The Sunday Mirror*) caused harm by releasing news about singer Kylie Minogue, the European Court of Justice held that compensation to be paid cannot be higher than in the state where the website is based (in practice, where the

<sup>43</sup> *Consumer Law 2005 Update-The Judge's Guide To Federal And New York State Consumer Protection Statutes* page 17, available at [http://www.nysba.org/Content/NavigationMenu21/CommitteePages/ClassAction/Consumer\\_Law\\_2005\\_Update.pdf](http://www.nysba.org/Content/NavigationMenu21/CommitteePages/ClassAction/Consumer_Law_2005_Update.pdf)

<sup>44</sup> Blasi, M.: *Das Herkunftslandprinzip der Fernseh- und der e-Commerce-Richtlinie*. Köln–Berlin–München, 2004; Fallon, M.–Meeusen, J.: *Le commerce électronique, la directive 2000/31/CE et le droit international privé*. *Revue critique de droit international privé*, 91 (2002) 3, 435–490; Höning: *The European Directive... op. cit.*; Drasch, W.: *Das Herkunftslandprinzip im internationalen Privatrecht*. Baden-Baden, 1997; Mankowski, P.: *Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie*. *Zeitschrift für vergleichende Rechtswissenschaft*, 100 (2001) 2, 138–139; Thünken, A.: *Das kollisionsrechtliche Herkunftslandprinzip*. Frankfurt, 2003, 23; Höning, N.: *The European Directive on e-Commerce (2000/31/EC) and its Consequences on the Conflict of Laws*. *Global Jurist Topics*, 5 (2005) 2, 17–18; Naskret, S.: *Das Verhältnis zwischen Herkunftslandprinzip und Internationalem Privatrecht in der Richtlinie zum elektronischen Geschäftsverkehr*. Münster–Hamburg–London, 2003.

<sup>45</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) OJ L 178, 17.7.2000, 1–16.

website's owner has its seat).<sup>46</sup> Thus, even if compensation awarded abroad were higher and thus the provider's obligations were greater, laws of the website's "homeland" have to be applied—overwriting classic rules of collision.

However, the Directive has some "hidden" provisions for contracts in its Annex, which state that Arts 3(3), 3(1) and 3(2) do not apply to "the freedom of the parties to choose the law applicable to their contract" and to "contractual obligations concerning consumer contacts". As a result, in our case we do not have to take into consideration the Directive's provisions regarding applicable law. If these provisions were not included, we would have to apply the seller's law to the contract, and not that of the consumer.

#### **IV. Conclusions**

The system of remedies is significantly different in Europe than in the US. Consequently, in a legal dispute, the question of which law should be applied follows right after the procedural issues not covered by this article (e.g. in which state to sue, or how to enforce a judgment). It is clear that sometimes it may be beneficial for consumers to force the court to apply the law of their habitual residence in order to achieve a successful suit. As we have seen, this is possible in most cases, irrespective of habitual residence or nationality. In this regard the US jurisdiction appears less stable than the European one, but its basic approach is similar in most instances.

<sup>46</sup> Joined cases C-509/09 and C-161/10. Judgment of the Court (Grand Chamber) of 25 October 2011. *eDate Advertising GmbH v X* (C-509/09) and *Olivier Martinez and Robert Martinez v MGN Limited* (C-161/10), not published yet in the ECR.

LEONHARD DEN HERTO<sup>\*</sup>

## The Rule of Law in the EU: Understandings, Development and Challenges

**Abstract.** This article examines the development and particular nature of the rule of law in the European Union against the background of the wider legal and political theoretical debate on the principle. It hence analyses the case law of the Court of Justice of the EU and the Treaty revisions on the rule of law. It argues that the principle has developed greatly since the first mention of it in the case law of the Court and contends that the principle has a particular focus in the EU on judicial protection in light of human rights. Nonetheless it is hard to apply the dichotomies running through the debates in legal and political theory to the development of the principle in the EU; an idiosyncratic mix of features seems to emerge. Moreover, this article also takes the case study of the external dimension of migration control to assess the current challenges to the rule of law in the EU. It thereby uncovers ways of working in the EU that are hard to reconcile with the rule of law requirements.

**Keywords:** rule of law, European Union, judicial protection, human rights, migration control

### Introduction

The rule of law seems a self-evident value for academics and policy-makers and has been almost unanimously promoted in the post Cold War world. It is a constitutional cornerstone of the EU; the Treaties refer to it multiple times as a foundational value. It seems nonetheless that this cornerstone is becoming more porous: it suffers from a lack of conceptualisation and is under pressure in some EU policies.

This article puts the development of the rule of law in the EU in the wider scholarly perspective of the legal and political philosophy debates on the principle. What kind of rule of law is the EU actually adhering to or promoting? Firstly, this article argues that although indeed the EU seems to adhere to a “thick” or “substantive” notion of the principle, it seems nevertheless primarily focused on rather formal aspects, such as on judicial review, albeit in light of fundamental rights protection. Secondly, this article argues that, contrary to what may be conventional wisdom, compliance with the rule of law is at risk in some EU policy sectors due to the proliferation of new forms of governance.

The structure of this article is hence as follows. Section I briefly sets out the main conceptual dichotomies running through the debate on the rule of law in legal and political philosophy. This presents the different notions and discourses on the principle as background. It thereby informs the subsequent analysis of the principle in the EU. The development of the principle from it being first invoked by the CJEU in its landmark *Les Verts* case law (1986) to its current constitutional dominance is described in Section II. This analysis uncovers idiosyncratic features of the principle in EU law. The first two sections

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also aim to give a brief overview, or summary, of the main lines of thinking on the rule of law in the EU. Finally, Section III takes the case study of the external dimension of EU migration control to assess how the rule of law fares in contemporary EU policy making. The assessment reveals that despite uplifting rhetoric on the principle its full potential is not yet attained in this EU policy area.

### 1. Theoretical and Conceptual Discussions on the Rule of Law

The rule of law arguably suffers from a lack of clear conceptualisation. Many scholars have already suggested that *as a concept it is perhaps so elusive* that this made it in fact so universally and globally acceptable.<sup>1</sup> Craig even issues a “health warning” to those venturing into the rule of law debate;<sup>2</sup> there are so many diverging conceptions and academic discussions that the concept is held to become “elusive”<sup>3</sup>, “essentially contested”<sup>4</sup> and perhaps even “less clear today than ever before”.<sup>5</sup> This may be overstating it a bit. In the Union’s “Holy Trinity” of “democracy, human rights and the rule of law”, “human rights” have the Charter and international treaties to give them substance and “democracy” has its ultimate conceptual core in majority-rule through free and fair elections.<sup>6</sup> Articulating what “the rule of law” means is however rare, also on the national level.<sup>7</sup> In the EU there is no codified agreement on what the principle should mean, apparently not because it is so fiercely publicly contested but exactly *because it is not*.<sup>8</sup> This evokes the slightly disconcerting question: if indeed there is no shared notion within the Union, then *what* is it actually claiming to “safeguard”, “consolidate” or “support”? And if it is indeed true that the principle is so elusive for those actors, can it credibly constrain policies? After all, *constraining*—and not “guiding”—State power is the classic objective of the rule of law as traditionally perceived in the liberal-democratic nation-state.<sup>9</sup>

The substance, requirements and characteristics of the rule of law are also the object of much contention within political and legal theory. This section offers neither an extensive nor a conclusive description of what the rule of law means and how it evolved over time. Instead, to illustrate that it is “an essentially contested concept”, this section aims to give some background to the main disputes that exist over its meaning. The rationale for delving

<sup>1</sup> Tamanaha, B. Z.: *On the rule of law—history, politics, theory*: Cambridge, 2004. 3.

<sup>2</sup> Craig, P.: *The Rule of Law*. Appendix 5 in House of Lords Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament, HL Paper. 2006–2007. 97.

<sup>3</sup> Tamanaha: *op. cit.* 3.

<sup>4</sup> Waldron, J.: Is the rule of law an essentially contested concept (in Florida)? *Law and Philosophy*, 21 (2002) 2, 148.

<sup>5</sup> Fallon Jr., R.: The “Rule of Law” as a Concept in Constitutional Discourse. *Columbia Law Review*, 97 (1997)1, 1.

<sup>6</sup> Of course, democracy is not merely majority-rule; an appropriate democracy needs to include minority rights and constitutional limitations on law-making and (constitutional) change.

<sup>7</sup> Pech, L.: The Rule of Law as a constitutional principle of the European Union. *Jean Monnet Working Paper—NYU School of Law*, 4 (2009), 42–43.

<sup>8</sup> Pech, L.: Rule of Law as a guiding principle of the European Union’s external action. *CLEER Working Papers*, 3 (2012) 22. See also Chesterman, S.: An International Rule of Law? *American Journal of Comparative Law*, 56 (2008), 332.

<sup>9</sup> Tamanaha: *op. cit.* 114–119.

into this conceptual debate is that the development of the rule of law in the EU could be analysed and understood along some of these lines.

Since its origins in “the classics” and medieval times, the rule of law has expanded into a concept fundamental to the liberal-democratic nation-state.<sup>10</sup> The main dichotomy running through the theoretical debate is that between “thin” or “formal” versus “thick” or “substantive” concepts of the rule of law. The thinnest version is the “rule *by* law” conception: merely meaning “the government acts through laws” thereby avoiding “rule by men”. To illustrate, some claim that the Chinese regime adheres to this notion.<sup>11</sup> To endorse that conception of the rule of law would however be a misinterpretation of the liberal thought in which the concept evolved; “rule by law” lacks the notion of effective limitations on government power.

Therefore, the dominant thin version of the rule of law in liberal thought understands it as “formal legality”.<sup>12</sup> According to central legal theorists such as Hayek and Raz, the rule of law’s fundamental function would be “guiding the behaviour” of citizens.<sup>13</sup> Hence, it requires first of all general, prospective, clear and certain laws as the basis of government action. Secondly, a set of institutions were deemed necessary by Raz to effectuate the rule of law requirements, namely an independent judiciary with open and fair hearings and review of administrative and legislative action, and a limitation of security services’ discretion, such as the police’s.<sup>14</sup> What is important to understand is that this formal legality is “substantively empty”; it essentially only imposes procedural requirements. According to some, this “value free nature” made it so widely acceptable.<sup>15</sup> Possibly, to the shock of some, Raz pointed out that indeed slavery and the rule of law as formal legality could be perfectly well reconcilable.<sup>16</sup>

Thick (or substantive) theories bring—to different extents—individual rights into the rule of law concept. As Dworkin put it:

“I shall call the second conception of the rule of law the ‘rights’ conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. (...) It does not distinguish, as the rule book conception does, between the rule of law and substantive justice...”<sup>17</sup>

Some have voiced their concern over the anti-democratic implications of such a rights-based rule of law regime and its inherent judicialisation of politics, by taking the German *Rechtsstaat* as example.<sup>18</sup> The thickest substantive version of the rule of law also takes socio-economic “welfare” rights into the “dynamic concept” of the rule of law.<sup>19</sup>

<sup>10</sup> For example, Plato already discussed the rule of law: Aristotle, *Politics*, book 3, part XVI.

<sup>11</sup> Tamanaha: *op. cit.* 3, 92–93.

<sup>12</sup> Summers, R. S.: A Formal Theory of the Rule of Law. 6 *Ratio Juris*, 1993. 127.

<sup>13</sup> Raz, J.: The Rule of Law and its Virtue. In: Raz, J.: *The Authority of Law*. Oxford, 1979. 214; Hayek, F. A.: *The Political Idea of the Rule of Law*. Cairo, 1955. See also Waldron, J.: The Rule of Law in Contemporary Liberal Theory. *Ratio Juris*, 2 (1989), 84–85.

<sup>14</sup> Tamanaha: *op. cit.* 3, 92–93.

<sup>15</sup> *Ibid.* 94.

<sup>16</sup> Raz: *op. cit.* 221.

<sup>17</sup> Dworkin, R.: Political Judges and the Rule of Law. *Proceedings of the British Academy*, 64 (1978) 259, 262.

<sup>18</sup> Tamanaha: *op. cit.* 108.

<sup>19</sup> See e.g. International Commission of Jurists: *The Rule of Law in A Free Society: A Report of the International Congress of Jurists*. Geneva, 1959.

The rule of law fell also prey to the left-right divide in politics. On the left, mostly in Marxist philosophy, the rule of law was seen as a concept of the ruling elite to enforce the order of property protection and privilege.<sup>20</sup> On the right, especially in the US, the rise of the welfare state was seen as a considerable threat to the rule of law understood as formal legality, with the generality of government action believed to be in jeopardy by the mounting unaccountable administrative machinery of the state interfering ever more individually, or even arbitrarily, in citizens' lives.<sup>21</sup>

Although it seems that today in (Western) liberal democracies when the rule of law is invoked, it comes in the same "package" with democracy and human rights, this need not conceptually be the case. In fact, that is problematic: making the rule of law the "mother" concept and thus the battleground for clashes over human rights, social values and substantive equality comes at the cost of losing clear conceptual boundaries of the principle.

Recently, theorists have attempted to reconceptualise the rule of law for our times of globalisation.<sup>22</sup> For obvious reasons this debate is highly relevant when looking at the rule of law and the EU, itself being the world's most successful post-nationalist political structure. This reconceptualisation is not straight-forward exactly because the rule of law is so inextricably linked to the nation-state. In the global arena many of the essential state-like powers are not present. Nonetheless, the rule of law even in its thinnest version could add much to the ongoing construction of a rule-based global order with its own institutions, including those for review of state and individual action, thereby arguably reducing the much described "anarchy" in international relations. However, from the strand of critical legal theory others have pointed to the "perversity" of the global rule of law in legitimising and "organising irresponsibility" for human rights violations.<sup>23</sup>

## 2. Development of the rule of law principle in the EU

This section gives a brief overview of how the rule of law principle came to the constitutional forefront in EU law. It traces mostly the case law of the CJEU and the subsequent treaty revisions. From this analysis two questions will be answered: 1) To what conceptual notion of the rule of law does the EU adhere? 2) What are the dominant elements of the rule of law in the EU?

### 2.1. Development of the rule of law in the Court's case law

It was not until 1986 that the rule of law principle became explicit in the EU legal order; the Court held in the landmark *Les Verts* case that the Community is "based on the rule of law".<sup>24</sup> However, already before that defining case, the rule of law was implicitly embedded in the constitutional structure of the Community. Especially former Art. 164 TEC (later Art. 220 TEC), akin to Art. 31 of the ECSC Treaty, indicated the rule of law by stipulating that "the Court of Justice shall ensure that in the interpretation and application of this Treaty the

<sup>20</sup> Tamanaha: *op. cit.* 73–77.

<sup>21</sup> *Ibid.* 60–72.

<sup>22</sup> Zifcak, S.: *Globalisation and the Rule of Law*. London, 2005.

<sup>23</sup> Veitch, S.: *Law and irresponsibility—on the legitimation of human suffering*. London, 2007.

<sup>24</sup> Case 294/83, *Les Verts v. Parliament*, ECR [1986] 1339, para. 23.

*law is observed*" (emphasis added).<sup>25</sup> And although the Court had already referred to these Articles in its case law before 1986, the "Community based on the rule of law" formula signalled a watershed in the Court's role in the constitutionalisation of the principle. In this formula the Court thus aligned with the French notion of *Communauté de droit* (French was the language of the procedure), or German notion of *Rechtsgemeinschaft*.<sup>26</sup> This notion signals indeed the post-nationalist nature of the EU; in contrast to the *Rechtsstaat*.<sup>27</sup>

In *Les Verts* the Court had to decide on whether acts of the European Parliament could also be annulled under Art. 173 TEC (now Art. 263 TFEU); something that was not stipulated by the Treaty as it limited this to acts of the Council and the Commission. However, the Court held that notwithstanding this limited list of institutions under Art. 173 TEC

"...the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. (...) the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. (...) The general scheme of the Treaty is make a direct action available against 'all measures adopted by the institutions ... which are intended to have legal effects' (...) An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system."<sup>28</sup>

Hence, the Court introduced the rule of law principle to extend its own jurisdiction and the judicial protection offered. In subsequent cases the Court invoked the principle of the "Community based on the rule of law" to make similar strides to embolden judicial review in the EU.<sup>29</sup> For example, in the *Sogelma* case the Court of First Instance held that an EU

<sup>25</sup> Fernandez Esteban, M. L.: *The Rule of Law in the European Constitution*. The Hague, 1999. 104. She argues that "it results from the analysis of the case law of that the Court of Justice uses both Art. 164 of the European Community Treaty and the expression Rule of Law indistinctively". Pech: *The Rule of Law as a constitutional...* *op. cit.* 15, fn. 47, argues that this conclusion is not warranted; in fact according to him "it may be more accurate to contend that Art. 220 EC initially offered the only written basis from which the Court could convincingly derive the principle of a Community based on the rule of law." I agree with the Pech on this point; the references in Art. 164/220 EC did not yet encompass the full breadth of the Rule of Law principle.

<sup>26</sup> See for these terms the French and German versions of the judgment.

<sup>27</sup> It is interesting that the Court did not use the term "Rechtsstaat"; Pech convincingly argues that this, obviously, was not deemed appropriate as the Community was not a State. See for a more extensive discussion: Pech: *The Rule of Law as a constitutional...* *op. cit.* 11.

<sup>28</sup> *Les Verts*, paras 23–24.

<sup>29</sup> See for example the *Zwartveld* case in which the Court linked the *Les Verts* "Community based on the rule of law" with the duty of sincere cooperation (then Art. 5 TEC). *In casu*, the Court held that the Commission was under an obligation to provide documents and witnesses to a Dutch judicial investigation. Order of the Court in Case C-2/88 Imm., *J. J. Zwartveld and Others*, ECR [1990] I-3365, especially paras 16–17.

agency act, *in casu* of the European Agency for Reconstruction (EAR), could fall under the action for annulment, something not foreseen in the Treaty. It argued that “it cannot be acceptable, in a Community based on the rule of law, that such acts escape judicial review”.<sup>30</sup> In the *Commission v. EIB* case the Court employed a similar argument to adjudicate an act of the Management Committee of the European Investment Bank (EIB) under the action for annulment.<sup>31</sup> This was also not explicitly foreseen in the Treaty text.<sup>32</sup>

The Court, with some judicial activism, thus produced dynamic interpretation to fix gaps in judicial review in the EU legal system. In the words of AG Mischio’s Opinion in the 1990 *Busseni* case:

“...the Court has on a number of occasions relied on Article 164 of the European Community Treaty and the principles deriving from it for the purpose of giving broad and coherent interpretation to those provisions of the Treaty which deal with the various means of redress, even going so far, when the need arises, as to remedy omissions and lacunae within it.”<sup>33</sup>

It is interesting to see that the Court thus understood the rule of law mostly in procedural terms of judicial remedies: the complete system of remedies needs to be effectively in place so that decisions of public authorities can be reviewed independently.<sup>34</sup> This serves of course the effective judicial protection of individuals and other entities (the “subjective” function), but also serves to check the legality of measures taken, the latter mostly referring to the availability and appropriate choice of legal basis and the hierarchy of norms to safeguard the institutional balance in the Union (the “objective” function).<sup>35</sup>

However, it seems that the Court has increasingly moved towards linking this “procedural” or “formal” rule of law concept (dominated by judicial protection) with fundamental rights protection. Of course, some of the elements of the formal rule of law concept are human rights themselves (e.g. right to an effective remedy)<sup>36</sup> but it seems that the rule of law is increasingly seen as connected to general fundamental rights protection at large. Some recent case law is illustrative in this respect. The controversial *Kadi* case is perhaps the best example. It concerned a so-called “blacklisted” individual (i.e. under anti-terrorist policies) whose assets had been frozen; he sought to annul that measure. The Court of First Instance had held that no judicial remedy could be offered within the EU legal order as the origin of the contested Regulation was a UN Security Council resolution.<sup>37</sup> As

<sup>30</sup> Case T-411/06, *Sogelma v. EAR*, ECR [2008] II-2771, para. 37. However, the Court had before also declared an application under former Art. 230 TEC inadmissible because it involved an agency: Case C-160/03, *Spain v. Eurojust*, ECR [2005] I-2077, paras 36–44.

<sup>31</sup> Case C-15/00, *Commission v. EIB*, ECR [2003] I-7281, para. 75.

<sup>32</sup> See former Art. 237(b) TEC.

<sup>33</sup> Opinion of AG Mischio in Case 221/88, *ECSC v. Acciaierie e Ferriere Busseni spa in liquidation*, ECR [1990] I-495, pt. 20.

<sup>34</sup> Pech: *The Rule of Law as a constitutional... op. cit.* 15. See also Jacobs, F.: *The sovereignty of law: the European way*. Cambridge, 2007. 35.

<sup>35</sup> See for the objective v. subjective functions: Esteban: *op. cit.* 122.

<sup>36</sup> See e.g. Art. 47 Charter.

<sup>37</sup> Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No

this thus concerned international law, the Court of First Instance held that it did not have jurisdiction to adjudicate the matter.<sup>38</sup> The Court of Justice however decided otherwise and held that

“...the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. (...) Review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee [our emphasis] stemming from the EC Treaty as an autonomous legal system (...).”<sup>39</sup>

The clear link between the “formal” rule of law requirements and the “substantive” protection of fundamental rights is thus clear. Also in the *PKK* case the Court has held that in a “Community based on the rule of law” restrictive measures cannot go unchecked by the judiciary.<sup>40</sup> In the *UPA* case, although the eventual outcome was not beneficial for the applicants, the Court linked these elements perhaps most explicitly when it held:

“The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order (...).”<sup>41</sup>

## 2.2. The rule of law in EU Treaty making

Quite surprisingly, it was not until the Maastricht Treaty (entry into force in 1993) that the rule of law was explicitly mentioned in EU’s constitutional text. However, this was still “mostly symbolic”<sup>42</sup> and was in no way as strongly worded as the Court had done in *Les Verts*. Instead the preamble to the Treaty indicated that the Member States “confirmed their attachment” to *inter alia* the rule of law. The Amsterdam Treaty (entry into force in 1999) finally repeated the Court’s formula and stated thus that the “Union is founded on the

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337/2000 [2001] OJ L67/1; Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 [2002] OJ L139/9.

<sup>38</sup> The Court of First Instance did however hold that it would have jurisdiction if *jus cogens* norms would be in question. See: Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, ECR [2005] II-03649, para. 226.

<sup>39</sup> Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECR [2008] I-03651, paras 285 and 316. Strictly speaking the Court only adjudicated the EU implementing measure of the UN resolution.

<sup>40</sup> Case C-229/05 P, *PKK and KNK v. Council*, ECR [2007] I-439, paras 109–110.

<sup>41</sup> Case C-50/00 P, *UPA*, ECR [2002] I-6677, paras 38–39.

<sup>42</sup> Pech: *The Rule of Law as a constitutional... op. cit.* 17.

principles of liberty, democracy, respect for human rights and fundamental freedoms, *and the rule of law*, principles which are common to the Member States” (emphasis added).<sup>43</sup> The Treaty of Lisbon changed the wording from “principles” to “values”, something generally seen as insignificant in academic analysis.<sup>44</sup> Also, over the course of the Treaty revisions, the rule of law has been worded in the Treaty as an objective for EU’s foreign policy (Arts 21(1) and (2b) TEU), as condition for the accession of new Member States (Art. 49 TEU), and as ground for punitive measures against Member States in (or risking) “serious and persistent” breach of the rule of law (Art. 7 TEU).<sup>45</sup> The Charter also refers to the rule of law in its Preamble, but here still as “principle”. From this brief overview, three conclusions are appropriate. Firstly, the Treaty text also clearly presents the rule of law principle separately but in package with human rights and fundamental freedoms, something that, as argued above, increasingly emerges from the Court’s case law as well. Secondly, the rule of law is also used as a, what Pech calls, “politico-legal benchmark”: current and potential Member States need to act in accordance with the rule of law to enjoy full EU membership.<sup>46</sup> And thirdly, perhaps more than other constitutions, the Treaties clearly present the rule of law as a value to be exported in the Union’s external relations.<sup>47</sup>

### 2.3. *What Notion and Understanding of the Rule of Law in the EU?*

Taking the legal and political theory debate as presented in section 2 and the analysis of case law and Treaty revisions in sections 3.1. and 3.2. as background, this section attempts to establish what kind of rule of law the EU is adhering to.

A *prima facie* analysis of the development of the rule of law in the EU may seem to indicate a development from a “thin” or “formal” to a “thick” or “substantive” notion of the concept. It seems that when the principle was developed by the Court it focused on providing the remedy as such; it served therefore to expand the “complete system of remedies” and to assert the independence of the EU legal order. Also, the rule of law principle provided the Court with an opening to assert and extend its own jurisdiction. The focus then gradually shifted to the rule of law as necessary principle to ensure human rights protection.<sup>48</sup> However, contrary to what some academics argue, this does not necessarily imply that the Union now adheres to a full “substantive” notion of the rule of law as discussed in the theoretical debate. That notion implies that the rule of law *includes* human rights and perhaps even democracy; essentially that *there is no rule of law* if that law is unjust or immoral.

Although it is true that the Union legal order, mostly through the Charter and accession to the ECHR, has increasingly acknowledged rule of law principles (e.g. right to effective

<sup>43</sup> Art. 2 TEU. Laurent Pech shows convincingly in his long article that the rule of law is indeed a principle “common to the Member States”: Pech: *The Rule of Law as a constitutional... op. cit.*

<sup>44</sup> See Pech: *The Rule of Law as a constitutional... op. cit.* 21.

<sup>45</sup> Art. 7 TEU has never actually been used against a Member State.

<sup>46</sup> Pech: *The Rule of Law as a constitutional... op. cit.* para. 4.2.1.

<sup>47</sup> Larik argues that the EU Treaties are not an odd outlier when it comes to wording such explicit principles to guide external relations. Although it is one of the “most explicit” such constitutional provisions, he considers them “the vanguard of a global trend”. See Larik, J.: *Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law. CLEER Working Papers*, 5 (2011), 36–37.

<sup>48</sup> See for such a conclusion Pech: *The Rule of Law as a constitutional... op. cit.* 53.

remedy) as fundamental rights, and it is also true on a conceptual level that the rule of law always includes some moral ideals and minimum rights,<sup>49</sup> this does not necessarily entail that the rule of law concept is now fully “substantive”. Indeed, the rule of law and human rights go now hand in hand in the Union legal order, as also shows from the Treaty, but the Court invokes the rule of law mostly to justify decisions related to legal remedies. That this rule of law often serves fundamental rights protection would not necessarily alter that conclusion: it does not mean that human rights are an *inherent part of* the rule of law. It means however clearly that the rule of law and fundamental rights are principles *inextricably linked*. Supporting and obvious evidence for an *intertwined but separate* legal and conceptual understanding of the rule of law and fundamental rights would also be the separate wording of the principles in the Treaty in Art. 6 TEU. I would thus agree with Arnall when he argues that such a rule of law notion for the Union enables conceptualising “a meaning which is distinct from, though complementary to, that of the other principles on which the Union is said to be founded”.<sup>50</sup>

However, applying the political and legal theory debate to the Union legal order also shows that this debate yields only limited relevance. Rather a more mixed and nuanced picture emerges in the EU where, as said before, the rule of law is increasingly *connected* to fundamental rights protection. The rule of law, although itself lacking clear justiciability,<sup>51</sup> is thus the “umbrella” principle from which different specific principles are derived that are connected with the assertion of the independent Union legal order as founded as a *Rechtsgemeinschaft* in which fundamental rights are protected.<sup>52</sup> Additionally, as explained in the previous section, from the Treaty it becomes evident that the rule of law also evolved into a “politico-legal” benchmark for current and future Member States and that it increasingly became an overarching value in EU’s external relations. All these aspects are peculiar features of the rule of law in the EU.

### 3. Challenges for the rule of law in the EU: the external dimension of migration control

One may assume that after such solid case law by the Court and the explicit constitutional enshrinement of the principle, the rule of law is now in safe hands in the EU. That assumption may be further emboldened by the increased jurisdiction for the Court after the Lisbon Treaty; the court now has formal jurisdiction over a wider range of EU entities and policy fields.<sup>53</sup> There is, however, reason to be cautious on this optimistic conclusion.

The policy field of the external dimension of migration control provides an excellent case to put EU’s rhetorical commitment to the rule of law to the test. It is an area in which

<sup>49</sup> *Ibid.* 28.

<sup>50</sup> Arnall, A.: The Rule of Law in the European Union. In: Arnall, A.–Wincott, D. (eds): *Accountability and Legitimacy in the European Union*. Oxford, 2002. 254.

<sup>51</sup> Pech: The Rule of Law as a constitutional... *op. cit.* 9, 30, 46.

<sup>52</sup> Esteban: *op. cit.* 175.

<sup>53</sup> The Lisbon Treaty added to the institutions of the Union also the agencies and other bodies of the EU, see e.g. Art. 263 TFEU. Former third pillar dealing with Police and Judicial Cooperation in Criminal Matters (PJCC) is now also firm in the jurisdiction of the Court, albeit with a five-year transitional period, see Art. 10, Protocol on transitional provisions. The Common Foreign and Security Policy (CFSP) still falls outside its jurisdiction.

internal and external aspects of the rule of law meet: it presents both an area where far-reaching administrative actions are taken to limit irregular migration, thus calling for judicial review, and where the Union “goes abroad” to persuade third States to cooperate with its migration policy, thus calling for rule of law promotion.

### 3.1. *The External Dimension of EU's Migration Control Policy*

For those not familiar with the external dimension of migration control it may be good to outline in this section the main features of this policy field. At the outset it should be noted that in the EU there exists no clearly circumscribed policy field bearing the name “external dimension of EU migration control”. Also, there is no single EU entity dealing with this area.

However, roughly speaking, this “external dimension” refers to all those policies to be implemented outside the EU (although often by or with the support of the EU) that aim to contribute to EU migration control. Cooperation with third State governments or international organisations is usually indispensable for this. Hence, it means that migration concerns have become part of EU's wider external relations.

With the 1992 Maastricht Treaty the foundations were laid for EU migration and asylum policy. It was not until 1999 that the European Council in Tampere called for greater coherence between internal and external policies of the Justice and Home Affairs (JHA) field.<sup>54</sup> In the subsequent years ever more attention was given to this important political aim of the EU. Cooperation of third States with EU's migration control agenda is now regarded as crucial by EU policy makers.<sup>55</sup>

Nowadays, the main EU strategic document on the “external dimension” is the “Global Approach for Migration and Mobility” (GAMM, as recently the Commission proposed a renewed version) which is intended to address the external dimension of migration in a coherent way.<sup>56</sup> Different approaches to the external dimension come together in this document: the “migration-development nexus”, the preventive “root causes” approach and restrictive migration control.<sup>57</sup> The emerging core instrument for the “external dimension” seems to be the “Mobility Partnership” which includes components such as a readmission agreement, cooperation with Frontex (EU Border Agency), enhanced mobility for certain groups of third-country nationals and capacity-building programmes for foreign security services (such as border guards).<sup>58</sup> However, also the implementation of EU visa policy by airlines on foreign airports can be considered part of the “external dimension”.<sup>59</sup> The same

<sup>54</sup> European Council (1999), *Conclusions of the Presidency*, Tampere.

<sup>55</sup> See e.g. European Council: *The Stockholm Programme—An open and secure Europe serving and protecting citizens*. OJ 2010, C 155/01, at 28.

<sup>56</sup> See for the recently proposed changes: European Commission Communication: *The global approach to migration and mobility*, COM(2011) 743 final. The original Global Approach was adopted in 2005.

<sup>57</sup> *Ibid.* 5–7.

<sup>58</sup> See European Commission Staff Working Document: *Mobility partnerships as a tool of the global approach to migration*, SEC(2009) 1240. Mobility Partnerships have also been at the centre of EU's response to the migration flows resulting from the Arab Spring: European Commission Communication: *A dialogue for migration, mobility and security with the southern Mediterranean countries*, COM(2011) 292 final.

<sup>59</sup> Gil-Bazo, M. T.: *The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited. International Journal of Refugee Law*. 18 (2006) 3–4, 573.

goes for extraterritorial Frontex joint operations, also because they are often dependent on arrangements with third State governments or international organisations.

Along with this greater attention for the “external dimension” came a body of academic literature addressing it from different disciplinary directions, most notably from political and legal scholarship. Concepts such as “externalisation”, “extra-territorialisation” or “remote border control” were developed to understand this new push in JHA policy-making.<sup>60</sup> Although the meanings of these concepts diverge, the red line running through them is the conclusion that the EU is pursuing ever more policies that aim to “shift the border outside”.<sup>61</sup> This is done 1) by making external entities (e.g. third States, international organisations, private entities) responsible for elements of migration control or 2) by operating those controls outside EU territory. Some have understood this as an “effective” way to limit unwanted irregular migration while maintaining mobility for EU citizens and pre-authorised travellers.<sup>62</sup> From legal scholarship several contributions have also identified challenges resulting from these “externalisation” approaches to safeguarding human rights and the rule of law.<sup>63</sup>

### 3.2. *Challenges for the Rule of Law*

The scope of this article does not allow for an extensive overview of all the external dimension practices and all the possible challenges for the rule of law. However, a few elements of the external dimension are identified to highlight the extent to which the rule of law is under pressure in these practices; most notably Frontex joint operations. Three such elements are presented: secret and unclear ways of working, lack of legal basis, lack of judicial remedies and the risk to external rule of law promotion.

Firstly, much of the external relations initiatives in this field are shrouded in secrecy and fuzziness. Many of the working arrangements between EU governments or agencies (e.g. Frontex) and third State authorities are not publicly accessible. They are also not subject to the regular constitutional procedures for international treaty-making as foreseen in the Treaty, thus also excluding involvement of the European Parliament.<sup>64</sup> Moreover, effective monitoring is lacking. For example, when joint operations of EU Agency Frontex

<sup>60</sup> See respectively Boswell, C.: The external dimension of EU migration and asylum policy. *International Affairs*, 79 (2003) 3, 622; Cremona, M.–Rijpma, J. J.: The extra-territorialisation of EU migration policies and the rule of law. *EU Working Paper, Law*, (2007)1, 12; Guiraudon, V.: Before the EU border: remote control of the “huddled masses”. In: Groenendijk, K.–Guild, E.–Minderhoud, P. (eds): *In Search of Europe’s Borders*. The Hague, 2003, 194–195.

<sup>61</sup> See Lavenex, S.: Shifting up and out: The foreign policy of European immigration control. *West European Politics*, 29 (2006) 2, 330.

<sup>62</sup> Guiraudon: *op. cit.* 194–195.

<sup>63</sup> See e.g. Fischer-Lescano, A.–Löhr, T.–Tohidipur, T.: Border controls at sea: requirements under international human rights and refugee law. *International Journal of Refugee Law*, 21 (2009) 2, 256–296; Den Heijer, M.: Europe beyond its borders: refugee and human rights protection in extraterritorial immigration control. In: Ryan, B.–Mitsilegas, V.: *Extraterritorial immigration control*. Leiden, 2010. 169–198; Weinzierl, R.–Lisson, U.: *Border management and human rights, a study of EU Law and the Law of the Sea*. Berlin, 2007.

<sup>64</sup> They are so-called “soft law” often under the name of “working arrangements” therefore not scrutinised by the European Parliament under Art. 218 TFEU.

“go abroad” no independent monitors are entitled to join.<sup>65</sup> It is therefore not always clear what is happening in these operations on the high seas or in the territories of third States. Within such joint operations it is often difficult to establish liability for actions. As many actors are usually involved (Frontex, Member States, international organisations and third State authorities) it is difficult to disentangle the web of actions.<sup>66</sup> All these factors make it difficult for individuals to challenge decisions taken in the course of such operations. Because several human and refugee law rights are at stake, these decisions (for example, to return a boat with migrants without examination of individuals) may have serious repercussions for the lives of those targeted individuals. There are clear risks that individuals are returned to a country where his or her life is in danger, in contravention of the *non-refoulement* principle. The secret and unclear ways of working make it however extremely difficult to establish liability and to build a case worth bringing to a European court.<sup>67</sup>

Secondly, for many of the practices in Frontex joint operations, such as interception at sea, there is no clear legal basis available in EU law or international law of the sea. Recently some efforts have been undertaken to provide such a legal basis in EU law.<sup>68</sup> For activities on the high seas, the law of the sea applies, with its principles of freedom of the high seas and right of navigation for the flag State.<sup>69</sup> This is not the place to discuss in detail the different justifications under maritime law to stop, search and divert boats in international waters, but those options are limited. “Search and rescue” or “absence of nationality”, sometimes invoked by Frontex,<sup>70</sup> are indeed relevant grounds but cannot serve, in my opinion, *a priori* to justify a general and proactive policy of intercepting vessels even if

<sup>65</sup> During the negotiation of Frontex’ new mandate in 2011, some MEPs attempted to include a standard independent monitor system of its operations, this is however not included in the new text. This is why the Greens voted against the new Regulation in the EP, see The Greens/European Free Alliance in the European Parliament: Révision Frontex: des garanties insuffisantes pour le nouveau mandat de l’agence. *Press Release*, 12 July 2011.

<sup>66</sup> Baldaccini, A.: Extraterritorial border controls in the EU: the role of Frontex in operations at sea. In: Ryan, B.–Mitsilegas, V. (eds): *Extraterritorial immigration control: legal challenges*. Leiden, 2010. 230.

<sup>67</sup> See also Mitsilegas, V.: Extraterritorial immigration control in the 21st century: the individual and the State transformed. In: Ryan, B.–Mitsilegas, V. (eds): *Extraterritorial immigration control: legal challenges*. Leiden, 2010. 39–68.

<sup>68</sup> European Commission: *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement*, COM(2011) 118 final, Annex IV. This proposal to allow for border checks in third countries is currently under review by the EP.

<sup>69</sup> See Arts 87 and 90, UNCLOS (United Nations Convention on the Law of the Sea).

<sup>70</sup> Frontex Press Kit: *Backgrounder on operations*. 2010, 1: “Joint operations coordinated by Frontex represent Europe’s biggest search and rescue operation.” Search and rescue is an obligation under international law; see mostly the SAR (Search and Rescue), UNCLOS (United Nations Convention on the Law of the Sea) and the SOLAS (Safety of Life at Sea) Conventions. See also Council (2010). This Decision is however challenged before the CJEU by the EP on grounds of exceeding the implementing powers under Art. 12(5) SBC, see: Action brought on 14 July–European Parliament v Council of the European Union, Case C-355/10, OJ 2010, C246/58. The case is pending.

they themselves do not indicate a state of distress.<sup>71</sup> Neither they can serve to justify push-back practices.<sup>72</sup> Hence, the extra-territorial policy of Frontex JOs should be seriously scrutinised on grounds of a lacking adequate legal basis under EU an international law. This is not only hard to reconcile under “thick” but also under “thin” notions of the rule of law, such as the dominant formal legality notion.

Thirdly, in many situations there is no remedy available for individuals targeted in the wider external dimension. “Extra-territorialising” migration control entails the *inherent* consequence that individuals have increasingly limited access to a European court, as they are simply not in Europe, to challenge decisions nevertheless taken, prepared or supported by European administrative authorities. It thus results in extending the “executive” reach of Europe beyond its territory, without accompanying it with a sound judicial framework. And even if migrants are under the control of European authorities, such as in Frontex joint operations on the high seas, there is often no remedy available to challenge the decisions taken by the border guards before they are being implemented. This is thus irrespective of that fact, as highlighted above, that these decisions may have serious human rights repercussions. In the recent *Hirsi* case the European Court of Human Rights (ECtHR) also clearly held that the right to an effective remedy under Art. 13 ECHR was violated by returning a boat of African migrants from the high seas to Libya.<sup>73</sup> Hence, this core right flowing from the rule of law is deemed to be under pressure in these operations. However, it should be seen in a wider context; by aiming to keep migrants as closely to their country of origin as possible the EU is also making it complicated for refugees to reach European territory and subsequently get their refugee status recognised in a fair and impartial case.

Lastly, these “externalisation” pushes by the EU increasingly jeopardise its self-proclaimed image as a power that exports its core values, such as the rule of law. The academic “Normative Power Europe” thesis would arguably have a hard time explaining these external policies of the EU.<sup>74</sup> The dominant restrictive pushes in the external dimension field, such as the readmission agreements and Frontex joint operations, thus delegitimise the rhetoric from Brussels about human rights and the rule of law. Apart from the expected long-term international relations repercussions resulting from this, it is also hard to reconcile with the Treaties that so vehemently proclaim that the rule of law should guide external policies.

This uncovers the diverging nature of the internal and external “functions” of the rule of law in the EU; respectively to *constrain* administrative action and to *promote* the principle externally. It is especially the constraint function of the rule of law that is easily

<sup>71</sup> Article 110 (1.d), UNCLOS authorizes the visiting of a ship on the basis of suspicion that the ship is without nationality. Art. 98 UNCLOS, and the above-mentioned additional conventions, lay down a “search and rescue” obligation. These articles can indeed be legal bases for intercepting a vessel. However, these legal bases must not become a justification to stop any boat for which there is a “suspicion” that migrants are on board. Boarding without any of these legal bases available is thus problematic, although apparently vessels have been boarded without any clear distress situation, see Papastavridis, E.: “Fortress Europe” and Frontex: within or without international law? *Nordic Journal of International Law*, 79 (2010), 86, ftnt. 56.

<sup>72</sup> In the UNCLOS there is no legal basis for the coercive push-back of vessels to third States.

<sup>73</sup> ECtHR, *Hirsi and others v. Italy*, Application No. 27765/09, judgment of 23 February 2012. See especially paras 205–207.

<sup>74</sup> See Manners, I.: Normative Power Europe: a contradiction in terms? *Journal of Common Market Studies*, 40 (2002) 2, 235–258.

disregarded in EU external relations, as it is assumed that third parties, and not the EU itself, should improve on its rule of law record. However, the extraterritorial migration control evidences how this assumption may sometimes be unfounded.

## Conclusion

This section offers a brief overview of the main conclusions of this article and adds a few critical notes. As we have seen in this article, the rule of law has made a remarkable development in the EU. From the first mention in *Les Verts* in 1986 it has now become a prominent constitutional cornerstone. Through the sometimes daring and dynamic case law of the Court it developed a strong emphasis on judicial protection to safeguard human rights in the EU. The Treaty has followed, albeit with delay, and now prominently features the rule of law as a foundational value of the EU, alongside other values such as fundamental rights and democracy. It is thus clear that in the EU the rule of law cannot be easily captured in the “all-or-nothing” theoretical dichotomy on “thin” versus “thick” notions of the principle. Instead, the principle is accorded idiosyncratic “procedural” features of judicial review but is nevertheless strongly connected with fundamental rights protection. Moreover, the constitutional text of the EU also holds the rule of law to be a “politico-legal benchmark” for current and future members and stresses the guiding role of the principle in external relations.

No matter how far the rule of law has indeed developed in the EU, the analysis in this article also uncovered persisting weaknesses. In the external dimension of migration control there are secret and unclear ways of working emerging that present serious threats to effectively upholding the rule of law. Moreover, the lack of judicial remedies accessible to individuals on the move who encounter “externalised” EU administrative actions and of inadequate legal basis for the carried out activities are at odds with basic rule of law requirements. In fact, problems in the EU with regard to legality, especially related to lack of adequate legal basis, may not be limited to the case study assessed in this article. It would hence be interesting for future academic contributions to examine whether peculiar features of EU governance prompt such problems. There may be a general trend in the EU, due to its specific *sui generis* nature, under which cooperation and initiatives are first “experimented” and, if they are deemed successful, given a proper legal basis only later on.

The analysis in this article has also highlighted the different functions of the rule of law internally and externally, respectively dealing with the constraint of administrative action and with the promotion of the principle abroad. These two functions are in an uneasy relationship in fields such as the external dimension of migration control where restrictive administrative action of EU authorities and promotion of the rule of law are sometimes difficult to reconcile.

So, with these identified challenges, the development of the rule of law in the EU cannot be expected to have reached its final stage. In fact it is well possible that the Court will further extend its jurisdiction to offer increasingly extensive judicial protection as new administrative strategies and ways of working feature in the European “executive” branch. Therefore, both from an academic and policy perspective the rule of law will expectedly remain an area of high interest. Although the substance of the principle, and especially its relation with fundamental rights, will remain an area of contestation for theorists, it seems that the development of the principle in any given polity will follow its idiosyncratic path resulting in different mixtures of and connections between “formal” and “substantive” elements.

ISTVÁN DOBOS\*

## Mergers and Acquisitions in the Law of the European Union and Their Economical Background

**Abstract.** The purpose of this paper is to discuss the mergers and acquisitions activity from various perspectives. The concept of mergers and acquisitions always has a strong economic background, which will be considered even if the concept is discussed from a legal perspective. After clarification of the basic terms of mergers and acquisitions, the economic background of mergers and acquisitions will be examined. From legal point of view this paper mainly concentrates on the relevant directives of the European Union. Currently, there are four relevant company law directives related to corporate reconstruction in the law of the European Union: the Merger Directive, which regulates mergers between public companies, the Sixth Company Law Directive, which covers the division of an existing public company into entities, the directive, which concerns cross-border mergers and last but not least the Takeover Directive. From this four company law directives, this paper mainly focuses, besides the economical background and basic terms of mergers, on the Merger and Cross-Border Directive.

**Keywords:** merger, acquisition, company law, Merger Directive, economical background, synergy, economies of scale, SEVIC System Case

### Introduction

The purpose of this paper is to discuss the mergers and acquisitions activity from various perspectives. Mergers and acquisitions always have a strong economical background, which will be considered even if the concept is discussed from a legal perspective.

After clarification of the basic terms of mergers and acquisitions, the economic background of mergers and acquisitions will be examined. From legal point of view this paper mainly concentrates on the relevant directives in the law of the European Union. The scope of this paper does not spread out to the relevant competition law rules in relation to the mergers, because of the different character of competition law rules and company law in strict manner.

The special alchemy of a merger or acquisition is the principle that “one plus one makes three”. The key principle behind buying a company is to create shareholder value, over and above that of the sum of the two merging companies. Two companies together are more valuable than two separate companies—at least that is the reasoning behind merger and acquisition.<sup>1</sup>

This rationale is particularly alluring to companies when times are tough. Strong companies will act to buy other companies to create a more competitive, cost-efficient company. The companies will come together hoping to gain a greater market share or to

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<sup>1</sup> <http://www.investopedia.com/university/mergers/mergers1.asp#axzz1XAYBiC3G>, time of download: 11.10.2011

achieve greater efficiency. Because of these potential benefits, target companies will often agree to be purchased when they know they cannot survive alone. The other main grounds and accelerators of mergers and acquisitions will be discussed in chapter 2.2.

## 1. Basic Elements of Mergers and Acquisitions

### 1.1. Distinction between Mergers and Acquisitions

Although mergers and acquisitions are often meant in the same sense and used as they were synonymous, the terms merger and acquisition mean slightly different things.

When one company takes over another and clearly establishes itself as the new owner, the purchase is called an acquisition. From a legal point of view, the target company ceases to exist, the buyer “swallows” the business and the buyer’s stock continues to be traded. So in this case, when a company buys a majority stake of a target company’s shares, the companies will not merge.

In the pure sense of the term, a merger happens when two firms, often about the same size, agree to go forward as a single new company rather than remain separately owned and operated. This kind of action is more precisely referred to as a “merger of equals”.<sup>2</sup> Both companies’ stocks are surrendered and new company stock is issued in its place. For example, both Daimler-Benz and Chrysler ceased to exist when the two firms merged, and a new company, DaimlerChrysler, was created.

In practice, however, actual mergers of equals don’t happen very often. When a deal is made between two companies in friendly terms, it is typically proclaimed as a merger. Usually, one company will buy another and, as part of the deal’s terms, simply allow the acquired firm to proclaim that the action is a merger of equals, even if it’s technically an acquisition. Being bought out often carries negative connotations, therefore, by describing the deal as a merger, deal makers and top managers try to make the takeover more comfortable.

A purchase deal will also be called a merger when both CEOs agree that joining together is in the best interest of both of their companies. But when the deal is unfriendly—that is, when the target company does not want to be purchased so the stronger firm swallows the target firm—it is always regarded as an acquisition.<sup>3</sup>

### 1.2. Economic Rational of Mergers and Acquisitions

Regardless of their category or structure, mergers and acquisitions all have one common goal that is to create synergy that makes the value of the combined companies greater than the joint value of the two parts. The success of a merger or acquisition depends on the extent this synergy is achieved.

Synergy is the most important word that allows for enhanced cost efficiencies of the new business. Synergy takes the form of revenue enhancement and cost savings. By merging, the companies hope to benefit from the following elements:

- Cost reductions: Mergers usually results cost-reductions, for example reduction of the number of employees. Consider all the money saved from reducing the number

<sup>2</sup> <http://finance.mapsofworld.com/merger-acquisition/difference-between.html>, time of download: 11.12.2011

<sup>3</sup> *Ibid.*

- of employees from accounting, marketing and other departments. Job cuts will also include one of the former CEOs, who typically leave with a compensation package.<sup>4</sup>
- Economies of scale: Mergers also translate into improved purchasing power to buy equipment or office supplies, when placing larger orders, companies have a greater ability to negotiate prices with their suppliers.
  - Acquiring new technology: To stay competitive, companies need to stay on top of technological developments and their business applications. By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge.
  - Improved market reach and industry visibility: Companies buy companies to reach new markets and grow revenues and earnings. A merge may expand two companies' marketing and distribution, giving them new sales opportunities. A merger can also improve a company's standing in the investment community: bigger firms often have an easier time raising capital than smaller ones.

The above synergies are not automatically realized when two companies merge. In some cases when two businesses are combined they may gain a better position, but sometimes it works in reverse. In many cases, one and one add up to less than two.<sup>5</sup>

### 1.3. Types of Mergers<sup>6</sup>

With regard to business structures, there are a number of different mergers. A couple of these types are listed below, distinguished by the relationship between the two merging companies. This distinction is based on an economical perspective; the types of mergers based on the Directive 2011/35/EU<sup>7</sup> will be discussed below.

- Horizontal merger: The merger of two companies that are in direct competition and share the same product lines and markets.
- Vertical merger: The merger of a customer and a company or a supplier and a company, which is the merger of two companies active in different levels of production or supply chain.
- Market-extension merger: The merger of two companies that sell the same products in different markets.
- Product-extension merger: The merger of two companies selling different but related products in the same market.
- Conglomeration: The merger of two companies that have no common business areas.

<sup>4</sup> <http://www.investopedia.com/university/mergers/mergers1.asp#axzz1XAYBiC3G>, time of download: 11.12.2011

<sup>5</sup> Harka, Ö.: *Mergers and Acquisitions*. Acta Universitatis Szegediensis, Szeged, 2004. 5.

<sup>6</sup> Based on the classification of Harka: *op. cit.* 6.

<sup>7</sup> Third Council Directive 78/855/EEC of 9 October 1978 based on Art. 54 (3) (g) of the Treaty concerning mergers of public limited liability companies; hereinafter referred to as: "Third Directive", which was replaced by Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies; hereinafter referred to as "Merger Directive"

### *1.4. Types of Acquisitions*

From business perspective, acquisition may be only slightly different from a merger. Like mergers, acquisitions are actions through which companies seek economies of scale, efficiencies and enhanced market visibility. Unlike all mergers, all acquisitions involve one firm purchasing another—there is no consolidation as a new company. Acquisitions are often congenial, and all parties feel satisfied with the deal. Other times, acquisitions are more hostile.

According to the main view of the jurisprudence, we can distinguish between share deal and asset deal. In the strict sense, share deal corresponds more to the term of acquisition. In the case of an asset deal an asset or assets will be acquired, without acquiring shares of the target company.

In an acquisition a company can buy another company with cash, stock or a combination of the two. Another possibility as we discussed above, which is common in smaller deals, is for one company to acquire all the assets of another company.

Regardless of their category or structure, all mergers and acquisitions have one common goal: they are all meant to create synergy that makes the value of the combined companies greater than the sum of the two parts. The success of a merger or acquisition depends on whether this synergy is achieved.<sup>8</sup>

## **2. Conducting an Acquisition Transaction in General**

### *2.1. The Offer*

When the management of a company decides to carry out a merger or acquisition with a public listed company, they will start with a tender offer.

The process usually starts on the way that the acquiring company carefully and discreetly buys up shares in the target company with the aim of building up a position. Such takeovers are highly regulated and strictly reviewed in all jurisdictions. In Hungarian Law this topic is regulated in the Capital Market Act.<sup>9</sup>

### *2.2. Tender Offers*

We should discuss two principles regarding to the tender offer. One is the “all shareholders principle”; the other is the “best purchase price principle”. Based on the first all discrimination between shareholders is undersaid. Based on the later principle, except for two step transactions, all shareholders accepting the offer must receive the highest price that was paid to any shareholder during the course of the tender; this however does not exclude the possibility of offering different countervalues to the shareholders during the course of the tender.

Regarding to the process of the takeover with the assistance of financial advisors and investment bankers, the acquiring company will work out an overall price that it is willing to pay for its target in cash, in shares, or both. Investors in a company that is aiming to take

<sup>8</sup> <http://www.investopedia.com/university/mergers/mergers1.asp#axzz1ZBqHYklz>, time of download: 11.10.2011

<sup>9</sup> Hungarian Capital Market Act No. 120 of 2001.

over another one must determine whether the purchase will be beneficial to them, therefore the value of the target must be determined.<sup>10</sup>

Of course the two sides of a merger and acquisition deal will have different ideas about the worth of a target company; the buyer to achieve the lowest possible price, but the seller will tend to value the company as high as possible.

The most common method of valuation, which is usually carried out with the assistance of various experts (lawyers, auditors, investment bankers), is the comparison with other companies in an industry. Some other methods of assessment that may be used are the following<sup>11</sup>:

- Comparative Ratios: The most frequently used of these are the price/earnings ratio and the price/sales ratio.
- Replacement Cost: Acquisitions may be based on the cost of replacing the target company, by considering the time needed to assemble a good management, to acquire property and to get the right equipment. This method of establishing a price however cannot be used in the service industry where the key assets are people and ideas which are hard to value and develop.
- Discounted Cash Flow: This is used as a key valuation tool in mergers and acquisitions. It determines the current value according to its estimated future cash flows. Forecasted free cash flows are discounted to a present value using the company's weighted average cost of capital.<sup>12</sup>

### 2.3. *The Target's Response*

When the tender offer has been made, the target company can do the following:

- Accept the terms of the offer. In case the target's management and its shareholders are satisfied with the terms of the transactions, they will accept these terms.
- Other option is the attempt to negotiate. In the case when the tender offer price is not being high enough for the target company's shareholders, or the specific terms of the deal are not good enough, then they might try to negotiate better terms. Execute a poison pill or some other hostile takeover is also possible.
- Or the last option is to find a "white knight". The target company's management may seek out a friendlier potential acquirer as an alternative. If a "white knight" is found, it will offer an equal or higher price for the shares than the hostile bidder.

### 2.4. *Closing the Deal*

Finally, once the target company agrees to the tender offer and regulatory requirements are met and all permissions are obtained, the merger deal will be executed by means of a transaction. In a merger in which one company buys another, the acquirer will pay for the target company's shares with cash, stock or both.

<sup>10</sup> Gran, A.: Abläufe bei Mergers & Acquisitions. *Neue Juristische Wochenschrift*, 60 (2008), 1411.

<sup>11</sup> According to Wegen, G.: Mergers and Acquisitions in Germany. *The Comparative Law Yearbook of International Business*, 14 (1992), 35–37.

<sup>12</sup> Miller, E. L.: *Mergers and Acquisitions, A Step-by-Step Legal and Practical Guide*. New Jersey, 2008. 31–40.

A cash-for-stock transaction is fairly straightforward, the target company's shareholders receive a cash payment for each share purchased. If the transaction is made with stock instead of cash, then there is a simply exchange of share certificate.

### *2.5. Merger Control*

Nowadays, merger control bears also relevance in relation to mergers. In most jurisdictions the importance and relevance of competition law is continuously growing, therefore the decision-making bodies of merging companies must always be aware of the restrictions and limitations imputed by merger control.

As written above, the scope of this paper does not spread out to the relevant competition law rules regarding the mergers, because of the difference character of competition law rules and company law in strict manner.

## **3. Merger and Acquisition Legislation in the Law of the European Union**

As in non-European jurisdictions, recent general European trends towards a more market-inclined (shareholder-valued) approach have been observed in corporation attitudes in the last 30 years. For example, the Washington Post reported on 11 March 1999:

*"...The change in corporate culture and behaviour here in the past few years has been nothing short of radical. The government-coddled climate in France, the cosy shareholder relationship in Germany, the secretive empires of the Italians—are all giving way to American-style cowboy capitalism..."*<sup>13</sup>

The issue of regulatory conformity in the area of company law in the European Union drew particular attention from the other jurisdictions around the time when its internal market was completed in 1992.

Now, there are four relevant company law directives in relation to corporate reconstruction in the EC: the Merger Directive which regulates mergers between public companies, the sixth company law directive, which covers the division of an existing public company into entities, the directive, which concerns cross-border mergers and the Takeover Directive.

### *3.1. The Third Company Law Directive*

Mergers of public companies and divisions of them were conceived within the same idea at the time of proposal of the third and sixth directives. The Third Directive was initially proposed in 1970 and was adopted based on Art. 54 (3) (g) of EC Treaty in 1978, concerning mergers between public companies.

Under the definition of the Third Directive, there were four types of mergers: mergers by acquisition of another company, mergers by formation of a new company, acquisition of a wholly owned subsidiary, and analogous operation. The Merger Directive also contains these four types of mergers. To characterise a merger type of amalgamation in a word, all the assets and liabilities of the acquired company (or companies) are transferred to the

<sup>13</sup> Swardson, A.: In Europe, An Urge to Conquer Hostile takeovers set new standard. *Washington Post*, (1999/03/11), 1.

acquiring company and dissolved without any process of winding up. EU member states were obliged to implement the Third Directive by October 13, 1981.<sup>14</sup> The Third Directive has been substantially amended several times. In the interests of clarity and rationality the Third Directive was replaced by the Merger Directive.

### *3.1.1. The Scope and the Different Types of Mergers*

Article 1 of the Merger Directive regulates the personal scope of the directive, namely the public limited companies, formed validly under national law. The Member States do not have to apply the Merger Directive in cases where the company or companies, which are being acquired or will cease to exist are the subject of bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies, judicial arrangements, compositions and analogous proceedings. Based on Art. 2, the Member States shall, as regards companies governed by their national laws, make provisions for rules governing merger by the acquisition of one or more companies by another and merger by the formation of a new company.

Articles 3 and 4 describe the different types of mergers. Merger by acquisition shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value.

According to Art. 4, merger by the formation of a new company shall mean the operation whereby several companies are wound up without going into liquidation and transfer to a company that they set up all their assets and liabilities in exchange for the issue to their shareholders of shares in the new company and a cash payment, if any, not exceeding 10% of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value. Hungarian regulation refers to the two main types of mergers: Para. 80 and Para. 81 of the Hungarian Act on Business Associations<sup>15</sup> mention the two main types of mergers, namely the merger by the formation of a new company and merger by acquisition.

### *3.1.2. Indirect Protection of Shareholders*

It is important to note that the Merger Directive does not contain explicit provisions for direct shareholder protection. We can evaluate the disclosure duties and the expert examination during the merger process as indirect protection of shareholders.

Article 5 contains the details of the draft terms of merger, meanwhile Art. 6 prescribes a disclosure duty, namely that draft terms of merger must be published in the manner prescribed by the laws of each Member State in accordance with Art. 3 of Directive 68/151/EEC. These rules correspond to the typical information model favoured by EC legislature and the *ex ante* protection of shareholders and creditors. We can find the correlating Hungarian provision to the draft terms of merger in Paras 79 and 279 of the Hungarian Company Act.

<sup>14</sup> Ueada, J.: A Comparative Study on Cross-Border Mergers and Acquisitions: Modelling the UK, Germany, the US and Japan for Regulatory Harmonisation. *International Company and Commercial Law Review*, 15 (2004), 358.

<sup>15</sup> Act No. 4. of 2006 on Business Associations.

A merger shall require at least the approval of the general meeting of each of the merging companies. The laws of the Member States shall provide that this decision shall require a majority of not less than two thirds of the votes attaching either to the shares or to the subscribed capital represented. Although, there are possibilities for exemptions laid down in Arts 7 and 8.

The directive does not contain rules regarding to convening of the general meeting or exercising of right to vote. Accordingly, there is no harmonisation regarding these questions.

### *3.1.3. Report Concerning the Merger*

As described above, mergers and acquisitions always have a strong economical background. Article 9 bears in mind this fact, so it prescribes that the administration or management bodies of each of the merging companies shall draw up a detailed written report explaining the draft terms of merger and setting out the legal and economic grounds for them, in particular the share exchange ratio.

The report shall also describe any special valuation difficulties which have arisen. One or more experts, acting on behalf of each of the merging companies but independent of them, appointed or approved by a judicial or administrative authority, shall examine the draft terms of merger and draw up a written report to the shareholders. However, the laws of a Member State may provide for the appointment of one or more independent experts for all the merging companies, if such appointment is made by a judicial or administrative authority at the joint request of those companies. Such experts may, depending on the laws of each Member State, be natural or legal persons or companies or firms.

In the report the experts must in any case state whether in their opinion the share exchange ratio is fair and reasonable. Their statement must at least:

- indicate the method or methods used to arrive at the share exchange ratio proposed;
- state whether such method or methods are adequate in the case in question, indicate the values arrived at using each such method and give an opinion on the relative importance attributed to such methods in arriving at the value decided on.

The report shall also describe any special valuation difficulties which have arisen. Each expert shall be entitled to obtain from the merging companies all relevant information and documents and to carry out all necessary investigations.

Based on Art. 11, all shareholders shall be entitled to inspect at least the following documents at the registered office at least one month before the date fixed for the general meeting which is to decide on the draft terms of merger:

- the draft terms of merger;
- the annual accounts and annual reports of the merging companies for the preceding three financial years;
- an accounting statement drawn up as at a date which must not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date;
- the reports of the administrative or management bodies of the merging companies;
- the reports of the experts.

### 3.1.4. Protection of Creditors Based on Arts 13–15 and the Effects of Mergers

The laws of the Member States must provide for an adequate system of protection of the interests of creditors of the merging companies<sup>16</sup> whose claims antedate the publication of the draft terms of merger and have not fallen due at the time of such publication.

To this end, the laws of the Member States shall at least provide that such creditors shall be entitled to obtain adequate safeguards where the financial situation of the merging companies makes such protection necessary and where those creditors do not already have such safeguards.

Such protection may be different for the creditors of the acquiring company and for those of the company being acquired. Holders of securities, other than shares, to which special rights are attached, must be given rights in the acquiring company at least equivalent to those they possessed in the company being acquired, unless the alteration of those rights has been approved by a meeting of the holders of such securities, if such a meeting is provided for under national laws, or by the holders of those securities individually, or unless the holders are entitled to have their securities repurchased by the acquiring company.

The disclosure duty can be seen as one of the main guaranties of creditor protection in the directive. Thus Art. 18 prescribes that a merger must be publicized in the manner prescribed by the laws of each Member State, in accordance with Art. 3 of Directive 68/151/EEC, in respect of each of the merging companies. The acquiring company may itself carry out the publication formalities relating to the company or companies being acquired.

Article 19 contains the effects of merger, which effects have to be mentioned under the fundamental principles of mergers. Correspondingly, Para. 80 and Para. 81 of Act on Business Associations also repeat some of these principles.

A merger shall have the following consequences *ipso iure* and simultaneously: The transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired. The shareholders of the company being acquired become shareholders of the acquiring company and the company being acquired ceases to exist.

### 3.1.5. Liability Rules Based on Arts 20 and 21

As mentioned above, the provisions concerning the personal liability of shareholders and experts are very important elements of creditor protection.

Based on Art. 20 of the Directive, the laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the members of the administrative or management bodies of that company in respect of misconduct on the part of members of those bodies in preparing and implementing the merger.

The laws of the Member States shall at least lay down rules governing the civil liability towards the shareholders of the company being acquired of the experts responsible for drawing up on behalf of that company the report referred to in Art. 10 (1) in respect of misconduct on the part of those experts in the performance of their duties.

It has to be repeated, that the scope of the Merger Directive extends only on domestic mergers. However, the expectations of the business life forced out the rules relating to the

<sup>16</sup> See Bakos, K.: Gläubigerschutz bei der Umwandlung von Gesellschaften. In: *European Legal Studies and Research; International Conference of PhD Students in Law*. 3rd ed., Timisoara, 2011. 40–52.

cross-border mergers. Before the examination of the detailed rules of the Cross-Border Merger Directive<sup>17</sup>, we shall discuss the SEVIC System Case in order to demonstrate the importance of the regulated legal institution of cross border mergers.

### 3.2. *The SEVIC System Case*<sup>18</sup>

The scope of the freedom of establishment regarding companies was in rapid movement over several years. Already in Daily Mail, Centros, Überseering and Inspire Act corporate mobility within the EU was under ECJ's scrutiny. However, SEVIC was the first case dealing with a cross border merger.

Until recently, it was highly disputed whether such transactions can be implemented. Member states, such as Austria and Germany did not provide for cross-border mergers, the legal situation was unclear. Apart from the formation of a European Company by merger, secondary EC law equally did not provide for an explicit legal basis in the area of corporate law. With regard to tax law, however, provisions on cross-border mergers existed since 1990, which recently had been updated and extended. Until SEVIC, the prevailing doctrine remained that cross-border mergers into Germany were not possible.<sup>19</sup>

#### 3.2.1. *The Facts of the SEVIC Case*

SEVIC Systems Aktiengesellschaft ("SEVIC") with its registered office in Germany and Security Vision Concept SA ("SVC") with its registered office in Luxembourg entered into a merger agreement in which they agreed to dissolve SVC without liquidation and to transfer the whole of its assets to SEVIC.

The local court in Neuwied refused the application for registration of the merger in the German corporate register, citing as grounds that Para. 1 (1) of the German Reorganization Act<sup>20</sup> provides solely for mergers between legal entities established in Germany. This, however, is not given in the present case, because the transferring company is incorporated under Luxembourg Law. Because of cross-border mergers were not possible under the German law; various forms of organization were established by drawing up contracts in order to achieve a result that was as close as possible to that of a merger.<sup>21</sup>

SEVIC brought an action against that rejection decision before regional court in Koblenz. Since the latter had doubts as to whether Para. 1 (1) of the German Reorganization Act complies with Arts 43 and 48 EC, it decided to stay the proceedings and referred to the ECJ the following question for a preliminary ruling according to Art. 234 EC:

"Are Articles 43 and 48 EC to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies under

<sup>17</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, hereinafter referred to as: "CBM Directive".

<sup>18</sup> Case C-411/03, SEVIC Systems AG, [2005]-ECR I-10805.

<sup>19</sup> Doralt, M.: Cross-border mergers—A glimpse into the future. *European Company and Financial Law Review*, 4 (2007), 23.

<sup>20</sup> Reorganization Act 1994 (Deutsches Umwandlungsgesetz 1994); hereinafter referred to as: "Reorganization Act".

<sup>21</sup> Becker, A.—Begemann, A.: The German Law on Crossborder Mergers Following the Sevic Decision. *The Comparative Law Yearbook on International Business*, 31 (2009), 201.

Paragraphs 16 et seq. of the Reorganization Act, on the grounds that Paragraph 1 (1) (1) of that law provides only transformation of legal entities established in Germany?"

In the opinions of the Advocate General of 7 July 2005 proposed that Arts 43 and 48 EC preclude legislation of a member state not permitting the registration in the national corporate register of mergers between companies established in that member state and companies of other member states.

In the Advocate General's view Para. 1 (1) of the Reorganization Act constitutes a discriminatory rule, since the provision in question treats companies quite differently depending on their place of establishment, by permitting mergers if the companies in question are established in Germany and prohibiting them if one of those companies is established abroad. An absolute and automatic prohibition which is consequently applicable in a general and preventative manner to all cases of cross-border mergers cannot be satisfied, irrespective of the possible harm or risks associated with them.<sup>22</sup>

### 3.2.2. *The ECJ's Decision*

With the decision of the ECJ it was clarified that both the transferring company as well as the acquiring company enjoy the protection of the freedom of establishment. The court held that the provision at stake constitutes a restriction of the freedom of establishment. In the ECJ's view the mere fact that—unlike for mergers within Germany—no provisions for registration of cross border mergers exist, represents a restriction within the meaning of Arts 43 and 48 EC. Nevertheless, the ECJ denied all arguments submitted by the member states. This decision in the SEVIC Case was in line with the court's earlier judicature.<sup>23</sup>

The three key takeaways of the SEVIC judgement:

- The right of establishment applies to cross-border mergers. This holds true, even if there are no provisions harmonizing such transactions.
- Second, the difference in the treatment of internal and cross-border mergers constitutes a restriction on the freedom of establishment.
- Third, such restrictions can be permitted only if it is justified by imperative reasons in the public interest and provided that it is both appropriate and does not go beyond what is necessary.<sup>24</sup>

### 3.3. *Directive on Cross-border Mergers*

Cross border mergers constitute a very efficient method of corporate restructuring which could contribute subsequently to the strengthening of the international market. As described above, Merger Directive regulates national mergers of public limited liability companies; there was no EU legal framework which regulated cross border mergers until 2005.<sup>25</sup>

This was due to completely different approaches to the issue. Some Member States (e.g. Germany) did not allow cross border mergers because they were afraid of possible circumvention of their company and employment law safeguards. If a company wanted to

<sup>22</sup> Decher, C. E.: Cross Border Mergers: Traditional Structures and SE-Merger Structures. *European Company and Financial Law Review*, 4 (2007), 6.

<sup>23</sup> Schindler, C. P.: Cross-Border Mergers in Europe—Company Law is catching up! *European Company and Financial Law Review*, 3 (2006), 188.

<sup>24</sup> Doralt: *op. cit.* 24.

<sup>25</sup> The CBM directive was implemented in Hungarian law by the Act No. 140 of 2007 on cross-border mergers of limited liability companies.

merge with a company from another merger State, there were numerous legislative difficulties which restricted the choice. This situation limited significantly the methods of corporate restructuring which were available to EU companies and as a result restricted their business organisational freedom under the EC Treaty.

After many years of negotiations, the CBM Directive was finally adopted in December 2005. The European Commission strongly believed that it was necessary, with a view to the completion and functioning of the single market. Because of the following reasons we cannot overemphasise the importance of the CBM Directive.

Consistently with the legal framework of European Company Law, the CBM Directive is legally based, first of all, on the right of establishment. The mobility of companies of any Member State within the European Union, in terms of either transferring seat or setting up new companies or branch in the territory of another Member State, is the result of the creation and functioning of a Single Market, namely an area without internal frontiers in which free movement of goods, persons, services and capital is guaranteed.<sup>26</sup>

It contributes to the growth of companies and so it allows to European companies to be competitors of US and Japanese firms.

ECJ in the SEVIC case confirmed that cross-border mergers already had to be accepted, because of the guarantees enshrined in the fundamental freedoms. CBM Directive removed remaining uncertainties. But it is important to note that the CBM Directive does not cover private law transactions with the same effect (merger in broad sense), i.e. share deals and asset deals.

### 3.3.1. *Aim of the CBM Directive*

From an economic point of view, European companies may be willing to “move” within the European Union by cross-border mergers since they allow to rationalise corporate structures and to gain efficiencies in terms of economies of scale.<sup>27</sup>

Since the CBM Directive requires to be implemented in each Member States, the CBM Directive does not aim at dictating uniform rules to be applied by the Member States, but rather at laying down guidelines, inspired to common principles and without conflicting with national systems, to be followed in order “to facilitate the carrying-out of cross-border mergers between various types of limited liability companies governed by the laws of different Member States.”<sup>28</sup>

### 3.3.2. *The Scope of the Cross-Border Mergers Directive*

The directive shall apply to mergers of limited liability companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, provided at least two of them are governed by the laws of different Member States.

A company, which has its registered office in a Member State adopting the incorporation theory could follow the provisions of the Cross-Border Mergers Directive and merge with another company. This allows “letter-box” or pseudo-foreign companies with

<sup>26</sup> Ugliano, A.: The New Cross-Border Merger Directive: Harmonisation of European Company Law and Free Movement. *European Business Law Review*, 18 (2007), 588.

<sup>27</sup> Rogers, P.: Cross-Border Mergers. *International Company and Commercial Law Review*, 13 (2002), 343.

<sup>28</sup> Preamble 1 to the CBM Directive.

non-EU origins to participate in cross-border mergers. This contrasts with the rules on the formation of the European Company (Societas Europaea-SE), the SE Statute requires forming companies of SEs to have their head office within the European Union, unless, in certain limited cases the Member State relaxes this requirement.<sup>29</sup>

The merging companies have to be limited liability company which means a company as referred to in Art. 1 of Directive 68/151 (First Company Law Directive) or a company with share capital and having legal personality, possessing separate assets which alone serve to cover its debts and subject under the national law governing it to conditions concerning guarantees such as are provided for by the First Company Law Directive for the protection of the interests of members and others.<sup>30</sup> As far as the first category of limited liability companies is concerned, the First Company Law Directive includes both private and public limited liability companies. This constitutes an advantage of the Cross-border Mergers Directive because it could also be used as a method of corporate restructuring and cross-border establishment by some small- and medium-sized enterprises formed as private limited liability companies. Thus, cross-border methods is not a corporate financial technique limited only to large listed companies, smaller companies with limited liability can also enjoy this product of the European integration. We should not forget that the small and medium-sized companies are special and sensitive parts of the internal market and deserve always the care of the European legislature.

The second category of companies which fall within the scope of the Directive are companies with limited liability<sup>31</sup> which comply with some requirements of the First Company Law Directive (registration, accounting, publicity, capacity, nullity, representation).

A further condition is prescribed by Art. 4 (1) (a) of the Cross-Border Merger Directive: cross-border mergers shall only be possible between types of companies which may merge under national law of the relevant Member States.

If national company law does not grant right to a company to merge with another domestic company, the company will not have the right to participate in a cross-border merger.

The Cross-Border Mergers Directive describes three ways of completing a merger in compliance with the Third Directive.

Article 2 (2) states that merger means an operation whereby: one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares or two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that new company and, if applicable, a cash payment not exceeding 10% of the nominal value, or in the absence of a

<sup>29</sup> Papadopoulos, T.: Legal Perspectives on the Scope of the Tenth Company Law Directive on Cross-Border Mergers. *European Current Law*, 17 (2008) 10, 78.

<sup>30</sup> Directive 2005/56 Art. 2.

<sup>31</sup> I.e. legal personality and separate assets.

nominal value, of the accounting par value of those securities or shares; or a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital.

### 3.3.3. *Conditions Relating to Cross-border Mergers*

Article 4 contains the detailed conditions relating to cross-border mergers. Save as otherwise provided in the CBM Directive: cross-border mergers shall only be possible between types of companies which may merge under the national law of the relevant Member States; a company taking part in a cross-border merger shall comply with the provisions and formalities of the national law to which it is subject. The laws of a Member State enabling its national authorities to oppose a given internal merger on grounds of public interest shall also be applicable to a cross-border merger where at least one of the merging companies is subject to the law of that Member State. This provision shall not apply to the extent that Art.21 of Regulation (EC) No 139/2004 is applicable.

The provisions and formalities shall, in particular, include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees as regards rights other than those governed by Art. 16.

A Member State may, in the case of companies participating in a cross-border merger and governed by its law, adopt provisions designed to ensure appropriate protection for minority members who have opposed the cross-border merger.

### 3.3.4. *Procedural Rules of the CBM Directive*

The procedural mechanism, on one hand, is consistent with that provided by the Merger Directive on domestic mergers and, on the other hand, in consideration of the international features of the mergers in question, constantly refers to the national laws of the participating companies.<sup>32</sup>

The first step of the merger process is the drawing up of common draft terms of the cross-border merger by the management of administrative organs of each of the participating companies. Article 5 provides the minimum mandatory content, which might be integrated by the Member States with the implementation of directive. In particular, the following details have to be specified in the draft terms:

- the form, name and registered office of the merging companies and those proposed for the company resulting from the cross-border merger;
- the ratio applicable to the exchange of securities or shares representing the company capital and the amount of any cash payment;
- the terms for the allotment of securities or shares representing the capital of the company resulting from the cross-border merger;
- the likely repercussions of the cross-border merger on employment;
- the date from which the holding of such securities or shares representing the company capital will entitle the holders to share in profits and any special conditions affecting that entitlement;

<sup>32</sup> Ugliano: *op. cit.* 602.

- the date from which the transactions of the merging companies will be treated for accounting purposes as being those of the company resulting from the cross-border merger;
- the rights conferred by the company resulting from the cross-border merger on members enjoying special rights or on holders of securities other than shares representing the company capital, or the measures proposed concerning them;
- any special advantages granted to the experts who examine the draft terms of the cross-border merger or to members of the administrative, management, supervisory or controlling organs of the merging companies;
- the statutes of the company resulting from the cross-border merger;
- where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Art. 16;
- information on the evaluation of the assets and liabilities which are transferred to the company resulting from the cross-border merger;
- dates of the merging companies' accounts used to establish the conditions of the cross-border merger.

The common draft terms must be made public in each of the Member States of the Participating Companies in accordance with the respective rules set out under Art. 3 of the First Directive, at least one month before the date of the general meeting convened to decide on the draft terms.

### *3.3.5. Reports on Common Draft Terms*

The common draft terms must be accompanied by two types of reports. The first one includes the reports drawn up by the management or administrative organ of each participating company for the purpose of explaining and justifying the legal and economic aspects of the transaction, as well as the relative implications for members, creditors, and employees.<sup>33</sup>

The second one covers the reports drawn up by independent experts, natural or legal persons, acting in the interest of each participating company, but independent of them, and appointed and approved by a judicial or administrative authority.

### *3.3.6. Approval by the General Meeting*

Further to the exam of the reports of the management body and of the independent experts, the general meeting of each of participating companies is to approve the common draft terms of the cross-border merger. The general meeting of each of the merging companies may reserve the right to make implementation of the cross-border merger conditional on express ratification by it of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger.

### *3.3.7. The Merger Phase*

The law of the Member State to whose jurisdiction the company resulting from the cross-border merger is subject shall determine the date on which the cross-border merger takes effect.

<sup>33</sup> Article 7 of CBM Directive.

The law of each of the Member States to whose jurisdiction the merging companies were subject shall determine, with respect to the territory of that State, the arrangements, in accordance with Art. 3 of Directive 68/151/EEC, for publicising completion of the cross-border merger in the public register in which each of the companies is required to file documents.

The registry for the registration of the company resulting from the cross-border merger shall notify, without delay, the registry in which each of the companies was required to file documents that the cross-border merger has taken effect. Deletion of the old registration, if applicable, shall be effected on receipt of that notification, but not before.

### 3.3.8. *Protection of Creditors and Shareholders*

The protection of creditors and shareholders is guaranteed under the CBM Directive through the provisions and formalities of national laws to which the participating companies are subject, so such interests are protected in compliance with the national provisions of the Member States governing domestic mergers.<sup>34</sup> It is noteworthy, however, that such national provisions and formalities should be applied “taking into account the cross-border nature of the merger”.

This provision seems to allow Member States to include additional protections to such categories in case of cross-border mergers.<sup>35</sup>

In the light of the procedural overview, it is possible to argue that the CBM Directive may provide the European companies with significant advantages in engaging in cross-border transactions.

It is a very positive development for the internal market that both national and cross-border mergers are regulated at EU level. The fact that private companies as well as public companies could take part in cross-border mergers and acquisitions does not restrict the benefits of freedom of establishment and EU corporate restructuring to one category of companies only (as the Merger Directive does).

The Cross-Border Mergers Directive also embraces companies with no head office in the Community and prescribes a very relaxed cash balance requirement if any Member State allows it, allowing transactions similar to public offers of shares.

### 3.4. *Takeover Directive*<sup>36</sup>

If we examine the basic directives in the Law of European Union regarding to mergers and acquisitions, we shall also mention briefly the takeover directive, which was adopted on 21 April 2004. It came into force on 20 May 2004 and had to be implemented into national law by all Member States by no later than 20 May 2006. The main objectives of the Directive, when it was first tabled before the European Parliament were to provide a framework of common laws for takeovers in the EU, address the barriers to takeovers and ensure an adequate level of protection for minority shareholders across the EU in public offers. As a

<sup>34</sup> Ugliano: *op. cit.* 607.

<sup>35</sup> Rickford, J.: *The European Company, Developing a Community Law of Corporations*. Antwerp–Oxford–New York, 2003. 108 and Rickford, J.: *The Proposed Tenth Company Law Directive on Cross Border Mergers and its Impact in the UK*. *European Business Law Review*, 16 (2005), 1408.

<sup>36</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, hereinafter referred to as “Takeover Directive”.

result of over 14 years of either languishing in stalemate or being the subject of intense political negotiation and debate, the Directive in its final form is a product of political compromise.

Under the Takeover Directive, individual member nations are supposed to create a regulatory framework for takeovers, including appointing supervisory agencies to review and approve proposed takeovers. The directive also mandates equal treatment of shareholders, states that bids must be conducted in a timeframe long enough to allow people to reach informed decisions, and requires companies offering to make takeovers to provide projections on how they will affect employment. Each member nation is expected to use the Takeover Directive in establishing their own laws for handling takeovers.

After the passage of the Takeover Directive, some critics accused it of including protectionist language and of actually hindering takeovers, rather than facilitating them. Others felt that the legislation did not go far enough in terms of clarity and protections for people involved in takeovers. The conflict between these sides is illustrative of the results of the compromise negotiations used in developing the directive.<sup>37</sup>

Many European Union members had difficulty implementing this piece of legislation. Implementation proposals have varied in scope and nature as the individual governments of member nations work to implement the directive. In some cases, reorganizations and reforms have been needed within a nation's financial regulatory system to meet the terms of the directive and this has required substantial negotiation and discussion.

## Conclusion

Generally speaking, the European harmonisation process carried out in the view of creation and consolidation of a European Company Law seems to have been developed through two different tracks:<sup>38</sup> On the one hand, harmonisation of national rules and laws through the enactment of directives; on the other hand, creation of European Company forms (i.e. the SE), as supranational corporate vehicle, through the adoption of regulations.

In relation to the first track, it has been widely discussed by the scholars, the necessity and the effect of harmonisation measures as to company laws in the context of European Union, especially in the light of the so-called "Delaware effect" stemmed from the US experience.<sup>39</sup>

On the one side, harmonisation has been regarded as a mean to avoid such an effect and the "race to the bottom" that it might imply, namely to avoid that the country with the most liberal and flexible company legislation might be the most attractive and might be followed by other countries, on the other hand, absence of harmonisation of national company laws has been supported on the grounds that it may encourage competition between countries and, as a result, the creation of "the best company law".

<sup>37</sup> <http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=2875>, time of download: 15.11.2011

<sup>38</sup> Werlauff, E.: *EU Company Law*. Copenhagen, 2003. 102.

<sup>39</sup> The name comes from the US State of Delaware which adopted a more liberal company law, in terms of minimum degree of interference by the management, procedural simplification, minimum capital requirements, in order to attract companies, willing to be incorporated there, and thereby to gain more revenue for the state through taxation and use of services.

Consistently, the company law directives regarding to merger and acquisitions do not prevent each Member State from applying its own company law, but they ensure minimum standards which have to be met in order to avoid the possible negative effects mentioned above.

*“A dynamic and flexible company law [...] is essential for deepening the internal market and building an integrated European capital market. Essential for maximising the benefit of enlargement for all Member States, new and existing.”<sup>40</sup>*

<sup>40</sup> Communication from the Commission to the Council and the European Parliament—Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward, 2003/0284, Introduction.

TAMÁS NÓTÁRI\*

## The State of Facts of Robbing of a Grave in Early Medieval German Laws<sup>1</sup>

**Abstract.** In the present paper we analyse the state of facts of robbing of a grave in German folk laws. We pay special regard to the issue to what extent the impacts of Roman law and the Church and primarily German customary law can be demonstrated in the system of state of facts and sanctions of specific laws. This investigation requires the analysis of the legal source base as well as some examination in the history of language, which allows a comparative analysis of the issue and helps to highlight the various layers of the norms of German folk laws by the example of this state of facts.

**Keywords:** sepuchrum violatum, wargus, Friedlosigkeit, Volksrecht

### Introduction

Almost all of German codices—except for *Lex Saxonum*, *Lex Thuringorum* and *Ewa Chamavorum*—extensively discuss legal protection of the grave and the dead body and sanction persons who disgrace the grave and the dead body. So, this scope of issues is dwelt upon in details by *Edictum Theodorici*,<sup>2</sup> *Lex Visigothorum*,<sup>3</sup> *Lex Burgundiorum*,<sup>4</sup> *Edictus Rothari*,<sup>5</sup> *Lex Salica*,<sup>6</sup> *Lex Ribuaria*,<sup>7</sup> *Pactus Alamannorum*,<sup>8</sup> *Lex Alamannorum*<sup>9</sup> and *Lex*

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<sup>2</sup> *Edictum Theodorici* (Ed. F. Bluhme: *Monumenta Germaniae Historica, Leges nationum Germanicatum*, V. Berlin 1889.) 110.

<sup>3</sup> *Lex Visigothorum* (ed.: Zeumer, K.: *Monumenta Germaniae Historica, Leges*, I. Hannover, 1902.) 11, 2, 1–2.

<sup>4</sup> *Lex Burgundiorum* (ed.: v. Salis, L. R.: *Monumenta Germaniae Historica, Leges*, II/1. Hannover, 1892.) 34, 3.

<sup>5</sup> *Edictus Rothari* (ed.: Bluhme, F.: *Edictus ceteraeque Langobardorum leges cum constitutionibus et pactis principum Beneventanorum ex maiore editione monumentis Germaniae inserta*. Hannover, 1869.) 14–16.

<sup>6</sup> *Lex Salica* (ed.: Eckhardt, K. A.: *Monumenta Germaniae Historica, Leges*, I. IV/2. Hannover, 1969.) 55.

<sup>7</sup> *Lex Ribuaria* (ed.: Sohm, R.: *Lex Ribuaria et Lex Francorum Chamavorum ex Monumentis germaniae Historiae recusae*. Hannover, 1883.) 55, 1–2; 88, 1–2.

<sup>8</sup> *Pactus Alamannorum* (ed.: Pertz, G. H.: *Monumenta Germaniae Historica, Leges*, III. Hannover, 1863.) 16, 1–3; 17, 1–7.

<sup>9</sup> *Lex Alamannorum* (ed.: Pertz, G. H.: *Monumenta Germaniae Historica, Leges*, III. Hannover, 1863.) 48, 1; 49, 1–2.

*Baiuvariorum*.<sup>10</sup> This paper first examines Gothic, Burgundian and Langobardic sources (I); then, analyses Frankish sources (II); finally, surveys the provisions of South German, i.e. Alemannian and Bavarian sources (III).

## I

Several questions arise with respect to the lapidary provision of *Edictum Thoderici* stating that a person who has demolished/ruins a grave shall suffer death.<sup>11</sup> (*Edictum Theodorici*, the code of the eastern Gothic ruler, Theoderich the Great I was also created around 500; it did not rest with the principle of personality but applied to the population of both Gothic and Roman origin; it was based on the collections of imperial decrees and Paulus's *Sententiae*.<sup>12</sup>) The historian Cassiodorus relates several cases when Theoderich took direct measures to open graves. He gave an order to his official, Duda to open a grave and take the gold and silver in it for public purposes.<sup>13</sup> Yet, the ruler commanded that the corpse should remain untouched and he arranged for restoring the grave with proper decoration, and—as he could obtain the treasure only through *funestum scelus*—he gave reasons for this act stating that in the relevant case (as it were referring to a cause excluding unlawfulness) it was possible to take the gold and silver from the grave because it was the living and not the dead who needed them. In his notice to Anna *comes*—as it is related by Cassiodorus—Theoderich condemns robbing of the grave; more specifically, in case of a priest called Laurentius he instructs his *comes* to make sure that the perpetrator should not keep the loot if it is proved that the priest has disturbed the peace of the dead while searching for treasures in the grave.<sup>14</sup> Yet, paying regard to the perpetrator's ecclesiastical status, he waives his punishment alluding at the greater punishment to come by which he means—and this is difficult to decide—either divine punishment or the chastisement imposed by the bishop.<sup>15</sup> In the so-called *Formula comitivae privatarum* left to us by Cassiodorus, the provision by which Theoderich assigns certain duties to his *comeses*, among others, he charges them with arranging for the peace of the dead, preventing the graves from being deprived of marble cover, columns from their decorations, and the corpses and the ashes from being treated undeservedly, impiously, contrary to the requirements of *pietas*.<sup>16</sup> This provision reveals that Theoderich the Great ordered to punish the act of robbing of a grave/desecration of a grave as well as those who has demolished or impaired a sepulchre, for example, in order to obtain building material or remove a grave which limits the use of their estate.<sup>17</sup>

<sup>10</sup> *Lex Baiuvariorum* (ed.: Nótári, T.: *Lex Baiuvariorum*. Szeged, 2011.) 19, 1–8.

<sup>11</sup> *Edictum Theodorici* (ed.: Bluhme, F.: *Monumenta Germaniae Historica, Leges nationum Germanicarum*, V. Berlin, 1889.) 110. *Qui sepulchrum destruxerit, occidatur*.

<sup>12</sup> Nótári, T.: *Római köz- és magánjog (Roman Public and Private Law)*. Kolozsvár, 2011. 493.

<sup>13</sup> Cassiodorus: *Variae* (ed.: Mommsen, Th.: *Monumenta Germaniae Historica, Auctores antiquissimi*, XII. Berlin, 1894.) 4, 34, 129.

<sup>14</sup> *Ibid.* 4, 18, 122.

<sup>15</sup> Nehlsen, H.: Der Grabfrevel in den germanischen Rechtsaufzeichnungen. Zugleich ein Beitrag zur Diskussion um Todesstrafe und Friedlosigkeit bei den Germanen. In: Jankuhn, H.–Nehlsen, H.–Roth, H. (hrsg.): *Zum Grabfrevel in vor- und frühgeschichtlicher Zeit. Untersuchungen zu Grabraub und „haugbrod“ in Mittel- und Nordeuropa*. Göttingen, 1978. 107–168., 113.

<sup>16</sup> Cassiodorus: *Variae. op. cit.* 6, 8, 181. f.

<sup>17</sup> Nehlsen: *Der Grabfrevel... op. cit.* 114.

This is not surprising as it is known of the ruler that he saw to it that Antique buildings should be protected.<sup>18</sup>

It is, however, questionable if the death penalty ordered by *Edictum Theoderici* was of German origin *ex asse* indeed. To get an answer to this question, Roman legal regulation and the Council regulations of the period should be looked at. In accordance with classical Roman law, *sepulchrum violatum*, the act of ruining/desecration of the burial place as *delictum* with a sacred background—since the burial place was protected under divine law, more specifically *res religiosa*—resulted in *popularis actio*; so, it could be applied for by any citizen if it was not brought by the relatives.<sup>19</sup> In the former case the amount of penalty depended on the judge's decision, in the latter it was one hundred *sestertius*; the relevant action at law was *actio de sepulchro violato*, which involved *infamia*.<sup>20</sup> At the same time, an imperial decree in force in the provinces only, which can be, perhaps, linked with the name of Tiberius, threatened persons who desecrate a burial place with death penalty.<sup>21</sup> In a more general scope, through jurists' *interpretatio* desecration of a grave became indictable offence, since the provisions of *lex Iulia de vi publica* and *lex Iulia de vi privata*, applicable only to disturbing of a burial in relation to the dead, were extended to desecration of a grave, which from then on became punishable by forced labour, *relegatio*, *deportatio* or death.<sup>22</sup> Armed grave robbers just as highwaymen (*latrones*) were punished by death.<sup>23</sup>

The content of Paulus's *Sententiae* does not show a clear picture: one of the loci stipulates that the perpetrator should be punished by *deportatio* if he is *honestior* and by mine labour if he belongs to *humiliores*,<sup>24</sup> and, according to the other locus, by death if he belongs to *humiliores*.<sup>25</sup> Iulianus Apostata's decree threatens to apply the punishment for robbery of a church, i.e. capital sanction, to robbing of a grave/desecration of a grave.<sup>26</sup> Gordianus ranks the act of trading with parts, building components of a grave among *crimen laesae maiestatis*,<sup>27</sup> and Constantinus I punishes persons who take building materials away from a sepulchre by a further penalty, ten pound gold to be paid to the treasury.<sup>28</sup> Valentinianus II's decree from 385 excludes persons who desecrate a grave from the scope of any later amnesty,<sup>29</sup> and Valentinianus III's decree from 447 gives detailed regulation of the punishment to be imposed on perpetrators of the act in terms of their *status*: if the perpetrator is a clerical, he should be deprived of his dignity and should live in eternal exile, if he is a slave, *colonus* or a freeman with no property he should suffer death, if he is

<sup>18</sup> Dahn, F.: *Die Könige der Germanen, III. Verfassung des ostgothischen Reiches in Italien*. München, 1866. 170. ff.

<sup>19</sup> Cf. Ulpianus D. (ed.: Mommsen, Th.: *Corpus Iuris Civilis, I*. Berlin, 1954<sup>16</sup>.) 47, 12 pr.

<sup>20</sup> Nótári: *op. cit.* 343.

<sup>21</sup> Cumont, F.: Un rescrit impérial sur la violation de sépulture. *Revue Historique* 163. 1930. 341–366., 242. ff.

<sup>22</sup> Macer D. 47, 12, 8; Mommsen, Th.: *Römische Strafrecht*. Leipzig, 1899. 665<sup>4</sup>.

<sup>23</sup> Ulpianus D. 47, 12, 3, 7.

<sup>24</sup> Paulus, *Sententiae* (ed.: Riccobono, S.: *Fontes iuris Romani anteiustiniani, III*. Firenze, 1940.) 1, 21, 4–5.

<sup>25</sup> *Ibid.* 5, 19A

<sup>26</sup> *Codex Iustinianus* (ed.: Krueger, P.: *Corpus Iuris Civilis, II*. Berlin, 1908<sup>8</sup>.) 9, 19, 5.

<sup>27</sup> *Ibid.* 9, 19, 1.

<sup>28</sup> *Ibid.* 9, 19, 4. = *Codex Theodosianus* 9, 17, 4.

<sup>29</sup> *Codex Theodosianus* (eds: Mommsen, Th.–Meyer, P. M., Berlin, 1905.) 9, 38, 8. = *Lex Romana Visigothorum* 9, 28, 1.

a notable, he should be deprived of half of his property and should be *infamis*, and if an imperial official fails to prosecute this crime he should be deprived of his office, property and honour.<sup>30</sup> The Council of Toledo IV held in 633 orders to discharge priests who desecrate a grave of their office and obliges them to three years' repentance.<sup>31</sup>

In the light of all that it can be established that Theoderich the Great punishes robbing of a grave/desecration of a grave by death penalty fully in harmony with the spirit and provisions of Roman (imperial) law that took increasingly firm action against this crime, and most probably in the course of that lays special emphasis on protecting buildings and valuable sepulchres, which intention is quite clear from Constantinus I's above-mentioned decree already.<sup>32</sup>

*Lex Burgundiorum*<sup>33</sup> contains the following provision: a husband can dismiss his wife with impunity for three reasons: if she has committed adultery, crime, desecration of a grave, and in these cases the judge should pass sentence on the wife.<sup>34</sup> (It needs to be added that in case a wife leaves her husband, in accordance with Burgundian law, she shall suffer death by being drowned in a swamp.<sup>35</sup>) Connections with Roman law are absolutely clear again, for in one of his decrees Constantinus I vests the husband with the right to cast off his wife if she has committed adultery, magic or pandering, and, albeit, this list does not include desecration of a grave, the decree empowers the wife to divorce if her husband is guilty of manslaughter, mixing poison or desecration of a grave.<sup>36</sup> *Lex Romana Burgundiorum* issued for the Roman population adopts this provision, and ranks desecration of a grave among causes for divorce that a wife can refer to.<sup>37</sup> (*Lex Romana Burgundiorum*—which was also called *Papianus* from the erroneous version of Papinian's name—was created at the turn of the 5<sup>th</sup> and 6<sup>th</sup> c. upon the instructions of King Gundobad, and contained provisions for the inhabitants of the territory considered former Roman subjects. It was made on the basis of three collections of imperial decrees: *Codex Gregorianus*, *Codex Hermogenianus* and *Codex Theodosianus*, Paulus's *Sententiae* and one of Gaius's works, however, not by abridgement but by rewriting the content.<sup>38</sup>) In view of the fact that the Burgundian law mentions desecration of a grave committed by the wife together with adultery to be punished by death penalty, it can be presumed that its

<sup>30</sup> *Lex Romana Visigothorum Nov. Valentiniani III.* (ed.: Krüger, P.: *Collectio librorum iuris antejustiniani, III.* Berlin, 1878.) tit. 5.

<sup>31</sup> *Concilium Toletanum IV. (a. 633)* (ed.: Mansi, J. D.: *Sacrorum conciliorum nova amplissima collectio, IX.* Firenze, 1763.) 46.

<sup>32</sup> Nehlsen: *Der Grabfrevel... op. cit.* 118.

<sup>33</sup> See Nehlsen, F.: *Lex Burgundionum.* In: *Handwörterbuch zur deutschen Rechtsgeschichte.* II. Berlin, 1978. 1901–1915.

<sup>34</sup> *Lex Burgundionum* 34, 3. *Si quis vero uxorem suam forte dimittere voluerit et ei potuerit vel unum de his tribus criminibus adprobare, id est: adulterium, melficium vel sepulchrorum violatricem, dimittendi eam habeat liberam potestatem; et iudex in eam, sicut debet in criminosam, proferat ex lege sententiam.*

<sup>35</sup> *Ibid.* 34, 1. *Si qua mulier maritum suum, cui legitime est iuncta, dimiserit, necetur in luto.*

<sup>36</sup> *Codex Theodosianus* 3, 16, 1.

<sup>37</sup> *Lex Romana Burgundionum* (ed.: V. Salis, R. L.: *Monumenta Germaniae Historica, Leges, II/1.* Hannover, 1892.) 21, 3. *Quod si mulier nolente marito repudium ei dare voluerit, non aliter fieri hoc licebit, quam si maritum homicidam probaverit, aut sepulchrorum violatorem, aut veneficum.*

<sup>38</sup> Nótári: *op. cit.* 493.

sanction could not be any milder.<sup>39</sup> To understand to what extent it was translated into practice, it is worth looking at the letter of Sidonius Apollinaris bishop of Clermont, in which he describes an event when he caught perpetrators looting graves in the act and driven by righteous anger he immediately punished the robbers instead of delivering them to the bishop having competence—later, he regretted what he had done, however, he made it clear that they would have been punished by death penalty anyway in accordance with ancient unwritten law.<sup>40</sup>

In the mirror of all that—just as in the case of *Edictum Theoderici*—the severity of the sanction should be traced back to Roman impact rather than to its presumed roots in German folk laws.<sup>41</sup>

Although it extensively drew on Roman law, Visigothic law preserved several elements arising from ancient German customary law, for example, the *compositio* system prevailed for a long time—this regime stipulated pecuniary compensation for serious offence in case the perpetrator was a free man. Accordingly, *Lex Visigothorum* sets forth the following provisions under the title *De violatoribus sepulchrorum*. The same locus contains two states of facts: ruining of a grave (literally opening of a grave), robbing of the clothes or ornaments of the yet unburied dead person: if the perpetrator is a free man, he shall pay one pound gold to the relatives of the deceased and shall return the objects taken, if there are no inheritors, the penalty equal to seventy-two *solidus* is due to the treasury; furthermore, the perpetrator shall be hit one hundred times by a whip. If the perpetrator is a slave, after he has been hit two hundred times by a whip—just as in the Roman system where capital punishment was always preceded by *verberatio*<sup>42</sup>—he shall be burnt.<sup>43</sup> Flogging, which is introduced by the term “*praeterea*” and should be executed on perpetrators in a free *status* too, is most probably the result of later addition since there are good chances that the core of the provision evolved as early as during the period of Eurich (466–484) or Leovigild (568–586), and this sanction was included in punishments only during the period of Recceswind (653–672), however, this punishment, which can be presumed to be original, and the sanction under Roman law significantly overlap.<sup>44</sup>

In accordance with the next provision related to the grave: if anybody—specifically a free man—has taken the sarcophagus because he needed *remedium*, he will be bound to pay twelve *solidus* to the relatives of the dead person; if this has been done by a slave upon his master’s command, then his master shall pay instead of him; and if this act has been committed by a slave at his own discretion, then he shall be hit one hundred times by a whip, and once he has returned the misappropriated things, he shall restore the original state

<sup>39</sup> Nehlsen: *Der Grabfrevel... op. cit.* 119.

<sup>40</sup> Sidonius Apollinaris, *Epistulae* (ed.: Luetjohann, C.: *Monumenta Germaniae Historica, Auctores antiquissimi, VIII.* Berlin, 1887.) 3, 12.

<sup>41</sup> Nehlsen: *Der Grabfrevel... op. cit.* 118.

<sup>42</sup> Nótári: *op. cit.* 429.

<sup>43</sup> *Lex Visigothorum* 11, 2, 1. *Si quis sepulcri violator extiterit aut mortuum expoliaverit et ei aut ornamenta vel vestimenta abstulerit, si liber hoc fecerit, libram auri coactus exolvat heredibus et que abstulit reddat. Quod si heredes non fuerint, fisco nostro cogatur inferre et preterea C flagella suscipiat. Sevus vero, si hoc crimen amiserit, CC flagella suscipiat et insuper flammis ardentibus exuratur, deditis nihilominus cunctis, que visus est abstulisse.*

<sup>44</sup> Nehlsen: *Der Grabfrevel... op. cit.* 120. f.

of the grave.<sup>45</sup> The term *remedium* calls for some explanation since it cannot be interpreted as *medicine, drug*. There is a good chance for presuming that the objects related to the dead person were required as requisites of magical rituals since ceremonies conducted by this kind of aids were widely accepted both in Roman and German religious belief.<sup>46</sup> All this seems to be supported by the fact that Burchard of Worms discussed desecration of a grave under the title *De arte magica in Liber decretorum*.<sup>47</sup> Yet, as a matter of fact, it cannot be ruled out that the sarcophagus was stolen not for some mystical cause but for the pure reason that the thief wanted to use it, which is far from surprising since both Roman law and early medieval lawmaking deals with the issue of double burial and clearly prohibit it.<sup>48</sup> This might explain the fact that the law orders to punish a perpetrator in free *status* by a penalty of a relatively low amount.<sup>49</sup>

It can be stated that in the legal system of Ostrogoths and Burgundians robbery of a grave/desecration of a grave was punished by death—presumably upon the impact of Roman law; western Gothic law represents some kind of transition between Roman and German legal tradition: while slaves suffer death for this act, free persons are punished by pecuniary penalty only, which will be accompanied only later by corporeal punishment, flogging.<sup>50</sup>

Langobardic laws, more specifically *Edictus Rothari* created in 643, distinguish three states of facts, which serve protection of the dead person and the grave. With regard to murder committed in secret (*morth*) the law orders to punish persons who plunder a dead person (*plodraub*) by eighty *solidus* in addition to the *conpositio* of manslaughter (nine hundred *solidus*),<sup>51</sup> which shall be paid to the relatives of the killed person.<sup>52</sup> If somebody robs a dead person found in a riverbed or outdoors who was not killed by him (*raibraub*) and hides the corpse, he shall pay eighty *solidus* to the relatives of the deceased. However, if he finds a dead person, plunders him, and then notifies the fact to the neighbours, and it becomes clear that he took the valuables found with the dead person as a reward and not with the intention to misappropriate them, then it will not be necessary to investigate the matter, once he has returned the valuables.<sup>53</sup> There are good chances that *plodraub* and

<sup>45</sup> *Lex Visigothorum* 11, 2, 2. *Si quis mortui sarcofagum abstulerit, dum sibi vult habere remedium, XII solidus iudice insistente heredibus mortui cogatur exolvere. Quod si domino iubente servus hoc admiserit, dominus pro servo suo componere non moretur. Servus vero, si ex sua voluntate hoc admiserit, nihilominus C flagella suscipiat, et quod tulerat et loco et corpori proprio reformetur.*

<sup>46</sup> Dahn, F.: *Westgothische Studien*. Würzburg, 1874. 235; Kiessling, E.: *Zauberei in den germanischen Volksrechten*. Diss. Frankfurt, 1941. 30. f.

<sup>47</sup> Nehlsen: *Der Grabfrevel... op. cit.* 121.

<sup>48</sup> Ulpianus D. 47, 12, 3, 3; *Concilium Matisconense* (a. 585) can. 17; *Concilium Antissiodorensis* (a. 573/603) can. 15.

<sup>49</sup> Nehlsen: *Der Grabfrevel... op. cit.* 123.

<sup>50</sup> *Ibid.*

<sup>51</sup> Baesecke, G.: *Die deutschen Worte der germanischen Gesetze. Beiträge zur Geschichte der deutschen Sprache und Literatur* 59. 1935. 1–101, 32; Munkse, H. H.: *Der germanische Rechtswortschatz im Bereich der Missetaten. Philologische und sprachgeographische Untersuchungen, I. Die Terminologie der älteren germanischen Rechtsquellen*. Berlin–New York, 1973. 266.

<sup>52</sup> *Edictus Rothari* 14. *Et si expolia de ipso mortuo tulerit, id est plodraub, conponat octoginta solidos.*

<sup>53</sup> *Ibid.* 16. *Si quis hominem mortuum in flumine aut foris invenerit aut expoliaverit et celaverit, conponat parentibus mortui solidos octoginta. Et si eum invenerit et expoliaverit et mox vicinibus patefecerit, et cognoscitur quod pro mercedis causa, nam non furtandi animo fecerit, reddat spolia, quas super cum invenerit, et amplius ei calumnia non generetur.*

*raibraub*,<sup>54</sup> i.e. plundering of a dead person, might have been states of facts regulated by German unwritten law a long time before Rothari's code, and the eighty *solidus* as payable amount appears at several other points in *Edictus Rothari*, for example, in the state of facts of *marhwuorfin*, i.e. throwing a free man off of a horse.<sup>55</sup> (It should be added that linguistically *raibraub* and *plodraub* show close connections with the term *walaraupa* contained in *Lex Baiuvariorum*,<sup>56</sup> which means plundering of a person killed in action.<sup>57</sup>) However, if somebody ruins a grave and throws out the corpse (*grapwurf*),<sup>58</sup> he shall pay nine hundred *solidus* to the relatives of the dead person, and if there are no relatives, then this amount will be collected by the *gastaldus* or *sculdhais* for the treasury.<sup>59</sup> This punishment more or less corresponded to the fine ordered by Constantinus I (ten pound gold), however, as it has been described above, the imperial decree threatened the perpetrator with death penalty in addition to the above.<sup>60</sup> (The nine hundred *solidus* amount of the *conpositio* is applied with regard to other crimes that seriously prejudice public interest in *Edictus Rothari*, for example, in case of causing *scandalum* at a meeting,<sup>61</sup> attacking a traveller on the way to the king,<sup>62</sup> distraint of a horse or a herd without the king's licence,<sup>63</sup> and the above-mentioned assassination, *morth*.<sup>64</sup>) Presumably, the high amount of *conpositio* was assessed not in view of the motive but because public peace was endangered, i.e. the legal interest meant to be protected by the king<sup>65</sup> was prejudiced.<sup>66</sup> If the perpetrator was unable to pay the *conpositio*, he became a life-long servant of his creditor, in accordance with Liutprand's provision.<sup>67</sup> In case robbing of a grave/desecration of a grave was committed by a slave, he was to suffer death, in accordance with the provisions of King Grimoald,<sup>68</sup> which might have been an innovation of the king since during the reign of King Rothari when a slave committed a crime, then his master had to

<sup>54</sup> See van den Rhee, F.: *Die germanischen Worte in den langobardischen Gesetzen*. Rotterdam, 1970. 39 f.; 111. f.

<sup>55</sup> *Edictus Rothari* 30.

<sup>56</sup> *Lex Baiuvariorum* 19, 4.

<sup>57</sup> Baesecke: *op. cit.* 16; 23; 32; 87; Kralik: *op. cit.* 124. f.

<sup>58</sup> Cf. Rhee: *op. cit.* 78.

<sup>59</sup> *Edictus Rothari* 15. *Si quis sepulturam mortui hominis ruperit et corpus expoliaverit aut foris iactaverit, nongentos soledos sit culpavelis parentibus sepulti. Et si parentis proximi non fuerint, tunc gestaldius regis aut sculdhais requirat cupla ipsa et ad curte regis exegat.*

<sup>60</sup> Nehlsen: *Der Grabfrevel...* *op. cit.* 124.

<sup>61</sup> *Edictus Rothari* 8.

<sup>62</sup> *Ibid.* 18.

<sup>63</sup> *Ibid.* 249.

<sup>64</sup> *Ibid.* 14.

<sup>65</sup> *Ibid.* 74.

<sup>66</sup> Nehlsen: *Der Grabfrevel...* *op. cit.* 125.

<sup>67</sup> *Leges Liutprandi* (ed. F. Bluhme: *Edictus ceteraque Langobardorum leges cum constitutionibus et pactis principum Beneventanorum ex maiore editione monumentis Germaniae inserta*. Hannover, 1869.) 152.

<sup>68</sup> *Leges Grimoaldi* (ed. F. Bluhme: *Edictus ceteraque Langobardorum leges cum constitutionibus et pactis principum Beneventanorum ex maiore editione monumentis Germaniae inserta*. Hannover, 1869.) 3.

pay the *compositio* and he could not exercise the option to deliver the slave to the authorities in order to get rid of the penalty.<sup>69</sup>

Just as in western Gothic law, in Langobardic law it is possible to discover the German legal roots in judging the act, i.e. the *delictum* character, which required the perpetrator to pay *compositio*; the *crimen* character, i.e. the option of capital punishment, was introduced later—but, contrary to western Gothic law, Langobardic law did not reach this level in case of perpetrators with a free *status*.<sup>70</sup>

## II

From among Frankish sources, first, it is worth investigating *Lex Ribuaria* noted down in the first half of the 7th c.<sup>71</sup> Under the title *De corporibus expoliatis* the law distinguishes plundering of an unburied corpse and an already buried corpse. In case of plundering an unburied corpse, if the perpetrator admits his act, he shall pay sixty *solidus*, if he denies it and he has been proved to have committed the act, he shall pay one hundred *solidus* and the *dilatatura*, or he shall take a cleansing oath together with six fellow oath-takers—this issue will be discussed later.<sup>72</sup> *Dilatatura* is usually interpreted in the sense of *default penalty*—nevertheless, the term covers the reward to be paid to the *delator*, the person who makes the charge.<sup>73</sup> In the above-mentioned case of plundering the dead person the perpetrator shall pay two hundred *solidus*.<sup>74</sup>

It should be noted that a few titles later *Lex Ribuaria* returns to this issue and under the title *De corpore expoliato* expounds the state of facts of plundering an unburied and a buried corpse again, however, here it no longer distinguishes a perpetrator who admits his act from the one who denies it. The robber of an unburied corpse shall pay one hundred *solidus*, shall return or compensate for the robbed valuables and shall bear the reward of the person who makes charges.<sup>75</sup> Compared to the state of facts referred to in the above-mentioned title, the difference is that in the former the lawmaker might have presumed that the injured party had been killed by the perpetrator, and for this reason inserted the distinction between an admitting and denying perpetrator in the text subsequently, which is supported by the fact that a cleansing oath to be taken together with six fellow oath-takers is completely senseless in case of a perpetrator who admits his act. In the light of that, the latter title refers to the state of facts when the plundered person has not been killed by the

<sup>69</sup> Nehlsen, H.: *Sklavenrecht zwischen Antike und Mittelalter. Germanisches und römisches Recht in den germanischen Rechtsaufzeichnungen. I. Ostgoten, Westgoten, Franken, Langobarden.* Göttinger Studien zur Rechtsgeschichte 7. Frankfurt a. M.–Zürich, 1972. 377.

<sup>70</sup> *Ibid.* 126.

<sup>71</sup> Schmidt-Wiegand, R.: *Lex Ribuaria.* In: *Handwörterbuch zur deutschen Rechtsgeschichte*, II. Berlin, 1978. 1923–1927.

<sup>72</sup> *Lex Ribuaria* 55, 1. *Si quis autem hominem mortuum, antequam humetur, expoliaverit, si interrogatus confessus fuerit, bis trigenos solidos multetur. Si autem negaverit et postea convictus fuerit, bis quinquaginta solidos cum dilatatura multetur, aut cum VI iuret.*

<sup>73</sup> Nehlsen: *Sklavenrecht ... op. cit.* 313<sup>286</sup>.

<sup>74</sup> *Lex Ribuaria* 55, 2. *Si quis mortuum effodire praesumpserit, quater quinquagenos solidos multetur aut cum XII iuret.*

<sup>75</sup> *Ibid.* 88, 1. *Si quis corpus mortuum, priusquam sepeliatur, expoliaverit, C sol. cum capitale et dilatatura multetur.*

robber.<sup>76</sup> With respect to the two hundred *solidus* penalty imposed on the person who plunders an already buried person there is no difference between the two titles, but the latter adds a stipulation to it, concordant with *Lex Salica*, stating that the perpetrator will be considered *wargus* until—emphatically until and as long as—he has paid the *compositio* to the relatives of the injured party.<sup>77</sup>

The analysis of the relevant loci of *Lex Salica* is significantly more problematic than the examination of the folk laws containing fairly clear provisions, discussed so far, which can be attributed to a considerable extent to uncertainties of the texts left to us, therefore—for the avoidance of doubt—we shall consistently use the terms of Eckhardt's *editio*.<sup>78</sup> In the most reliable manuscripts (A2, A3, A4, C5, C6) the state of facts of plundering a yet unburied dead person in a free status can be found under the title *De supervenientis vel expoliationibus*, and the law orders to punish it by one hundred *solidus* penalty.<sup>79</sup> In agreement with Eckhardt, the term *chreumusido* can be translated as body snatching (*Leichenberaubung*).<sup>80</sup> However, a few titles later the state of facts of body snatching occurs again (under the title *De corporibus expoliatis*), and on this locus there are considerable differences between the manuscripts that belong to group A and group C, since the texts of group C set out sixty-two and a half *solidus* penalty and speak about the corpse of a dead person only (*corpus hominis mortui*);<sup>81</sup> yet, the texts of group A stipulate *compositio* amounting to sixty-three *solidus* and mention the corpse of a killed person (*corpus occisi hominis*).<sup>82</sup> Eckhardt corrected the term *freomosido* in the glossary (interpreted by him as robbing of a free man) and replaced it by *chreoosido* that occurred before;<sup>83</sup> yet, no matter which text version we accept, the amount of the *compositio* set out in the two titles are by no means equal, which is adopted by *Lex Salica-Karolina*, too.<sup>84</sup> At the same time, newer manuscripts (D, E) mention body snatching at one place only, and they order to punish it by sixty-two and a half *solidus*.<sup>85</sup> There are good chances that *Lex Salica Karolina* did not adopt the two separate states of facts—specifically: the differentiation of plundering a person killed by the robber (*occisus*) and of a dead person not injured by the robber (*mortuus*)—

<sup>76</sup> Nehlsen: *Der Grabfrevel... op. cit.* 136.

<sup>77</sup> *Lex Ribuarica* 88, 2. *Si autem eum ex homo traxerit et expoliaverit, CC sol. cum capitale et dilatura culpabilis iudicetur. vel wargus sit (hoc est expulsus), usque ad parentibus satisfecerit.*

<sup>78</sup> Eckhardt, K. A. (ed.): *Lex Salica. Monumenta Germaniae Historica, Leges nationum Germanicarum*, IV. 2. Hannover, 1969.

<sup>79</sup> *Lex Salica* 14, 9. *Si quis hominem mortuum antequam in terra mitatur in furtum expoliaverit, malb. chreumusido sunt den. III M qui fac. sol. C cupl. iud.*

<sup>80</sup> Eckhardt, K. A. (ed.): *Pactus legis Salicae. Monumenta Germaniae Historica, Leges nationum Germanicarum*, I. 4/1. Hannover, 1962. 281.

<sup>81</sup> *Lex Salica* 55, 1. (C6) *Si quis corpus hominis mortui antequam in terra mitatur in furtum expoliaverit, malb. freomodis sunt den. IIMD qui fac. sol. LXII semis culp. iud.*

<sup>82</sup> *Ibid.* 55, 1. (A1) *Si quis corpus occisi hominis antequam in terra mittatur expoliaverit in furtum, mal. uuaderio hoc est f. sol. LXIII culp. iudic.*

<sup>83</sup> Eckhardt: *Pactus... op. cit.* 205.

<sup>84</sup> *Lex Salica Karolina* 17, 1. *Si quis hominem mortuum antequam in terra mittatur in furtum expoliaverit, IVM denariis qui faciunt solidos C culpabilis iudicetur;* 57, 1. *Si quis corpus hominis mortui antequam in terra mitatur per furtum expoliaverit, MMD denariis qui faciunt solidos LXII semis culpabilis iudicetur.*

<sup>85</sup> *Ibid.* 19, 1. (D) *Si quis corpus occisi hominis, antequam in terra mittatur, in furtum expoliaverit, mallobergo chreo mardo (sunt dinarii MMD qui faciunt) solidus LXII semis culpabilis iudicetur.*

because it did not become deeply rooted in legal literacy. On the other hand, it maintained the double amount of *compositio*: sixty-two and a half and one hundred *solidus*, which might have meant that the man who robbed the valuables of a dead person was obliged to pay one hundred *solidus*, while the one who killed his victim first and then plundered him was obliged to pay, in addition to blood money for murder, sixty-two and a half *solidus*.<sup>86</sup>

In case of plundering a dead slave, the perpetrator shall pay thirty-five *solidus* to the slave's master,<sup>87</sup> if, however, the objects with the slave did not exceed the value of forty *denarius*, then the perpetrator was obliged to pay merely fifteen *solidus*.<sup>88</sup>

All these amounts of *compositio* properly harmonise with other blood moneys of *Lex Salica*: a robber of a free man shall pay sixty-two and a half *solidus*, too,<sup>89</sup> just as those who intrude into an alien courtyard<sup>90</sup> or commit bodily injury causing paralysis of the hands,<sup>91</sup> similarly, a person who plunders a live slave shall pay thirty-five or fifteen *solidus*.<sup>92</sup> The *compositio* amounting to one hundred *solidus* occurs in the case of robbing of a sleeping person.<sup>93</sup>

Actual robbing of a grave is dealt with by the groups of older manuscripts (A, C, K) under two titles: *De supervenientis vel expoliationibus* and *De corporibus expoliatis*. In case of the first, the man robbing a grave shall pay two hundred *solidus*.<sup>94</sup> The second locus (according to groups A and C) again stipulates indemnification of two hundred *solidus*, however, it includes the stipulation containing the term *wargus*, which gives rise to extensive disputes, that condemns the perpetrator as *wargus* until he has discharged his debt. A person considered *wargus* is compelled to live outside society until the relatives of the injured party ask the judge to let him return, until which time nobody, not even his next of kin or relatives can give him bread or shelter; so, he gets into a kind of *exlex* status, and anybody who breaches this prohibition shall pay fifteen *solidus*.<sup>95</sup> The groups of manuscripts D and E explain the term *wargus* by the word *expellis*, and again add that the perpetrator can live his life solely as an outcast until paying off the *compositio*.<sup>96</sup>

<sup>86</sup> Nehlsen: *Der Grabfrevel... op. cit.* 138.

<sup>87</sup> *Lex Salica* 35, 6. (C6) *Si quis servum alienum mortuum in furtum expoliaverit et ei super XL den. valentes tulerit, malb. teofriomosido IMCCCC den. qui fac. sol. XXXV culp. iudic.*

<sup>88</sup> *Ibid.* 35, 7. (C6) *Si quis spolia minus XL den. valuerit, teofriomosido DC den. qui fac. sol. XV culp. iud.*

<sup>89</sup> *Ibid.* 14, 1.

<sup>90</sup> *Ibid.* 14, 6.

<sup>91</sup> *Ibid.* 29, 2.

<sup>92</sup> *Ibid.* 35, 2. 3.

<sup>93</sup> *Ibid.* 26, 1.

<sup>94</sup> *Ibid.* 14, 10. (A2) *Si quis hominem exfuderit et expoliaverit, mal. turni cale sunt din. VIIIIM fac. sol. CC cui fuerit adprobatum cul. iud.*; (C6) *Si quis hominem mortuum effoderit vel expoliaverit, malb. ternechallis sive odocarina sunt den. VIIIIM qui fac. sol. CC culp. iud.*

<sup>95</sup> *Ibid.* 55, 4. (A, C) *Si quis corpus iam sepultum effoderit et expoliaverit et ei fuerit adprobatum, mallobergo muther hoc est, uuargus sit usque in diem illam quam ille cum parentibus ipsius defuncti conveniat, ut et ipsi pro eo rogare debeant, ut ei inter homines liceat accedere. Et qui ei, antequam cum parentibus conponat, aut panem dederit aut hospitem dederit, seu parentes, seu uxor sua proxima, DC denariois qui faciunt solidos XV culpabilis iudicetur. Tamen auctor sceleris, qui hoc admisisse probatur aut efodisse, mallobergo tornechale sunt, VIIIIM denarios qui faciunt solidos CC culpabilis iudicetur.*

<sup>96</sup> *Ibid.* 55, 4. (D, E) *Si quis corpus sepultum exfodierit et expoliaverit, uuargus sit, id est expellis, usque in diem illum, quam ipsa causa cum parentibus defuncti faciat emendare et ipsi*

From among provisions on desecration of a grave, up to now in literature the greatest attention has been paid to title 55 of *Lex Salica*,<sup>97</sup> as it is here that the word *wargus* can be read as a synonym of *expulsus* or *expellis*, which was translated by Jacob Grimm as *robber* or *wolf*, in view of the fact that the person cast out of the community is the inhabitant of the wilderness just as a beast, and anybody can kill him with impunity just as a wolf.<sup>98</sup> This conception was confirmed by Wilda's view<sup>99</sup> which stated that close connection can be made between *wargus*, interpreted by him in the context of restlessness (*Friedlosigkeit*), and the Old Norse *vargr* (malefactor, wolf)—in spite of all the criticism,<sup>100</sup> this view prevailed both in older<sup>101</sup> and contemporary German legal history.<sup>102</sup>

For example, Mitteis defines *Friedlosigkeit*—in organic relation to the legal content of the meaning of the term *wargus*—as follows: it includes violation of the interests of the people and the state (for example, body snatching, since thereby the perpetrator makes it impossible to exercise the cult of the dead), acts committed with vile intentions, by stealth—due to all that the perpetrator will become an outlaw (*exlex, outlaw*), his wife shall be considered a widow and his children orphans, from then on he must live in the wilderness, far from any human community, just as if he were a werewolf (*Werwolf, gerit caput lupinum*).<sup>103</sup> Kaufmann also connects the phrase *wargus* with the Anglo-Saxon word *vearg* and the Old Norse word *vargr*, and relates the person cast out of the community—specifically concerning the robbing of a grave considered religious crime—to a wolf that lives outside human society, civilisation.<sup>104</sup> In his interpretation, Erler goes even further: he calls the attention to the aspect of the wolf in Old German religion based on which it was associated with body snatching, corpse/carrion eating and therefore was considered a death demon—so, he provides further indicium with regard to a desecrator of a grave or a body snatcher for relating him to a wolf.<sup>105</sup> It should be underlined that Erler considered this identification an allegory, imagery manifesting itself in law as well as one of the most magnificent documents of archaic thinking.<sup>106</sup> A similar position, a position unambiguously considering body snatching/desecration of a grave one of the major crimes, was taken in this respect by

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*parentes rogare ad iudicem debeant, ut ei inter homines liceat habitare, si tamen auctor sceleris, mallobergo turnichal, (sunt dinarii VIIIIM qui faciunt) solidus CC culpabilis iudicetur. Et qui eum, antequam cum parentibus defuncti satisfaciat, ospicium dederit, (sunt dinarii DC qui faciunt) solidus XV culpabilis iudicetur.*

<sup>97</sup> Geffcken, H.: *Lex Salica*. Leipzig, 1898. 205. ff.; Unruh, G. C. v.: *Wargus. Friedlosigkeit und magisch-kultische Vorstellungen bei den Germanen. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung* 74. 1957. 1–40; Jacoby, M.: *wargus, vargr, Verbrecher, Wolt, eine sprach- und rechtsgeschichtliche Untersuchung*. Uppsala, 1974. passim.

<sup>98</sup> Grimm, J.: *Deutsche Rechtsalterthümer, I–II*. Leipzig, 1922<sup>4</sup>. I. 270; 334. f.

<sup>99</sup> Wilda, W. E.: *Geschichte des deutschen Strafrechts, I. Das Strafrecht der Germanen*. Halle, 1842. 278. ff.

<sup>100</sup> Rehfeldt, B.: *H. Siuts, Bann und Acht und ihre Grundlagen im Totenglauben, 1959. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung*, 87. 1961. 437–439.

<sup>101</sup> Brunner, H.: *Deutsche Rechtsgeschichte, I–II*. Berlin 1906<sup>3</sup>. I. 410. ff.; Harder, 1938. 5.

<sup>102</sup> Mitteis, H.: *Deutsche Rechtsgeschichte*. München, 1978<sup>15</sup>. 31. f.

<sup>103</sup> *Ibid.* 31.

<sup>104</sup> Kaufmann, E.: *Acht*. In: *Handwörterbuch zur deutschen Rechtsgeschichte*, I. Berlin, 1971. 25–32.

<sup>105</sup> Erler, A.: *Friedlosigkeit und Werwolfglaube*. *Paideuma* 1. 1938/40. 303–317.

<sup>106</sup> *Ibid.* 317.

Amira<sup>107</sup> and His<sup>108</sup> too. In literature it was Nehlsen who called the attention for the first time—quite properly—to the point that in relation to this state of facts extreme care should be taken when comparing sources, especially in involving northern sources.<sup>109</sup>

When interpreting this locus—to get an answer to the question whether the *wargus* locus covers an institution of ancient German customary law *ex asse* indeed—it is worth examining ecclesiastical lawmaking as well. The Council of Toledo IV held in 633 classified desecration of a grave as *sacrilegium*.<sup>110</sup> *Poenitentiale Romanum* from the 8<sup>th</sup> c. sentences a clerical who commits desecration of a grave to seven-year penitence, including three years on bread and water,<sup>111</sup> in other words, it imposes the same punishment as on a layman committing manslaughter,<sup>112</sup> and *Poenitentiale Casinense* dating from the early 8<sup>th</sup> c. prescribes five-year penitence<sup>113</sup> (exactly as many as in case of kidnapping/abduction),<sup>114</sup> just as the Frankish *Poenitentiale Parisiense*,<sup>115</sup> *Poenitentiale Merseburgense*<sup>116</sup> and *Poenitentiale Hubertense*.<sup>117</sup> If the perpetrator was not willing to submit to either secular punishment (payment of *compositio*) or ecclesiastical penalty (penitence), the Church had the opportunity to excommunicate him from the Church, i.e. apply *anathema* against him.<sup>118</sup> This sanction was applied, for example, against those who caused damage to ecclesiastical property, who stubbornly refused to pay reparation,<sup>119</sup> however, similar punishment was imposed in accordance with *Poenitentiale Vinniai* on clericals who committed homicide and who were allowed to enter the community again only after long penitence, reconciliation with the relatives of the injured party.<sup>120</sup> The sanction of *Poenitentiale Columbani*<sup>121</sup> created in Gallia, which can be definitely compared with this provision, states that a *homicida* who

<sup>107</sup> See Amira, K. v.: Die germanischen Todesstrafen. Untersuchungen zur rechts- und Religionsgeschichte. *Abhandlungen der Bayerischen Akademie der Wissenschaften*. Philosophisch-philologische und historische Klasse, XXXI/3. München, 1922.

<sup>108</sup> His, R.: *Geschichte des deutschen Strafrechts bis zur Karolina*. München–Berlin, 1928. 159.

<sup>109</sup> Nehlsen: *Der Grabfrevel... op. cit.* 111.

<sup>110</sup> *Concilium Toletanum IV. (a. 633)* (ed. Mansi, J. D.: *Sacrorum conciliorum nova amplissima collectio*. IX. Firenze, 1763.) 46. *Si quis clericus in demoliendis sepulcris fuerit deprehensus, quia facinus hoc pro sacrilegio legibus publicis sanguine vindicatur, oportet canonibus in tali scelere proditum a clericatus ordine submoverti, et poenitentiae triennio deputari.*

<sup>111</sup> *Poenitentiale Romanum* (Hrsg.: Schmitz, H. J.: *Die Bußbücher und Bußdisziplin der Kirche*. Mainz, 1883.) 29.

<sup>112</sup> *Ibid.* 4.

<sup>113</sup> *Poenitentiale Casinense* (Hrsg.: Schmitz H. J.: *Die Bußbücher und Bußdisziplin der Kirche*. Mainz, 1883.) 76.

<sup>114</sup> *Ibid.* 79.

<sup>115</sup> *Poenitentiale Parisiense* (Hrsg.: Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 9.

<sup>116</sup> *Poenitentiale Merseburgense* (Hrsg.: Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 15.

<sup>117</sup> *Poenitentiale Hubertense* (Hrsg.: Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 16.

<sup>118</sup> Cf. *Concilium Toletanum IV. (a. 633)* 75.

<sup>119</sup> *Concilium Turonense II. (a. 567)* (ed. Maassen, F.: *Monumenta Germaniae Historica, Concilia aevi Merovingici*, I. Hannover, 1893.) 25.

<sup>120</sup> *Poenitentiale Vinniai* (Hrsg. Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 23.

<sup>121</sup> Laporte, J.: *Le penitentiel de Saint Coloman*. Tournai–Paris–Rome–New York, 1958. 20. ff.

does not submit to secular punishment must be expelled from the community and can enter it again when a cleric attests that he has paid the *compositio* to the relatives of the injured party.<sup>122</sup> In accordance with *Lex Salica* the relatives themselves stand witness that payment of the *compositio* has been made.

In case of abduction of nuns, the expulsion of a perpetrator who fails to perform the punishment imposed on him is prescribed by *Lex Baiuvariorum*, too,<sup>123</sup> and the phrase "*expellatur de provincia*" used by it is a clear reminiscence of the phrase "*wargus sit, id est expellis*" of *Lex Salica*.<sup>124</sup>

On the other hand, ecclesiastical lawmaking contains, in addition to excommunication, prohibition of maintaining contact with the outcast person. For example, the relevant canon of the Council of Arles concluded in 506<sup>125</sup> was inserted in *Collectio vetus Gallica* created between 585 and 626/27, which forbids any kind of connection with the outcast person.<sup>126</sup> In 511, the Council of Orléans I<sup>127</sup> set similar regulations; what is more, it subjected persons breaching this prohibition to *anathema (excommunicatio)*.

Based on all that it can be declared that the provision of *Lex Salica* highly corresponds to the ecclesiastical lawmaking of the period, i.e. the efforts of the Church to outcast those from society who are reluctant to pay the penalty, and to ensure that all kinds of solidarity and communication with them shall be prohibited until it is proved credibly—by testimony of the relatives of the injured party in *Lex Salica*—that they have discharged the statutory sanction. As the Church introduced this practice from the late Antiquity already, the current ruler, who took such action against perpetrators in case of robbing of a grave/desecration of a grave, could rely on the support of the Church. As far as *Lex Baiuvariorum* is concerned, ecclesiastical assistance in drafting the text can be considered fairly clear; however, based on that even in case of *Lex Salica* the contribution of the clergy to editing cannot be ruled out either.<sup>128</sup>

Now, it is worth examining what the term *wargus* covers in *Lex Salica* and to what extent it can be considered a surviving element of ancient German linguistic tradition and written law. Three loci in Wulfila's Gothic translation of the New Testament are noteworthy with respect to the translation of the verb *damnare* and its derivatives. It interprets the text on condemnation of Jesus in the Gospel according to St. Matthew (*et damnabunt eum*

<sup>122</sup> *Poenitentiale Columbani* (Hrsg. Wasserschleben, F. W. H.: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitung*. Halle, 1851.) 15.

<sup>123</sup> *Lex Baiuvariorum* 1, 11.

<sup>124</sup> *Lex Salica* 55, 4.

<sup>125</sup> *Concilium Arelatense (a. 442–506)* (ed.: Mansi, J. D.: *Sacrorum conciliorum nova amplissima collectio, XXIII*. Firenze, 176.) 2.

<sup>126</sup> *Collectio vetus Gallica* (Hrsg.: Mordek, H.: *Kirchenrecht und Reform in Frankenreich. Die Collectio Vetus Gallica, die älteste systematische Kanonensammlung des fränkischen Gallien. Studien und Edition*. Berlin, 1975) 17, 12. *Si quis a communione sacerdotale fuerit auctoritate suspensus, hunc non solum a clericorum, sed etiam a totius populi conloquio adque convictu placuit excludi, donec resepicens ad sanitatem redire festinet.*

<sup>127</sup> *Concilium Aurelianense I. (a. 511)* (ed.: Maassen, F.: *Monumenta Germaniae Historica, Concilia aevi Merovingici, I*. Hannover, 1893.) 11. *De his, qui suscepta poenitentia religionem suae professionis oblii ad saecularia relabuntur, placuit eos a communicatione suspendi et ab omnium catholicorum convivio separari. Quod si post interdictum cum iis quisquam praesumerit manducare, et ipse communione privetur.*

<sup>128</sup> Nehlsen: *Der Grabfrevel... op. cit.* 154.

morte) by the phrase "jah gawargjand ina dauþan",<sup>129</sup> in which *gawargjand* corresponds to the Latin verb *damnare*.<sup>130</sup> The noun *damnatio* in one of the loci of St. Paul<sup>131</sup> is translated into Gothic by the word *wargiþa*<sup>132</sup> and in another locus<sup>133</sup> *condemnatio* corresponds to the Gothic noun *gawargeins*.<sup>134</sup>

The term *wargus* in this form occurs for the first time in one of Sidonius Apollinaris's letters, which relates that a woman was abducted by *varguses*, i.e. highwaymen, and explains that this is how local robbers are called (*latrunculi*).<sup>135</sup> In chronological order this locus is followed by the relevant passage of *Lex Salica*,<sup>136</sup> however, this law contains both the noun *wargus* and the verb *wargare* in relation to kidnapping an alien slave where *plagiavit* is explained by *wargaverit*.<sup>137</sup> This locus supports that *wargare* means to *kidnap (to abduct)*.<sup>138</sup> The first loci of the Carolingian Age can be found in the Anglo-Saxon *Heliand*: Judas ends his life *warg an wargil*,<sup>139</sup> the convicted rogues crucified alongside Christ die as rogues deserve to die (*waragtrewe*),<sup>140</sup> and the author puts the word *giwaragean* into Christ's mouth regarding those condemned to the pains of hell.<sup>141</sup> Tatianus's Old High German translation of the Gospel contains *firwergit*<sup>142</sup> and *forwergiton*<sup>143</sup> as equivalent of *maledicti*.<sup>144</sup> In the mirror of all that it is not surprising that the authoritative lexicon lists the phrases *wiergan* and *weargewedolian* as equivalents of *maledicere*, *maledictio*, *maledictus* and *malignari*.<sup>145</sup> The terms *anathemazatus*, *maledictus*, *profugus*, *vagus* and *rapax* that appear in ecclesiastical lawmaking, applied by the lawmaker to a person expelled from the community, can be taken as the equivalent of the phrases *wargus*, *gawargjan*, *warc* etc.<sup>146</sup>

Based on the above, Nehlsen excludes a *limine* that the phrase *wargr (vargr)* means *wolf* with respect to early medieval sources, and adds that the (mostly Old Norse) underlying

<sup>129</sup> *Evangelium secundum Marcum* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 10, 33.

<sup>130</sup> Feist, S.: *Vergleichendes Wörterbuch der gotischen Sprache*. Leiden, 1939<sup>3</sup>. 210; 325; 551; Nehlsen: *Der Grabfrevel... op. cit.* 154.

<sup>131</sup> Paulus, *Epistola ad Romanos* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 13, 2.

<sup>132</sup> Feist: *op. cit.* 551; Nehlsen: *Der Grabfrevel... op. cit.* 155.

<sup>133</sup> Paulus, *Epistola ad Corinthos* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 2, 7, 3.

<sup>134</sup> Feist: *op. cit.* 325; Nehlsen: *Der Grabfrevel... op. cit.* 155.

<sup>135</sup> Sidonius Apollinaris, *Epistulae* 6, 4. ...*forte Vargorum, hoc enim nomine indigenas latrunculos nuncupant.*

<sup>136</sup> *Lex Salica* 55, 4.

<sup>137</sup> *Ibid.* 66. (E); 65. (D)

<sup>138</sup> Nehlsen: *Sklavenrecht ... op. cit.* 110. ff.; Nehlsen: *Der Grabfrevel... op. cit.* 155.

<sup>139</sup> *Heliand* (Hrsg. C. Burchhardt, Verden, 2007.) 5168.

<sup>140</sup> *Ibid.* 5563.

<sup>141</sup> *Ibid.* 25131.

<sup>142</sup> *Evangelium secundum Iohannem* (Biblia Sacra Iuxta Vulgatam Versionem, Stuttgart, 1994.) 7, 49.

<sup>143</sup> *Evangelium secundum Matthaum* 25, 41.

<sup>144</sup> Cf. Nehlsen: *Der Grabfrevel... op. cit.* 156.

<sup>145</sup> Köbler, G.: *Lateinisch-germanisches Lexikon. Arbeiten zur Rechts- und Sprachwissenschaft* 5. Göttingen-Gießen, 1975. 189.

<sup>146</sup> Nehlsen: *Der Grabfrevel... op. cit.* 156.

sources are from the 11<sup>th</sup> c. or from later periods, and thereby he deprives the *Friedlosigkeit* theory of one of its most important bases. He asserts that the term *wargus* is the German equivalent of the ecclesiastical usage, the loci of *Lex Salica* (and *Lex Ribuarica*) indicate merely borrowing of ecclesiastical lawmaking and do not prove the ancient German theory and continued existence of ancient German faith.<sup>147</sup> Furthermore, he makes it clear that expulsion from the community did not incur *ipso facto*, instead, the perpetrator had to wander the world alone as Cain (*more Cain vagus et profogus*) only as a consequence of failure of the payment of *compositio*, i.e. refusal of statutory punishment.<sup>148</sup> Therefore, in this case living the life of a *wargus* is the consequence of defiance of the law, as it seems to be supported by the phrase "*si noluerit emendare et reddere*"<sup>149</sup> in *Lex Baiuvariorum*.<sup>150</sup>

On the other hand, still with regard to the phrase *wargus*, the question arises why the later groups of texts of *Lex Salica* (E) completely omitted this term from the text. Probably because this folk law term without any explanation would have been no longer interpretable in the Carolingian Age.<sup>151</sup> The Middle Latin term *wargus* appears to be related to the following German words: the Old Norse *vargr* (*malefactor, wolf*), the Anglo-Saxon *wearg* (*outcast, damned, malefactor*) and the Old High German *warg/warch* (*enemy, devil*) and the Gothic words: *gawarjagan* (*to condemn*), *wargiba* and *gawargeins* (*judgment, condemnation*).<sup>152</sup> Furthermore, the following words can be considered related phrases: the Old Saxon *giwaragean* (*to condemn a malefactor*), *warg/warag* (*malefactor, devil*), *wurgil* (*rope*), *wargtreo* (*gallows*), the Old English *warhtreo* (*gallows-bird*), the Old Norse *gorvargr* (*cattle thief*), *kaksnavarher* and *brennuvargr* (*arsonist murderer*), *morðvargr* (*murderer*) and *vargdropi* (*descendant of an outcast*).<sup>153</sup> The etymology of all these phrases that can be traced back to the Old German word *\*yarz-a* is not fully clarified;<sup>154</sup> yet, if we presume to find its origin in the Indo-European root *\*uer-gh* (*to wind, to press, to strangle*), then *wargus* might mean *strangler* and *the person to be strangled*.<sup>155</sup> In the mirror of the above, Schmidt-Wiegand can see a clear connection with the meaning *wolf*; at the same time, he claims that it should be investigated whether this word carried the meaning *hostis* (*alien, enemy*) in ancient German times already, and as underlying words he refers to the Langobardic *waregang* and the Old English *waeregenga* (*alien, protection seeker*).<sup>156</sup>

Consequently, it should be analysed in what connection, chronology the meaning *malefactor* is related to the meaning *wolf*, in other words, which meaning can be considered primary with respect to the phrase *wargus/vargr*. It can be declared beyond doubt that the

<sup>147</sup> *Ibid.* 157. f.

<sup>148</sup> *Ibid.* 164.

<sup>149</sup> *Lex Baiuvariorum* 1, 11.

<sup>150</sup> Nehlsen: *Der Grabfrevel... op. cit.* 165.

<sup>151</sup> Schmidt-Wiegand, R.: *Wargus. Eine Bezeichnung für den Unrechtstäter in ihrem Wortgeschichtlichen Zusammenhang*. In: Jankuhn, H.–Nehlsen, H.–Roth, H. (Hrsg.): *Zum Grabfrevel in vor- und frühgeschichtlicher Zeit. Untersuchungen zu Grabraub und „haugbrod“ in Mittel- und Nordeuropa*. Göttingen, 1978. 188–196., 190.

<sup>152</sup> *Ibid.* 191; Feist: *op. cit.* 210. 551.

<sup>153</sup> Sehrt, E.: *Vollständiges Wörterbuch zum Heliand und zur altsächsischen Genesis*. Göttingen, 1966<sup>2</sup>. 641. f.; 725; Schützeichel, R.: *Althochdeutsches Wörterbuch*. Tübingen, 1974<sup>2</sup>. 222; Vries, J. de: *Altnordisches etymologisches Wörterbuch*. Leiden, 1962<sup>2</sup>. 183; 645.

<sup>154</sup> Jacoby: *op. cit.* 12.

<sup>155</sup> Pokorny, J.: *Indogermanisches etymologisches Wörterbuch, I*. Bern, 1959. 735.

<sup>156</sup> Schmidt-Wiegand: *Wargus... op. cit.* 191. Cf. Baesecke: *op. cit.* 96; Rhee: *op. cit.* 133. f.

meaning *malefactor* is much earlier in terms of the age of the source since sources from the Continent in this sense occur from the 6<sup>th</sup> c. already, while the meaning *wolf* beside the meaning *malefactor* can be documented only in Old Norse sources from five centuries later—on the other hand, it should not be forgotten that the Old Norse terminology was basically developed later than the Continental one.<sup>157</sup> In the light of that, the Old Norse phrase *vargr*—irrespective if either ‘malefactor’ or ‘wolf’ is considered the primary meaning—belongs to a later layer compared to Continental terms and even within Old Norse.<sup>158</sup> Also, it should be made clear that both on the Continent and on northern territories relatively few traces of pagan tradition can be found in laws written down since all the rules wanted by enacting such laws was to eliminate ancient German elements and introduce Christian thinking and legal awareness.<sup>159</sup> After all, Schmidt-Wiegand finds that *wargus* as a legal term should be interpreted in a wider sense: as expulsion from the community, and refuses the primacy of the meaning *wolf/werewolf*, although he acknowledges the significance of further development of the term to this direction both on the Continent and in the north. Expulsion (*Acht*) was imposed on perpetrators of all the acts (desecration of a grave /robbing of a grave, manslaughter by arson, assassination, breach of peace, etc.) that was denoted by the Gothic and Old Norse legal language by the phrase *fairina* and *nidingsverk*, respectively, and whose sanction, i.e. expulsion, was expressed by the Old Swedish word *utlægher*, the Old Norse *utlagr*, the Anglo-Saxon *utlath*, the Middle High German *ēlos* and the Middle Latin *exlex*. Transformation of the meaning *outcast* and its extension by the meaning *wolf* can be undoubtedly connected with the fact that it was noted in *Lex Salica* already that a malefactor who has failed to pay *compositio* hides in the forest (*per silvas vadit*),<sup>160</sup> and later he was denoted by the phrase *wealdgenga* by the Anglo-Saxon sources and *skōgarmaðr* by the Old Norse sources.<sup>161</sup>

### III

Alemannian law regulates the issue more specifically and—to put it more exactly—it determines the amount of *compositio* depending on the *status* of the dead person. *Pactus Alamannorum*<sup>162</sup> noted down in the early 7<sup>th</sup> c. sets up the following system. In case of killing a free man, if the perpetrator in a free *status* delivers taken valuables to the relatives, no investigation need to be conducted due to robbing of the dead person,<sup>163</sup> if, however, he does not deliver them, he shall pay forty *solidus*.<sup>164</sup> If the perpetrator took the valuables of a

<sup>157</sup> Schmidt-Wiegand: *Wargus... op. cit.* 193.

<sup>158</sup> Jacoby: *op. cit. passim*.

<sup>159</sup> Schmidt-Wiegand: *Wargus... op. cit.* 194.

<sup>160</sup> *Lex Salica* 115. *Nam si certe fuerit malus homo, qui malei in pago faciat et non habeat ubi consistat, nec res unde conponat, et per silvas vadit et in praesentia nec agens nec parentes ipsum adducere possunt...*

<sup>161</sup> Schmidt-Wiegand: *Wargus... op. cit.* 196.

<sup>162</sup> See Schott, C.: *Pactus, Lex und Recht*. In: Hübner, W. (Hrsg.): *Die Alemannen in der Frühzeit. Veröffentlichungen des alemannischen Instituts* 34. Bühl–Baden, 1974. 135–168.

<sup>163</sup> *Pactus Alamannorum* 17, 1. *Si quis ingenuus ingenuum interficiet et ei aliquid de res suas sangulentas tulerit aut hoc offerit ad parentes, nihil est ad requirendum.*

<sup>164</sup> *Ibid.* 17, 2. *Si enim vero non offerit, XL sol. solvat.*

liberated dead person, he paid thirteen *solidus* and one *tremisse*,<sup>165</sup> and if the “injured person” was a slave, the sum of *conpositio* amounted to twelve *solidus*.<sup>166</sup> If the dead person was an Alemannian woman in a free status, then the perpetrator had to pay eighty *solidus* or had to take a cleansing oath together with twelve fellow oath-takers.<sup>167</sup> In case of a liberated woman, the perpetrator had to pay twenty-six *solidus* and two *tremisse*,<sup>168</sup> and in case of a woman in a slave *status* he had to pay twelve *solidus* or had to take an oath together with twelve fellow oath-takers.<sup>169</sup> The forty *solidus* payable in case of a free Alemannian injured party corresponds to the *conpositio* of bodily injury—a cut off ear according to the source<sup>170</sup> or to the penalty that had to be paid when somebody placed an object with a value higher than one *solidus* beside the dead person.<sup>171</sup> The *conpositio* payable in case of female injured parties amounted to twice the sum to be paid by male persons, however, this principle was not enforced with regard to servants. *Pactus Alamannorum* contains a further provision, which regulates the state of facts of plundering a yet unburied person killed by a third party: in this case the law—just as *Edictus Rothari*<sup>172</sup>—prescribed *conpositio* of eighty *solidus*.<sup>173</sup> However, the interpretation of the locus raises difficulties as the phrase regarding plundering a buried dead person (i.e. actual robbing of a grave) was, beyond any doubt, inserted in the text later—as it is shown by the uneven linguistic structure. Consequently, there are good chances that *Pactus Alamannorum* originally defined only two states of facts in this scope: the crime called *plodraub* and *rairaub* in Langobardic law, and the state of facts of robbing of a grave was interpolated in the text of the law only later.<sup>174</sup>

*Lex Baiuvariorum* regulates issues related to dead persons and the grave in an independent title (*De mortuis et eorum conpositione*). In case of homicide committed in secret, if the perpetrator throws the corpse in the river or hides it so that it could not be found, he shall pay forty *solidus* (and the law gives an explanation: because the dead person cannot be provided with decent burial) in addition to blood money; and if somebody throws a corpse washed ashore into the water again, he shall pay twelve *solidus*.<sup>175</sup> In case of an injured party in a slave *status* the amount of *conpositio* is one hundred and eighty *solidus*.<sup>176</sup> These loci contain the phrase *murder*, i.e. *murdrida* and *camurdrit*. Two further passages serve the protection of an unburied corpse. One of them stipulates that a person who wounds a corpse by an arrow to drive away birds settling on it shall pay twelve *solidus*.<sup>177</sup> In

<sup>165</sup> *Ibid.* 17, 3. *Si letus fuerit in ecclesia aut in heris generacionis dimissus fuerit, XIII sol. et tremisso componat.*

<sup>166</sup> *Ibid.* 17, 4. *Si servo fuerit facto, XII sol. componat.*

<sup>167</sup> *Ibid.* 17, 5. *Si ingenua Alamanna factum fuerit, LXXX sol. componat aut cum XII iuret.*

<sup>168</sup> *Ibid.* 17, 6. *Si leta fuerit, XXVI sol. et duos tremissos componat.*

<sup>169</sup> *Ibid.* 17, 7. *Si ancilla fuerit, XII sol. componat aut cum XII medicus electus iuret.*

<sup>170</sup> *Ibid.* 6, 2.

<sup>171</sup> *Ibid.* 16, 1.

<sup>172</sup> *Edictus Rothari* 16.

<sup>173</sup> *Pactus Alamannorum* 16, 3. *Et cuicum que mortuo, tam occiiso quam qui sua morte morit, aloquid tollatur aut involatur, de fossa, ubi reponatur, exfoditur et expoliatus fuit, quod ibi tullit, reddat et LXXX sol. solvat.*

<sup>174</sup> Nehlsen: *Der Grabfrevel... op. cit.* 129.

<sup>175</sup> *Lex Baiuvariorum* 19, 2.

<sup>176</sup> *Ibid.* 19, 3.

<sup>177</sup> *Ibid.* 19, 5.

accordance with the other locus, a person who wounds the body of a person killed by somebody else shall pay twelve *solidus* as *compositio*, both in case of serious mutilation (cutting off the head, hands, feet or ears) and wounds causing minor bleeding (as the dead person died not long ago).<sup>178</sup> With regard to a perpetrator who prevents burial of a dead person, the question has arisen in literature if the making of the state of facts go back to pagan or Christian traditions: Dahn supported the former,<sup>179</sup> while His the latter view<sup>180</sup>—most probably properly, paying regard to the powerful ecclesiastical contribution to creating *Lex Baiuvariorum*.

The importance of burying the dead person is implied by the provision which stipulates that an alien burier must be given one *solidus* as reward—this passage supports the significance of the ecclesiastic impact as the reasons of the law refers to a locus in the New Testament,<sup>181</sup> which makes burial of the dead person obligatory.<sup>182</sup> This thought was highly emphasised in old Christian authors already, for example, Lactantius claimed that it is forbidden to leave a man made in God's own image unburied so that he should end up in the bowels of beasts, he should be returned to earth where he comes from.<sup>183</sup> The provision of *Lex Baiuvariorum* that takes position against heathen burial ceremonies is meant to strengthen this thought, too.<sup>184</sup>

With regard to actual desecration of a grave/robbing of a grave in case of an “injured party” in a free *status* the law prescribed payment of forty *solidus* and *compositio* imposed on theft with respect to the valuables taken, i.e. compensation of<sup>185</sup> ninefold amount of the value.<sup>186</sup> Forty *solidus* as *compositio* is not different from that of mutilation since, for example, the perpetrator was obliged to pay this amount for cutting off a foot.<sup>187</sup> (It is worth adding that while this state of facts was punished by Langobardic law by *compositio* of nine hundred *solidus*,<sup>188</sup> the Bavarian law contended itself with a fraction of it—at the same time, it should be noted that while in accordance with *Edictus Rothari* in the absence of any relatives this amount was due to the king, *Lex Baiuvariorum* is silent about the fact that in this case the amount of *compositio* would be due to the duke's treasury.<sup>189</sup>)

In addition to robbing of a grave, the law provides for taking the clothes of unburied dead persons (*waluraupa*):<sup>190</sup> if the person who has killed them has taken them along, he should pay double indemnification, if they have been taken by somebody else, not the perpetrator of the murder, then he shall pay the usual amount for theft,<sup>191</sup> i.e. nine-times *compositio*.<sup>192</sup> Accordingly, the differentiation between clothes taken by the murderer and

<sup>178</sup> *Ibid.* 19, 6.

<sup>179</sup> Dahn, F.: *Die Könige der Germanen, IX. Die Bayern*. München, 1903. 271.

<sup>180</sup> His: *op. cit.* 123.

<sup>181</sup> Cf. *Genesis* 23, 6. 15.

<sup>182</sup> *Ibid.* 19, 7.

<sup>183</sup> Lactantius, *Institutiones divinae* 6, 12.

<sup>184</sup> *Lex Baiuvariorum* 19, 8.

<sup>185</sup> *Ibid.* 9, 1.

<sup>186</sup> *Ibid.* 19, 1.

<sup>187</sup> *Ibid.* 4, 9.

<sup>188</sup> *Edictus Rothari* 15.

<sup>189</sup> Nehlsen: *Der Grabfrevel... op. cit.* 133.

<sup>190</sup> Cf. Eckhardt: *Pactus... op. cit.* 76.

<sup>191</sup> *Lex Baiuvariorum* 9, 1.

<sup>192</sup> *Ibid.* 19, 4.

somebody else can be found in the Bavarian law, too, just as in Langobardic and Alemannian law. The issue of double *conpositio* mentioned here, however—as it was underlined by Brunner already<sup>193</sup>—is far from being unproblematic. It can be presumed that here the law imposed the payment of the double amount of the usual *conpositio* and not of the valuables taken on the perpetrator as it was stipulated by law, for example, in case of acts committed against travellers.<sup>194</sup> Nehlsen—in our view properly—presumes ecclesiastical impact behind the stipulation of this unusually high amount in the law.<sup>195</sup> (This title of *Lex Baiuvariorum* contains two stipulations, which sanction taking of the boat of another person.<sup>196</sup> It arises as a question why the two passages covering boats were placed beside the provisions on dead persons. It is possible that somehow it has to do with the ancient pagan burial form where the dead person and his valuables were put on a boat and were set afloat.)

With regard to the provisions of *Lex Baiuvariorum* concerning robbing of a grave—and plundering of dead persons in general—it should be stated that they do not contain any provisions that go back to ancient German legal customs or have the perpetrator expelled from the community; what is more: it is this law where the impact of the Christian Church is the most striking with respect to judging these crimes.

### Conclusion

The aim of this study has been to provide a comparative analysis of the state of facts of robbing of a grave, paying regard to the question to what extent elements of Roman law, canon law and primarily German customary law can be demonstrated in specific codes. As part of that the Gothic, Burgundian, Langobardic, Frankish, Alemannian and Bavarian *Volksrecht* have been examined. As a result, with regard to all these codices it can be established that formulation of the state of facts of robbing of a grave/desecration of a grave and the related sanction clearly draws on Roman and canon law roots and—although, as a matter of fact, these provisions organically fit in with the spirit and system of sanctions of German folk laws—neither the system of sanctions, nor the images related to it imply any genuine connections with ancient German (pagan) thoughts and religion.

<sup>193</sup> Brunner: *op. cit.* I. 879.

<sup>194</sup> *Lex Baiuvariorum* 4, 30.

<sup>195</sup> Nehlsen: *Der Grabfrevel... op. cit.* 134.

<sup>196</sup> *Lex Baiuvariorum* 9, 9. 10.

## Book reviews

LENKE FEHÉR

**Kelemen László: Miként vélekedünk a jogról? Szociálpszichológiai kutatás 2010 (How we are thinking on law? Sociopsychological research in 2010).** Line Design Kiadó, Budapest, 2010. 215 p.

The above-mentioned book—based on social-political research—tries to give an adequate answer to the complex question, how people are thinking on law, in particular criminal law and criminal justice. The answers given to the questionnaire of the survey are mirroring the opinion of the different social groups on such important issues like public security, risk of victimisation, fear of crime. The survey shows, how the people get informed on public affairs, which sources of news, written and electronic media surfaces are held by them authentic, credible and which ones are regarded less reliable. There are further questions concerning the level of democracy; the role of participation of people in public life, and their possible influence on it; the level of living standards; on the role and importance of voting at the elections for the political decisions; the necessity of fight against corruption and so on. The research gives a short insight into the nature, quality and extent of changes before and after changing the political regime in Hungary.

The survey was finished and the book was published in 2010, before the elections. During the two-year period of the research, the data of questionnaires of the two samples was compiled and elaborated (consisting altogether 1100 persons), moreover the manuscript had been prepared and the book had been published, working with several thousands of data.

The topic has an *interdisciplinary* approach, covering two disciplines: law and psychology. The book *consists of seven parts*, out of which four deals with the essential questions (like on the aim of the research, the theoretical background, the research methodology, the research results) while the last parts include the annex, diagrams and list of background literature.

In the theoretical background, the work discusses and summarises the meaning of social representations and functions, including the connected researches, it analyses the questions of belief in justice, the law and order, the system-approval and system-critic, enriching it with the findings, results of the different empirical studies.

After discussing the general questions, the book leads the reader to the field of criminal law and criminology. First, an overview is given on the causes of criminality, the aim of punishment as well as the connected most relevant theories. The book provides an analysis of the definition and the role of victim, the injured party as well as summarising the most important theories and research results on victimisation and fear of crime. Concerning victimisation, the book consist criminal statistical data and several references to the connected legal literature, empirical research results. There is a reference also for an earlier work of the author, on which the present survey is based, the recent one applies however many more case-study, a wider scope of investigation and consequently constituting an

important step forward in its content as well as methodology. At discussing the sanction system, the book deals with several theoretical questions, among others the pro and contra arguments, opinions on death penalty.<sup>1</sup> Finally, the chapter dealing with methodology provides the content of the questionnaire, the samples, introduces the data on survey and analyses them, summarises the main results. The research findings are rich, adequate and well structured.

In the survey extended to 1100 persons, two different samples played a role: a nationwide representative sample, consist of 1000 persons and a sample of 100 persons with finished legal studies. The two samples were compared on the basis of *socio-demographical* characteristics, the *interests on actual problems* of society, as well as on *political party preferences*. The author made an analysis in both samples concerning the multidimensional context of the basic distribution and differences of *dependent and independent variables*, too.

The research aimed at identifying what is the common opinion of the present society in certain questions. The questionnaire contained both *legal and psychological* questions. The interesting research gives answer for some very actual questions, like the relationship between the severity of sanction system and the decreasing criminality; the question of reducing the so-called “crime of living” by decreasing unemployment or increasing social benefits, etc.

Among the legal issues, the especially important questions of *legislation and legal practice*, as well as the *realisation of basic principles* of criminal justice can be found. Besides these, the research deals with the *causes of criminal behaviour and prevention of crime*. Before getting a deeper insight into the content of the questionnaire, on the basis of studying the book, maybe it seems to be an additional question to deal with the opinions on death penalty, which is for a long time does not constitutes part of the sanction system. However, studying further the research structures, the reason and logic of this question becomes clearer.

The rate of questioned women in the representative sample is 53%, while in the sample of lawyers 59%.<sup>2</sup> Thus, in the second sample the women were slightly overrepresented. It is very important that the survey contains several data regarding gender-related distribution, too. For instance, the answers on possible connection of increasing social support and decreasing criminality; or the questions whether support or oppose the legalisation of drugs: *increase of social support* could decrease criminality according to 39% of the answers in the women, while 31% in the man sample. The gender-related distribution is missing however in the answers of questioning the possible prohibition of *abortion*. We can see the distribution according *age-groups* (94% of the youngest and 54% of the eldest<sup>3</sup> population disagree with the possible prohibition of abortion) and *school-education* (86% of the persons with higher education and 53% with lower education disagree with the possible prohibition of abortion), too. It should be noted that *most of the interviewed persons however disagree with the possibility of prohibition of abortion*. Discussing the possible legalisation of soft drugs, according to the data of research, *great majority of man and woman is against legalisation*. 31% of man involved in the research and 24% of women

<sup>1</sup> Death penalty was cancelled in Hungary by the decision AB (23) 1990. (VI. 31.) of the Constitutional Court.

<sup>2</sup> See p. 72.

<sup>3</sup> 70–79 years old.

involved supported the idea of legalisation of soft drugs. The man involved in the sample of research seems to be more permissible in this question, than woman.<sup>4</sup>

Looking at some of the main findings I would refer to the followings.<sup>5</sup> Concerning the question on *legislation, legal practice, prevention* was regarded as the most important issue by the majority in the sample of lawyers, while in the representative group the majority supported the strengthening of punishments. The answers with the opinion on strengthening the sanction system, basically more or less anticipates the attitude towards the theoretical restoring of the death penalty-institution: in the representative sample (except inhabitants of Budapest or the sample of higher education) the majority of answers support restoring death penalty. In the sample of lawyers however the majority was against death penalty. The survey contains a great amount of data in this respect. It should be referred that the author in the theoretical introduction of this topic, gives an analyses and summary on the arguments pro and contra on death penalty, the human rights aspects, the possibility of error in law and other questions, too.

In both sample, it was a general opinion that people have higher fear of crimes of violence, than it is a real risk. According to gender-related data, 63% of women and 51% of men have fear of criminal victimisation.<sup>6</sup> As far as criminal justice is concerned, in the representative sample there is a strong negative attitude, while in the sample of lawyers there is a positive opinion with some critical remarks (one quarter of the cases).

It is also very interesting that in the representative sample the world is regarded as unjust, the system needs reforms, however there was a positive attitude towards participation in public life and possibility of election. In the sample of lawyers, as a consequence of higher education and social status, in all of these questions there was a positive attitude.

The research results discussed in the book are valuable and innovative. The book is based on elaborating the most interesting and actual aspects of the survey. The excellent work—which made an effort of discovering, mapping the essence, and important characteristics of different opinions—represents an important contribution to the interdisciplinary approach of the given thematic.

<sup>4</sup> See p. 117. table 41.

<sup>5</sup> See p. 162.

<sup>6</sup> See p. 128.

## BALÁZS BODZÁSI

*Osztovits András* (ed.): **A Polgári törvénykönyvről szóló 1959. évi IV. Törvény Magyarázata (Commentary on Act IV of 1959 on the Civil Code)**. Opten Kft., Budapest, 2011. 2418 p.

In an international comparison, the literature of legal commentaries is rather modest in Hungary. This is particularly true in the area of private law. In the twenty years following the fall of communism, only two commentaries on the Civil Code were published (a loose-leaf version by HVG Orac, which was edited by *Ferenc Petrik*, and a commentary by KJK/Complex, which was edited by *György Gellért*).<sup>1</sup>

This might seem surprising in the light of earlier traditions of Hungarian civil law studies, which produced outstanding examples of scholarly work such as *Magyar Magánjog* (Hungarian Private Law), which was published between 1899 and 1905 under the editorship of *Ármin Fodor*, or the six-volume commentary that was published in 1941 with the same title and was edited by *Károly Szladits*. Both are useful even today and discuss certain issues in greater detail than the contemporary commentaries. Another work worth mentioning is the two-volume Civil Code commentary that was published in 1981 and edited by *Gyula Eörsi* and *György Gellért*. Other than the sections that deal with provisions which have been repealed since, this commentary can still be used even today.

The commentary edited by *András Osztovits*, a Supreme Court judge, aims to join this tradition. The two-volume commentary is the work of twenty authors.

This is a remarkable book because each one of the authors is a member of the younger generation of civil law experts. They are young academics who also have connections to the practical side of the law in one way or another, with some of them practicing as lawyers (such as *Gergely Baross*, *Dániel Bán*, *Ádám Boóc*, *Ádám Fuglinszky*, *Zoltán Nemessányi* or *István Sándor*). Almost all of them teach law in one of Hungary's law schools. Most authors have a lengthy list of past publications, including contributions to books in the same vein as with this commentary. This new book afforded them the opportunity to provide a synthesis of their earlier work from a different aspect.

Compared to previous commentaries, there is a certain shift of focus in this book. For example the section dealing with persons is considerably more detailed than what can be found in other works (almost 300 pages). Contractual securities and delictual liability also receive significant attention, and the book also addresses inheritance law in detail (on almost 300 pages).

One of the characteristic features of this new commentary is that it discusses the distinguishing features of various legal concepts. This can be very useful for legal professionals who practice law. It is important to note that the book's analysis of contracts is not limited to those regulated in the Civil Code; contracts that are used in practice but not specifically defined in the Civil Code are also discussed in detail.

It is a reasonable question whether it makes any sense to publish a new book in 2011 with commentary on the current Civil Code. The draft version of the new Civil Code is now publicly available and the Parliament is expected to pass it into law during the autumn session. This, however, does not mean that the current Civil Code will be rendered useless

<sup>1</sup> This was later complemented by a commentary published by Magyar Hivatalos Közlönykiadó.

in the foreseeable future. Contracts and other legal relationships will be governed by this Civil Code for years to come. This is particularly true of long-term contracts (e.g. bank loan agreements with terms of 20 or 30 years). Therefore, a new commentary that analyses the current Civil Code can be very useful even with the imminent introduction of the new legislation.

The thoroughness of the book means that its readers will be able to rely on it with confidence in their day-to-day application of the Civil Code. The publisher should be commended for not placing restrictions on the authors in terms of volume and from not shying away from publishing a book that runs to more than 2,400 pages.

Obviously, the length of a legal text will not determine its success. But anybody who opens this book will immediately realise that it more than meets the standards of legal writing that are expected in this genre.

We recommend this Commentary on the Civil Code to all legal practitioners and we are sure that they will find it very useful.

## BALÁZS FEKETE

*V. Varano–V. Barsotti: La tradizione giuridica occidentale. Vol. I. Testo e materiali per un confronto civil law common law.* G. Giappichelli Editore, Torino, 4th ed., 2010. 596 p.

1. Writing a comparative law course book is certainly not one of the easiest tasks. The future authors have to face various difficulties. Firstly, they should decide about the scope of the book. Should it encompass all the main legal systems including, for instance, China or India, or is it enough to focus on the law of European countries? Secondly, the width of the manual is also very problematic. How detailed discussion of the chosen legal systems is needed for the goals of university teaching? If it is short, the risk to become too vague is real. If the chapters are longish and detailed, the students may find the whole subject boring and unpromising. Lastly, the methodological bases can also raise serious concerns, since they are not as unambiguous as they may seem at the very first glance. Is it still adequate to follow the traditional path—paved by such classics as Renè David or Konrad Zweigert—of presenting legal families or groups, or should it better approach legal systems as unique legal cultures? This line of questions can easily be continued: is the discussion of supranational legal orders, e.g. EU Law, needed in such a manual?, should the historical method be widely applied in the presentation?, are the effects of globalization worthy of consideration?—these points are perfectly enough to illustrate the difficulty of this task. Thus, authors should really make proper choices at the very beginning and keep in mind that these choices will deeply determine both the outcome and the academic reception of their work.

The first edition of this Italian volume was published in 2002. Originally, it was a course book written by professors and researchers of the University of Florence for basic comparative law studies (*"Sistemi giuridici comparati"*). The fourth edition in 2010, however, underwent some serious changes; both its scope and content have been extended. The most important novelty is that the volume has a lot of new content. For instance there is an almost twenty pages long section in Chapter Two which elaborates on the special features of East European legal systems. Furthermore, the sections about the legal systems of Latin-America, China, Japan, India and Islamic Countries are also entirely new parts. Additionally, several parts of the book has been rewritten or considerably expanded. So, it has already changed a lot compared to the earlier editions, therefore, it is worthy of a detailed presentation. The lessons arising from this brief study may even be interesting for the broader academic circles.

2. The structure of the book can be summarized as follows. Chapter One deals with certain introductory questions. It briefly touches upon some points of the history of comparative law, and also discusses its nature, functions and aims. Moreover, it also analyzes how certain scholars tried to classify the legal systems of the world. The various approaches of Arminjon-Nolde-Wolff, David, Zweigert-Kötz and Mattei are discussed in detail.

Chapter Two is dedicated to the tradition of civil law. The first two sections are based on a historical approach. Section One discusses the formation of continental civil law prior to the codifications of the 19th century. Besides the impact of Roman law it focuses on the role of universities in legal development—emphasizing the prominent place of the University of Bologna—and presents the different legal schools (*Glossatori, Canonisti, Commentatori*

and *Umanisti*) contributing to this development. The features of modern codes—*Code civil* (1804), *Allgemeines Landrecht* (1794), *Bürgerliches Gesetzbuch* (1900), *Zivilgesetzbuch* (1912)—are the main issues of the next section. Many questions related to these codes are examined, including their historical context, structure and influence on other legal systems. Section Three surveys the system of legal sources in civil law. It stresses that legal rule in these systems mainly means the rules expressed in codes or acts, and it also analyzes the typical hierarchy of norms in civil law. Furthermore, such questions as the organization of the judicial system as well as the role of courts in legal development are also examined. The last section of this chapter is devoted to the legal systems of Eastern Europe, and after a detailed historical introduction describing both the Socialist period and the democratic transition; it presents the main peculiarities of the region. The role of constitutional courts as “creatures and creators” of democratic transitions is well explained.

Common Law tradition is presented in Chapter Three which is comprised of four sections. The structure of this chapter resembles the earlier one and this editorial solution considerably emphasizes the similarities of the two legal traditions. The first section contains a general introduction to common law, and explains it from a predominantly historical perspective, focusing on the formation and the main features of the system of writs and on the nature of Equity. The 19th century and recent history of English court system is the topic of Section Two. It presents the main provisions of the Judicature Acts of 1873–1875 as well as the newest changes in the last twenty years. Section Three analyzes the sources of common law and mostly focuses on the functioning of the doctrine of binding precedent and on problems related to statutory interpretation. The main features of the legal system of the United States are the topic of Section Four. It mainly discusses the separation of powers provided by the Constitution, the judiciary, the unification of law and the role of different legal sources in U.S. law. As for constitutional justice the section also analyzes the famous case of *Marbury v. Madison* in detail.

The last two chapters deal with the legal systems of the Scandinavian countries and the legal systems outside of the Western world. The chapter about Scandinavian law surveys every important question including historical development, Nordic legal cooperation and the place of *travaux préparatoires* in the system of legal sources. Chapter Five—Encounters of the Western legal tradition—could perhaps be regarded as the most unconventional part of the whole book. It tries to briefly describe certain important, non-European legal systems in order to make the panorama of the book more complete, but the authors mostly focus on the influence of Western law, not on the entirety of these systems. Every section of the chapter drafts the main lines of a given legal system and discusses the influence of the Western legal tradition. For instance in the section devoted to India, one can read about the influence of common law legal culture including Bentham’s idea on codification, as well as the effect of US constitutional law in modern Indian law. Latin-America, China, Japan, India and Islamic countries are analyzed through same lenses.

3. As a first remark, it should be mentioned that this book is really suitable for university teaching. It is rich in information and data; thanks to the several appendixes attached to each chapter. These appendixes are parts of important legal documents (such as the index of the *Code civil* or the preamble of the Chinese constitution), case excerpts, and some pages of important scholarly papers. So, law students can really get acquainted with the major legal systems of the world from this manual.

An overview of our introductory questions might also be useful and interesting. However, here, we have to start with the problem of methodology since methodological

choices always comprehensively determine the practical content. As the underlying concept it is obvious that the volume's approach is strongly linked to the premises of post-World War II comparative law. It is apparent at many points. For instance, as the title shows it, the authors share the view of René David that civil law and common law—even though there are unambiguous differences between these two European legal traditions—can be unified in a more comprehensive legal unit due to many, mostly philosophical reasons. For David this was the so-called *droit occidental*,<sup>1</sup> for the authors this is the *tradizione giuridica occidentale*. It should also be mentioned that this approach implies two premises at least. On the one hand it expects that these legal traditions converge since a longer period, on the other hand it also presupposes that the main task of comparative law is the study of similarities.

This is a well-developed starting point but some new trends in comparative law should also be taken into consideration. A wave of cultural comparative law<sup>2</sup> has begun in the mid-nineties—for example the works of Pierre Legrand or David Nelken can be mentioned here—and this new approach questions the very basics of this “classic” way of thinking. These scholars doubt the neutrality of the traditional functional approach developed by Zweigert and widely applied by comparatists, and they also advocate the research of differences of legal systems.<sup>3</sup> For instance, the so-called “convergence thesis”—supposing the gradual convergence of civil and common law—was explicitly rejected by Legrand, who argued that due to many reasons—for instance the different conceptions of legal rule and the divergence of legal thinking—it is simply impossible, even under the scope of European integration.<sup>4</sup>

Obviously, the emergence of cultural approach in comparative law does not mean that course books and comparative law readers should completely be rewritten. It is unnecessary since these cultural theses are also hot issues and they are questioned and debated from many points in the international comparative law scholarship. For instance a Finnish scholar advocates the preservation of a moderate version of functionalism contrary to all post-modern critics, that is, the use of this method without relying on Zweigert's famous presumption of similarity.<sup>5</sup> However, the integration of certain insights of culturalism—the sensitivity toward differences, the approach of law as a cultural phenomenon, or the research of various attitudes in legal cultures—into the book's conceptual background can surely be an important point.

Each chapter contains a comprehensive discussion of its subject matter. From this aspect, the volume seems to be balanced, only the parts on non-Western legal systems are slightly shorter. This difference reflects that the main aim of the book is the presentation of Western Law in the broadest sense. It is certainly a good choice, since the very detailed

<sup>1</sup> David, R.: Existe-t-il un droit occidental? In: *XXth Century Comparative and Conflicts Law Legal Essays in Honor of Hessel E. Yntema* (eds. K. H. Nadelmann—A. T. von Meheren—J. Hazard). A. W. Sythoff, Leiden, 1961. 56–64.

<sup>2</sup> For a detailed analysis see: Whitman, J. Q.: The Neo-Romantic Turn. In: *Comparative Legal Studies. Traditions and Transitions* (ed. by P. Legrand and R. Munday). Cambridge University Press, Cambridge, 2003. 312–344.

<sup>3</sup> For the origins of this approach see: Frankenberg, G.: Critical Comparisons: Re-thinking Comparative Law. *Harvard International Law Journal*, 1985/2. 411–456.

<sup>4</sup> Legrand, P.: European Legal Systems are not Converging. *The International and Comparative Law Quarterly*, 1996/1. 52–81.

<sup>5</sup> Husa, J.: Farewell to Functionalism or Methodological Tolerance. *Rabes Zeitschrift für ausländisches und internationales Privatrecht*, 2003/3. 419–447.

discussion of non-Western systems could raise difficult problems. First of all, due to the linguistic deficiencies, it is very hard to find adequate information on the everyday functioning of these legal cultures. In Western languages, except for a few basic articles,<sup>6</sup> real knowledge on the socio-legal reality of these systems is hardly accessible. However, without this information the comparatist risks to fall into the trap of dilettantism. It is perfectly enough to recall how broad the gap between the written norms and their application was in the Socialist law. Thus, the avoidance of a detailed discussion of non-Western legal systems seems to be a legitimate decision in a course book.

Lastly, the volume also successfully avoids the dangers of Eurocentrism, even though it mostly focuses on the Western Legal Tradition. It presents each important non-Western legal culture to a certain degree—perhaps the world of traditional African legal cultures<sup>7</sup> is the only missing link. The approach of these chapters focusing on the historical Western influence is also justifiable, since the reception of Western legal patterns is, perhaps, the most interesting point for European law students, and on the other hand, Western researchers are also more or less familiar with this issue. All in all, from the point of view of its scope the volume reflects good editorial decisions.

The main advantage of this manual, however, lies in a slightly different point. This volume of Varano and Barsotti has a certainly innovative character as a course book, which is why it is really able to raise concerns on the future of both comparative law course book writing and, moreover, comparative law in general. The discussion is more than needed since one thing should be obvious for all comparatists: research and teaching of comparative law cannot be effectively continued without taking into account how the world has changed in the last twenty years due to the fundamental transformation of the political and economic relations.

<sup>6</sup> Cf. for instance: Kim, C.–Lawson, C. M.: The Law of the Subtle Mind: the Traditional Japanese Conception of Law. *The American Journal of Comparative Law*, 1972/2. 491–513.

<sup>7</sup> For a different approach see for instance: Gambaro, A.–Sacco, R.–Vogel, L.: *Le droit de l'Occident et d'ailleurs*. LGDJ, Paris, 2011. 415–443.



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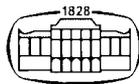
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CSABA VARGA\*

## Philosophising on Law under the Umbrella of Marxism in Hungary

**Abstract.** From amongst legal theories of Socialisms' Marxism, Hungarian scholarship played a rather balancing role all along. Characterised by dialogue and successful mediation, it strove to take a middle-of-the-road stance within the Socialist orbit. It took the professional requirements of scholarship rather seriously within the bounds of feasibility at varying times. Under restrictive conditions and despite ideological dictates, it filled a fermentative role. All in all, it made both (1) the sociological approach and (2) the historico-comparative perspective accepted in the Socialist world by transcending legal positivism and especially "Socialist normativism", on the one hand, and by breaking out from domestic/regional self-seclusion, on the other. Moreover, it (3) introduced the ontological perspective, built upon the epistemological perspective, exclusive till then, and thereby it could attribute ontic significance to the self-explanation and self-representation of different legal cultures, usually treated as having merely an ideological importance; and (4) by developing a law and modernisation theory, it could address Central and Eastern Europe in a responsive way. The overview starting by assessing the legacy in the end of WWII concludes in a parallel characterisation of the state of scholarship and its achievements throughout the countries concerned by the end of the Soviet rule. Through and owing to all this, the Hungarian pattern offered a relatively near-to-optimum alternative, a kind of optimality in its solutions and responses.

**Keywords:** Marxism, Leninism, "Socialist normativism", legal philosophy and sociology, comparatism, ontology/epistemology, law and modernisation

### 1. Preliminaries

In the terms of the legal ideology of the Communist dictatorship, gradually establishing itself in Hungary according to Soviet patterns with Stalinian-cum-Vishinskyan inspirations after WWII, the legal philosophy as cultivated in the interwar period and renewed in the post-war period could only qualify as a remnant of the despised "bourgeois" continuity, part of a past to be done away with anyway. In a position of degradation from the outset, it soon became subject to the political attacks waged against everything coming from the national heritage, despite the fact that this legal philosophy had indeed represented an imposing culture and professional highlight, nurtured by highly valued scholars in both the interwar and the post-war short-lived coalition periods. In view of its representative output and dynamic post-war re-start, one may remember quite a few remarkable accomplishments indeed. For instance, Julius Moór—democrat and legal philosopher, the first post-war metropolitan rector—set an exemplary pattern for facing the past, formulating ethical and spiritual lessons for a new start in a sublime and inspiring way.<sup>1</sup> With constant efforts at

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<sup>1</sup> Cf. his CV and Bibliography by the present author, introducing Moór, J.: *Schriften zur Rechtsphilosophie*. (Hrsg.: Cs. Varga, Budapest), 2006. and <http://philosophyoflaw.wordpress.com/>, ix–xxii.

reaching a synthesis, Barna Horváth just paved a new path, opening up further theoretical prospects.<sup>2</sup> József Szabó of Szeged, having launched his career by laying the foundations of jurisprudence in the methodology of sciences, faced a multitude of new tasks, such as an understanding and at least psychological explanation of Anglo–American lawyerly mentality and a description of the ultimate motives of state jurisdiction and public administration. And, last but not least, István Losonczy of Pécs produced a summary of his so-called realistic legal philosophy (it having by then been developed into a systematic doctrine).<sup>3</sup> Well, all this ensured the promise of a smooth continuation.

Of course, we can regard it open to question whether or not this legal philosophy (especially of Moór and J. Szabó) could have advanced from the kind of reliable, intelligent and self-critical reflexive thought that was fellow-traveller to Western European and Atlantic models, to an independent trend, ensuring an internationally pro-active presence. Well, all our respect and esteem notwithstanding, my personal answer could at most be a rather hesitating “yes”. And we may also add that in the case of some of the period’s most self-aware reformers (especially Horváth and Losonczy), the chance of a positive answer is not more secure either, as they failed, despite the considerable volume of their academic output, to surpass the stage of outlining claims, packed with sketches and improvisations, but without arriving at explications extended into full theories as tested through their application to partial problems, within the working period spanning from their professorial appointment to the Communist takeover (i.e. a quarter of a century in the case of Horváth and one decade in the case of Losonczy). Yet it can be regarded as a fact that even their disciples (on behalf of Horváth, pioneering in school-founding at Szeged, István Bibó, József Szabó and Tibor Vas,<sup>4</sup> as well as Vera Bolgár who, having just launched her career, followed her master by soon emigrating, and on behalf of Moór, all along a lonely thinker who had not established a school of thought, Kornél Scholz) chose challenging paths, each of his or her own; meaning, all in all, that jurisprudence in Hungary covered practically the entire range of theoretical approaches then cultivated in Europe. Thus the uni-directionality of the 1920s (Moór), followed by the antagonism of the emerging companion (Horváth) as rival to the former, in fact ended by being replaced by a series of mutual stimulations and inspirations, matured in group discussions.

<sup>2</sup> Back in 1948, he was even planning an international symposium within the metropolitan Pázmány Péter University. Cf. Horváth, B.: *The Bases of Law / A jog alapjai*. [1948.] (ed.: Cs. Varga), Budapest, 2006.

<sup>3</sup> Cf., as a posthumous edition, Losonczy, I.: *Abriß eines realistischen rechtsphilosophischen Systems* (Hrsg.: Cs. Varga), Budapest, 2002. For a contrasted narrative of personal dramas, cf. Varga, Cs.: *Philosophising on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war)*. In: *The 2005 ALPSA Annual Publication of the Australian Legal Philosophy Students Association* (ed.: M. Leszkiewicz). Brisbane, 2005. 82–86. [on Moór] and 86–94. [on Losonczy].

<sup>4</sup> Cf. *Die Schule von Szeged. Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas*. (Hrsg.: Cs. Varga), Budapest, 2006.

## 2. Cold War Period

### a) Liquidation of “Residues”

Shortly after the Communist takeover, a frontal attack started against everything with a flavour of the past, i.e. deterrence from following tradition through discrediting past thoughts and hindering their survival; in short, prevention of the national heritage from exerting any influence at all. This act of political and ideological liquidation was accomplished within one or two years. It was executed, e.g. through political measures like the mercilessly fanatic pseudo-journalism of George Lukács calling for purges or through the Communist-Party-initiated thought-police<sup>5</sup> instituted as the Committee for Science Policy destined to replace the Academy of Sciences, staffed by young professionals, mostly holocaust-survivors, headed by Erzsébet Fazekas (a Muscovite historian, practically unknown until then), wife of Ernő Gerő, who all along rivalled Rákosi for number one leadership. Such a purge became manifest through dismissing the old staff, deteriorating their existential conditions, blocking their academic chances and dissociating them from prevalent professional networks (e.g., through a series of partisan debates generated by new-comer Communists such as, in law, Imre Szabó, János Beér, Gyula Eörsi and Márton Sarlós).<sup>6</sup> In sum, the “new” was in fact built in utter irrelevance of and disrespect for the “old” in an inherently destructive manner, by fulfilling a political commission via administratively marshalled means—as is usual in a dictatorship.<sup>7</sup>

<sup>5</sup> Involving mathematicians Gy. Alexits and I. Fenyő as well as historians like P. Hanák, L. Zsigmond and J. Szűcs.

<sup>6</sup> See, e.g. Vas, T.: A burzsoá jogfogalom meghatározásának marxista bírálata [Marxist criticism of the bourgeois concept of law]. *Jogtudományi Közlöny*, 5 (1950), 3–6 and Földesi, T.: Hogyan használjuk fel ma Marx és Engels bírálatait a burzsoá jog- és államelméletekről? [How to use the criticism offered by Marx and Engels in the struggle against the bourgeois theories of law and state?]. *Jogtudományi Közlöny*, 9 (1954), 169–177. As the best species of intimidation, calling every ones bluff, cf. also “‘A Horthy-fasizmus állam- és jogbölcselete’”: Az ELTE ÁJK tanácsülésén 1955. január 29-én rendezett vita Szabó Imre készülő könyvének IX. fejezetéről [Legal philosophy and theory of state of the Horthy-fascism: Eötvös Loránd University Faculty Board debate on ch. 9 of Imre Szabós book under preparation]. (ed.: Cs. Varga), *Jogelméleti Szemle*, 2004/3 in <<http://jesz.ajk.elte.hu/varga19.html>>.

<sup>7</sup> For its literary outcome, see, first of all by Szabó, I.: I. V. Sztálin tanítása a nyelvtudományról és a jogi felépítmény kérdése [The teaching of I. V. Stalin on linguistics and the issue of legal superstructure]. *Az MTA Társadalmi–Történelmi Tudományok Osztályának Közleményei* II (1951), 91–104 and *Jogtudományi Közlöny*, 6 (1951), 155–160; I. V. Sztálin tanítása és a jogelmélet kérdései [The teaching of I. V. Stalin and the issues of legal philosophy]. *Az MTA Társadalmi–Történelmi Tudományok Osztályának Közleményei*, 2 (1950), 113–122 and *Jogtudományi Közlöny*, 6 (1951), 723–727; Vita haladó jogi hagyományaink kérdéséről [Debate on our progressive legal traditions]. *Jogtudományi Közlöny*, 6 (1951), 653–662; A szocialista törvényességről [On Socialist legality]. *Társadalmi Szemle*, 8 (1953), 796–810; Állam- és jogtudományunk elméleti alapjainak néhány fő vonása [Main characteristics of the theoretical foundations of our science on state and law]. In: *Az Eötvös Loránd Tudományegyetem Évkönyve*, 1955. (ed.: L. Tamás) Budapest, 1956. 37–43.

### b) Soviet Uniformisation

In the absence of any genuine domestic preliminaries<sup>8</sup> or self-generated scholarly results—which proves most obviously that the Marxism of Socialism came into being as solely motivated by direct politico-ideological considerations and was bound to remain all along alien to any mature sense of scholarship—the construction of Marxist theory in Hungary took a start through translation of pitifully crude and theoretically poor brochure-style militant pieces from the Soviet literature,<sup>9</sup> which had in its time had the Bolshevik mission to replace the certainly not overly-sophisticated but didactical instruction manuals of Tsarist Russia. By supporting the Communists' putschist political hegemony, a Hungarian post-epigonism of the Soviet Stalin-epigonism became the yardstick of party-political trustworthiness, signalling its actors' deep personal and professional identification with the cause of Socialist revolutionism.<sup>10</sup>

### c) Denial of the Past

The fate of Marxist legal theorising in Socialist Hungary became strangely defined from the beginning by an overtly purposeful monograph on the overall history of legal philosophising in Hungary. This work, prepared *au pair* with the Communist takeover to fulfil (through officialised academic debates on the field of law) most of the latter's political function, had the expressed vocation to close down the past for ever. Rejecting and trampling down the values of the past by closing them back in the junk-room of an alleged pre-history, it simply condemned past achievements as harmful and, therefore, to be surpassed and forgotten, never to be resumed. No wonder that it earned its author a Kossuth-prize, the very first and highest official recognition of lawyerly intellectual accomplishment by the new regime. This book was the first Marxising grand monograph by Imre Szabó, bearing all the "stylistic" marks of Leninism–Stalinism,<sup>11</sup> which—guided by the author's intention to display his own legal-philosophical talents as well—built in fact a pile of cadavers out of his forerunners, in order to show how to "transcend" (while not staining itself with any attempt at retrospection as to the merits) and to "surpass" them (even if not troubled by genuine understanding).

It is a paradoxical after-effect (certainly neither intended nor foreseen at the time by the author) that these scarcely buried cadavers proved in fact to remain practically alive—owing to the bare fact that by being memorialised in a monograph, the past of legal

<sup>8</sup> With a sole and rather miserable exception. Cf., for its overview, Varga, Cs.: Die Entwicklung des rechtstheoretischen Denkens in der Ungarischen Räterepublik. In: *Der Kampf der politisch-rechtlichen Auffassungen in der Geschichte und Gegenwart. Materialien des multilateralen Symposiums vom 16. bis 18. September 1986*. Berlin, 1988. 122–136.

<sup>9</sup> Published in translation and/or reviewed by Soviet or domestic authors in *Szovjetjogi cikkgyűjtemény* [Collection of articles from the Soviet law] I–IV (1951–1954).

<sup>10</sup> As a typical example, cf., by Vas, T.: Az állam- és jogtudományok néhány kérdése az SzKP XX. Kongresszusa után [Some questions of the science on state and law after the 20th Congress of the Soviet Communist Party]. *Jogtudományi Közlöny*, 11 (1956), 193–199. as well as Néhány állam- és jogelméleti kérdés az SzKP XXIII. Kongresszusának tükrében [Some questions of the theory of state and law in the mirror of the 23<sup>rd</sup> Congress of the Soviet Communist Party]. *Jogtudományi Közlöny*, 21 (1966), 516–519.

<sup>11</sup> Szabó, I.: *A burzsoá állam- és jogbölcselet Magyarországon* [Bourgeois theory of state and law in Hungary]. Budapest, 1955.

theorising could earn a positive memory and reputation within the Hungarian profession up to the present day. Otherwise speaking, notwithstanding its official rejection and ideological annihilation and eradication, this very past could still be integrated into the local Marxism's background consciousness, serving as a standard to provide standing inspiration, even if in hidden forms. It was as if the author's politico-ideological service had still—albeit through detours—been counter-balanced by his own demand for true scholarship, preserved from his personal past to some extent.<sup>12</sup> For, by the very act of writing, through extensive research, a number of elaborate chapters on the subject, he not only expelled past achievements intentionally and *pars et totus* from the circle of official conceivability, but also described them thoroughly and comprehensively as no one had before, and, thereby, challenged contemporary scholarship by revealing the richness of the approaches predecessors had once testified to. By the same act—*nolens volens*—he reminded readers of the same theoretical problems still unresolved, and the past approach (although condemned to become extinct) that kept its relevance—while remaining unspoken and unprocessed, yet offering an alternative to the officially Sovietised neo-primitive one-sidedness.<sup>13</sup>

At the same time, as a mark of its politico-ideological role, canonised declarations (standing for scholarly conclusions), too, appeared in ready form in this new theorisation. Because, in the spirit of the hurriedly adopted and ruthlessly enforced creed of its new fighters, the truth that could be uttered at all actually offered no temporary rest against tormenting hesitations and meditations but served as a revolutionary action (trans)forming society, like any revolutionary target set by superior command. That is, whatever truth was presented, it took the form of a canon officially declared, taken to be valid (and, therefore, made unquestionable) until revocation, the doubting or evading of which had to be retaliated against as a species of betrayal or sabotage. This attitude survived nearly till the end of the era, even if gradually less enforceable as time passed. However, as long as it was virulent it excluded even the feasibility of scholarly debates and any collective generation of ideas with open-ended chances. Ironically enough and in a tragic manner, this same attitude eventually destroyed its main representative as well, the one who had been the first to apply it to jurisprudential life in Hungary.<sup>14</sup>

<sup>12</sup> The works by Szabó, written in his twenties as a member of the Hungarian minority living in the successor-state Czechoslovakia, include, e.g. *A jogszociológia munkaköre* [The working field of legal sociology]. *Korunk* [Kolozsvár/Klausenburg/Cluj], 10 (1935), 809–815; *Jog és erőszak* [Law and violence]. *Korunk*, 12 (1937), 523–527; *Az időszzerűtlen jogtudomány* [Untimely jurisprudence]. *Korunk*, 13 (1938) 7–8, 615–618; *Szellemtudomány és pozitívizmus* [Humanities and positivism] *Korunk*, 15 (1940), 527–534; as well as *Néprajz, jog, szociológia: Népi jogéletkutatás* [Ethnography, law, sociology: research on popular living law]. *Társadalomtudomány*; [Budapest] 22 (1942), 422–427. and *Népi jogéletkutatás* [Research on popular living law]. *Társadalomtudomány*, 22 (1942), 483–485.

<sup>13</sup> It is noteworthy that, e.g. a monograph having remained in manuscript as a juvenile opus—Szegvári, K.: *Somló Bódog* [Felix Somló]. [Szeged, 1952–53] (ed.: Cs. Varga). *Jogelméleti Szemle*, 2004/4 <<http://jesz.ajk.elte.hu/szegvari20.html>>—did not recall any ambivalence of such a kind. Applying a powerful (although, in her own way, also politicised) historico-critical method, she not only gave a theoretically high-standard summary but also could manage to accomplish it.

<sup>14</sup> These features (along with the professional revolutionaries habit of only declaring without giving a reason) had become integrated into Imre Szabós personality so much that when he became withdrawn, widowed and struggling with illness alone, he was also abandoned by one-time subordinates as he could not change his mood of being receptive to nothing but one-sided communication. This was a personal fate in sharp contrast with that of Viktor Knapp, of a similar

Well, this is the context within which the entire legal thought of nearly a decade—including the reporting (even if with some critical distance) on the patterns that were to be taken over imperatively<sup>15</sup>—was built up, and into which the treatment of topical issues—from the main strategic debates on the law’s continuity<sup>16</sup> and superstructural character (*vis-à-vis* its economic basis)<sup>17</sup> up to the timely issues of codification and the class-related social contents of the kind of will manifested in law—was caged.<sup>18</sup>

d) “Socialist Legality”, drawn from memory of a progressive past in Europe

For the first time, it was Imre Szabó who formulated—*pars pro toto* in his impressive monograph laying down the basics of Socialist jurisprudence<sup>19</sup>—the requirements of political Stalinism, as translated by Vishinsky into the language of legal superstructure. The author built his doctrine of Socialist legality on statutory positivism as developed in Western Europe in the middle of the 19<sup>th</sup> century, in order to generalise it as a common feature for the entire Central and Eastern European region under the aegis of Marxism, with an approach and theoretical foundation that would rigidify Marx’s and Engels’ science-philosophical and science-methodological presuppositions (dating back to the first half of the 19<sup>th</sup> century), by rendering them exclusive as to the domain of theoretical legal thought for long decades to come.<sup>20</sup>

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disposition and age, who had the luck of falling out of official favour early enough, due to his sympathy towards the Prague spring in 1968. Deprived of the post directing the Law Institute of the Academy of Sciences of Czechoslovakia, he had time enough to metamorphose into the common attitude of average beings. He behaved as a friend and almost confidential conversation partner even in relation to me, despite the rather critical tone I had used when addressing him at East–West international conferences (e.g. in roundtable discussions of the European University Institute chaired by president Werner Maihofer), and greeted me as one of his most faithful friends during his last years, at a ceremony conferring him an honorary doctorship by the Safranyk University at Košice (Slovakia).

<sup>15</sup> E.g. Peschka, V.: Vita a jogfogalomról a szovjet jogelméletben [Discussing the concept of law in Soviet legal theory]. *Jogtudományi Közlemény*, 11 (1956), 190–194. as well as, by Péteri, Z.: Az állam- és jogelmélet vitás kérdései a szovjet jogtudományban [Controversial issues of the theory of state and law in Soviet jurisprudence]. *Cikkgyűjtemény a külföldi jog köréből*, 6 (1956), 41–44. and A jogfogalom néhány kérdése a szovjet jogtudományban [Some questions of the concept of law in Soviet jurisprudence]. *Az MTA Állam- és Jogtudományi Intézetének Értesítője*, 1 (1958), 304–314.

<sup>16</sup> E.g., Vita a jog és jogtudomány “viszonylag állandó elemeinek” problémájáról [Debate on the problem of the “relatively constant elements” in law and jurisprudence]. *Jogtudományi Közlemény*, 6 (1951), 368–377. and Szoatóczki, M.: A kontinuitás és diszkontinuitás kérdése a jogfejlődésben [The issue of continuity and discontinuity in legal development]. In: *Jubileumi tanulmányok*, 2. (ed.: T. Pap). Budapest–Pécs, 1967. 359–379.

<sup>17</sup> Cf., both as a survey and sharp criticism, Varga, Cs.: Autonomy and Instrumentality of Law in a Superstructural Perspective. *Acta Juridica Hungarica*, 40 (1999), 213–235.

<sup>18</sup> E.g. by Szoatóczki, M.: *A jogi akarat osztálytartalma* [Class contents of the will in law]. Budapest, 1959. and *Az egyéni érdek és az osztályérdek viszonya a tárgyi jogban* [Relationship between the individual and the class interest in substantive law]. Budapest, 1962.

<sup>19</sup> By Szabó, I.: *Interpretarea normelor juridice*. [1960] București, 1964. / *Die theoretischen Fragen der Auslegung der Rechtsnormen*. Berlin, 1963.

<sup>20</sup> For the background, cf. Varga, Cs.: *The Paradigms of Legal Thinking*. [1999] enlarged 2nd ed., Budapest, 2012. and <<http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>>.

*e) Search for Scholarly Evolution*

All that notwithstanding, a temporary attempt at summarisation appeared—true, concealed in lecture notes multiplied in a limited number of copies and never made regularly available again—, taking advantage of the chances before and after the Revolution of 1956, adjusted to the widest conceivable limits of a minimum conformism. For this summa promised and even achieved a reliable analysis of contemporary Western trends with thorough critical reflection, representing a unique clear moment in Hungarian Socialist legal theorising. Marked by Imre Szabó's authority, his associates could at this time commit themselves to nothing but scholarly analysis.<sup>21</sup> However, not even this enthusiastic restart (only to be seen later on as a next-to-mythical memory) was given the chance of becoming the mainstream.

### 3. Institutionalisation and Relaxation

*a) Epigonism as Scholarly Ideal*

Nevertheless, the relatively high standard of academic research—carried out under the direct control of the director of the Institute for Legal Studies of the Hungarian Academy of Sciences, academician Imre Szabó,—and the fact it was imbued with genuinely scholarly ideals, remained all along an exceptional phenomenon, enclosed within the Institute's uniquely privileged ivory-tower with no practical impact upon universities.<sup>22</sup> Within this framework of an almost antagonistic bipolarity between the *academia* and the *universitas*, the generation close to Szabó's (Tibor Vas, Sándor Feri, György Antalffy and Pál Halász<sup>23</sup>) with the disciples of the latter two (Ignác Pap at Szeged, from whose work perhaps only a bibliographical compilation had anything of a lasting value,<sup>24</sup> and Mihály Szozáczky at Pécs, who exerted some influence in both Hungary and the Socialist orbit but allowed—despite his often constructive and even provocative questions—his solutions to waste away in the forced doctrinarism of Marxism<sup>25</sup>) could not go beyond epigonism, leading to an obvious dead-end.

In consequence, the official legal theory, developed by the spirit of Communist party rank-and-file activism at law faculties, with an overwhelming dominance in both textbooks and popular writing, discredited in fact the theoretical profession on the whole, alienating from it legal practitioners and social theorists alike, as a mere ideological exercise. Such a theorisation could not exert major influence beyond its repeated ritual acts of self-commitment; it had not become truly destructive either. Ironically enough, as in a reversed

<sup>21</sup> Antalffy, Gy.—Kulcsár, K.—Peschka, V.—Péteri, Z.—Samu, M.—Szabó, I.—Szozáczki, M.—Sztodolnik, L.: *Allam- és jogelmélet* [Theory of state and law]. Budapest, 1957.

<sup>22</sup> The unbridgeable gap between the kinds of scholarship cultivated at the Academy and in universities became a legendary memory when Szabó started commissioning his disciples (e.g. Peschka) to apply genuine scholarly standards when consulting university staff (e.g. Pál Halász) who were preparing for their academic qualification, while reviewing their pre-publications, who were struck by the formers cold reflection as a personal attack, and then felt bound to react politically.

<sup>23</sup> E.g. Halász, P.: *A normativizmus és az elméleti jogtudomány* [Normativism and theoretical jurisprudence]. [Diss.] Budapest, 1963.

<sup>24</sup> *Magyar állam- és jogelméleti bibliográfia 1950–1980* [Bibliography of the Hungarian theory of state and law, with English and Russian titles in translation] (ed.: Lajos Nagy), Szeged, 1980.

<sup>25</sup> Szozáczki, M.: *A jog lényege* [The essence of law]. Budapest, 1970.

game, those cultivating it in such a corrupted manner were themselves pushed by aggressive indoctrination. Having contented themselves with having their careers assured in return for their political loyalty, university teachers did in fact acknowledge in peaceful (even jovial) co-existence both the cautious scholarly advancement by academician Szabó, revered and dreaded as the unquestionably number one authority (with due regard to his party, academy and university positions), and the incidental excesses by Szabó's students at the Academy.

At the same time, in a legal-political sense and within the confines of the tolerance of our *Brave New World* of “actually existing Socialism”, some inspiration to democratise practical legal life and increase economic efficiency by humanising the field of law could also finally appear.<sup>26</sup>

### *b) Stalinism in Critical Self-perspective*

Imre Szabó, who had formulated the dogmatic cardinal points of his era all along—while also involving supportive companions<sup>27</sup>—, finally attempted, in a delicate manner but increasingly explicitly, a sensible separation from Vishinsky's crude and politically biased position.<sup>28</sup> Indeed, when criticising “Socialist normativism” while promising its Marxising transcendence, he dedicated a monograph to a novel quasi-ontologising realisation, hoping that he could develop a systematic magisterial oeuvre in legal philosophy. Despite succeeding in having the outcome published in both French and Russian,<sup>29</sup> he might probably have been aware of his failure, with the work hardly performing anything more than a conceptual game. His theorisation on law proper was reducible to law being a reflection of something else, as the form of some dubious contents, concluded through the usual deductive channels of the dogmatic presuppositions of Marxism, all of which was eventually bound to stop exactly where it should have concerned law as such, in an explanation of some genuinely legal context. He never reverted to its continuation, never addressed ensuing problems. Confined to mere re-stylisation while hardened in doctrinarism, he formulated again and repeatedly the spectrum of the ideological tenets of the law of Socialism in a succession of further books<sup>30</sup>—rephrasing former writings (with decreasing theoretical depth) by self-dosing nothing but apologetics,<sup>31</sup> at times going so far as to justify

<sup>26</sup> See, above all, by Samu, M.: *Az új gazdasági mechanizmus állam- és jogelméleti vonatkozásai* [The new economic mechanism as assessed by the theory of state and law]. Budapest, 1967. and *Politika – jogpolitika – jog* [Policy – policy of law – law]. In: *A Magyar Jogász Szövetség 8. munkaértekezlete*. Szeged, 1975. 403–417.

<sup>27</sup> E.g. Péteri, Z.: *A szocialista állam- és jogelmélet néhány kérdése az SzKP XXII. Kongresszusán* [Some questions of the Socialist theory of state and law at the 22nd Congress of the Soviet Communist Party]. *Állam és Igazgatás*, 12 (1962), 330–343.

<sup>28</sup> Cf., by Szabó, I.: *Sotsialisticheskoe pravo* [Socialist law]. [1963] Moscow, 1964; *Társadalom és jog* [Society and law]. Budapest, 1964. and *Szocialista jogelmélet – népi demokratikus jog* [Socialist theory of law – peoples democratic law]. Budapest, 1967.

<sup>29</sup> By Szabó, I.: *Les fondements de la théorie du droit*. [1971] Budapest, 1973. / *Osnovy teorii prava*. Moscow, 1974.

<sup>30</sup> Cf., by Szabó, I.: *Jogelmélet* [Theory of law]. Budapest, 1977. and *A jog és elmélete* [Law and its theory]. Budapest, 1978.

<sup>31</sup> Cf., as symbolic re-assertions, by Szabó, I.: *Jogi gondolkodásunk szocialista átalakulása* [The Socialist transformation of our legal thinking]. *Állam és Igazgatás*, 10 (1960), 401–414; *Jogtudományunk nemzeti és nemzetközi jellegéről* [On the national and international character of our jurisprudence]. *Jogtudományi Közöny*, 24 (1969), 213–216. and *A Nagy Októberi Szocialista*

theoretically the Bolsheviks' so-called revolutionary justice,<sup>32</sup> the plain denial of any spirit of law. Through his re-Marxising he may have released the leftist soaring of his early juvenile self, backed by the inflexibility of an advanced age. Acting as the pioneer of Marxism's theoretical-legal renewal, he searched for additional fora to disseminate his ideas in the Socialist world,<sup>33</sup> arriving back, in the final analysis, at nothing but a retrograde restatement of the genuine renaissance of Marxist doctrinarism.

In the meantime, his disciples started, as detached in their methodological foundations as well, expressing explicit demands to Marxise legal thought to clear it of its random or directly politico-ideological ornaments of constraints (ascribed, even if implicitly, to its specific Russian-Soviet implementation, that is, to its Lenin-cum-Stalinist framework, which was suited to Asian political traditions). Firstly, they tried to liberate theorising from its degradation of serving as a simple auxiliary to the Communist Party's legal policy at the given time (which was practised in order to prevent scholars from interfering with actual practice).<sup>34</sup> Secondly, they separated Marxism as methodology from Socialism as a political fact imbued with ideological expectations, in order to enable the former to be freed from the latter's irrelevance to academic scholarship.<sup>35</sup> This was succeeded by further innovative efforts at clarification.<sup>36</sup>

### c) Diversification with New Trends

Szabó's younger students (Kulcsár and Peschka) as well as those affiliated with Tibor Vas (Péteri) or socialised in the metropolitan university (Samu and Sztodolnik) soon made their voices heard, heralding their own problem-sensitivity and facing the risk, then, of being seen as intellectually independent. Within the programmatically declared anti-pluralism of Marxism at the time—such that scholarly truth was one and indivisible, with any competition or variation amounting to subversion (to be eliminated and retaliated against at once)—, any reinterpretation of the established canon, even if inferred from Marx's texts (taken as a revelation, by the way), provoked excitement by its very existence as a supposedly wilful challenge to ideological indoctrination. This was dreaded and feared, calling for existential

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Forradalom hatása a marxista jogelmélet fejlődésére [The influence of the Great October Socialist Revolution on the development of Marxist legal theory]. *Magyar Tudomány*, 22 (1977), 803–810. As an attempt at offering some contrast, see also Samu, M.: Szocialista jogszemléletünk fejlődése [The development of our Socialist view on law]. *Magyar Jog*, 22 (1975), 135–142.

<sup>32</sup> Szabó, I.: Forradalom és törvényesség [Revolution and legality]. *Állam és Igazgatás*, 19 (1969), 199–208.

<sup>33</sup> Szabó, I.: *Karl Marx und das Recht* Vorträge. [1976] Berlin, 1981.

<sup>34</sup> Peschka, V.: A magyar állam- és jogtudományok és a társadalmi gyakorlat [Hungarian studies on state and law and the social practice]. *Az MTA Társadalmi és Történelmi Tudományok Osztályának közleményei*, 13 (1964), 429–441.

<sup>35</sup> Peschka, V.: Marxista és szocialista jogelmélet [Marxist and Socialist theories of law]. *Jogtudományi Közlöny*, 23 (1968), 165–172.

<sup>36</sup> As the most significant moment, cf. V. I. Lenin – Osvonopolozhnik sotsialisticheskogo prava [Lenin as the founder of Socialist law]. In: Lenin o prave [Lenin on law]. Moscow, 1969. 274–321. For their uncensored text, cf. Szabó, I.–Kulcsár, K.–Péteri, P.–Varga, Cs. in *Állam- és Jogtudomány*, 13 (1970), 3–57; and also Varga, Cs.: Lenin and Revolutionary Law-making. *International Review of Contemporary Law*. [Brussels] (1982) 1, 47–59. / Lénine et la création révolutionnaire du droit. *Revue internationale de Droit contemporaine*. [Bruxelles] (1982) 1, 53–65.

rétorsion, because this was also held to be liable to become easily multiplied and lead to unforeseeable, hard-to-control conclusions.

Two creative personalities got farthest on that road, marking the path for the development of legal theorising in Hungary. Kálmán Kulcsár's legal-sociological stand<sup>37</sup> and Vilmos Peschka's legal philosophy<sup>38</sup> were equally built on systematic foundations, the former on the harmonisation of Marxism with legal sociologising in Western Europe and the Atlantic world, the latter on re-scheming Marxist positions when confronted with contemporary (mostly German) legal philosophising. This double direction was complemented by the axiologism of Zoltán Péteri<sup>39</sup> and the criticism on the Rule of Law by László Sztodolnik.<sup>40</sup> As the Soviet empire stood for a monolithic bloc in which divergences could, if at all, arise unevenly—through diversion of either foreign politics (Yugoslavia, and then Albania and Romania) or ideology (Yugoslavia, and partly Poland)—, the growth of research into independent trends and schools meant not only a significant enrichment of jurisprudential thought but also a diversification of Socialist jurisprudence that could reveal latent potentialities developed from within. Notably, Kulcsár institutionalised legal sociology in Hungary in a way that disseminated its approach in the centres of orthodoxy (Moscow, Sofia and Bucharest as well). As a conceptual-analytic positivist, Peschka investigated a series of topics relevant to Marxist legal philosophising in order to build up his own Marxian orthodoxy step by step, derived critically from both Marxism and its roots in classical German philosophy, integrated with a number of insights taken from contemporary international monographic literature.<sup>41</sup>

<sup>37</sup> Cf., by Kulcsár, K.: *A jogszociológia problémái* [Problems of legal sociology]. Budapest, 1960. {rev. ed. *A jogszociológia alapjai* [The foundations of legal sociology]. Budapest, 1976.}, *A jog nevelő szerepe a szocialista társadalomban* [The educational role of law in a Socialist society]. Budapest, 1961. followed by his collections *Társadalom, politika, jog* [Society, politics, law]. Budapest, 1974. as well as *Gazdaság, társadalom, jog* [Economy, society, law]. Budapest, 1982.

<sup>38</sup> Cf., by Peschka, V.: *A jogviszonyelmélet alapvető kérdései* [The foundational issues of a theory of legal relations]. Budapest, 1960; *Jogforrás és jogalkotás* [Source of law and law-making]. Budapest, 1965; *Grundprobleme der modernen Rechtsphilosophie*. [1972] Budapest, 1974. / *Gendai hōtetsugaku no kihon mondai*. Kyōto, 1981; *Max Weber jogszociológiája* [Webers legal sociology]. Budapest, 1975; *Die Theorie der Rechtsnormen*. [1979] Budapest, 1982. and *Jog és jogfilozófia* [Law and legal philosophy]. Budapest, 1980.

<sup>39</sup> Cf., by Péteri, Z.: Die Kategorie des Wertes und das sozialistische Recht. *Wissenschaftliche Zeitschrift der Friedrich-Schiller-Universität Jena*, Gesellschafts- und Sprachwissenschaftliche Reihe, 15 (1966), 427–429 and Az értékek objektív megalapozásának kérdései a szocialista jogelméletben [Questions of the objective foundation of values in the Socialist theory of law]. *Állam- és Jogtudomány*, 21 (1978), 433–437 as well as Influence of Natural Law on Positive Law. In: *Études en droit comparé / Essays on Comparative Law* (ed.: Z. Péteri). Budapest, 1966. 45–60. Cf. also, by Sztodolnik, L.: Jog és igazságosság [Law and justice]. *Jog és Társadalom*, 1968/2, 12–24 and A szocialista jog és igazságosság [Socialist law and justness]. *Magyar Jog*, 17 (1970), 394–399.

<sup>40</sup> Sztodolnik, L.: Metamorphoses of the Rechtsstaat Idea. *Annales Universitatis Budapestiensis de Rolando Eötvös nominatae*, Sectio juridica, 4 (1962), 171–191, preceded by Péteri, Z.: Sulla cosiddetta “Rule of Law”. *Democrazia e Diritto*, [Roma] (1960), 1–18.

<sup>41</sup> For an obituary assessment, cf. Varga, Cs.: Vilmos Peschka (1929–2006). *Archiv für Rechts- und Sozialphilosophie*, 93 (2007), 253–255.

Such a substructure provided the medium for further initiatives to evolve as launched by the following generation, dedicated to a critical survey of the state of legal philosophising,<sup>42</sup> clarification of its methodology and<sup>43</sup> ontological reconstruction,<sup>44</sup> as well as elaboration of the systemic correlations between law, language and logic.<sup>45</sup>

#### d) *Comparatism*

The re-institutionalisation of legal comparatism—which meant, at an international level, integration of Socialist law in the legitimate world-wide families of law by having it recognised as an independent type amongst them, and in a Hungarian context, professionalisation (or rehabilitation) of law as a specific subject of cognition<sup>46</sup>—was indeed

<sup>42</sup> E.g. as a manuscript of 1966 banned by Szabó at his time, Varga, Cs.: A jogmeghatározás kérdése a 60-as évek szocialista elméleti irodalmában [Questions relating to the definition of law in the Socialist theoretical literature of the 60s]. *Állam- és Jogtudomány*, 22 (1979), 475–488, followed by his *Quelques problèmes de la définition du droit dans la théorie Socialiste du droit*. *Archives de Philosophie du Droit*, 12 (1967), 189–205.

<sup>43</sup> E.g. Varga, Cs.: *Quelques questions méthodologiques de la formation des concepts en sciences juridiques*. *Archives de Philosophie du Droit*, 18 (1973), 205–241. as well as Eörsi, Gy.: *Jogelméleti torzó* [A torso in legal theory]. *Állam- és Jogtudomány*, 23 (1980), 353–381.

<sup>44</sup> E.g. by Varga, Cs.: *Lukács's Posthumous Ontology as Reviewed from a Legal Point of View*. *Acta Juridica Academiae Scientiarum Hungaricae*, 22 (1980), 439–447. and *The Place of Law in Lukács Ontology*. In: *Hungarian Studies on György Lukács II*. (ed.: L. Illés et al.) Budapest, 1993. 563–577.

<sup>45</sup> E.g. Varga, Cs.: *On the Socially Determined Nature of Legal Reasoning*. *Logique et Analyse*, (1973) 61–62, 21–78 and in *Études de logique juridique*, V. Publ. Ch. Perelman. Bruxelles, 1973. 21–78; *Law and Its Approach as a System*. *Acta Juridica Academiae Scientiarum Hungaricae*, 21 (1979), 295–319. and *Informatica e Diritto*, [Florence] 7 (1981), 177–199. as well as *Leibnitz und die Frage der rechtlichen Systembildung*. Budapest, 1986. and in *Materialismus und Idealismus im Rechtsdenken*. Geschichte und Gegenwart (Hrsg.: K. A. Mollnau). Stuttgart, 1987. 114–127.

<sup>46</sup> In the Communist world, the first initiative was taken by B. T. Blagojevic in the Titoist Belgrade to found an *Institut za uporedeno pravo* (1955), with a specific law to grant it the status of a scientific institute (1974). Cf. <<http://www.icl.org.yu/m7e.html>>. In the Muscovite empire, re-orientation followed slowly and gradually, as started in Czechoslovakia. Cf., e.g. Bystrický, R.: *Za marxistickou srovnávací právovědu* [For a Marxist comparative jurisprudence]. *Právník*, [Prague] (1962) 8, 625 et seq.; Boguszak, J.: *K otázce tzv. srovnávací právovědy* [To the question of comparative jurisprudence]. *Právník*, (1962) 9, 803–806; Knapp, V.: *Verträge im tschechoslowakischen Recht* (Ein Beitrag zur Rechtsvergleichung zwischen Ländern mit verschiedenen Gesellschaftsordnung). *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 27 (1962), 495–518; Svoboda, M.: *Jestě k marxistické srovnávací právovědě* [Once more on a Marxist comparative jurisprudence]. *Právník*, (1963) 5, 388 et seq.; Knapp, V.: *K otázce socialistické srovnávací právní vědy* [To the question of a socialist comparative science of law]. *Právník*, (1963) 5, 391–402. It was followed by Zivs, S. L.: *O metode sravnitel'nogo issledovaniia v nauka o gosudarstve i prave* [On the method of comparative research in the sciences of state and law]. *Sovietskoe gosudarstvo i pravo*, (1965) 3, 23 et seq.; Kanda, A.: *Základní problémy srovnávání právních systémů ruznách ekonomických soustav* [Foundational problems of comparing legal systems pertaining to differing economic regimes]. *Právnícké Studie*, (1965) 4, 699–720; Tshikvadze, V. M.—Zivs, S. L.: *Sravnitel'noe pravovedenie v praktike mezhdunarodnaia nautshnaia sotrudnitshstva* [Comparative jurisprudence in the practice of international scientific cooperation]. *Sovietskoe gosudarstvo i pravo*, (1966) 2, 12–21; Posch, M.—Petev, V.: *Vergleichung in der Rechtslehre*. *Staat und Recht*, (1966) 1, 89 et seq.; by Knapp, V.: *Quelques problèmes méthodologiques dans la science du droit comparé*. *Revue roumaine*

a deed with momentous consequences, although, in fact, it required mere re-ideologised justification rather than reconstruction from its very roots (as in case of, e.g. legal sociology), implemented through measures of scientific organisation rather than by theoretical construction. That is, once Szabó (note it was he who had formerly expelled the discipline from legal curricula) decided to establish a section (with Zoltán Péteri as head) for the comparison of laws in his Institute for Legal Studies of the Hungarian Academy of Sciences—thereby complementing the extended documentation already compiled (serving the political establishment with up-to-date information on the laws of the Soviet Union, and of all peoples' democracies as well as of the leading “capitalist” countries) with comparative source-compilations and monographs—, well, under such conditions Szabó's methodological re-foundation of, with manifold initiatives in developing, a specifically “Socialist” approach to the comparison of laws soon resulted in a genuine movement permeating the whole Socialist world, the covert aim of which was clearly to have Socialist law internationally recognised as a full member within the families of law on Earth. This effort was crowned with success, so much so that, as a by-product, it also made it impossible to reject the doctrine of Socialist law on political or ideological grounds from that time on. Or, the “Marxist conception of law”, till then *a limine* ousted as a perverted ideology,<sup>47</sup> became transformed, with the Cold War degenerating into lukewarm Peaceful Co-existence, into a societal product prevalent in its own right, simply to be acknowledged as one of many flourishing trends, standing for “the theory of Socialist law”.<sup>48</sup>

As a secondary effect, all this also resulted in the growing professionalisation of law, on account of the fact that comparison became widespread as a method, a pre-requisite of any genuinely academic research in law. Consequently, from this time on domestic issues had to be treated, first, in a Socialist comparative context and, second, in contrast with other

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*des sciences sociales*, Série de Sciences juridiques, (1967) 1, 76 et seq. / Některé metodologické problémy srovnávací právní vědy. *Právník*, (1968) 2, 91 et seq. The very first scholarly stand in favour of legal comparison in Hungary is Szabó, I.: La science comparative du droit. *Annales Universitatis Budapestinensis de Rolando Eötvös nominatae Sectio juridica*, 5 (1964), 91–134; then Eörsi, Gy.: Comparative Analysis of Socialist and Capitalist Law. *Co-Existence*, (1964) 2, 139–151; followed by Varga, Cs.: Összehasonlító jog és társadalomelmélet [Comparative law and social theory]. *Allam- és Jogtudomány*, 9 (1966), 732–736. and again by Eörsi, Gy.: Réflexions sur la méthode de la comparaison des droits dans le domaine du droit civil. *Revue internationale de droit comparé*, 19 (1967), 397–418. and <[http://www.persee.fr/web/revues/home/prescript/article/ridc\\_0035-3337\\_1967\\_num\\_19\\_2\\_14824](http://www.persee.fr/web/revues/home/prescript/article/ridc_0035-3337_1967_num_19_2_14824)>. This is the field where Péteri's scholarly oeuvre could grow into his own direction. See, as earliest writings of that genre by Péteri, Z.: Z cinnosti Ústavu Státu a Práva Madarskej Akadémie Vied v oblasti srovnávacieho práva. *Právny Obzor*, [Bratislava] (1968), 634–639. and Some Aspects of the Sociological Approach in Comparative Law. In: *Droit hongrois – droit comparé / Hungarian Law – Comparative Law* (ed.: Z. Péteri). Budapest, 1970. 75–94. Editing national reports for the world congresses of comparative law became a constant job for him since 1966 until recently, beginning with *Études en droit comparé / Essays in Comparative Law*. Budapest, 1966. For an overview, cf. Tóth, J.: Rechtsvergleichung in Osteuropa. *Journal der Internationalen Juristen-Kommission*, [Geneva] 6 (1965), 277 et seq.

<sup>47</sup> See, e.g. Kelsen, H.: *The Communist Theory of Law*. New York–London, 1955; Lapenna, I.: *State and Law Soviet and Yugoslav Theory*. London, 1964. and Stoyanovitch, K.: *La philosophie du droit en U.R.S.S.* (1917–1953). Paris, 1965.

<sup>48</sup> Cf., as a representation, Szabó, I.: The Socialist Conception of Law. In: *International Encyclopedia of Comparative Law*, 2. (ed.: R. David). Tübingen, 1976. Ch. III, 49–84.

(“capitalist”, “bourgeois” or “imperialist”) solutions. In addition, practically all monographs in Hungary also had to be founded upon a historical sketch, outlining the particular development as leading to the contemporary present.

The question of why this innovative initiative, born at a right time, has not resulted in a scholarly accomplishment suitable to form grand theories as well—beyond some remarkable comparative historical monographs,<sup>49</sup> doctrinal elaborations and overviews<sup>50</sup>—remains an enigma even now.

#### *e) (Re)Discovery of Western Legal Philosophy*

At a time when the ideological combat against “phenomena of anti-Marxism” was still at its peak<sup>51</sup> and the indivisibility of Marxism’s truth was officially declared (ruling out even the chance that diverging directions or competitive views on its issues could be heard at all), a collection of papers, based upon some preliminaries,<sup>52</sup> was eventually published as a full representation of Hungarian legal theoretical thought.<sup>53</sup> With its critical reflections on “bourgeois” trends, however, it tacitly rehabilitated the latter’s fascinating richness and methodical values, re-integrating them into its own sphere. In addition to exploratory papers treating post-war and contemporary schools (which had broken continuity in Hungary),<sup>54</sup>

<sup>49</sup> Eörsi, Gy.: *Comparative Civil (Private) Law. Law Types, Law Groups, the Roads of Legal Development*. [1975] Budapest, 1979. and Varga, Cs.: *Codification as a Socio-historical Phenomenon*. [1979/1991] 2nd ed., Budapest, 2011. and <<http://drsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>>.

<sup>50</sup> E.g. Eörsi, Gy.: *A skandináv jogról és jogtudományról* [On Scandinavian law and jurisprudence]. Budapest, 1974. and Asztalos, L.: *Polgári jogi alaptan. A polgári jog elméletéhez* [The basic doctrine of civil law]. Budapest, 1987.

<sup>51</sup> The assessment of social sciences from a sole “class struggle” perspective permeated so powerfully the Hungarian Academy of Sciences even in the second half of the 1960s that on the demand of József Szigeti (director of the Academy’s Institute of Philosophy, soon rewarded by becoming a member himself of the Academy), a committee (to be presided over by him) was set up to co-ordinate the fight against “phenomena of anti-Marxism”. On behalf of the Academy’s Institute for Legal Studies, Imre Szabó—the only ordinary member of the Soviet Academy of Sciences at the time to be a jurist, who preferred, if such a choice could be made, scholarship to thought police—commissioned me, a strikingly low-ranking beginner, to represent him amongst institute directors, confined to reporting on nothing but the theoretical work carried out anyway in the Institute with a critical perspective on Western trends.

<sup>52</sup> E.g. Szabó, I.: A hegei jogfilozófia tárgya és a marxista jogelmélet [The subject of the Hegelian philosophy of law and Marxist legal theory]. *Állam- és Jogtudomány*, 9 (1966), 527–537; Kulcsár, K.: Marxizmus és a történeti jogi iskola [Marxism and the historical school of law]. *Jogtudományi Közlöny*, 10 (1955), 65–85; by Peschka, V.: A magyar magánjogtudomány jogbölcseleti alapjai [Legal philosophical foundations of the civil law doctrine in Hungary]. *Az MTA ÁJI Értesítője*, 3 (1959), 37–74 and Thibaut és Savigny vitája [The debate between Savigny and Thibaut]. *Állam- és Jogtudomány*, 17 (1974), 353–381.

<sup>53</sup> *Kritikai tanulmányok a modern polgári jogelmületről* [Critical studies on modern Western theories of law]. (ed.: I. Szabó). Budapest, 1963.

<sup>54</sup> E.g. Peschka, V.: Das bürgerliche rechtstheoretische Denken in der ersten Hälfte des XX. Jahrhunderts. *Acta Juridica Academiae Scientiarum Hungaricae*, 19 (1977), 1–29; by Péteri, Z.: Gustav Radbruch und einige Fragen der relativistischen Rechtsphilosophie. *Acta Juridica Academiae Scientiarum Hungaricae*, 2 (1960), 113–160. and Az “újjaéledt” természetjog néhány jogelméleti kérdése a második világháború után [Some legal theoretical questions of the “revived” natural law

their major texts were translated and published in Hungarian, too, in order to serve as critical editions of study materials to extend the scope of a genuinely scholarly reflection on law<sup>55</sup>—based on my repeated proposals and under my editorship, as a unique achievement in the Socialist empire.

At the same time, some middle-class fellow-travellers of the interwar illegal Communism—proudly preserving the scholarly and intellectual values of their civic past—also took part in this burgeoning, mostly through some precious manuscripts papers they bequeathed.<sup>56</sup>

### f) Mediator in the Region

In addition to launching *Acta Juridica Academiae Scientiarum Hungaricae* in 1957 as an English/German/Russian/French quarterly in company of quite a few monographs and national reports based on historical comparison, the Institute assumed—partly as directed toward the rigid Soviet, East German and Balkan bloc, while intending to build contacts

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after World War II]. *Állam- és Jogtudomány*, 5 (1962), 469–505; as well as Kulcsár, K.: A jog etnológiai kutatásának problémái – ma [Problems of the laws ethnological research today]. *Valóság*, 21 (1978), 1–11.

<sup>55</sup> *Modern polgári jogelméleti tanulmányok* [Studies from the modern Western theories of law]. (ed.: Cs. Varga). Budapest, 1977. and *Jog és filozófia*. Antológia a század első felének polgári jogelméleti irodalma köréből [Law and philosophy: Anthology of Western legal theorising from the first half of 20th century]. (ed.: Cs. Varga). Budapest, 1981. The new tone such an unprecedented publication heralded was at once perceived by those of Hungarian political emigration in the West. For Hanák, T.: *Az elmaradt reneszánsz*. A marxista filozófia Magyarországon [Renaissance that failed to take place: Marxist philosophy in Hungary]. Bern, 1979. 179 and 207, “However, Hungarian philosophical life has another branch or direction as well: one searching for paths to Europe’s philosophical life and heritage. This can be observed first of all in recent [...] chrestomathies introducing to the non-Marxist philosophical world like, e.g. *Modern polgári jogelméleti tanulmányok* [...]” “The book of selected legal philosophical studies [...] is an oeuvre supplying a great want.” One should note, the contract for *Jog és filozófia* had envisaged a three-part series. The second volume was intended to overview post-war western trends, while the third one’s endeavour was even more pioneering: to be the very first in the world to represent early Soviet-Russian legal theory alongside Stalinist and post-Stalinist Soviet developments, complemented by so-called peoples democratic Socialist legal theory. Ironically enough, when the second volume had mostly been completed (only copyright negotiations being under way) and a substantial amount of funds had been raised (with materials collected) for the third volume as well, all this was slowed down and then finally stopped by the ongoing financial crisis of the Publishing House of the Hungarian Academy of Sciences. The deliberateness of such an open-hearted start was also reflected in the late 1960s when “annotations” heading in the quarterly *Állam- és Jogtudomány* for foreign reviews were introduced (1966) and the biweekly *Jogi Tudósító* for translations was launched (1970). The present author collected and republished his most-in-the-depths contributions in Varga, Cs.: *Jogi elméletek, jogi kultúrák*. Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Legal theories, legal cultures: Reviews from the field of legal philosophy and comparative law]. Budapest, 1994.

<sup>56</sup> Outstanding in chapters dedicated to deontic logic at a time when it was practically banned, cf., e.g. Halász, A.: Szász-Schwarz Gusztáv és a jogalany. Második traktátus: A fikció [Szász-Schwarz on legal personality / tractate on fiction]. [Budapest, 1957] (ed.: Cs. Varga). *Jogelméleti Szemle*, (2005) 3 in <<http://jesz.ajk.elte.hu/varga16.html>>.

with Yugoslavia as well, which had started a politically and ideologically independent “alternative” path—a leading mediatory role to foster reconsideration of the Soviet/Socialist approach to law through the critically self-reflecting Hungarian theory.<sup>57</sup>

#### 4. Disintegration

##### a) *New Foundations for Marxism*

The ontological approach of Szabó, focusing on his return to “original” sources, idealised in fact the perspective of a hoped-to-come “renewal of Marxism”.<sup>58</sup> All it achieved was precisely contrary to his original intention: perfection of doctrinarism with a spasmodic insistence on setting “criteria out of principles”.<sup>59</sup> Reaching nothing but retrospective discreditation, he could, thereby, only achieve rigidifying his own position. Accordingly, intents to preserve Marxism’s hegemony—despite attempts at clarification at times<sup>60</sup>—became reduced to mere verbosity.

##### b) *Competitions*

The conceptual-analytic positivism of Peschka initiated deepened polemics as to contemporary Western trends.<sup>61</sup> Kulcsár’s sociologism centred, step by step, on the issue of modernisation (generalising, in order to build his own theory, mainly from American, Japanese and Indian approaches and case studies).<sup>62</sup> On behalf of others, functionalist comparative-historical theorisation as an openly epistemo-ontological approach,<sup>63</sup> efforts to formulate a sociological grand theory,<sup>64</sup> as well as expressly methodological reflections<sup>65</sup>

<sup>57</sup> E.g. *Aktuelle Probleme der marxistisch-leninistischen Staats- und Rechtstheorie*. Material der Konferenz der Staats- und Rechtstheoretiker der europäischen sozialistischen Länder (Hrsg.: Z. Péteri). Budapest, 1968.

<sup>58</sup> By Szabó, I.: *Ember és jog. Jogelméleti tanulmányok* [Man and law: Papers in legal theory]. Budapest, 1987.

<sup>59</sup> The “second, amended” edition of Szabó, I.: *A burzsoá állam- és jogbölcselet Magyarországon* [Bourgeois theory of state and law in Hungary]. Budapest, 1980. proved to be of an expressly provocative effect by its (new) Foreword (16–21.).

<sup>60</sup> E.g. Peschka, V.: *Wider die missverstandene marxistische Rechtstheorie*. In: *Legal Theory – Comparative Law. Studies in Honour of Professor Imre Szabó* (ed.: Z. Péteri). Budapest, 1984. 11–18.

<sup>61</sup> By Peschka, V.: *Az etika vonzásában* (Jogelméleti problémák az etika aspektusából) [Problems of legal theory from the aspect of ethics]. Budapest, 1980. and *Die Eigenart des Rechts*. Budapest, 1989.

<sup>62</sup> By Kulcsár, K.: *Rechtssoziologische Abhandlungen*. Budapest, 1980. and *Politikai és jogszociológia* [Political and legal sociology]. Budapest, 1987.

<sup>63</sup> Varga, Cs.: *The Place of Law in Lukács World Concept*. [1985/1998] 3rd ed., Budapest, 2012. and <<http://drcsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/>>.

<sup>64</sup> By Sajó, A.: *Társadalmi szabályozottság és jogi szabályozás* [Regulation by society and legal regulation]. Budapest, 1978. and *Látszat és valóság a jogban* [Semblance and reality in law]. Budapest, 1986.

<sup>65</sup> Sajó, A.: *Kritikai értekezés a jogtudományról* [A critical treatise on jurisprudence]. Budapest, 1983.

and clearly axiological claims<sup>66</sup> accompanied them. Well, all these were to re-contextualise—although not denying openly the tenets of the founders’ Marxism—theoretical legal thought in a wide-ranging area of conflicting insights and views.

c) *Western Legal Philosophy Acknowledged*

After the end of the short-lived coalition period following World War II, in the Socialist orbit, as is well known, the discourse with both Western European and Atlantic legal thought was broken. This very discontinuation was ended definitely when basic works representing Western ideas were translated into Hungarian, with the background intention of elevating them into part and parcel of domestic literature and academic thought by their own right.<sup>67</sup> Thereby, a kind of *usus*<sup>68</sup> was also born: referring to, while moreover systematically commenting upon, the entire professional heritage within the sole bound of

<sup>66</sup> Péteri, Z.: Perspectives for a Socialist Axiology of Law. In: *Rechtskultur – Denkkultur* (Hrsg.: E. Mock–Cs. Varga). Stuttgart, 1989. 96–105.

<sup>67</sup> Cf. also *Jog és szociológia* [Law and sociology] (ed.: A. Sajó). Budapest, 1979. Later on, historical part of Bodenheimer, E.: *Jurisprudence The Philosophy and Method of the Law*. [1962] Rev. ed. Cambridge, 1974. was also translated in *Bevezetés a jogbölcséleti gondolkodás történetébe*. Miskolc, 1991. 129 et seq.

<sup>68</sup> It was not only the bare fact of having masterpieces on ideologically sensitive fields translated that was unprecedentedly unique in the whole span of the Socialist period, either in Hungary or elsewhere in the bloc. It also became an exclusively Hungarian pattern in the region that ambitious anthologies with quite a few papers covering given topics (introduced by analytical surveys and accompanied with comprehensive bibliographies) were published in unbroken continuation. See, from the series “Jogfilozófiák” [Legal philosophies], launched and edited by Cs. Varga, *A társadalom és a jog autopoietikus felépítettsége* [The autopoietic structure of society and law] (eds: L. Cs. Kiss–A. Karácsony). (1994), *Alkotmánybíráskodás – alkotmányértelmezés* [Constitutional jurisdiction – constitutional interpretation]. (ed.: P. Paczolay) (1995), *Joguralom és jogállam* [Rule of law and Rechtsstaatlichkeit] (ed.: P. Takács) (1995), *Jog és filozófia* [Law and philosophy] (ed.: Cs. Varga) (1998, enlarged ed. 2001), *Jog és nyelv* [Law and language] (ed.: M. Szabó–Cs. Varga) (2000), *Jog és antropológia* [Law and anthropology] (ed.: I. H. Szilágyi) (2000), *Hayek és a brit felvilágosodás Tanulmányok a konstruktivista gondolkodás kritikájának eszmetörténeti forrásairól* [Hayek and the British enlightenment: Studies from the historical sources of the criticism on constructivist thought] (ed.: F. Horkay Hörcher) (2002), *Államtan* [Theory of the state] (ed.: P. Takács) (2003), *Európai alkotmányozás* [European constitution-making] (ed.: P. Paczolay) (2003), *Természetjog* [Natural law] (ed.: J. Frivaldszky) (2004, enlarged ed. 2006), and *A jogösszehasonlítás elmélete*. Szövegek a jelenkori komparatiztika köréből [Theory of the comparison of laws: texts from contemporary comparatistics] (ed.: B. Fekete) (2006); from the series of “Philosophiae Iuris”, *Historical Jurisprudence / Történeti jogtudomány* (ed. J.: Szabadfalvi) (2000), *Scandinavian Legal Realism* (ed.: A. Visegrády) (2003); and from the series “Prudentia Iuris” published in Miskolc under the editorship of M. Szabó, *Mai angol–amerikai jogelméleti törekvések* [Present-day Anglo–American trends in legal theory] (ed.: J. Szabadfalvi) (1996), *Logikai olvasókönyv joghallgatók számára* [Reader in logic for law students] (ed.: M. Bódig–M. Szabó) (1996); and finally, from the series “Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae”, *A jogi gondolkodás paradigmái*. Szövegek [Text to the study of the paradigms of legal thinking] (ed.: Cs. Varga) [1996] (1998). This was done with the intention partly to speed up western intellectual reception and partly in order to avoid entering into copyright procedures, plainly necessary for the translation of magisterial works *in extenso*.

critical and adaptive reflections.<sup>69</sup> All this having taken place under Szabó's patronage, it could already provide a basis for gradually expanding and then simply transcending the limits of tolerance of the until then completely closed, Moscow-dictated jurisprudential thought; this was also in the form of re-examining its own traditions in a more differentiated way, in parallel with (sometimes posthumous) editing of some bequeathed original texts.<sup>70</sup>

Such a foundation was already suitable for a comprehensive reevaluation of the classical Hungarian interwar legal thought and some surviving memories as well.<sup>71</sup>

#### d) *Hungarian Legal Theory as a National Corpus*

Assisted by all this, after decades of isolation Hungarian legal philosophy became again one of the internationally reputed workshops of vivid intellectual life. Following completion of a vast synthesising summary of the entire discipline,<sup>72</sup> after more than half a century and for the first time since the 1920s,<sup>73</sup> repeated encouragements came from abroad requesting a retrospective survey with political clichés replaced, from this time on, by diverging positions generated through public debates and also by attempts at self-critical evaluation in the professional press.<sup>74</sup> Also, a bibliographical overview was published in three languages spanning the whole Socialist period, and so-called annotations started reviewing the latest domestic developments in an international forum.<sup>75</sup>

<sup>69</sup> E.g. Pokol, B.: *Komplexe Gesellschaft*, Eine der möglichen Luhmannschen Soziologien. [1990] 2., erw. Ausg., Berlin, 2001.

<sup>70</sup> E.g. Horváth, B.: *Forradalom és alkotmány (Önéletrajz 1944–45-ből)* [Revolution and constitution: intellectual autobiography from 1944–45]. Budapest, 1993. and Szabó, J.: *Ki a káoszból, vissza Európába* [Away from the chaos, back to Europe]. Budapest, 1993.

<sup>71</sup> E.g. Hamza, G.–Sajó, A.: Savigny a jogtudomány fejlődésének keresztútján [Savigny at the crossroads of the development of jurisprudence]. *Állam- és Jogtudomány*, 23 (1980), 79–111.

<sup>72</sup> A monument-like testimony to this process is *Állam- és Jogtudományi Enciklopédia* [Encyclopaedia of the sciences on state and law], I–II. (ed.: I. Szabó). Budapest, 1980. all through critical and self-reflective indeed, by contrasting conflicting viewpoints within an emphasisedly theoretical framework.

<sup>73</sup> Somló, F.: Die neuere ungarische Rechtsphilosophie. *Archiv für Rechts- und Wirtschaftsphilosophie* I (1907–1908), 315–323; by Moór, J.: Somló Bódog [Felix Somló]. *Társadalomtudomány*, 1 (1921), 17–40. as well as Vorwort to Somló, F.: *Gedanken zu einer ersten Philosophie* (Hrsg. J. Moór). Berlin–Leipzig, 1926. 3–17; Horváth, B.: Die ungarische Rechtsphilosophie. *Archiv für Rechts- und Wirtschaftsphilosophie*, 24 (1930), 37–85.

<sup>74</sup> E.g. Szabó, I.: Az állam- és jogelmélet harminc éve Magyarországon [Thirty years of the theory of state and law in Hungary]. *Jogtudományi Közlöny*, 30 (1975), 129–134. and Peschka, V.: Le développement de la théorie du droit en Hongrie après la deuxième guerre mondiale. *Archives de Philosophie du Droit*, 16 (1971), 347–354. as well as Varga, Cs.: Current Legal Theory in Hungary. *Current Legal Theory*, 4 (1986), 15–21.

<sup>75</sup> As one of the founding members of the editorial board of *Current Legal Theory* [Leuven], Csaba Varga undertook the bibliographical and analytical presentation of the new outputs of legal theory in Hungary from the beginning up to its cessation (1983–1998), by preparing a long series of abstracts in English of Hungarian publications.

e) *Balance*

As soon as legal philosophy found its proper place under the sun and could explore various subjects in touch with other disciplines in a larger theoretical frame, applied research evolved, as well. From that time on, with ideological restrictions somewhat relaxed, the obvious task at hand was to develop a viable legal policy (on the basis of the given stuff of the law and by avoiding, as far as possible, the direct over-politicisation of the issues), together with searching for the ways through which the latter's conscious use could foster due protection of the law's autonomy and prestige, even under the still extant and politically forceful Socialist conditions.<sup>76</sup>

A prerequisite to this all was elaboration of a modernisation strategy, within a scheme neither discrediting law by its degradation into a substitute stabilising force of the *status quo ante*, nor running ahead, doubling the law's normative substance, but allowing each and every step and piece of change to build on one other by becoming integrated, without gaps, as fed back within the modernisation process itself.<sup>77</sup>

## 5. End-game of Legal Theorising in Substitution for State Religion

After the collapse of the political system of Socialism, Marxism as an official ideology underwent a strikingly rapid decline. Forced paths prescribed by ideological expectations and interventions had already been weakened by that time, and political changes were quasi-imminent. By this time, however, political changes happened to coincide with the most natural call for a generation change. Having reached an advanced age and withdrawn to mostly honorary entitlements, Imre Szabó was only capable of reframing earlier accomplishments without formulating any new ideas. His one-time disciples arrived at the point of publishing their own final syntheses, which they hoped were to crown their personal oeuvres.<sup>78</sup> Suddenly and by coincidence, all this anticipated and stood in fact for two generations' simultaneous retirement. On behalf of the next generation, a summary account of what Marxism had increasingly been and served for was formulated, in the spirit of closing the past.<sup>79</sup> There were also some essayistic surveys published to draw a temporary

<sup>76</sup> E.g. *A jogpolitika tudományos megalapozásának jogelméleti problémái / Pravogoteoreticheskie problemy nauchnogo obosnovaniia pravovoi politiki / Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik* (ed.: M. Samu). Budapest, 1986. and Samu, M.: *Jogpolitika – jogelmélet* [Policy of law–theory of law]. Budapest, 1989. A challenging project on the borderlines was Takács, P.: *Nehéz jogi esetek. Jogelmélet és jogászai érvelés* [Difficult cases of law: Theory of law and lawyerly argumentation]. [1994] Budapest, 2000.

<sup>77</sup> Kulcsár, K.: *Modernization and Law*. Budapest, 1992; by Sajó, A.: *Jogkövetés és társadalmi magatartás* [Law-observance and social behaviour]. Budapest, 1980. and *Társadalmi-jogi változás* [Socio-legal change]. Budapest, 1988.

<sup>78</sup> Kulcsár, K.: *Jogszociológia* [Sociology of law]. Budapest, 1997. and Peschka, V.: *Appendix "A jog sajátosságához"*. Tanulmányok [Appendix papers on to "The specificity of law"]. Budapest, 1993.

<sup>79</sup> Above all, Varga, Cs.: Introduction. In: *Marxian Legal Theory* (ed.: Cs. Varga). Aldershot–New York, 1993. 13–27.

balance.<sup>80</sup> For want of a proper distance in time, however, all such endeavours were mostly useful only to emphasise the need for a genuine restart.<sup>81</sup>

Having just passed the threshold of the third millennium, it is perhaps too early for us to prognosticate anything about such a legacy's future. What seems to be taken for granted is that Marxism may still have some potential to be present as an additional colour in the near future as well.<sup>82</sup> Moreover, it may even strengthen its position, at least regarding its inherent elements addressing "the quest for community",<sup>83</sup> in paradoxical support of present-day Christian and other humanistic tendencies. And we can even add to the above, from the controversial legacy of Marxism's 20th-century adventure in the history of ideas, a number of still living and inspiring concepts imbued with problem-sensitivities, methodological insights and definite value-consciousness, such as the principle of historicity and the idea of social conditionality. Others include the methodological significance of the concreteness of human and social existence, the theory of alienation (with the subsequent processes of objectification and reification in societal life accomplished), the immanent criticism of Capitalism and forms of post-capitalism as a civilisational idea reduced to material production and consumption, the deconstruction of "ideological" constructs, the advocacy for indigenous rights in an anti-colonialist spirit, the traditional concern for the fate of the Third World and, thereby, also the theoretical criticism of ongoing globalisation.

## 6. Temporary Balance

From among the legal theories of Socialism's Marxism, *Hungarian* scholarship played a rather balancing role all along. This naturally also involved narrowing and distorting simplifications, especially in the 1950s, even if somewhat milder as compared to the rest of Stalin's "peace camp". Its domestic effect was a hardly justifiable deformation with the loss of the sense of true scholarship. However, what it might have developed into if it had followed a path similar to neighbours (from Italy via Austria to West Germany), with Hungary having been successfully saved from our destiny, may perhaps be most reliably judged by the international role Hungarian theoretical legal thought was able to play even under such conditions. Well, despite any pressure, interference or direct political control,

<sup>80</sup> Also formulating a definite value judgement, see, above all, Pokol, B.: A magyar jogelmélet állapotáról [On the state of Hungarian legal theorising]. *Magyar Tudomány*, 37 (1992), 1325–1334. and Szilágyi, P.: Jogbölcsélet [Legal philosophy]. In: *Magyarország a XX. században*. 5.: Tudomány, 2.: Társadalomtudományok (ed.: I. Kollega Tarsoly). Szekszárd, 2000. 39–57 and <<http://mek.niif.hu/02100/02185/html/1183.html>>.

<sup>81</sup> Cf., retrospectively, *A szocializmus marxizmusának jogelmélete* [Legal theory of the Marxism of Socialism] (eds: Cs. Varga–A. Jakab). *Jogelméleti Szemle*, (2003) 4 in <[http://jesz.ajk.elte.hu/2003\\_4.html](http://jesz.ajk.elte.hu/2003_4.html)> and *Marxizmus és jogelmélet* [Marxism and legal theory]. *Világosság*, 45 (2004) and <http://www.vilagosság.hu/>; prospectively, Varga, Cs.: Development of Theoretical Legal Thought in Hungary at the Turn of the Millennium [commented by Paksy, M.–Takács, P.: Continuity and Discontinuity in Hungarian Legal Philosophy]. In: *The Transformation of the Hungarian Legal Order 1985–2005 Transition to the Rule of Law and Accession to the European Union* (eds: P. Takács–A. Jakab–A. F. Tatham). Alphen aan den Rijn, 2007. 615–638 [638–648].

<sup>82</sup> Cf., e.g. by Klenner, H.: *Recht und Unrecht*. Bielefeld, 2004. and *Historisierende Rechtsphilosophie*. Essays. Freiburg in Breslau, 2009.

<sup>83</sup> Nisbet, R. A.: *The Quest for Community*. A Study in the Ethics of Order and Freedom. San Francisco, 1990.

the path Hungarian legal philosophy took has from a relatively early period (throughout and practically without interruption) been characterised by *dialogue* (simultaneously in several directions) and successful *mediation*. For it strove to take a middle-of-the-road stance within the Socialist orbit, between the dogmatically over-ideologised Muscovite pole (represented by the Soviet Union and East Germany, accompanied by post-1968 Czechoslovakia and Bulgaria, united in politics and ideology) and the Polish pattern at the other limiting point (offering a political-rhetorical servicing of Marxism while actually bringing about a Western and Atlantic peripheral copy, with some achievements in genuine scholarship)—in addition to the former’s rivalry with the Yugoslav Titoan and pre-1968 Prague directions targeting the revitalisation (or “renaissance”) of Marxism, re-dogmatising it with a neo-scholastic zeal in fact but refraining from any direct criticism of the West when building its qualifiedly Marxist theory. Moreover, Hungarian theorising had attempted to take a mediator’s role (in representation of the entire Socialist bloc) from the turn of the 1950s and 1960s on between the Muscovite orthodoxy and the Western world, by exporting its rich offering in academic journals and monographic productions mostly in English to the rest of the world (especially the Third World). Most Hungarians who contributed to conferences in Moscow, East Berlin and other Socialist capitals could share the almost absurd experience that they encouraged, initiated and managed the flow of the exchange of publications and pieces of information between, say, the Institute for the Theory of State and Law of the Academy of Sciences of the German Democratic Republic (located in the Otto-Nuschke-Strasse, next to the Berlin Wall) and the *Freie Universität Berlin* (some thousand steps in distance) exactly via Budapest. What is even more, the contemporary Western European and Atlantic (in Soviet terminology: “bourgeois”, in East German terminology: “imperialist”) intellectual influence was mostly channelled via conventionalisations brought through a Marxising filter by Hungarian legal philosophy.<sup>84</sup> For owing to its procession through (by tracing it back to) original Marxian sources, all this seemed to be irrefutable, and not to be neglected. At the same time, the Hungarian pattern maintained a delicate balance between avoiding scandals and maximising the positive effect it could provoke.<sup>85</sup>

Merely conceivable phenomena do not materialise everywhere, in every circumstance. Depending upon specific conditions, even unshaken scholarly freedom in a liberal atmosphere may result in theoretical conformism, resulting in (and degenerating into) either repeated re-treatment of a single theoretical vision or dominance alternating among a few selected sub-mainstreams or schools, constantly switching over into one another. To be sure, Hungarian legal theoretical thought has shown optimum internal diversity all along,

<sup>84</sup> This became apparent to me through the occasions of my regular participation at the [East] Berlin *Rechtstheoretische Tagungen* organised bi-annually by K. A. Mollnau within that Institute as well as my decade-long co-operation under the auspices of the Institute for State and Law of the Soviet Academy of Sciences (with significant involvement by the Institute of State and Law of the Czechoslovak Academy of Sciences), which was initiated by V. Nersesiants with the view of exploring the moment of historicity in theoretical jurisprudence. It is characteristic that neither the Yugoslavs nor the Poles took part in these. At the same time, however, Hungarians (Z. Péteri, Cs. Varga and A. Sajó) were active in contributing to a bilateral academic co-operation launched by the Belgrade legal theory professor R. T. Lukić, President of the Serbian Academy of Sciences and Arts, for nearly a decade.

<sup>85</sup> It was in such an atmosphere that, e.g. the collection *Rozvoj teorij a státu a právu a současnost* (Ed. J. Blahož–V. S. Nersesiants). Praha, 1988. was prepared, including my contribution.

from its upswing starting in the 1960s. To mention just one example, the early collection edited by Imre Szabó in 1963 already presented on behalf of all those working in the field quite an abundance of internal problems of legal Marxism, where his own critical view on Socialist normativism (once expounded by Vishinsky) was extended to a re-appraisal of legal sociology and historical approach, legal comparatism and axiology, natural law and the promise of the Rule of Law, and some years later this successful initiative was followed by an elaboration of the historical and theoretical foundations of human rights in a similarly diversified approach.<sup>86</sup> Contrastingly expressed, we might even claim that Hungarian legal theory has from the era of political relaxation proved relatively richer in trends debating and competing with each other than, say, the almost unchallenged Hart-unison in Great Britain, which had in fact been monopolistic for decades, after subordinating the variety of approaches to a single one, practically without exception.<sup>87</sup>

Hungarian legal theorising took the professional requirements of scholarship rather seriously within the bounds of feasibility of the times. Possibly trying to neutralise the various control channels (especially by the Communist Party Central Committee Bureau, responsible for ideological issues, and the Ministry of the Interior attempts at infiltration) at all times,<sup>88</sup> it could attain quite a recognisably dominant position both in Hungary and the Socialist world. For it abstained from the political and ideological excesses recurrent in both the Muscovite world and Yugoslavia and Poland, thereby preventing accentuated public attention or scandals. Thanks to his over-dominance exerted through personal control, Imre Szabó could achieve the circumstance that neither the fora and personalities of *academia* and *universitas* nor theoretical trends themselves became outlawed in Hungary under the label of “anti-state activity”. Of course, this also implies that we had no emblematic scholar resorting to voluntary exile as some others had to undertake.

Such and similar features may testify to a high level of commitment, serving the cause of scholarship. A theoretical culture like this, constantly forming through internal debates, was suitable to produce significant results in a number of varied fields. All in all, under the restrictive conditions of Communist dictatorship and despite its ideological dictates, Hungarian theoretical-legal scholarship successfully filled a fermentative role, serving as a model, in at least four mutually related, basically paradigmatic and crucial fields of the theoretical cultivation of legal sciences in the second half of the 20th century:

(1) through making the *sociological approach* accepted in the Socialist orbit and, owing to its perspective, by presenting the substance of juridicity in the mirror of a new set of criteria in addition to the sole ones recognised by the mainstream positivistic approach it

<sup>86</sup> *Socialist Concept of Human Rights* (ed.: J. Halász). Budapest, 1966.

<sup>87</sup> Cf. Varga, Cs.: The Hart-phenomenon. *Archiv für Rechts- und Sozialphilosophie*, 91 (2005), 83–95.

<sup>88</sup> Professional socialisation at the Institute for Legal Studies of the Hungarian Academy of Sciences included, from the outset, appropriation of the linguistic and stylistic ideal of legal philosophising practised then and there. This was basically patterned on Karl Marx and Thomas Manns complexity of expression and several-times-periodic construction crammed with recurrent interpretive structures, as well as a thoroughly abstract language, made even less easily decypherable by the definitely German-originated sentence construction, while also abounding in foreign terms. So many impediments built with such a baroque verbosity may have deterred even the targeted readers. For sure, the Communist partys professional censors saved themselves not only the almost insurmountable trouble of figuring out the possible meaning of these piles of words but they actually refrained even from merely consuming them.

could “explode” the narrow-mindedness of “Socialist normativism” throughout, arriving at a theoretical transcendence that could result in conclusions also appreciable in international dimensions;

(2) through embracing the *historico-comparative perspective* as, having made it accepted generally in the Socialist world, it cultivated it with extraordinary force and reliable accomplishments;

(3) through introducing an *ontological perspective* (as against the methodology adopted in Socialism’s Marxism, exhausted by its exclusive epistemological perspective), so that it could not only give its developments a theoretical framework but—owing to the ontic explanation of the “lawyerly worldview” [*juristische Weltanschauung*] surpassing the inherent limitations implied by the merely epistemic approaches that are usual in social practices based on mere ideological forms—could also decisively contribute to breaking through any single-focus approach in jurisprudential thought; and

(4) in all of this—as a common effect in synthesis of all of the former—through evolution of a theory of *law and modernisation*, addressing crucial issues for the future elbowroom and possibilities of Central and Eastern Europe in a responsive way and with a long-run strategic sensitivity.

In conclusion, legal theorising in Hungary has sheltered the relative seriousness, pathos, scholarly commitment, ethical ambition and strategic and tactical responsibility, with the professionalism achievable under the given conditions. Through all this, the Hungarian pattern offered a relatively near-to-optimum alternative in its solutions and responses, a kind of optimality scarcely challengeable by counter-examples lived through under the almost half-of-a-century-long reign of “actually existing Socialism”.

MIKLÓS RÓNAY\*

## The Capacity of the Catholic Church's Legal Order for International Relations

**Abstract.** The active participation in the life of the international community of the Holy See is natural. As it comes from its nature, vocation and aim, the Holy See acts on behalf of the world-wide spread Catholic Church. Most of its bilateral diplomatic relations and international treaties are about the relations between a certain state and the local part of the Church. The Holy See is able to exert international activity in the name of the universal Church and for the benefit of it in such way that its acts are complied with the rules of the international law.

It can be read in the manuals of the international law that the Holy See is a *sui generis* subject of the international law. It can hardly be explained for the international law that the Holy See acts in face of “external entities” in the name of the universal Church and on behalf of it. This function is either not mentioned or it is seen as “a tradition” in the manuals of the international law. It can also happen that this function is viewed as a kind of concession from the part of the different states, but one can find other solutions as well.

In this essay I attempt to find a model outside the paradigm of the international law but inside the paradigm of law that explains *in what way the Holy See is able to exert international activity in the name of the universal Church and for the benefit of the universal Church* with the help of the mechanism of the jurisprudence.

**Keywords:** legal order, constitutional law of the Church, concordatarian law, international relations discipline, international law, sovereignty, nonce, Church, Holy See

### I. The description of the problem, the horizon of a plausible solution

#### 1. *The difference of way of thinking of the international law and the international relations discipline*

Generally, the manuals of international law start from the conceptual way of thinking of law, and first they examine the capacity of the aspirant entities for international law *on the basis of the criteria of statehood of the international law*. Although, the Church has the greatest number of diplomatic relations in the world (174 diplomatic relations<sup>1</sup> and several hundred concordatarian treaties<sup>2</sup>), it is difficult for international public law to handle this legal fact inside its model of explanation.<sup>3</sup>

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<sup>1</sup> Cf. [www.vatican.va/news\\_services/press/documentazione/documents/corpo-diplomatico\\_index\\_it.html](http://www.vatican.va/news_services/press/documentazione/documents/corpo-diplomatico_index_it.html)

<sup>2</sup> Primary sources: the official gazette of the Catholic Church, *Acta Apostolicae Sedis, Commentarium officiale*, Romae, from 1909. (abbr.: AAS), and the official gazettes of the treating states. Secondary sources: *Raccolta di cocondati su materie ecclesiastiche tra la Santa Sede le Autorita civili* (ed.: Mercati, A), Vol. I. 1098–1914, Vol. II. 1915–1954, Typis Polyglottis Vaticanis 1954., *I concordati di Pio XII 1939–1958* (eds: Ciprotti–Talamanca), Milano, 1976; *I concordati di Giovanni XXIII e dei primi anni di Paolo VI 1958–74* (eds: Ciprotti–Zampetti), Milano, 1976.

<sup>3</sup> In the Encyclopaedia of Law one can read a train of thought based on the criteria of statehood: “Until 1870, the international subjectivity [of the Holy See] was based on the statehood of the secular power of the Holy See. After the cessation of the Church State the international subjectivity of the

In a logical sense, the approach of the discipline of international relations discipline is prior to the international law. The way in which an international actor thinks about itself plays a great role in the examinations of international relations discipline. 1) The international actor settles its international relations according to its own view-point, 2) if its partners accept the international actor as a partner then the partners accept it as it negotiates and as it acted and there is no reason to think about the question of “how acceptable that actor is”. According to the discipline of international relations, every actor represents itself *on the basis of its self-reflection*.<sup>4</sup> The discipline of international relations sees international law even as a consequence. *The advantage of the discipline of international relations* in case of a Church related international research is that it is not necessary to state first whether the Church is a subject or not and if it is then how, but the result will come out in the end as an evidence.

## *2. Starting point: the crucial role of the canonical legal order in the self-expression of the Church*

Therefore it is not pointless how the Church thinks about itself, and this has to be taken in consideration during the research. The self-understanding of the Church, which is explained by the section of the theology called ecclesiology, characterizes the Church as a *sacred community that has a united teaching and a united organisation all over the world, and functions independently from all human power*.

It seems from the great number of the concordatary treaties that the Holy See is able to act in the name of the universal Church and on behalf of it in face of external entities. On a experimental basis it can be stated that the Church succeeds in asserting its self-image. *The canonical constitutional law plays a key role in shaping up the confidence to contract*. Thus the canonical constitutional law is such a self-regulation that is at the same time an important mean of assertion of the auto-reflection in face of the external entities (states).

In concordatary treaties the legal orders of the Church and the local state are seen as *two ordinary legal orders*, between which an *international public law treaty establishes collisional law*. Certain treaties declare themselves as collisional law expressly while others contain tacitly.

*One can suspect that it is the structure of the canon law itself* (more closely the canonical constitutional law) which compel states to establish relations with the Holy See if they want to have official contact with the part of the Church living on their territory.

## **II. The formation of the canonical constitutional law, its importance and its role**

### *1. The elaboration of the canonical constitutional law*

The claim for independency from all human power in the teaching and the ecclesiastical establishment was shaped up in the period of the cesaropapist rule of the Roman Empire (313–476) when the emperor tried to take sides in theological questions as well, but the Church resisted. After the fall of the Empire this claim take such a shape that the Church

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Holy See *still remained, although it functioned on the territory of Italy [...]*. But this is a paradox and not an explanation. Lamm, V.–Peschka, V. (eds): *Jogi lexikon*. Budapest, 1999. 555.

<sup>4</sup> The basic work of the identity based school is Wendt, A.: *Social Theory of International Politics*. Cambridge, 1999.

communicated with outsiders, it is to say with secular powers, as the independent powers generally communicate with each other. One-one and half millennium later one could call this way of communication that the Church communicated with other powers in manner of foreign relations. At the same time, the Church thought that way of thinking that the Church and the secular powers exerts supervision *in separate manners over the sacred and profane spheres of the human life (gelasian principle, dualism)*. The first and most famous source of this theory is the letter of Gelasius I (49–496) written to the emperor Anastasius. In the letter, which was written in 494, taking advantage of the political vacuum after the dethronement of Romulus Augustus in 476, Gelasius I wrote that the emperor had to oblige to the pope in religious matters and at the same time the clergy have to oblige to the emperor in secular matters.<sup>5</sup>

The legal appearance of this dualist way of thinking is the famous medieval *ius commune* or otherwise the dual legal system of the *utriusque iuris*. While its secular branch disappeared as a result of claims of the territorial sovereigns, its ecclesiastical branch still lives in the catholic canon law of today. Secular sovereigns used willingly the mean of instrumentalisation of religion (*cuius regio eius religio*). Protestant princes built up directly state-church/established church systems (the protestant religious leadership of the country was a part of the secular public administration). But the state–church system it was not even a choice for catholic sovereigns because the foreign activity and claim for independency<sup>6</sup> of the Catholic Church, shaped up from the middle of the first millennium, set the task for the ecclesiastical leadership to resist the tendency of nationalisation.

One can assess *the development of the theory of sovereignty of the Church* as a defence of the ecclesiastical self-image, as a reinforcement of the claim for independency. With the fact that the Church took part in working out of the theories of sovereignty by the development of its own theory of sovereignty (*societas perfecta seu sufficiens*) in the 16th century, the Church made its already existent rule of being a foreign actor *more approachable, more understandable, more compatible in an institutional sense*. The inner side of the theory of sovereignty, as an outside dispute, was the development of the canonical public law or *ius publicum canonicum* (which is now called the canonical constitutional law) as an independent branch of the canon law, at the same time with the formation of the theory of state sovereignty. In this system the Church formulated itself in it as a consistent legal order, which contributed to have a clearer defined borderline between the ecclesiastical and secular legal orders. This made it possible to think about the relation or the possible conflict between the Church and the local secular power, *according to the*

<sup>5</sup> Gelasius I, Epist. VIII. *Ad Anastasium Augustum*. “Duo quippe sunt, imperatore auguste, quibus principaliter mundus hic regitur: auctoritas sacra pontificum, et regalis potestas. [...] Si enim, quantum ad ordinem pertinet publicae disciplinae, [...] legibus tuis ipsi quoque parent religionis antistites, ne vel in rebus mundanis [...] quo, oro te, decet affectu eis obbedire, qui praerogandis venerabilibus sunt attributi mysteriis?” “Oh, majestic emperor, this world is based on two main things: the sacred authority of the pope and the royal power. [...] And if it is true that priests obey your laws upon public order and they do not want to have a say in earthly affairs, [...] is not right and proper that you should obey those to whom the right of the function in the divine mystery is given?”

<sup>6</sup> Before 756, the establishment of the Pontifical State, the Church already had such activity that can be called *foreign activity* today. As it continued after the cessation of the Pontifical State (1870) as well, at the time of the Roman question (1871–1929) when the pope did not have a territory. Thus the foreign activity of the Church is neither bound to the existence of the Pontifical State nor of the Vatican City State.

*pattern of the collision of classical legal orders*, in contrast with the chaotic every day practice of *ius commune*. On the other hands, although the theological bases had to be taken into the consideration absolutely, the canonical public law was shaped up by the same legal technique as secular theories of sovereignty, and it interpreted the ecclesiastical legal order with that kind of legal technique, that is *legally analog with secular legal orders*.

Nowadays, the ecclesiastical theory of sovereignty is not emphasised on the lectures of history of law, although it takes part in the universal history of law just as the historical formation of other legal systems. Its most important early thinkers were Francesco Suarez (1548–1617), Robert Bellarmin (1512–1621), Giovanni Battista De Luca (pope under the name of Benedict XIV. 1740–1758), Pihring, Engel, Pilcher, Layman, Prospero Farinaccio, Van Espen, Fagnani, and Reiffenstuel.

Thus the statal and ecclesiastical theories of sovereignty live side by side. From the different aspects, this phenomenon describes well the way how the Church considers the relation between the Church and states:

1. The Church is basically not in war with states, only it defends its jurisdiction in sacred issues.
2. It exerts its jurisdiction in sacred issues on a very big territory (on the whole Earth) that completely coincides with the territory of secular sovereigns (considered legitimate by the Church as well).
3. The basic situation between states and the world-wide spread Church is the peaceful coexistence and the fruitful cooperation for the people who live on the given territory, and not struggling with each other.

The simplest way how the Church could express this idea was that the Church interpreted itself *as a legal order existing parallelly besides* the developing secular legal orders.

The clear message of elaboration of the theory of sovereignty and the constitutional law is that “outsiders should have a relation to the Church on the basis of international law”. This message itself calms down the intercourse between the Church and different states, as it contributes to the change of the direction of the struggles from the political ones to the legal polemy. The latter one less endangers the ecclesiastical public administration and institutions.

This interpretation has an other sense, namely after the laws of separation (19th century) with setting up the doctrine of “the states do not know anything about theology” ‘a one-thousand-year-long dream of the Church became true (cf. dual view of sacred and profane sphere, principle of Gelasius I.)’ Church *remained an understandable entity* for states. States and functionaries of the states are not expected to know about religion, and what is more, it is better if they do not know about it *as statal functionaries*, it is enough if they know classical constitutional law, and this is exactly their job. Because of the deliberately formed structural analogy in its constitutional system the Church is able to communicate through its institutions with the different states, and at the same time it does not allow the states near to sacred sphere (dual view).

## 1.2. The work on constitutional law as “*demonstratio suverenitatis*”

1. The ecclesiastical constitutional law *interpreted* the Church as an organisation that has analog constitutional structure with states and which is built up *by the same principles of legal technique* as the sovereign states. By the interpretation of its constitutional law the

Church does not say that it is a state. Just the opposite: it always emphasized that it is a sacred entity. Lajolo says the societies that are called to be perfect are only legally equal and not from other aspects or according to their nature.<sup>7</sup>

2. As it was explained in earlier texts of constitutional law: it is an original quality of the Church that as a legal order it is the same with all secular legal orders.<sup>8</sup> The work of the Church with which it elaborated its self-interpretation according to the technique of sovereign legal orders, *is not the cause of the sovereignty* of the Church.<sup>9</sup> Thus the ecclesiastical constitutional law work is a 'demonstratio suverenitatis' and not a "creatio suverenitatis". Therefore the constitutional law is instrumental, and it is only a technique of structuring of the Church as a sacred entity.

3. By this "demonstratio suverenitatis" the Church makes it clearer for partners that in what way it is in dialogue with other legal orders. At the same time the theological reflection depicts the Church as an organisation *above which none of the powers can stay because of theological reasons*. For the different states, their politicians and jurists the best expression for this phenomenon is in the future too: *sovereignty*. As Peter Erdő says: "[...] the Catholic Church profess itself to be *sovereign*, and *at the same time* it is strictly *dependent* on the will and the directions of its founder Christ".<sup>10</sup>

4. In the documents of the second Vatican council (1963–1965) the doctrine of 'societas perfecta' is not used in a strict sense, but after the council the doctrine occurs in legal texts with low frequency (exactly in the MP *Sollicitudo omnium Ecclesiarum* that rules the diplomatic function of the Church<sup>11</sup>) and also in the specialised literature. I think, this phenomenon has practical reasons (too) and this practical reasons exactly are in connection with the international presence and foreign activity of the Church. The Church interpretation that was built up in the classical period of the *ius publicum ecclesiasticum* is understandable very well for states and therefore that Church interpretation is a very *important capital in foreign relations in the long term* as well. This Church interpretation showed the way to the image about the Church that could be seen by the different states and to the image about the Church which determine the relations between the Church and the different states. That kind of Church-image of the states guaranties that the states have that kind of relation with the Church what is acceptable for the Church. The states accepted this sort of relation, and as the practice demonstrates it, the states apply it also today.

### 1.3. The nature and character of the canonical legal order as a complete legal order

This legal order is not established for the defence of a territory or for the defence of economic interests, this legal order is not even adapted for this aim and the Church does not need for a defence of this things. This legal order *is expected to defend* the diachronically identical maintenance of the revealed message and *to guarantee* the uniform practice of the sanctifying function for the whole humanity. The Church cannot disregard to guarantee *its*

<sup>7</sup> Lajolo: *I concordati moderni*. Brescia, 1968. 493–496, and Gismondi–Maccarone–Saraceni–Spinelli: *Rapporti attuali fra Stato e Chiesa in Italia*. *Justitia*, 36, 151.

<sup>8</sup> The explanation of Jannacone to the concept of "ordinamento giuridico primario": "what finds its motivations and basic arguments in its own ecclesiastical society, and from which and in the interests of which the legal order comes into being". Cites Jannacone: Lajolo: *op. cit.* 146.

<sup>9</sup> Lajolo: *op. cit.* 33–34.

<sup>10</sup> Erdő, P.: *A magyarországi elválasztási modell alapelvei a katolikus egyház szemszögéből*. In: AA. VV.: *Az állam és egyház elválasztása*. Budapest, 1995. 118.

<sup>11</sup> Paulus VI, MP *Sollicitudo omnium Ecclesiarum*, 1969. VIII. 8., in *AAS* 61 (1969) 473–484.

*independence and the independence of its function* from all powers. According to Peter Erdő: “If the Catholic Church does not consider even itself fully competent in formation of some of its rules [viz. they are in the Church on the basis of the foundation of the Church by Christ], the Church can even less accept that this would be the right of the states”.<sup>12</sup> Thus the independence of the material of Christ from secular influence, its defence from political or other instrumentalisation is that ecclesiastic function *of which one derivation is the ecclesiastic foreign activity*. As it is discernible, the diplomatic function of the Holy See is the foreign function of the universal Church and not e.g. of the Vatican City State.

In fact this was a goal of the ecclesiastic discipline, too, when it was built up in the first centuries. The *view of constitutional law*, that started to develop in the 16th century, *added one thing to the canon law*. This is that *one can regard* the Church as an organised society in which the order of the sanctification and the teaching and the relation of the Christian faithfuls to each other are not ruled only by some occasional concert of traditions or customs. On the contrary, these things have a consistent order that *one can / should regard as a complete legal order*, and which functions as such legal order and one can communicate with this order as such.

#### 1.4. The importance of the theory of Church’s sovereignty on the field of international relations

Naturally, the above-mentioned image of the Church is not the same with the Church-images built up by the states in their own constitutional laws. Even these Church-images of the different states differ from each other as well. *This above-mentioned Church-image is the same all over the world*. This image of the Church is the same at least in such a degree that on this basis the states have contact with the Church on the basis of classical international relations. This is the key point concerning the international relations of the Church / Holy See, this factor is the effective one and not that one based on the internal statal law. This image of the Church is present in a very clear mode in practice, namely in the thematics of the diplomatic relations of the Holy See and in the thematics of the concordatarian treaties. The other way round: if one comprehends the diplomatic relations and the international treaties between the Church / Holy See and the states he / she has not to treat them as particular or extraordinary, because a very simple mechanism of functioning can be found, and this simple mechanism explains the treaties and the diplomatic relations between the Church and the states in a simply and evident way.

#### 2. *The Church as a sovereign legal order*

The Catholic standpoint: dualism of the Church and the state

The viewpoint legal unity of the Church leads to the transformation of the Gelasian principle of dual jurisdiction into the principle of two legal orders (Church and state) independent from each other. According to Paczolay the Gelasian principle of separation became a basic element of the social theory of the Christian way of thinking,<sup>13</sup> and the laws of separation in the 19th century followed this scheme, too.

The canon law as a legal verticum extends from the universal ecclesiastical legislator (the pope) to the Christian faithful (this is the equivalent term in canon law with natural

<sup>12</sup> Erdő: *op. cit.* 120.

<sup>13</sup> Paczolay cites it repeatedly: e.g. Paczolay, P.: *Államelmélet I. Machiavelli és az államfoglalom születése*. Budapest, 1998. 56.

person<sup>14</sup>) and it is effective all over the world, viz. on the territories that are covered by the system of the public administration of the Church. Thus it is pointless to make difference between the Holy See and the 'other parts of the Church', because the whole Church is one continuous legal order from the government of the Church to the single governed Christian faithfuls.<sup>15</sup>

As it follows, a Christian faithful who was baptised in the Catholic Church, at least belongs to two diplomatically represented legal orders, namely under the jurisdiction of the ecclesiastical legal order and under the statal legal order(s) of his / her citizenship(s). At first glance, this "problem of simultan subjection to two legal orders" can lead to great difficulties. An important part of the diplomacy of the Catholic Church is to represent the sacred benefit (and the financial benefits due to supply it) of the Christian faithfuls and of the dioceses under which jurisdiction they are against the states on which territories these dioceses are situated and of which these Christian faithfuls are citizens in the same time.<sup>16</sup> However, one cannot experience difficulties in practice, because on one hand the Church claim for exclusive jurisdiction only in sacred questions (e.g. in the question of the financial supervision of those ecclesiastical authorities that functions on the territories of the country at issue the Church does not claim any jurisdiction, because this is not a sacred matter), on the other hand, modern states only claim for exclusive jurisdiction in secular matters (the *ius publicum ecclesiasticum* or statal ecclesiastical law rules only non-sacred matters). Therefore the universal ecclesiastic legal order and the local statal orders do not collide in most cases, and as they are different in nature, they "pass side by side". But if there is collision in some questions, or there are not but the ecclesiastic and statal parties decide so, the two parties can establish collisional law in international treaty between the two legal orders.

### 2.1. The relation of the international law to the theory of sovereignty of the Church

It is not the aim of the Church that its sovereignty should be taught at schools and *it is not the purpose of the theory of the sovereignty of the Church to be taught or formally recognized*. The aim of the theory of sovereignty is that to make more understandable and institutionally more compatible its those mode of existence and action, *which exist in practice and are acknowledged in the practice*, which are also possessed by those other entities that are also independent of all other powers. International law coursebooks describe that the government of the Church (the Holy See) is independent from all other powers, and that "somehow" this government maintains the distant parts of the Church under its supervision, and that it stipulates international treaties with secular sovereigns in defence of those parts of the Church which are in the territory of this secular sovereigns, and that it keeps international contacts with them by ambassadors / nonces. The problem is when a coursebook tries to explain the above-mentioned characteristics of the Church as it came from the half square kilometre wide Vatican City State or as a kind of survivor of the customary law of the Church State ceased to be in 1870 (cf. explain everything from the

<sup>14</sup> CIC 204. *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*. Città del Vaticano 1989. (Abbr.: CIC + number of canon).

<sup>15</sup> E.g. the hierarchical and transnational structure of the Catholic Church is able to lead the "national" Churches. Dinh, Q. N.–Daillier, P.–Pellet, A.–Kovács, P.: *Nemzetközi közjog*. Budapest, 2003. 225.

<sup>16</sup> Ciprotti, P.: *Il diritto canonico nella diplomazia ecclesiastica*. In: *Ius populi Dei*. Roma, without year, 172.

criteria of statehood). It is also a problem when a coursebook tries to explain the above-mentioned characteristics as a “cultural tradition”, instead of an approach starting from the view of the *Church as united legal order all over the world*. But in practice this *legal unity* is a key for the states to the Church, they are able to stipulate treaties with the Church on the basis of its legal unity. On this basis the states expect from the government of the Church to be able to make the parts of the Church which function on the territory of the states execute the treaties. And if something works in the practice and it is an active component, then sooner or later it is possible to find a theoretical explanation as well. In spite of the fact that international public law coursebooks and state theory manuals *do not mention* the theory of sovereignty of the Church and *its structural analogy with states*, the states (the staff that works in foreign ministries, the negotiators, etc.) perceive the *legal effectivity* and the capacity for treaties of the *ecclesiastical legal order* precisely because of the *structural analogy*.

### 3. *The importance of the legal order of the Church in the international relations of the Church*

*My view is that states assess the present capacity of the ecclesiastical legal order and they find it able to international relations when states establish foreign relations with the Church. The reason why it was important to review the history of the legal order was to clear up why this legal order is so understandable, and why is this constitutional law so familiar for the states. Firstly, because of the millennium-long common development, secondly, because of the common basic terms of Roman law, thirdly, because the work of the legal theory which characteristically determines its present shape, has been accomplished in the same period of legal history and with the same legal technique as the work of the secular legal orders. The formal law analogy of the ecclesiastical legal order and the secular legal orders is the result of the above-mentioned common roots and common history, and consequently that the ecclesiastical legal order is just as comparable with the secular ones as secular legal orders can be compared with each other. Secular decision makers resp. their specialists can find solution when they consider establishing the first connection with the Church or stipulating an international treaty with the Church.*

### III. The capacity of a legal order for international relations

Lets consider the criteria of the capacity for international relations of an unspecified legal order. Bruno Bertagna sought for causes of the international personality of a legal order. Among others, he mentions, its capacity that have in its character and its reality:

- a) The personality comes from the *order* itself, on the basis of the rule of effectiveness [he refers to Verdross, Kelsen and Fedozzi].
- b) The capacity is simply a character which is present by the legal fact, that it is able to possess in history the requested characteristics of being in the international order.<sup>17</sup>

ad a) The *inner order* and the legal efficiency of the international actor is what makes the greatest impression to its foreign partners in the international practice. (In a state with an existing statehood, where there is a civil war, one do not know with whom one has to

<sup>17</sup> Bertagna, B.: Santa Sede ed organizzazioni internazionali. In: *Monitor Ecclesiasticus*. 1982. 141–142.

negotiate, who is the real possessor of the power, but if it functions good it can be known in the Church.) One can characterize the inner order of an entity by its legal structure. From the aspect of the capacity for international relations this is the relevancy of the inner law.

ad b) The examination of the existence of the capacity for existing in the international order points beyond the horizon of the legal thinking, and somehow it is related to the discipline of international relations. From the fact that a jurist examines this direction one can see that even the jurist demands some help beyond the purely conceptual way of thinking of the law.

Although this approach that is based on the conditions of legal orders seems to be too theoretical at a first glance, I think this is the one that stays nearest to the mechanisms that functions in practice. The examination of the content of the concordatary treaties shows that these documents contain collisional law or make collisional law between the Church as a legal order and the state as a legal order.<sup>18</sup> The states consider this legal order to be able to contract treaty precisely because it is able to show in a convincing way that if the treaty is stipulated the Church-government (the Holy See) will be able to put the treaty into effect even in the far-away parts of the Church. Not the international public law manuals persuade the decision makers of the states about the future fulfilment of the treaties but the ecclesiastical legal order itself by its analog structure with statal legal orders and *by its efficiency in putting its international treaties into effect*. Other states also experience that the Church puts into effect its treaties well and consequently, they tell this fact to a state that is about to contract with the Church. On this field the emphasis is on the practise instead of theories.

#### **IV. The present structure of the ecclesiastical legal order as a condition and owner of the capacity for international relations**

In the previous chapters we have observed in what way and under which conditions the legal conception of the canon law as a sovereign legal order developed and what were the motivations of its development. To be able to maintain the capacity of international relations this legal order continuously has to possess a those characteristics which convince the future partners about its capacity. Now I will examine all this problem on the basis of the canon law codex of 1983 and a few norms which as rules of sectoral law are relevant in the topic of international relations of the Church.

##### *1. The Church as united legal order*

###### **1.1. The government of the Church**

The experience of the origin of the Catholic Church is that it developed by the expansion of an initially little community in Jerusalem. Consequently, its structure is based on a “downwards” logic. This means that the system is not that the functionaries are elected by a smaller community to represent the members on a higher level. As it derives from this Church-image, the universal Church has a united structure which is divided into dioceses and other units of the public administration. The word “Catholic” comes from the Greek

<sup>18</sup> See Rónay, M.: *Ius matrimoniale concordatarium. A comparative approach. Acta Juridica Hungarica*, 47 (2006) 1, 27.

idiom *κατὰ ὅλον* (“*kata holon*” = according the whole), from which one can deduce many things about the self-image of the Church and its probable relations with the outside world.

The government of the Church is led by the legally elected pope,<sup>19</sup> with the assistance of the Roman curial authorities (CIC 360), which have ordinary auxiliary power (*potestas ordinaria vicaria*). The canon law and the international treaties name the whole of the pope and the curial authorities as Holy See (CIC 361). The specialised literature names it as Church-government and as the supreme authority of the Church as well. The central element of the institutional system of the foreign affairs of the Church is the Secretariat of State. The competent authority to stipulate international treaties is the Section for Relations with States inside the Secretariat of State, which is named by journalists frequently as the “Foreign Ministry of the Vatican”.

### 1.2. The relations of international treaties to the inner laws of the church-law

According to the canon 3 of the current law, the treaties stipulated earlier by the Holy See remain current instead of the contrary rulings of the present codex. With this rule the legislator maintains the usual order in relation of the universal canon law and the international law, which is maintained by all countries in relation to the own laws of the countries and the international law. This means that international treaties constitute higher law compared to the inner law of the legal order. The primary importance of this canon is that the *international partner knows in advance* that if the international partner stipulates a treaty with the Holy See the international treaty will *be considered and fulfilled in the same way in the canon law*, as states consider and fulfil their international treaties, namely the international treaty reconsiders inner law in case of collision.

This canon shows the aim of the diplomacy of the Holy See to the partner as well, namely that 1) in all greater cases the Holy See negotiates concerning the relation of the Church and state and that the Holy See represents directly the dioceses.<sup>20</sup> By such a ruling of the canon law, the Church interprets the boundary of internal and external world and the Church defines this border *between the local part of the Church and the local state*, and as a consequence *it is possible to negotiate with the Church on this basis*. 2) This gesture is that the legislator (the pope) continually invest the ecclesiastical legal order with those typical legal characteristics of which the contemporary statal legal orders generally possess. Therefore there are the typical gestures of the reception of legal patterns of external legal structures in the canon law of today as well. According to Graziani, it is a fact that the structure of canon law is capable to have the functions of an ecclesiastical jurisdiction and foreign representation.<sup>21</sup>

<sup>19</sup> “The bishop of the Roman Church, in whom continues *the office given by the Lord* uniquely to Peter, the first of the Apostles, *and to be transmitted to his successors*, is the head of the college of bishops, the Vicar of Christ, *and the pastor of the universal Church on earth*. By virtue of his office he possesses *supreme, full, immediate, and universal ordinary power* in the Church, which he is always able to exercise freely.” CIC 331.

<sup>20</sup> Cardinale, I.: *Le Saint-Siège et la diplomatie*. Paris–Tuornai–Rome–New York, 1962. 14.

<sup>21</sup> Graziani, E.: *Diplomazia pontificia*. *Enciclopedia del Diritto*, XII, without year, 598.

### 1.3. The institution of the nonce as a manifestation of the united foreign function of the Church

The ecclesiastical diplomatic function is ruled by the canon law. The codex contains a main figure and the enumeration of the tasks (CIC 362–367), and in its details it is ruled by the already mentioned *motu proprio* (sectoral law) *Sollicitudo omnium Ecclesiarum*. The Church considers and rules its diplomatic function *as one function of the universal Church*.

a) The MP *Sollicitudo omnium Ecclesiarum* states that the task of the papal delegate is to foster the relation *between the Church and state* and this is his task as a main rule.

b) The codex of '83 repeats this rule but it states that this task has to be done in harmony with the local bishops (CIC 354. 7.).

According to the definition of Oliveri: “The function of the nonce originates from the primacy of the bishop of Rome and such a way it fulfils such a task which is attached to the authority of the pope. Therefore, all nonces act directly on behalf of the Holy See, while the Holy See is an organ of the universal Church and [...] it represents the unity in the diversity which is the characteristic of the authority of the successor of Peter.”<sup>22</sup>

Those who work in this diplomacy get instruction according this point of view. The following example illustrates well the idea that derives from the nature of this function. Nonces are always ordained priests and bishops, in most cases endowed with a rank of titular archbishop. Nonces cannot be laymen, because they do not carry out their functions by the right of and on behalf of the Vatican City State, but by the right of and on behalf of the Catholic Church as a sacred structure that is extended in all the world.

The personals who works in the apparatus of foreign affairs of the Church (at the Section for Relations with States and the nunciatures) uniformly are instructed in Rome in the 300-year-old the institute of Accademia Pontificia Ecclesiastica.<sup>23</sup> This institution was founded depressingly for this reason. The training starts after the ordination a priest in form of postgraduate instruction. In order to be attached to the Church as such and not to the place of their mission, the ecclesiastical diplomatic agents receive new dispositions in 5–7 years, similarly to their secular colleagues.

### 1.4. Establishing diplomatic relation with the Church

If one sees the problem from a more practical point of view, e.g. from a point of view of *a politician of a country*, it is not the question whether he / she recognizes the Holy See (with or without the Church) as a real actor of international relations or not. The question is, in *what way* the politician *can negotiate* with the Church-part existing on the territory of that country. The first impression of the politician will be that the local bishops tell him / her that *they are not authorized* to negotiate in greater questions with the state *because they are unauthorized by the canon law*. Therefore, the politician must decide whether he / she follows the way that is required for a valid treaty by the legal order of his future partner or he / she backs from the intention.

However, it always arises in this way in practise, international law jurists do not discuss this side of the establishment of diplomatic relations with the Church. According to the theory of classical international law starting from the criteria of the statehood one can it

<sup>22</sup> Oliveri, M.: *Natura e funzioni dei legati pontifici, nel contesto ecclesiologico del Vaticano II*, Torino, 1978.162.

<sup>23</sup> Cf.: [www.vatican.va/roman\\_curia/pontifical\\_academies/acdecclles/index.htm](http://www.vatican.va/roman_curia/pontifical_academies/acdecclles/index.htm)

exclude that such a subject as the universal Church could exist but *in practice* the states negotiate with the Church as a sovereign. As a consequence, the solution as a *sui generis* subject came up in the international law.

## 2. *The role of the bishop conferences and the bishops during international talks*

The politicians of certain countries often regard the bishops or the bishop conference functioning on their territory as their evident partner of negotiation. However these are not *negotiating partners of the secular governments*. The lowest forum *with which the states can formally negotiate is the Holy See*.

Negotiations or treaties between single bishops or bishop conferences and local states are not international negotiations in the real sense of the word. According to Bertagna if bishops or their conferences carry out such acts then these ecclesiastical organs perform those negotiations *with the explicit or at least silent consent of the Holy See*. These sort of negotiations are not seen, neither within this conditions, as negotiations or treaties between the Catholic Church and the given state only those ones which are performed by the pope or the Holy See.<sup>24</sup>

A historical example can illustrate the above-mentioned ideas. After the Second World War the Hungarian government forced the bishops to sign an agreement by deporting thousands of nuns.<sup>25</sup> Domenico Tardini, who was the cardinal secretary of state of the Holy See, notified József Grósz, the archbishop of Kalocsa in advance that the Hungarian bishops *do not have any jurisdiction* to sign such an agreement. After signing the document, the Holy See addressed a monitum<sup>26</sup> to the Hungarian bishops on 9th October 1950 (“we noticed with indignation”<sup>27</sup>). In this monitum, the Holy See called the attention of the Hungarian bishops to the fact that settling the relations between Church and state belongs to the jurisdiction of the Holy See.<sup>28</sup> It is clear that the Holy See reacts in a sensitive way if the local bishops attempt, the diplomatic representation of the Church even if they act under pressure. My standpoint is that the agreement of 1950 is *invalid by the virtue of the law*, because it was signed by such people who *did not have the jurisdiction* for signing such an agreement.

## V. Concordatarian law and concordatarian politics

### 1. *The nature of the concordatarian law*

After the examination of the nature of the ecclesiastical legal order, one can interpret the nature of the concordatarian law much easier: the concordat is an *international treaty contracted between the Catholic Church and a state*. In case of a state the treaties are

<sup>24</sup> Cf.: Bertagna, B.: Santa Sede ed organizzazioni internazionali. *Monitor Ecclesiasticus*, 1982. 119.

<sup>25</sup> Gergely, J.: *Az 1950-es egyezmény és a szerzetesrendek feloszlatása Magyarországon*. Budapest, 1990.

<sup>26</sup> Monitum: punitive warning. Prohibition from further infringement of law. The Holy See gives such a measure to bishops very rarely.

<sup>27</sup> Zombori, I.: *Le relazioni diplomatiche tra l'Ungheria e la Santa Sede*. Szeged, 2001. 98.

<sup>28</sup> Adriányi, G.: *A Vatikán keleti politikája és Magyarország 1939–1978. A Mindszenty-ügy*. Budapest, 2004. 21–22.

contracted by the government (the competent authority is the Ministry of Foreign Affairs) as the representative of the state on the international level. This method is the same in the case of the Church. The treaties are contracted by the Holy See (the competent authority, is the Section for Relations with States inside the Secretariat of State).

The characteristics of all concordatary treaties<sup>29</sup> that 1. they establish *collisional law* between the *sacred, global and anational legal order* of the Church and a *secular legal order* of a state, 2. and they settle the relations between a part of the Church that functions on the territory of the country and the state of the country.

This definition of the concordatary law which interprets the international treaties of the Holy See as *collisional law between sovereign legal orders* is in full accordance with the international empirical facts 1. how the parties contract concordatary treaties, 2. what their attitude is to the contracted treaties.

If one examines the concordatary treaties from the *normative view* of the international law, then one has to start from the point that the Holy See signed the Convention of Vienna of 1969 upon the law of international treaties. The participation in this convention shows that *the Holy See contracts in an analog way with states*. This means that when the Church contracts concordatary treaties, it signs treaties *as* states do. With doing this the Church does not become a state because this is only an analogy, but the international law acts of the Church *have the same nature and efficiency as* the Church would be a state.

Bertrams expresses this in a very similar way. He says that the Church is a person of international law in an analog sense: the Church is an international law person while it has not the same nature with state.<sup>30</sup> This means that from the aspect formal law it is the same but in its nature is different. Bertagna expresses this such a way that in the sense of the international law the activity of the Church is real (namely it is not a legal fiction), the difference is that the Church acts in another way and it works for other aims than states.<sup>31</sup>

Bertagna summarises why *the whole Church contracts* a concordat in such a way: The concordat as such includes in it that it is stipulated by the supreme authority of the Church, or at least the supreme authority of the Church participates in it, namely because of 1. *theological*, 2. *canonical* 3. and *international law* reasons.<sup>32</sup> He says that

“1. according to the second Vatican council the totality of the concept of the Church subsists in all dioceses *inasmuch* as the diocesis stays *in communion* (communio) with the other dioceses, first of all with the diocesis of Rome (the bishop of Rome is the pope). Therefore, the condition of the theological totality of the diocesis is *its being in communion with the whole Church*.

2. the concordat concerns the whole Church, otherwise, when the Church contracts concordats then it exercises the right and freedom which derives from the nature of the whole Church.

<sup>29</sup> The reason for using this complicated expression is that most treaties do not name themselves as concordat, but partial agreement, *modus vivendi*, exchange of notes and protocol, etc. All these forms belong to the category of concordatary treaties because their legal mechanism of effectivity is the same.

<sup>30</sup> Cf.: Bertrams, W.: *De origine personae moralis in Ecclesia. Periodica*, 36 (1947) 169–184; and Hervada–Lombardia: *El Derecho del Pueblo de Dios*. Navarra, 1970. 259–265.

<sup>31</sup> Bertagna: *op. cit.* 113.

<sup>32</sup> Bertagna: *op. cit.* 118. and Oliveri, M.: *Natura e funzione dei legati pontifici nel contesto ecclesiologico del Vaticano II*, Torino, 1978. 242–244.

3. the concordat, as it comes from its nature, is *brought into being by independent and autonom subjects*, and bishop conferences, archbishops and bishops are not such.”

When the nonces negotiate with states they work under the jurisdiction of the authority of the Section for Relations with States.<sup>33</sup> Therefore the international treaties of the Church are manifestations of the *contractual foreign policy* of a single office. No wonder that after the comparative examination of the treaties, a really consistent contractual foreign policy takes shape.

## 2. *The erga omnes effectivity of the international subjectivity and the unity*

It can be said that *the expressis verbis recognition of the international subjectivity and the unity of the canonical legal order* exists only with those states with which the Church contracted an international treaty. But exist some legal statements which confirm the *erga omnes* perceptibility and effectivity of the international subjectivity and unity.

It is known, e.g. the resolution of the French Court of Nullity (Cour de cassation) in 1913: France did not have a diplomatic relation with the Holy See at that time. But *referring to the consensus of the international practice* the Court and the Ministry of Foreign Affairs decided that France regards the Holy See as a subject of international law. This example shows that not only those countries which have diplomatic relations with the Holy See regard the Holy See as an international law subject, but the others as well.<sup>34</sup>

There is a resolution of the Italian Constitutional Court of 1978 as well. In Italy they wanted to hold a definitive referendum on the Lateran concordat of 1929. (This document is different from the Lateran treaty which established the Vatican City State albeit they are stipulated in the same day.) However the Italian Constitutional Court passed that resolution in 1978 that “the Lateran concordat of 1929 is an international law treaty, with other words, a treaty stipulated by independent and sovereign subjects”, and as such it is not allowed to be taken as an object of definitive referendum.

From the international fame of these resolutions one can know that these unilateral statal declarations have strong precedential value. Even the justifications of these resolutions refer to the wide acceptance of these facts. In the same way, the international treaties also have precedential value. It is also known that the view of precedents is not far from to the international law and the diplomatic practice.

## **Conclusion: a foreign nature relation between sovereign legal orders**

With the examination of the *canonical constitutional law* one can show that *in the legal technique interpretation of its self-reflection* the Church consciously endeavoured to use the common legal formulas and legal techniques which was based on the Roman law—used by exterior (states) as well—during one and half year thousand. In this way and with the help of shaping its legal institutions, the Catholic Church is able express its self-reflection of theological nature that *it is a united organisation all over the world*. It has such a *global*

<sup>33</sup> Its current ruling: Ioannes Paulus II, Const. Ap. *Pastor Bonus*, De romana curia, 1988. VI. 28, in *AAS* 80 (1988) 872.

<sup>34</sup> Gidel, M.: Quelques idées sur la condition internationale de la Papauté. In: *Revue des droit international public*, XVIII (1911) 589.

*and anational construction* and such a constitutional structure that keeping relations with the Church is only possible with regard to this feature. This is the very reason why the states negotiate with the Church-government (Holy See) in spite of local bishops or their conferences, since this way of negotiation is not made compulsory by the laws of the single states for the decision-makers of the states. It follows that if one wants to *deal with the international relations of the Church* he / she cannot avoid the study of the *constitutional structure of the Church*.

The foreign function of the Church is centralised, the system of nunciatures and contractions of international treaties are led by an authority of the Holy See (Section for Relations with States inside the Secretariat of State) on the basis of the law *MP Sollicitudo omnium Ecclesiarum*. This authority makes a consequent foreign policy in the international treaties and in the diplomatic relations of the Church.

The examination of the conditions of canon law of the *international function capacity of the canonical legal order* became clear it that the legal capacity of bishops and their conferences are ruled by the canon law in way that they are not able to represent the local parts of the Church officially in face of the local state. This system assures that the Holy See is the lowest representative of the smallest part of the Church as well. During their diplomatic activity the states communicate with the global, anational legal order of the Church, and *in case of a concordatarian treaty* the *contracting partner of the secular legal order* of the state is the *universal ecclesiastical legal order*.

FRUZZSINA GÁRDOS-OROSZ\*

## The Hungarian Constitutional Court in Transition – from *Actio Popularis* to Constitutional Complaint

**Abstract.** In Hungary, the year 2012 brought a significant change in constitutional review. With modifying the competencies of the Constitutional Court, the Basic Law introduced three types of constitutional complaints and abolished *actio popularis*. *Actio popularis* was a well-functioning legal instrument in Hungarian law since the political transition of 1989–1990. Up until January 2012 anyone could request the abstract *ex post facto* constitutional review of a law or regulation. Unlike the former *actio popularis*, the essence of the new system of constitutional complaints is to have standing requirements for the complainants. Furthermore, new types of complaints are designed to defend constitutionality against personal injuries caused by ordinary courts as well. The article aims to describe *actio popularis* and constitutional complaints with regard to possible comparison of weaknesses and strong points. The author argues that regarding its effectiveness the new system do not yet provide a complete substitution for *actio popularis*.

**Keywords:** constitutional law, constitutional review, constitutional complaint, competencies of the Hungarian Constitutional Court

### Introduction

The Hungarian Basic Law,<sup>1</sup> effective from the first January 2012, has significantly modified the competencies of the Constitutional Court. Among several changes it introduced three types of constitutional complaints and abolished the former existing *actio popularis*. *Actio popularis* meant a legal possibility that anyone could turn to the Constitutional Court claiming that a law, legal provision or a regulation is contrary to a constitutional provision. The petitioner could also request the annulment of that piece of law. Constitutional complaint under former jurisdiction was to be lodged only in case of personal injury caused by the application of an unconstitutional norm. The aim of the new constitutional complaint mechanisms were to protect against personal injuries caused by ordinary courts and provide a possibility for constitutional review also in cases where the complainant cannot turn to ordinary court. Moreover, the Constitutional Court may supervise the constitutionality of legal provisions when applied in certain judicial cases and leads to unconstitutional court decision. This article first describes *actio popularis* and questions if *actio popularis* and constitutional complaint as such could be alternatives to each other. The second part gives a brief summary of the new constitutional complaint mechanisms in Hungary and about the practice of the Constitutional Court in the first semester of 2012. The author argues that concerning effective constitutional remedy the new system so far do not provide a complete

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<sup>1</sup> Called Fundamental Law in the wording of the official translation of the Hungarian constitution. For better understanding this paper uses the translation as Basic Law similarly to mainstream legal literature.

substitution for *actio popularis*. Due to the fast transition several methodological questions of fundamental importance have to be answered during the first period of the operation of the new system.

## I. The *actio popularis*

### 1. *Actio popularis in Hungary 1990–2011*

In Hungary, until the new constitution called Basic Law has turned into effect, approximately 1,600 actions were brought annually at the Constitutional Court within the framework of the abstract ex-post facto review of law (*actio popularis*)<sup>2</sup> procedure, which has no standing requirement. The ordinary courts adjudicated violations of the rights of the individual, while the primary duty of the Constitutional Court was to review the constitutionality of laws and regulations. Even in the procedure of constitutional complaint, the Constitutional Court could only investigate the unconstitutionality of the challenged law or regulation, and this investigation did not have as a mandatory consequence the retroactive exclusion of the applicability of the unconstitutional law or regulation in the given case.<sup>3</sup>

Therefore, the duty of the Constitutional Court in Hungary, instead of protecting individual rights and the rights of the community and of the adjudication of specific cases, has been abstract constitutional review.<sup>4</sup> The Constitution and the over 20 years of constitutional practice interpreting it demonstrated that the democratic protection of the rule of law is in the interest of all members of the society. This was the assumption behind the legal instrument adopted by Para. 32/A (4) of Act XX of 1949 (the Constitution), the so-called *actio popularis*.

Para. 21 of Act XXXII of 1989 (Act on the Constitutional Court), in force until January 1, 2012, determined who was entitled to initiate given procedures. Anyone could propose an action to initiate a proceeding for the ex-post facto review of a law or a public regulatory mechanism, or for the redress of an unconstitutional omission. “Anyone” was defined by Constitutional Court practice to include actual natural and legal persons, who could even be foreign nationals or stateless people. The Court protected the assumption of the physical existence of the petitioner; generally, this was not something evidence was presented on.

The vast majority of the Constitutional Court’s work consisted of the adjudication of these constitutional issues that could be proposed by anyone.<sup>5</sup> With regard to the fact that at the political transition the Constitutional Court could not monitor the constitutionality of the entire legal system, as a consequence of *action popularis*, the cases that were heard came random. Alongside the fact that certain most important proceedings could be initiated by “anyone”—constitutionality in the democratic society was subject to the watchful scrutiny of the *populus*. The state effectively protected constitutionality with this broad opportunity

<sup>2</sup> [www.mkab.hu/letöltések/evkonyv](http://www.mkab.hu/letöltések/evkonyv).

<sup>3</sup> About competencies of the Constitutional Court under the Act XXXII of 1989 on the Constitutional Court and about changes brought by the new Basic Law see in a nutshell The Constitutional Court. In: Csink, L.–Schanda, B.–Varga, Zs. A. (eds): *The Basic Law of Hungary*. Dublin, 2012. 157–167.

<sup>4</sup> Halmai, G.–Tóth, G. A. (eds): *Emberi Jogok* (Human Rights). Budapest, 2005. 215–216.

<sup>5</sup> About the abolition of death penalty, see Decision 23/1990. (X. 31.) CC. About the official use of personal identification number see Decision 15/1991 (IV. 13.) CC.

for bringing an action, declaring that the creation and preservation of constitutionality is in everyone's interest and right.

Over the course of the past 20 years, in spite of these internal values, *actio popularis* had become one of the most disputed elements in Hungarian Constitutional Court practice; one of the reasons for this was—as declared by even the president of the Constitutional Court—the unbearable workload, inhibiting the adjudication of the cases within a reasonable period of time. Consequently, the Basic Law introduced another form of protecting constitutionality; it eliminated the *actio popularis*, and enabled the bringing of an action on the basis of individual standing within the framework of a constitutional complaint, not only concerning unconstitutional decisions deriving from the application of an unconstitutional law or regulation, but also versus decisions or proceedings of an ordinary court or of an authority not providing the opportunity for a legal remedy.

With the elimination of the *actio popularis*, what has come to the foreground is the opportunity for anyone to go to the ombudsman and propose that in the case of an unconstitutional law or regulation, the Commissioner for Civil Rights commence a proceeding for an ex-post facto review of law before the Constitutional Court.

In order to ensure a fair transition between the *actio popularis* and the new system of constitutional complaints, during the first quarter of 2012, pursuant to the new Act on the Constitutional Court,<sup>6</sup> those *actio popularis* motions could be submitted as constitutional complaints whose contents were originally targeted at the ex-post facto review of the constitutionality of a law or regulation and were not proposed by a person who would also have had standing to do so under the Basic Law. On the basis of the Act on the Constitutional Court, however, the petitioner of the terminated proceeding could only file the motion containing the constitutional concern in compliance with the law designated in the unadjudicated proposal, if his/her proposal also complied with the new rules applicable to constitutional law complaints (namely, Para. 26. (2) of the Basic Law)<sup>7</sup> and the violation of constitutional rights referenced therein amounts to a violation of the Basic Law.

This means that even though as of the 1st of January, 2012, the ex-post facto review proceeding (*actio popularis*) that could be initiated by anyone had ceased to exist, the new Constitutional Court Act provided an opportunity for natural and legal persons to submit previously ex-post facto review of law motions as direct constitutional law complaints in such cases where the substantive content of their motion indicates a comprehensive compliance with the conditions applicable to the submission of a direct constitutional law complaint.

## 2. *The role of the actio popularis proceeding in constitutional adjudication*

The origin of *actio popularis* can be found as early as in Roman law.<sup>8</sup> The word derives from the Latin words *actio* (action) and *popularis* (of the people). Many forms of *actio popularis* are known in constitutional law. When we mention *actio popularis*, this primarily means that anyone can initiate an ex-post facto review of law and can request the annulment of the law. There are states (e.g. Croatia), where in the case of such motion, the authority

<sup>6</sup> Act CLI of 2011 on the Constitutional Court.

<sup>7</sup> See *intra*. II. 1.2.

<sup>8</sup> Mercier, P. P.: Citizens Right to Sue in the public interest: The Roman *Actio popularis* revisited, *University of Western Ontario Law Review*, 21 (1983), 89. and Nótári, T.: *Római köz- és magánjog* (Roman public law and private law). Kolozsvár, 2011. 277.

conducting the constitutional review must take action, while there are some other states where the motion is only considered a proposal and it is the decision of the authority conducting the review as to whether to complete the proceeding (e.g. Israel). The type of constitutional complaint where the objective of the proceeding is the annulment of the law but the proposing party can only use this method of constitutional protection if the law is applied in his/her specific case, therefore he/she/it must show some kind of an involvement, is called quasi *actio popularis* (e.g. the Czech Republic).<sup>9</sup>

It was Kelsen, Austrian-American jurist and legal philosopher, who in 1928 first had used the expression *actio popularis* in his work in the context of constitutional law. According to Kelsen, *actio popularis* is the strongest guarantee to enable the filtering out of unconstitutional rules. Nonetheless, he did not recommend the introduction of such broad standing requirement into Austrian law, because in his view, the possibility for abuse was too large, as well as the fact that the Constitutional Court would have certainly become inundated with cases.<sup>10</sup>

Ex-post facto review of law proceedings that can be initiated by anyone are exceedingly rare in European constitutional law; to some extent, Bavaria (provides an opportunity to do so although the other German states and German federal states do not employ this form of initiating a proceeding), Croatia, Macedonia Republic of the Former Yugoslavia, Liechtenstein, Malta, Montenegro, Serbia and Slovenia. The system of constitutionality review and within it the circle of those who can initiate a proceeding is extremely varied in the various constitutional democracies. In some states, such as Lithuania only a group of Members of Parliament or the Government can initiate the review of the constitutionality of laws, in Estonia not even Members of Parliament can initiate such proceeding.<sup>11</sup> There are states, however, which provide nearly unlimited access to the legal institution of constitutional review.<sup>12</sup> An exemplary representative of this latter group was the system of *actio popularis* in Hungary, operating until the beginning of January 2012.

Thus, the essence of *actio popularis* is that it is not necessary that the petitioner has any interest in the success of the proceeding, meaning that it is not necessary for that person to be affected. For the most part, the countries establishing the opportunity for *actio popularis* come from the line of post-socialist nations. *Actio popularis* could be the most important tool of direct democracy in a transitional democracy.<sup>13</sup> In the peaceful and effective management of transitioning into a constitutional democracy, constitutional observations by citizens affecting legislative activity may have a significant role, and this form of participation in exercising power may also greatly invigorate public sentiment and the sense of joint action. Thus, the introduction of *actio popularis* also reflects a kind of philosophy of democracy. The establishment of a proceeding which can be initiated by anyone in constitutional democracies is not a shared European minimum requirement in the area of reviewing the

<sup>9</sup> Sadurski, W.: *Rights before courts, a study of constitutional courts in postcommunist states of Central and Eastern Europe*. The Netherlands, 2005. 6–7.

<sup>10</sup> Arjomand, S. A.: Constitutional development and political reconstruction from nation building to new constitutionalism. In: Arjomand, S. A. (ed.): *Constitutionalism and political reconstruction*. The Netherlands, 2007. 39.

<sup>11</sup> Sadurski: *op. cit.* 6–7.

<sup>12</sup> More about the subject in Study No 538/2009 of the European Commission for democracy through law (Venice Commission): Study on individual access to constitutional justice.

<sup>13</sup> Sólyom, L.: The role of constitutional courts in the transition to democracy—with special reference to Hungary. In: Arjomand (ed.): *op. cit.* 312.

constitutionality of laws and regulations. For example, in the case of Montenegro, the Venice Commission of the Council of Europe did not recommend the introduction of *actio popularis*, citing Serbian experiences according to which the opportunity places undue burdens on the proceeding court.<sup>14</sup> In the Commission's opinion 614/2011 dated March 28, 2011, however, it is stated that in Hungary the *actio popularis* was indeed able to filter out unconstitutional laws and regulations adopted prior to the effective date of the Constitution, during the years immediately following the political transition.<sup>15</sup>

### 3. *The actio popularis and the constitutional law complaint – alternatives?*

In legal literature, *actio popularis* is often presented as contrary to the proceeding initiated in the form of a constitutional complaint.<sup>16</sup> The basis of the comparison is that while in the case of *actio popularis* it is part of its definition that there are no admissibility/standing criteria for the review of constitutionality, in the case of a constitutional complaint the authority conducting the review (generally the Constitutional Court or the Supreme Court) always expects that the initiating party be somehow involved in the case. In the case of the constitutional complaint, the primary objective of the complainant is to obtain legal remedy for their own case, as in the improvement of their own personal or financial position. The result of the proceeding can be the annulment of the unconstitutional law, just as in the case of the *actio popularis* based abstract designated review of the law; however, the annulment of the unconstitutional law from the perspective of the complainant is merely a tool to obtain legal redress in his/her/its own case. To the contrary, in *actio popularis*, the service of public interest, not the service of private interest, forms the backdrop. Although the two scopes of review can be contrasted from this perspective, the *actio popularis* and the constitutional law complaint are still not alternatives to each other; doctrinally, there is no obstacle to employing them side-by-side. In spite of this fact, in jurisprudence, the two legal institutions do not operate simultaneously in any nation. One partial reason for this is the workload limit of the authorities conducting the constitutionality review. A constitutional complaint with a broad scope and *actio popularis* cannot be employed in most countries without expensive structural expansions and operational reforms in such a way so the cases could be resolved within a reasonable length of time. The effective operation of legal remedy forums, meaning the realisation of the fundamental principle that the decisions be made within a proximity to the injured party, in an easily accessible and prompt manner, can suffer because of the complexity of the review system.

Contrary to *actio popularis*—the essence of which is that the Constitutional Court accepts a motion as long as the petitioner indicates which law or regulation is deemed unconstitutional and explains intelligently why—the substantive element of the constitutional law complaint is to set up the system of admissibility criteria, the essence of which is that a

<sup>14</sup> Opinion on the Draft Law on the Constitutional Court of Montenegro of the European Commission for democracy through law (Venice Commission). Opinion 479/2008.

<sup>15</sup> Opinion no. 614/2011. of the European Commission for democracy through law (Venice Commission) on three legal questions arising in the process of drafting the new constitution of Hungary.

<sup>16</sup> E.g. Uitz, R.: May Less be More? Public Interest Standing and the Protection of Constitutional Rights. Lessons from Hungary's *Actio Popularis*. In: Pasquino, P.–Randazzo, B. (eds): *La giustizia costituzionale ed i suoi utenti, Pubblicazioni dell'Institutio di Diritto Pubblico*. no. 57, Milan, 2006. 89–117.

law can be annulled only when its application in a specific case has led to a specific violation of a fundamental right.<sup>17</sup> The admissibility criteria helps that *actio popularis* and constitutional complaints aiming for the annulment of a legal provision could be separated. Thus one can only request the abolition of an unconstitutional law in the framework of a constitutional law complaint, if the merit of the complainant's case in front of the ordinary court is significantly affected by the challenged law. Usually constitutional complaints can only be initiated in the case of the violation of the rights and freedoms of the complainant, while the *actio popularis* proceeding usually may be initiated in the case of the violation of any constitutional provision.

The constitutional complaint and the *actio popularis* may work with similar effectiveness regarding the filtering out of unconstitutional laws and regulations in the legal system. However, while the constitutional complaint, as a strong point, is able to redress individual violations of rights as well, it is a unique characteristic, a strong point of *actio popularis* that the petitioner there acts in the interest of maintaining constitutional democracy. *Actio popularis* as a legal institution relies on the participation of people taking action in the interest of the public.

## II. The new system of constitutional complaints in Hungary

In the first few months of the Basic Law in effect, the Constitutional Court, alongside the drafting of a few substantive decisions mainly of lesser significance, established the procedural and substantive conditions of exercising its new competences. The Basic Law has changed the competences of the Constitutional Court,<sup>18</sup> a new fundamental law governs the Constitutional Court<sup>19</sup> (Abtv.). Under the new legislation, the composition of the cases changed completely. In May of 2012, of 686 pending cases, 536 were constitutional complaints, while in former years the constitutional complaints only comprised an insignificant portion of the Constitutional Court's caseload. In the first semester of 2012, approximately half of the constitutional complaints were based on Para. 26 (1) of the Abtv. (old type complaints), over a third were based on Para. 26 (2) of the Abtv. (direct complaint) and a smaller percentage was based on Para. 27 of the Abtv. (real complaint).<sup>20</sup> The primary competence of the Constitutional Court has therefore shifted from the ex-post facto abstract review of laws to the adjudication of constitutional complaints.

Over the course of its preparation, during the first half of the year of its operation under the Basic Law, the Constitutional Court had prepared the intake of pending constitutional complaints supplemented on the basis of the Basic Law and also complaints initiated on the basis of a motion for an ex-post facto review of laws, submitted prior to January 1, 2012. Additionally, the general and specific tasks and their associated procedures in connection with the new constitutional complaints gained definition in the new organisational system.<sup>21</sup> During the first semester of 2012, in addition to the continuous

<sup>17</sup> Sadurski: *op. cit.* 7.

<sup>18</sup> The Basic Law of Hungary (25 April 2011) Art. 24.

<sup>19</sup> Act CLI of 2011 on the Constitutional Court.

<sup>20</sup> [www.mkab.hu/statisztika/2012](http://www.mkab.hu/statisztika/2012).

<sup>21</sup> Under the new legislation the Constitutional Court consists of 15 judges instead of the former 11, and brings its decisions either in plenary session, in 5 member divisions or in a single judge procedure. See Decision I/2012 (I. 3) about the procedural rules of the Constitutional Court, I. chapter.

discussion of procedural issues, the Court had clarified many dilemmas of a substantive nature as well. The discussion of procedural rules developed in connection with the adjudicability of constitutional complaints of various types on the merits (admissibility). It is well known that the procedure itself is also a substance:<sup>22</sup> If constitutional law complaints are stuck as early as the intake procedure stage because of the strict conditions, few constitutional complaints remain to be decided on the merits. On the other hand, if the admissibility criteria are not self evident, abuses may take place during the intake stage of the case, or the inconsistent practice may violate the rule of law, a fundamental pillar of constitutional democracy.

### *1. The three types of constitutional complaints*

Pursuant to Para. 24 (2) (c) of the Basic Law, on the basis of a constitutional complaint, the Constitutional Court reviews the compliance of the law or regulation applied in the given case with the Basic Law (old type and direct constitutional law complaint). Pursuant to Para. 24 (2) (d) of the Basic Law, on the basis of the constitutional complaint, the Constitutional Court also reviews the compliance of the court decision with the Basic Law (new type, real complaint). By breaking down the rules contained in the Basic Law, the Act on the Constitutional Court established three categories of constitutional complaints.

#### *1.1. The old type complaint*

Pursuant to Para. 26 (1) of the Abtv. according to Para. 24 (2) (c) of the Basic Law, a person or organisation affected in an individual case may turn to the Constitutional Court with a constitutional complaint, as long as over the course of the application of an unconstitutional law in the court proceeding conducted in the matter, a violation of his/her/its rights has occurred and he/she/it had already exhausted available legal remedies or legal redress is unavailable. This is what we call the old type constitutional law complaint.

Constitutional complaints submitted pursuant to Act XXXII of 1989 remained pending also as old type constitutional complaints, as long as pursuant to the decree of the Constitutional Court, the complainant supplemented his/her/its complaint within the allotted deadline (31 March 2012) with the provisions of the Basic Law violated by the challenged legal instrument and associated information regarding related constitutional correlations, as well as the certification of legal representation required by the new Abtv.

Pursuant to Para. 73 (1) of the Abtv., in pending cases before the Constitutional Court, the proceeding of the Constitutional Court must be conducted in accordance with the provisions of the Abtv., if the case can be examined in conjunction with the mandates of the Basic Law and the standing of the petitioner is established pursuant to the provisions of the new Abtv. In case of constitutional law complaints originally submitted prior to December 31, 2011 and still pending on January 1, 2012, in its decree ordering the supplementation of the motion, the Constitutional Court also set a deadline of March 31, 2012.

#### *1.2. The direct constitutional complaint*

Pursuant to Para. 26 (2) of the Abtv., unlike in Section (1), as an exception, the proceeding of the Constitutional Court can commence when by virtue of the application or effect of the unconstitutional provision the violation of the filing party's rights had occurred directly,

<sup>22</sup> Tóth, G. A.: Az eljárási alkotmányosság tartalma (The meaning of procedural constitutionality). *Fundamentum*, (2004) 3, 5–33.

without a court decision, and no legal remedy is available to redress the unconstitutional situation, or the petitioners had already exhausted their legal remedies. This is what is called a direct constitutional complaint.

Newly submitted motions that are based on *actio popularis* motions from before 2012 are also treated as direct constitutional complaints. In the case of such constitutional complaints, it was also a condition (although the petitioners did not generally take this into account) that if the legal regulatory framework enabled the petitioner to turn to an authority or a court, they had to exhaust such opportunities for legal remedy.

From a constitutional law perspective, many have considered it worrisome that pending proceedings on December 31, 2011 cannot be completed pursuant to previously valid law. More moderate opinions merely thought it desirable that those motions which request the completion of a proceeding regarding a violation of the Constitution which at the same time can be interpreted as a violation of the Basic Law should be allowed to be resubmitted in some form to the Constitutional Court.<sup>23</sup>

As a result of the transitional provisions, many motions previously submitted as *actio popularis* became filtered as constitutional complaints through the admissibility procedure. The legislator provided a solution in order to keep the petitioners who have been waiting, in some cases, for many years, from feeling deprived of their constitutional rights. En masse, however, transforming motions indicating unconstitutionality *in abstracto* into acceptable constitutional complaints will certainly not be successful, because the original complaints were not designed to show injury to an individual's rights.

### 1.3. The real constitutional complaint

Pursuant to Para. 27 of the Abtv., according to Para. 24 (2) (d) of the Basic Law, the affected person or organisation in a given case can turn to the Constitutional Court against a court decision that is contrary to the Basic Law, if the substantive case decision or other decision concluding the court proceeding violates the rights of the complainants in the Basic Law and the petitioners had already exhausted their legal remedies or no legal remedies had been made available. This is what is called a real constitutional complaint.

The real constitutional complaint is known from German law and has been a desired legal institution in Hungary by many for a long time.<sup>24</sup> Its practice—meaning the activity of the Federal Constitutional Court of Germany of reviewing the decisions of the ordinary courts from a constitutionality perspective—eases the development of uniform standards of constitutionality to be applied by the courts. After the binding conclusion of the lawsuit violating the party's fundamental rights, the party can turn to the Constitutional Court pursuant to Para. 93 (1) (4) (a) of the Basic Law. The legal literature of past decades distinguished the German and Hungarian type of constitutional complaints with the adjective "real". In the case of the Hungarian type, pursuant to Act XXXII of 1989 on the Constitutional Court, the affected party could only turn to the Constitutional Court with a motion requesting the annulment of the law applied in her case. Above annulment, it could only be stated in individual, specially justified cases that the application of the unconstitutional provision in the case of the complainant is retroactively excluded by the Constitutional Court. Consequently, in the past the party submitting the constitutional

<sup>23</sup> [http://tasz.hu/files/tasz/imce/2011/Abtv.elemzes\\_20111027\\_final.pdf](http://tasz.hu/files/tasz/imce/2011/Abtv.elemzes_20111027_final.pdf).

<sup>24</sup> E.g. Halmai, G.: Az Alkotmány mint norma a bírói jogalkalmazásban (The Constitution as a norm in judicial adjudication). *Fundamentum*, (1998) 3, 77–81.

complaint could not request the potential review of the constitutionality of the litigation proceeding and of the ordinary court decision.

The institution of the real constitutional complaint is of crucial importance because it creates an opportunity for the Constitutional Court to monitor the activity of ordinary courts besides monitoring the activity of the legislator. The review is conducted from a constitutional perspective, the Constitutional Court has to adjudicate whether the interpretation of civil law, of the law of public administration or of criminal law complied with the Basic Law. This so-called real constitutional law complaint, however, also has its limits in German law: Constitutional review is possible only if the Court's decision is based on a material misinterpretation of the basic Law, with particular focus on the extent of the violation thereof.<sup>25</sup> In the interest of preserving the allocation of functions, separation of powers between the courts and the Constitutional Court, the Federal Constitutional Court of Germany established, as early as in the first volume of published decisions, the designation of *special constitutional issue* (Specifisches Verfassungsrecht).<sup>26</sup> The Federal Constitutional Court of Germany stated that conducting the proceeding, the finding and evaluation of the facts, the interpretation of the laws and their application to the given case continue to be the duty of ordinary courts and are exempted from the review of the Federal Constitutional Court, except when it concerns a "special constitutional issue".<sup>27</sup>

The so-called special constitutional issue gained its currently valid form in 1964, in the decision issued in a patent law case, the "Heck'sche formula".<sup>28</sup> In essence, this means that the Federal Constitutional Court of Germany does not review the constitutionality of the decision in all cases, only when it concerns a special constitutionality issue. As expressed in *Bürgschaft* and similar, as early as in the *Mephisto* case, the Federal Constitutional Court of Germany stated that without the suspicion of a special constitutional issue, the Federal Constitutional Court is not entitled to review a decision even if presumably it would come to a different conclusion on the merits than the court adjudicating the civil case.<sup>29</sup>

Laws and regulations somehow always impact fundamental rights. It would be contrary to the principle of separation of powers and consequently with the goals of the Constitutional Court if in all cases one could turn to the Constitutional Court as the final judicial forum. The interpretation of laws and regulations and their application in a given case is the duty of the ordinary courts. Thus, in the framework of a constitutional complaint, one can only turn to the Constitutional Court if the petitioner can substantiate the probability that the constitutional problem arising over the course of the judicial proceeding is of particular constitutional significance.

In German legal practice, the Federal Constitutional Court of Germany first examines whether the motion contains a special constitutional issue. Therefore, the error of the disputed court decision must be based on the court ignoring the fundamental rights or

<sup>25</sup> BVerfG 7 February 1990, BVerfGE 81, 242 (Handelsvertreter), 253; BVerfG 19 October 1993, BVerfGE 89, 214 (Bürgschaft) 230.

<sup>26</sup> Kenntner cited by Zakariás, K.: A rendes bíróságok határozatainak alkotmányossági felülvizsgálata a német Szövetségi Alkotmánybíróság gyakorlatában (Constitutional supervision of decisions of ordinary courts in the practice of German Constitutional Court). *Jogtudományi Közlöny*, (2010) 2, 98, 102.

<sup>27</sup> 1 BVerfGE, 418 (420), cited by Zakariás: *op. cit.* 102.

<sup>28</sup> It is named after Karl Heck, judge of the constitutional court. See Zakariás: *op. cit.* 98, 102.

<sup>29</sup> BVerfG 19 October 1993, BVerfGE 89, 214 (Bürgschaft) 230.

incorrectly applying the law to a significant constitutional degree.<sup>30</sup> First, it is those errors in interpretation that can become special constitutional issues which mean the fundamental modification of the meaning of a fundamental right and in the context of a specific case, are also significant in a substantive legal sense.

## 2. Admissibility in the practice of the Constitutional Court

Over the course of adjudicating constitutional complaints, the Constitutional Court faced many interpretive tasks. The clarification of issues in connection with the admissibility of a motion and the development of procedure and doctrine will fundamentally define how constitutional law complaint legal remedies will operate in Hungary.

### 2.1. Involvement<sup>31</sup>

Pursuant to Para. 26 and Para. 27 of the Abtv., a condition of submitting constitutional complaints is the verification of personal involvement. Pursuant to Para. 52 (4) of the Abtv., compliance with the conditions of the Constitutional Court proceeding must be verified by the petitioner, therefore it is not enough to refer to involvement in the motion, but all the verifying, as in evidentiary facts that prove that fact; when necessary, associated documents must be attached.<sup>32</sup> It is the subject of this stage of the admissions procedure whether the petitioner can verify that the application or entering into force of the law or regulation had subjected her to personal or direct violation of her right(s).<sup>33</sup>

Even though in its decisions rejecting the admissibility of constitutional complaints, the Constitutional Court does not disclose all reasons underlying the decision, in related notes it does reference the details and results of the review. In constitutional complaint proceedings lodged on the basis of Para. 26 (1) and Para. 27 of the Abtv., the petitioner challenges a court decision. In this case, the review of involvement is generally problem-free, as typically involved parties are those whose rights or lawful interests is directly affected by the challenged court decision. In the case of direct complaints lodged pursuant to Para. 26 (2) of the Abtv., however, the showing of involvement is a considerably more difficult task. In this area, one cannot talk of solidified standards and consistently applied rules, trends can be observed instead. The Constitutional Court visibly strives to delienate the direct constitutional law complaint from the *actio popularis* proceeding.<sup>34</sup>

The problem is sharply outlined in the case of constitutional complaints former submitted as an *actio popularis* motion prior to the effective date of the Basic Law. In many cases, the petitioners have submitted their earlier motion requesting an abstract ex-post facto review of law without going into detail on the issue of direct involvement and suffered violation of fundamental rights. Cases were rejected, for example, where in connection with the reform of the pension fund system reform, the petitioners verified their involvement with their private pension fund memberships.<sup>35</sup> The essence of the justification of the

<sup>30</sup> 18 BVerGE, 85. (92).

<sup>31</sup> This subchapter is based on the following article: Bitskey, B.–Gárdos-Orosz, F.: A befogadható alkotmányjogi panasz: az első hónapok tapasztalatai (The admissible constitutional complaint: first experiences). *Alkotmánybírószági Szemle*, (2012) 2, 93–95.

<sup>32</sup> Decision 3105/2012. (VI. 26.) CC.

<sup>33</sup> Decision 3063/2012. (VII. 26.) CC.

<sup>34</sup> E.g. Decision 3105/2012. (VI. 26.) CC.

<sup>35</sup> Decision IV/2856/2012. CC.

decision—similarly to other pension fund cases<sup>36</sup>—is that involvement cannot be determined because the referenced provisions only affect the complainant in the event of their future application.

In an other case, complainants, in constitutional complaints directed at the finding of government activity counter to the Basic Law in an effort to exclusively possess power, have based their personal involvement on the fact that in the text of Article C, Paragraph (2)<sup>37</sup> Basic Law the word “everybody” is expressly set forth, a concept which encompasses all Hungarian natural persons and organisations, including the petitioner itself. On the basis of all of the above—according to the petitioners—anyone can submit a constitutional complaint if the challenged laws and regulations serve the forceful acquisition or exercise of power, or its exclusive possession.

According to the position of the Constitutional Court, the referenced law sections have not been applied against the petitioners, either directly or indirectly, and their coming into force did not affect them directly, their individual rights were not impinged upon by the adoption of the challenged provisions. For all of the foregoing, the Constitutional Court had rejected the admission of the complaint.<sup>38</sup>

The reasoning shows that personal involvement as an admissibility criterion sharply separates *actio popularis* and the new type of constitutional complaint. Thus, it is not enough to form the foundation of the motion that the petitioner is subject to the effects of the law; an actual, verified, personal injury at law must be indicated to have direct involvement.

Upon the examination of personal, direct involvement, it is, however, not desirable to draw a distinction between petitioners as to whether they suffered an injury to their rights because of the entering into force of a law which has an effect on large numbers of people or because of one which expresses general rules applicable to smaller groups.

The doctrinal development of direct and personal involvement requires great effort. In the case of a direct complaint contained in Para. 26 (2) of the Abtv., it has been found that on the basis of those laws, and other legal mechanisms defined in Para. 37 (2) of the Abtv., which cannot enter into force directly by their nature (such as a resolution for the uniformity of law, which is only binding on the courts, or generally those laws and regulations which govern the proceedings of authorities and courts, etc.), direct involvement cannot be determined. The legal injury in such cases can necessarily only take place through a court or authority proceeding and action, therefore only an old type constitutional complaint can be initiated pursuant to Para. 26 (1).<sup>39</sup>

The directness of the involvement could be also defined by the weight of suffered disadvantages. The evaluation of the issue is doctrinally complex, however, because it is connected with the criteria applicable to the raising of the fundamental constitutionality issue contained in Para. 29 of the Abtv. It is an interesting problem how the weight of the injury to rights and the directness of involvement are interconnected.

<sup>36</sup> Decision 3020/2012. (VI. 21.) CC.

<sup>37</sup> “No activity of anyone may be directed at the acquisition or exercise of public authority by force, nor at its exclusive possession...”.

<sup>38</sup> Referring to Art. 64 b) of the Act CLI of 2011 on the Constitutional Court and Art. 30 (2) of the Procedural Rules of the Constitutional Court.

<sup>39</sup> E.g. Decision 3114/2012. (VII. 26.) CC.

In connection with involvement, it is also a question as to whether a constitutional complaint can only be submitted in case of an injury at fundamental rights, or in case of any other right provided for in the Basic Law; possibly in case of the violation of constitutional values or in case of unconstitutional omission of the legislator. This latter problem is highlighted by those complaints that are based on the violation of the concept of rule of law.<sup>40</sup>

With regard to the issue of involvement, two more interesting problems are definitely worth mentioning from the first half year of practice of the Constitutional Court, in 2012. The first is that in the case of certain sector specific, code type laws (for example, laws and regulations concerning public education) it has been an ordinary occurrence that advocacy groups and trade unions submitted constitutional complaints with regard to such laws or regulations which did not affect their rights personally, only the rights of certain employees or the rights of practitioners of a given profession. In this case, however, the Constitutional Court held that only individual, specifically involved persons can submit the complaint, the union for example is not entitled to do so, as it is not directly involved.<sup>41</sup>

## 2.2. A fundamental issue of constitutional significance

With regard to constitutional complaints, in addition to the Abtv., the Procedural Code of the Constitutional Court set forth additional rules. Pursuant to Para. 29 of the Abtv., the Constitutional Court shall only admit constitutional complaints in the event of a conflict with the Basic Law which materially influences the court decision or in the case of an issue of constitutional significance. Paragraph 30 (2) of the Procedural Code, however, lists this admissions criterion as the Constitutional Court shall deny the admission of the constitutional complaint if the petitioner does not claim conflict with the Basic Law which materially influences the disputed court decision, or the problem raised is not a fundamental issue of constitutional law.

Even though the two forms of the statement could mean the same thing grammatically, the practice of the Constitutional Court to date shows that it could be a matter of dispute as to how the two “or” criteria can be interpreted. Contrary to the Abtv., one of the ways the Procedural Code is interpreted is when the “or” criterion in the law becomes a conjunctive condition. If the text of the Procedural Code provides an opportunity to deny the admission of the complaint, if it does not raise a significant constitutional issue or this question did not influence on the merits the court’s decision, it actually requires that both criteria are met at the same time for admission.

As a consequence of the foregoing, even though for admission, pursuant to the text of the Abtv., it is sufficient in and of itself if the problem raised has fundamental constitutional significance, having made that finding, the Constitutional Court will also review whether the constitutional law issue had materially influenced the court decision. By the same token, even if the Constitutional Court had determined that the constitutional law question had materially influenced the court decision, it could be an additional question as to whether that was of a fundamental constitutional significance.

It can assist in understanding the problem if at the time of examining the admission issues, we account for the possible legal consequence related dilemmas as well. The true question behind the admissions disputes is perhaps that it cannot yet be seen what the legal

<sup>40</sup> See *supra* Polish regulation.

<sup>41</sup> Decision 3091/2012. (VII. 26.) CC.

consequence is in the case of a constitutional complaint which successfully designates the fundamental constitutionality problem, but cannot show that it had materially influenced the court decision.<sup>42</sup>

This dilemma is most understandable in the case of real constitutional complaints pursuant to Para. 27 of the Abtv., as here it must be weighed how the legal consequence resulting from the vacating of the court decision is warranted when the decision was not actually materially influenced by the significant constitutional issue. Even in the case of complaints lodged on the basis of Para. 26 (1), this question remains in effect, but in the case of old type complaints, the legal consequence that is doctrinally easier to trace from the regulatory framework is the annulment of the law independently, while keeping the challenged court decision in force.

In the old procedural system pursuant to Act XXXII of 1989 on the Constitutional Court, in the case of constitutional law complaints, in addition to the annulment of the law or regulation, the Constitutional Court could make a decision regarding the exclusion of the applicability of the unconstitutional law or regulation. The Constitutional Court could decide in a similar manner regarding the fate of the law and of the court decision.

In the framework of a direct constitutional complaint, the Constitutional Court had received such motion where the petitioner found the text “special exception” in Para. 26 (2) of the Abtv. and the “or an issue of fundamental constitutional significance” test in Para. 29 of the Abtv. unconstitutional. In the petitioner’s view, these provisions conflict with Para. 24 (2) (c) of the Basic Law because they might deprive one of the opportunity to submit a constitutional complaint to be provided in any case against laws and regulations that are contrary to the Basic Law. The fact that Para. 26 (2) only enables the injured party to attack a law or provision that are contrary to the Basic Law as an exception is a material limitation on the right to turn to the Constitutional Court and makes the initiation of the proceeding unpredictable.<sup>43</sup>

In the first half a year of practice by the Constitutional Court, few guidelines can be gleaned to assist in the definition of Para. 29 of the Abtv. It can be seen, however, that in nearly all cases the Constitutional Court had rejected the admission of the motions because of the absence of an issue of fundamental constitutional significance. There were multiple cases in which the reason why the Constitutional Court did not see an issue of fundamental constitutional significance was because the constitutional complaint raised such issues in which the Constitutional Court had decided in the past.<sup>44</sup> It is important to highlight that in these cases the decisions did not employ the doctrine of *res judicata*, the reasoning did not refer to the fact that the Constitutional Court had already made a decision with regard to the given law or regulation, but rather it emphasised that a constitutional issue on which the Constitutional Court had already issued a decision on cannot be of fundamental significance.<sup>45</sup>

<sup>42</sup> Refusal of the complaint (Inadmissibility) was justified with not foreseeable or not satisfactory possible remedies, e.g. Decision 3003/2012. (VI. 21.) CC.

<sup>43</sup> Decision IV/02229/2012. CC.

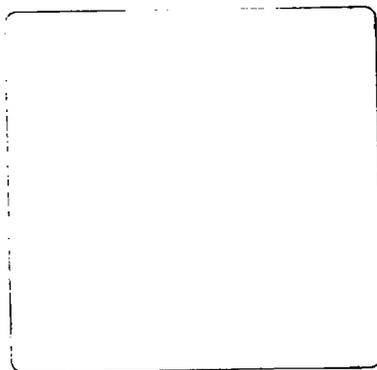
<sup>44</sup> E.g. Decision 3004/2012. (VI. 21.). CC.

<sup>45</sup> Worries about *res judicata* [e.g. Decision 3005/2012. (VI. 21.) CC. or Decision 3083/2012. (VII. 26.) CC.] see [http://tasz.hu/files/tasz/imce/2011/Abtv.\\_elemzes\\_20111027\\_final.pdf](http://tasz.hu/files/tasz/imce/2011/Abtv._elemzes_20111027_final.pdf).

## Conclusion

In January 2012, a broad array of constitutional complaints had been introduced to Hungarian constitutional law. During the transitional period of constitutional review from *actio popularis* to a complex system of constitutional complaints, the majority of complaint proceedings resulted in the denial of the admissibility of the motion. The petitioners were experiencing the same problems in Hungarian law as the ones acting under the previously valid law. For the most part, this means cases in connection with the use of wheel clamps, rules on keeping animals or landscaping, local taxes (e.g. special taxes, fees), or pension regulation. Even these frequently received petitions rarely comply with the procedural and most of all, content requirements applicable to new constitutional complaints.

The development of constitutional democracy following the political transition in 1989 was effectively assisted by the legal institution of *actio popularis*. Hungary could be an example to the entire world for how constitutional protection operates smoothly as a result of the mostly public-interest driven action of natural and legal persons. There might have been good reasons in Hungarian law for introducing the new types of constitutional complaint. The new system enables the monitoring of the constitutionality of court decisions simultaneously with the constitutional review of laws and regulations. The expectations, however, are rather high, as the new type of constitutional protection did not complete but replaced a fundamentally well functioning system.



MÓNIKA GANCZER\*

## International Law and Dual Nationality of Hungarians Living Outside the Borders

**Abstract.** According to the recent amendment of the Hungarian Citizenship Act, Hungarians living outside the borders can acquire an additional nationality, and become dual or multiple nationals. The study analyses the prohibition or recognition of dual nationality and the relevant practice of neighbouring states as the main purpose of the amendment was to enable Hungarians living in territories detached owing to historical events to acquire nationality. By assuming international obligations states may limit their discretion in matters of nationality, which otherwise fall within the domestic jurisdiction of states. Human rights drive the regulation of nationality in certain cases all the more towards the realm of international law. For that reason, human rights limiting the regulation of nationality, such as the right to a nationality, the prohibition of (arbitrary) deprivation of nationality and the prohibition of discrimination, also need to be examined. The analysis also extends to the lack of effectiveness of nationality of Hungarians concerned as well as the binding nature of the principle of effectiveness. The study concludes that the principle of effectiveness may not serve as a basis for other states to declare non-recognition of nationality of these individuals. Finally, obligations under bilateral treaties on good neighbourliness, confidence and friendly co-operation concluded by Hungary and several neighbouring states between 1992 and 1996 are taken into consideration, as well.

**Keywords:** dual nationality, statelessness, right to a nationality, prohibition of (arbitrary) deprivation of nationality, prohibition of discrimination, *domaine réservé*, principle of effectiveness

### I. Introduction

The recently amended Hungarian Citizenship Act<sup>1</sup> provides for a preferential naturalisation of Hungarians living outside the borders. According to the amendment, a non-Hungarian citizen,<sup>2</sup> whose ascendant was a Hungarian citizen, or who demonstrates the plausibility of

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<sup>1</sup> Act No. LV of 1993 on Hungarian Citizenship, Art. 4(3).

<sup>2</sup> The notions of “citizenship” and “nationality” need to be distinguished on the basis of their nature in domestic law and international law. “Citizenship” includes the rights and obligations of a person originating from his citizenship. See Moore, J. B.: *A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists, and Especially in Documents, Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, the Opinions of the Attorneys-General, and the Decisions of Courts, Federal and State*. Vol. III. Washington, 1906. 273. § 372; Hyde, Ch. Ch.: *International Law Chiefly as Interpreted and Applied by the United States*. Vol. II. Boston, 1945. 1066–1067; Garay, J. C.: La théorie de la citoyenneté automatique des étrangers. *Revue de Droit International*, 4 (1926) 1, 135; Isay, E.: De la nationalité. *Recueil des Cours*, 5 (1924) 4, 432; Cogordan, G.: *Droit des gens. La nationalité au point de vue des rapports internationaux*. Paris, 1879. 6. Since the existence of citizenship rights and obligations are relevant from the point of

his or her descent from Hungary and provides proof of his or her knowledge of the Hungarian language may—on his or her request—be naturalized on preferential terms since 1 January 2011. The changes compared to the previous version of the Act are that the criteria of assured livelihood and permanent residence in Hungary as well as the requirement of an exam in basic constitutional studies have been waived.

The main purpose of the broad wording of the phrase “whose ascendant was a Hungarian citizen, or who demonstrates the plausibility of his or her descent from Hungary” is to enable Hungarians and their descendants living in territories detached during the 20th century to acquire Hungarian citizenship. In addition, that wording also embraces those, who emigrated in the meantime and lost their citizenship.

The first significant group of Hungarians living outside the borders emerged in the wake of the Peace Treaty of Trianon of 1920.<sup>3</sup> In the course of territorial revisions between 1938 and 1941, a number of Hungarians received back their Hungarian citizenship.<sup>4</sup> However, at the end of the Second World War, Para. 2 of the Armistice Agreement of 1945<sup>5</sup> stipulated that the borders of Hungary must be re-established in line with their status as of 31 December 1937, and any acts and administrative decisions relating to the territorial revisions must be terminated.<sup>6</sup> Hence, from among the persons, who acquired Hungarian

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view of domestic law, the term “citizenship” is mainly used as a notion of domestic law. See Koessler, M.: “Subject,” “Citizen,” “National,” and “Permanent Allegiance”. *The Yale Law Journal*, 56 (1946–1947), 62–63. “Nationality” primarily means the belonging of an individual to a state irrespective of citizenship rights and obligations. See *Minor v. Happersett*, 88 U.S. 162 (1874); *Romano v. Comma*, (Egyptian Mixed Court of Appeal), 12 May, 1925. Annual Digest of Public International Law Cases, 1925–1926. Case No. 195., 265. For analyses focusing on nationality in international law, it is the bond between the individual and the state that has significance; the existence of rights and obligations is irrelevant. Consequently, the term “nationality” has to be used in international law.

<sup>3</sup> Treaty of Peace between the Allied and Associated Powers and Hungary. Trianon, 4 June 1920. Entry into force: 31 July 1921. Arts 61–66.

<sup>4</sup> Arbitral award establishing the Czechoslovak-Hungarian boundary, Vienna, 2 November 1938. Annex, Para. 4. Reports of International Arbitral Awards, Vol. XXVIII. 405. Agreement between the Kingdom of Hungary and the Republic of Czechoslovakia on regulation on citizenship according to arbitral award in Vienna on 2 November 1938, Budapest, 18 February, 1939. For more details concerning the arbitral award see Kovács, P.: A propos du chemin vers l’arbitrage de Vienne de 1938. In: Kovács, P. (ed.): *International Law—A Quiet Strength. Le droit international, une force tranquille (Miscellanea in memoriam Géza Herczegh)*. Budapest, 2011. 31–70. Between 15 and 18 March 1939, the Hungarian army invaded the territory of Sub-Carpathia. The ensuing questions of nationality were regulated in Hungarian domestic law by Section 5 of Act No. VI of 1939. Award relating to the Territory ceded by Romania to Hungary, 30 August 1940. Paras 3–4. Reports of International Arbitral Awards, Vol. XXVIII. 410. Certain elements of the Second Vienna Arbitral Award became part of Hungarian domestic law by way of Section 4 of Act No. XXV of 1940. Territories of the South were re-annexed after the invasion of the Hungarian army on 11 April 1941. The ensuing questions of nationality were regulated in Hungarian domestic law by Section 4 of Act No. XX of 1941.

<sup>5</sup> Agreement concerning an armistice between the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America on one hand and Hungary on the other. Moscow, 20 January 1945. Entry into force: 20 January 1945.

<sup>6</sup> Decree No. 526/1945. M. E. executed the Para. 2 of the Armistice Agreement by stating the repealing Acts relating to territorial changes after 1937.

nationality in the course of territorial revisions, only those could retain it, who had transferred their permanent residence into the territory of the state as of 31 December 1937.<sup>7</sup>

Even though the amendment had a primarily symbolic purpose by granting citizenship to Hungarians, who or whose ascendants lost their Hungarian citizenship in consequence of historic events and hitherto could not retrieve it for lack of residency in Hungary, this measure and the reactions of neighbouring states have raised several questions of international law.

## II. Prohibition or Recognition of Dual Nationality

In accordance with the amendment Hungarians living outside the borders can acquire a second nationality in addition to their existing one, and as such become dual nationals provided that the state of their former nationality recognises dual or multiple nationality (hereinafter: dual nationality). The international community is divided on this matter: a number of the states recognise dual nationality, while others refuse it.

### 1. Prohibition or Recognition of Dual Nationality in International Law

It is generally accepted that matters on nationality—as derived from the sovereignty of states—fall within the domestic jurisdiction of states, and form part of *domaine réservé*.<sup>8</sup> *Domaine réservé* includes matters in which states enjoy absolute and unrestricted discretion. The determination of conditions of the granting and loss of nationality as well as the prohibition or recognition of dual nationality also count among these matters. However, the discretion of states likewise includes the undertaking of international obligations concerning these matters, whereby states may establish limits on their own.<sup>9</sup> The undertaking of an international obligation “places a restriction upon the exercise of the sovereign rights of the [s]tate”,<sup>10</sup> but limits cannot be presumed in the lack of will of the state.<sup>11</sup> Therefore, the sovereignty of states and the limits of international law on matters of nationality “are well

<sup>7</sup> According to Section 1 of the Decree No. 5.070/1945. M. E., individuals, who acquired Hungarian citizenship on the basis of the repealed Acts, but their permanent residency was in the territory of Hungary as of 31 December 1937 at the time of entry into force of the Decree, that is on 21 July 1945, could remain Hungarian citizens.

<sup>8</sup> See the opposite opinion of Hans Kelsen: “[T]here are no matters which [...] are ‘solely’ [...] [or] ‘essentially’ within the domestic jurisdiction of a state” as long as any matter “acquisition or loss of citizenship [...] may [also] be the object of an international agreement. The fact that these matters are, normally, not regulated by a rule of international law is no reason to assume that they are ‘essentially’ within the domestic jurisdiction of the states.” Kelsen, H.: *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*. London, 1951. 776.

<sup>9</sup> See the opposite opinion of Hans Kelsen: “Although the individual states remain competent, in principle (even under international law) to regulate everything, they retain their competence only so far as international law does not regulate a subject matter and thereby withdraws it from free regulation by national law. Under the assumption of international law as a supranational legal order, the national legal order, then, has no longer an illimitable competence (*Kompetenzhoheit*.)” Kelsen, H.: *Pure Theory of Law*. Clark, 2005. 338.

<sup>10</sup> *The S.S. Wimbledon (Great Britain, France, Italy, Japan, and Poland v. Germany)*, Permanent Court of International Justice, Judgment of 17 August 1923. P.C.I.J. Series A, No. 1, 25.

<sup>11</sup> *The S.S. Lotus (France v. Turkey)*, Permanent Court of International Justice, Judgment of 7 September 1927. P.C.I.J. Series A, No. 10, 18.

compatible".<sup>12</sup> The prohibition or recognition of dual nationality is governed by international law to such extent only as the state concerned undertakes international obligations pertaining to that matter.

The practice of states concerning dual nationality can be easily ascertained from their domestic legal regulations and international obligations. Since Hungarians living outside the borders are nationals of neighbouring states, their dual nationality depends on the attitude of neighbouring states.

Notwithstanding that the idea of elimination of dual nationality appeared in the so-called "Bancroft Treaties"<sup>13</sup> and in the Convention on certain questions relating to the conflict of nationality laws of 1930,<sup>14</sup> the comprehensive regulation of dual nationality emerged at the beginning of the 1960s, when the main purpose of the international community was to unambiguously prohibit and abolish this phenomenon. The Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality under the *aegis* of the Council of Europe was concluded in such an environment.<sup>15</sup> According to Art. 1 of that Convention, persons who acquire of their own free will the nationality of another state shall lose their former nationality, if both states are parties to the Convention. Since neither Hungary nor the neighbouring states—with the exception of Austria—are parties to that Convention, the above-mentioned provision is irrelevant.

Concerning another problem arising from dual nationality, that is, the conflict of citizenship rights and obligations of different states, several bilateral agreements have been concluded, which adequately ensure the elimination of its negative consequences and guarantee the enjoyment of its positive features. Suffice it to mention the European Convention on Nationality of 1997<sup>16</sup>—to which Hungary and the majority of neighbouring states (Austria, Romania, Slovakia and Ukraine) are also parties. Given that Art. 17 of the Convention deals with the rights and duties related to multiple nationality, and it contains a separate chapter on military obligations in cases of multiple nationality,<sup>17</sup> the rights and obligations of persons towards the states concerned can be easily distinguished.<sup>18</sup>

<sup>12</sup> Triepel, H.: Internationale Regelung der Staatsangehörigkeit. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1 (1929), 197.

<sup>13</sup> The "Bancroft Treaties" were concluded by the United States and other states on naturalisation of each other's citizens in the late 19th and early 20th centuries.

<sup>14</sup> Convention on Certain Questions Relating to the Conflict of Nationality Laws. The Hague, 12 April 1930. Entry into force: 1 July 1937. Preamble, Art. 12.

<sup>15</sup> Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality. Strasbourg, 6 May 1963. Entry into force: 28 March 1968.

<sup>16</sup> European Convention on Nationality. Strasbourg, 6 November 1997. Entry into force: 1 March 2000.

<sup>17</sup> *Ibid.* Chapter VII.

<sup>18</sup> It should be emphasised that Slovakia made the following reservation to Art. 22 on exemption from military obligations or alternative civil service: "According to Art. 22, paragraph b, the Slovak Republic declares that persons who are nationals of a State Party which does not require obligatory military service and who are equally nationals of the Slovak Republic shall be considered as having satisfied their military obligations when they have their habitual residence in the territory of the Slovak Republic." According to this reservation, Slovakia recognises military service in other states depending on the habitual residence in Slovakia—and not depending on the habitual residence in the territory of the state concerned as stated in Art. 22(b)—even if the military service is not obligatory.

## 2. *The Practice of Neighbouring States Concerning Dual Nationality*

Romania and Hungary concluded an agreement on the elimination of dual nationality in 1979,<sup>19</sup> in line with the contemporaneous practice of socialist states,<sup>20</sup> but it was terminated in 1990. Currently Romania can be ranked among those states, which recognise dual nationality principally on the basis of the Citizenship Act of 1991.<sup>21</sup> Romanians, who keep their residency abroad, may acquire citizenship similarly to the Hungarian regulation. The main purpose of this rule is to promote the gaining of dual citizenship for Romanians living in Moldova. Constitution of Romania refers the regulation of nationality to the Citizenship Act, as an organic law,<sup>22</sup> which does not consider the acquisition of another nationality as a ground for the loss of Romanian nationality.<sup>23</sup> Consequently there is no rule in Romania on the prohibition of dual nationality, and Hungarians living in Romania can become dual nationals after requesting Hungarian nationality.

Croatia, Serbia and Slovenia recognise dual nationality and allow the acquisition of another nationality for those living outside the borders similarly to the Hungarian and Romanian regulations. The Serbian Citizenship Act of 2004<sup>24</sup> does not mention the elimination of dual nationality; what is more, it offers the acquisition of nationality for Serbs living abroad. Since the domestic legal regulation of Serbia is similar to rules of the Hungarian Citizenship Act, Serbia obviously does not oppose it. The same holds true for the Croatian Citizenship Act of 1991, which likewise allows the acquisition of citizenship by Croats even without a domicile in Croatia.<sup>25</sup> The Slovenian Citizenship Act of 1991<sup>26</sup> and the Act concerning the Settlement of the Status of Citizens of Other SFRY Successor States in the Republic of Slovenia of 1999<sup>27</sup> recognise dual nationality, as well.

Contrary to the above-mentioned states, Ukraine unambiguously prohibits dual nationality; consequently Hungarians living in Ukraine lose their Ukrainian nationality upon the acquisition of Hungarian nationality. In addition to the Constitution of Ukraine,<sup>28</sup> the Citizenship Act of 2001<sup>29</sup> also states that the state recognizes only one citizenship per person; therefore in case someone gains another citizenship he or she will automatically lose his or her Ukrainian citizenship.

<sup>19</sup> Agreement between People's Republic of Hungary and Socialist Republic of Romania on Solution and Prevention of Cases of Dual Nationality. Bucharest, 13 July 1979. Entry into force: 10 February 1980. The Law regarding Romanian Citizenship No. 21 of 1 March 1991.

<sup>20</sup> Hungary concluded such agreements with Bulgaria, Czechoslovakia, the German Democratic Republic, Mongolia, Poland and the Soviet Union, between 1958 and 1981. All of them were terminated between 1990 and 1994 for different reasons. See Ugróczy, M.: Az állampolgárság szabályozása Európában (Regulation of Nationality in Europe). *Acta Humana*, 10 (1999) 37–38, 63.

<sup>21</sup> Law No. 21 of 1991 regarding Romanian Citizenship, Art. 11.

<sup>22</sup> Constitution of Romania, Art. 5.

<sup>23</sup> Law No. 21 of 1991 regarding Romanian Citizenship, Chapter 5 on losing Romanian citizenship.

<sup>24</sup> Law on Citizenship of the Republic of Serbia of 2004.

<sup>25</sup> Act on Croatian Citizenship of 1991, Arts 11 and 16.

<sup>26</sup> Citizenship Act of the Republic of Slovenia of 1991.

<sup>27</sup> The settling of the status of citizens of other SFRY Successor States in The Republic of Slovenia Act No. 61/99 of 1999.

<sup>28</sup> Constitution of Ukraine, Art. 4.

<sup>29</sup> Law on Citizenship of Ukraine of 2001, Art. 2.

Austria also belongs to the group of states, which refuses dual nationality.<sup>30</sup> This statement is well illustrated by the fact that from among the neighbouring states Austria is the sole party to the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality of 1963. According to the Federal Law concerning Austrian Nationality of 1985,<sup>31</sup> a person, who acquires a foreign nationality upon his application, his or her declaration or express consent brings about the loss of Austrian nationality, unless he or she was not previously granted the right to retain that nationality. Therefore, a person will lose his or her Austrian nationality in consequence of acquiring Hungarian nationality, unless he or she was not permitted to retain it.

Slovakia is the only country that responded to the Hungarian amendment by legal means. According to the rapidly passed amendment to the Slovak Citizenship Act,<sup>32</sup> which entered into force on 17 July 2010, persons automatically lose their Slovak citizenship, who voluntarily acquire another nationality, with the exception of those, who gain it through birth or marriage. In this manner, with a view to avoid the dual nationality of persons belonging to the Hungarian minority, Slovakia abandoned her former practice, according to which dual nationality was recognised and accepted.

Until 2010, pursuant to the Slovak Citizenship Act,<sup>33</sup> Slovak citizenship could only be lost upon an explicit personal request for release from the state bond. There existed no regulation concerning the loss of citizenship of dual citizens; moreover several conditions were required for the elimination of the bond of citizenship. Besides, Slovakia, a member state of the Council of Europe, is not a party to the above-mentioned Convention of 1963.

It is worth noting that a bilateral agreement was concluded by Czechoslovakia and Hungary in 1960, according to which persons possessing the nationality of both states had to make a choice and decide which nationality they wish to retain. Following the dissolution of Czechoslovakia in 1992, the two states should have had to demonstrate that they regarded the treaty as effective in order to keep it in force. Hungary did not make a statement on this matter; what is more, the act that promulgated the treaty was revoked. Slovakia also should have made a notification of succession regarding the agreement, but it did not come to pass according to the available and conflicting pieces of information. It appears, therefore, that Slovakia has changed her former practice and joined the group of states, which refuse dual nationality.

The overview of domestic regulations and international obligations of neighbouring states reveals that Croatia, Romania, Serbia and Slovenia recognise dual nationality, whereas Austria, Slovakia and Ukraine prohibit it. Hungarians living in the latter three states will lose their nationality, if they voluntarily acquire Hungarian nationality on the basis of the amendment of the Hungarian Citizenship Act.

<sup>30</sup> It is worth mentioning Decision No. 1217/B/1991. of the Constitutional Court at this point. In that case, the applicant presented that the precondition of acquisition of Austrian nationality by way of naturalisation was the loss of his former Hungarian nationality.

<sup>31</sup> Federal Law concerning Austrian Nationality of 1985, Art. 27(1).

<sup>32</sup> Law of Slovak National Council of 19th January 1993 regarding Citizenship of Slovak Nationality.

<sup>33</sup> *Ibid.* Art. 9.

### III. Human Rights Obligations of States Concerning Nationality

Human rights obligations of states limiting the regulation of acquisition and loss of nationality in domestic law, such as the respect for the right to a nationality, the prohibition of (arbitrary) deprivation of nationality and the prohibition of discrimination, need to be examined, as well. The relationship of human rights and the *domaine réservé* of states can be illustrated, *inter alia*, by General Assembly Resolution 36/103 of 9 September 1981,<sup>34</sup> which—unlike the previous resolutions concerning the inadmissibility of intervention<sup>35</sup>—referred to the respect for human rights in the following manner:

“The duty of a State to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States [...]”<sup>36</sup>

Five years later, the International Court of Justice also made a remarkable pronouncement in the Nicaragua Case, stressing that “the use of force could not be the appropriate method to monitor or ensure [the] respect [for human rights] [...]”<sup>37</sup> It may readily be inferred from these statements that human rights issues have already left the realm of *domaine réservé* by the 1980s. This conclusion can also be substantiated by an important resolution adopted by the Institute of International Law during its session in Santiago de Compostela in 1989, which holds that in case of a breach of human rights obligations, states cannot evade responsibility by claiming that the matter pertains essentially to the reserved domain.<sup>38</sup> In other words, states “may no longer invoke the inviolability of sovereignty and the principle of non-intervention in case they are being

<sup>34</sup> Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. G.A. Res. 36/103, 91st plen. mtg., 9 December 1981, U.N. Doc. A/RES/36/103.

<sup>35</sup> Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty. G.A. Res. 2131, 1408th plen. mtg., 21 December 1965, U.N. Doc. A/RES/2141; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. G.A. Res. 2625, 1883rd plen. mtg., 24 October 1970, U.N. Doc. A/RES/2625, Annex; Declaration on the Strengthening of International Security. G.A. Res. 2734, 1932nd plen. mtg., 16 December 1970, U.N. Doc. A/RES/2734; Non-interference in the international affairs of States. G.A. Res. 31/91, 98th plen. mtg., 14 December 1976, U.N. Doc. A/RES/31/91; Non-interference in the international affairs of States. G.A. Res. 32/153, 106th plen. mtg., 19 December 1977, U.N. Doc. A/RES/32/153; Non-interference in the international affairs of States. G.A. Res. 33/74, 85th plen. mtg., 15 December 1978, U.N. Doc. A/RES/33/74; Non-interference in the international affairs of States. G.A. Res. 34/101, 103rd plen. mtg., 14 December 1979, U.N. Doc. A/RES/34/101; Non-interference in the international affairs of States. G.A. Res. 35/159, 94th plen. mtg., 12 December 1980, U.N. Doc. A/RES/35/159.

<sup>36</sup> Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. G.A. Res. 36/103, 91st plen. mtg., 9 December 1981, U.N. Doc. A/RES/36/103, Annex, para 2.(II)(l).

<sup>37</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, Judgment of 27 June 1986. I.C.J. Reports 1986. (para 268.) 134.

<sup>38</sup> Institut de Droit International, La protection des droits de l’homme et le principe de non-intervention dans les affaires intérieures des Etats. Session de Saint-Jacques-de-Compostelle, 1989. Article premier, Art. 2.

criticized for serious breaches of human rights.”<sup>39</sup> For these reasons, the removal of human rights issues from the *domaine réservé* of states thrusts the regulation of nationality in certain cases all the more into the realm of international law.

### *1. Right to a Nationality and Prohibition of Deprivation of Nationality*

In recent times, states that refuse dual nationality are occasionally criticised on the basis of the prohibition of deprivation of nationality. The case of losing nationality as a consequence of the acquisition of Hungarian nationality needs to be analysed from the point of view of its conformity with international law.

Austria, Slovakia and Ukraine are equally obliged by international instruments, which contain the prohibition of deprivation of nationality. Such instruments include the Universal Declaration of Human Rights of 1948,<sup>40</sup> and the European Convention on Nationality of 1997.

The provision of the Universal Declaration of Human Rights, which states that “[e]veryone has a right to a nationality”,<sup>41</sup> was subsequently taken over by the European Convention of Nationality.<sup>42</sup> The records of debates that took place during the drafting of the Universal Declaration of Human Rights suggest that the purpose of this provision was to ensure protection against statelessness,<sup>43</sup> but the obscure phrasing leaves room for divergent interpretations. The indefinite article “a” before the expression “nationality” is similar to the numeral “one” in certain languages—for example, “*une*” in French stands for either an indefinite article or a numeral.<sup>44</sup> Consequently, an absurd theory emerged, according to which the right to a nationality actually means the right to one nationality,<sup>45</sup> and serves as a means to eliminate dual nationality. Due to the fact that the purpose of regulation was undoubtedly to eliminate statelessness, neither a human right of dual nationality,<sup>46</sup> nor a prohibition of dual nationality can be deduced from the provision under consideration.

According to the generally accepted view, the right to a nationality includes the right to acquisition and retention of nationality.<sup>47</sup> Notwithstanding that scholarly opinions

<sup>39</sup> Sulyok, G.: 2. § [Függetlenség] (2. § [Independence]). In: Jakab, A. (ed.): *Az Alkotmány kommentárja I.* (Commentary of the Constitution I.). Budapest, 2009. 141.

<sup>40</sup> Universal Declaration of Human Rights. G.A. Res. 217A, 183rd plen. mtg., 10 December 1948. U.N. Doc. A/RES/217A (III). As generally known, the Declaration is a resolution adopted by the United Nations General Assembly. Even though the resolutions of that organ are not legally binding, the Declaration have become binding as customary international law.

<sup>41</sup> Universal Declaration of Human Rights, Art. 15(1).

<sup>42</sup> European Convention on Nationality, Art. 4(a).

<sup>43</sup> Verdoodt, A.: *Naissance et signification de la Déclaration universelle des droits de l'homme*. Louvain, 1964. 156–161.

<sup>44</sup> Real content of the paragraph is expressed exactly by the expression “valamely” in Hungarian translation.

<sup>45</sup> Griffin, W. L.: The Right to a Single Nationality. *Temple Law Quarterly*, 40 (1966–1967), 57–64.

<sup>46</sup> Spiro, P. J.: Dual citizenship as human right. *International Journal of Constitutional Law*, 8 (2010) 1, 111–130.

<sup>47</sup> Chan, J. M. M.: The Right to a Nationality as a Human Right. The Current Trend Towards Recognition. *Human Rights Law Journal*, 12 (1991) 1–2, 3.

significantly differ concerning the right to change nationality as that particular right is related to the disposition of nationality rather than to the elimination of statelessness.

The prohibition of deprivation of nationality cannot be directly deduced from the right to a nationality, albeit it is closely linked thereto, and as such, it generally follows the right to a nationality in international instruments. The epithets “arbitrary” and “unlawfully” are frequently attached as attributes to the prohibition of deprivation, but their interpretation gives rise to heated debates. “Arbitrary” as an attribute is used by the Universal Declaration of Human Rights and the European Convention on Nationality, while “unlawful” appears alongside “arbitrary” in the Convention on the Rights of Child of 1989.

The Universal Declaration of Human Rights includes the prohibition of arbitrary deprivation of nationality without offering a definition of arbitrariness. If the right to a nationality is considered as a fundamental human right, any deprivation of nationality that results in statelessness can be labelled as “arbitrary” as it would be blatantly incompatible with the purposes of the Declaration. It should be added that the Convention on the Reduction of Statelessness of 1961 stipulates that states shall not deprive a person of his or her nationality, if such deprivation would render him or her stateless. The text of the prohibition, however, does not contain any epithets.

Consequently, the prohibition of arbitrary deprivation of nationality does not cover dual or multiple nationals, who will possess at least one nationality after losing a nationality through deprivation. This can be illustrated by Art. 7 the European Convention of Nationality that, in addition to the prohibition of arbitrary deprivation of nationality in Art. 4(c), permits states to provide for the loss of nationality in their domestic enactments either *ex lege*, or at the initiative of the state, in case a person voluntarily acquires another nationality.<sup>48</sup> In addition, the Explanatory Report to the European Convention on Nationality<sup>49</sup> gives indications concerning the prevention of arbitrary deprivation of nationality. As regards the substantive grounds, “the deprivation must in general be foreseeable, proportional and prescribed by law”.<sup>50</sup> A deprivation is also arbitrary, if it is based on any of the grounds contained in Art. 5(1) on the prohibition of discrimination. The Explanatory Report refers to Art. 7 for an exhaustive list of grounds for deprivation, which likewise proves that an *ex lege* loss of nationality in consequence of a voluntary acquisition of another nationality cannot be deemed arbitrary.<sup>51</sup>

The prohibition of denying the right to change nationality in the Universal Declaration of Human Rights entails the prohibition of deprivation of both the renunciation of nationality and the acquisition of another nationality. It cannot be construed, however, as a prohibition of deprivation of and a right to retain the former nationality, since the expression “change” suggests the loss of that nationality.

In sum, the regulation of certain states, according to which persons lose their nationality in consequence of the acquisition of another nationality, is in conformity with international law. The loss of former nationality in Austria, Slovakia and Ukraine cannot be evaluated as an arbitrary deprivation of nationality.

<sup>48</sup> European Convention on Nationality, Art. 7(1)(a).

<sup>49</sup> Explanatory Report to the European Convention on Nationality. Available at <<http://conventions.coe.int/Treaty/en/reports/html/166.htm>> (26 March 2012).

<sup>50</sup> *Ibid.* para 36.

<sup>51</sup> *Ibid.*

These regulations should be analysed not only in the context of international law, but also in the context of domestic law. In particular, the harmony of the Constitution of Slovakia and the amendment of the Citizenship Act calls for thorough examination. According to the Constitution “[n]o one shall be deprived of citizenship of the Slovak Republic against his or her will”.<sup>52</sup> This provision begs the question: Can a request for Hungarian nationality be regarded as an intention of the person to give up his or her Slovak nationality? It can reasonably be argued that a request by a person for another nationality cannot be interpreted as a loss of nationality on his or her own will, even if he or she is aware of the consequences of that action, namely the loss of Slovak nationality. The will of the person concerned only covers the acquisition of Hungarian nationality, from which the intention of losing Slovak nationality cannot be convincingly deduced. According to the Constitution, the Slovak nationality can only be lost by way of renunciation, but this case does not involve such a renunciation.<sup>53</sup> The authoritative clarification of this issue is solely within the competence of the Constitutional Court of Slovakia.

## *2. Prohibition of Discrimination*

A possible violation of the prohibition of discrimination may occur in Slovakia from among the neighbouring states. It is open to debate whether the Citizenship Act is discriminative as it recognises dual nationality in two cases: if the other nationality is acquired by birth or marriage. The European Convention on Nationality expressly mentions the recognition of dual nationality, if another nationality is automatically acquired by birth or marriage, thus the exceptions of the Act seem to be generally accepted at first glance. It is obvious that permitting a child to become a dual national at birth is not discriminative, since he or she acquires the other nationality automatically, rather than on request. However, in a case of marriage the situation is completely different, since the Act only recognises dual citizenship, if the Slovak citizen acquires another nationality in connection with a marriage with a foreign citizen, by the existence of that marriage. The legislator presumably had an automatic acquisition in mind, but the text does not reflect it unambiguously. Hence it seems that in cases of marriage both automatic acquisition and acquisition at request are allowed. If either party gains another nationality at request, discrimination between cases on facts may occur, because in this case the Slovak nationality can be retained, whereas in every other scenario the request of another nationality brings about the loss of Slovak nationality.

The Universal Declaration of Human Rights does not explicitly mention the prohibition of discrimination in the context of nationality, but the rule that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, [...]” evidently encompasses the right to a nationality as provided for in Art. 15, as well.<sup>54</sup> Thus

<sup>52</sup> Constitution of the Slovak Republic, Art. 5(2).

<sup>53</sup> Article 25 of the Citizenship Act of Germany is similar to the regulation of Slovakia, according to which “[a] German shall lose his citizenship upon the acquisition of a foreign citizenship where such acquisition results from his application [...]”. Although this rule is in compliance with Art. 16 of the Constitution of Germany, according to which “[n]o one may be deprived of his German citizenship. Loss of citizenship arises only pursuant to law, and against the will of the person affected only if such person does not thereby become stateless.”

<sup>54</sup> Article 2 of the Declaration reads as follows: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

the Declaration prohibits every kind of discrimination regarding to the right to a nationality as well as to the arbitrary deprivation of nationality. Furthermore, the International Covenant on Civil and Political Rights of 1966<sup>55</sup>—to which Slovakia is also a party—demands equality before the law, the prohibition of discrimination on any grounds, and the granting to all persons equal and effective protection against discrimination by the law.

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950<sup>56</sup> does not contain the right to a nationality, and provides for the prohibition of discrimination with regard to rights set forth in the Convention only. Even though the Protocol No. 12 to the Convention has since introduced a general prohibition of discrimination, Slovakia is not a party thereto.<sup>57</sup> The European Court of Human Rights would have jurisdiction over related cases only, if Slovakia violated a right set forth in the Convention or any of its Protocols to which Slovakia is a party. For that reason, both of the above-mentioned European instruments are irrelevant. It does not change the fact, however, that Slovakia is obliged to eradicate all forms of discrimination under international law.

#### IV. Elimination of Statelessness

The notion of statelessness is not defined by any of the relevant international instruments. In theory, statelessness has two forms: *de jure* and *de facto* statelessness. Those persons are considered *de jure* stateless, who do not possess the nationality of any state. *De facto* stateless persons, on the other hand, do possess a nationality in a legal sense, but it is not real as the rights and obligations, which originate from that nationality, cannot be exercised and fulfilled for some reason.

The international community has primarily focused on *de jure* statelessness, as states have erroneously believed that all *de facto* stateless persons were refugees. At the United Nations Conference on the Elimination or Reduction of Future Statelessness, the participating states, in addition to the conclusion of the Convention on the Reduction of Statelessness,<sup>58</sup> adopted a number of resolutions, as well. One of these resolutions declared that “[t]he Conference recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality”.<sup>59</sup> Naturally, this pronouncement was merely a recommendation for states and had no binding force whatsoever.

It comes from the general purpose of the elimination of statelessness that states should endeavour to abolish both *de jure* and *de facto* statelessness. The purpose of the resolution quoted above is to avoid becoming *de facto* stateless and to achieve a real nationality, which can only be ensured by the state of nationality—consequently, this requirement should be fulfilled by Hungary.

<sup>55</sup> International Covenant on Civil and Political Rights, New York, 16 December 1966. Entry into force: 23 March 1976.

<sup>56</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. Entry into force: 3 September 1953.

<sup>57</sup> Slovakia signed Protocol No. 12 on 4 November 2000, but has not ratified it yet.

<sup>58</sup> Convention on the Reduction of Statelessness, New York, 30 August 1961.

<sup>59</sup> United Nations Conference on the Elimination or Reduction of Future Statelessness, Resolution I.

Subsequent to the loss of their previous nationality, Hungarians living outside the borders possess a nationality, which is, in principle, identical to that of Hungarians living in the territory of Hungary, but in absence of registered residency, employment and tax-paying, they are neither able to exercise several citizenship rights, nor receive a share from social benefits. Even so, they do not become *de facto* stateless, especially in the light of the right to vote as provided by the new Act on election of the members of Parliament.<sup>60</sup>

## V. Effectiveness of the New Hungarian Nationality

The analysis of the lack of effectiveness of the nationality of Hungarians, who live outside the borders need to be distinguished from the analysis of *de facto* stateless status. *De facto* statelessness manifests itself as the inability of the individual to exercise rights and fulfil obligations of citizenship. The examination of effectiveness, however, focuses on factors other than citizenship rights and obligations, and concentrates on the genuine link between the person and the state.<sup>61</sup> According to the judgment passed by the International Court of Justice in the *Nottebohm Case* in 1955, an effective nationality is “based on stronger factual ties” between the person concerned and the state. As stated by the judgment, a factor of utmost importance is “the habitual residence of the individual”, “but there are other factors such as the centre of the [person’s] interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”<sup>62</sup>

In addition to the absence of effectiveness, individuals frequently lack citizenship rights and obligations, although it does not originate from the absence of effectiveness. Such coincidences typically result from the similar features of requirements formulated by states concerning the factors indicating the existence of effectiveness and the exercise and fulfilment of rights and duties of citizenship.

Several individuals currently applying for citizenship have previously had Hungarian citizenship, and as such, some sort of link exists between them and Hungary, even though their permanent residence can be found elsewhere and they habitually live and work in another country, usually along with their families. The bond with Hungary is less genuine in case of those individuals, who were born and live in the territory of another state, barely speak Hungarian<sup>63</sup> and acquire citizenship owing to their ascendants. The preferential naturalization does not require the passing of an exam in basic constitutional studies, but it is worth noting that this exam remains to be a criterion for other kinds of naturalisation in Hungary. Compared to the naturalisation of other persons habitually resident in Hungary, the legislator indeed set less stringent requirements for a preferential naturalisation. As a result, the nationality of Hungarians living outside the borders can hardly be considered effective, especially in light of the fact that it is acquired on the basis of the earlier

<sup>60</sup> Act No. CCIII of 2011 on the Election of the Members of Parliament, Art. 12(3).

<sup>61</sup> International Court of Justice, *Nottebohm Case (Liechtenstein v. Guatemala)*, Second Phase, Judgment of 6 April 1955. I.C.J. Reports 1955. 23.

<sup>62</sup> *Ibid.* 22.

<sup>63</sup> There is no process for determination of the meaning of providing of proof of knowledge of Hungarian language, thus the request form can be filled out at home and sometimes the proof of knowledge means that the person shall answer in Hungarian some questions regarding his data on the request form.

nationality of ascendants or the demonstration of the plausibility of Hungarian descent, and a sufficient knowledge of the Hungarian language.

In 2004, in a decision concerning a referendum that, had it been successful, would have offered citizenship to Hungarians living outside the borders upon presenting “a proof of Hungarian nationality”,<sup>64</sup> the Constitutional Court failed to recognise an objection, which sought to draw attention to the lack of real and genuine link.<sup>65</sup> Judge Kukorelli, however, correctly argued in his dissenting opinion that “a declaration on national status is inadequate to prove the existence the close, real (effective) link between the citizen and the state”.<sup>66</sup> In the present case, the link is closer, but it is hardly genuine.

Bearing all that in mind, the potential consequences of lack of effectiveness on the side of the individual also need to be analysed. First of all, it should be emphasized that the norms of international law concerning nationality do not impose an obligation on states to grant citizenship to persons only in case a genuine link exists. The same applies, of course, to Hungary. Given the difficulties related to the determination of a genuine link, such a norm would allow states to arbitrarily interfere in matters of nationality, which form part of *domaine réservé*. The intentions of members of the international community do not point toward the framing of such rule.

The academic debate continues on relationship of the principle of effectiveness and the diplomatic protection of individuals possessing one nationality—a topic that was discussed by the International Court of Justice in the *Nottebohm Case*. In case the principle exists in international law as a customary rule, its content is the following: if diplomatic protection is provided on the basis of an ineffective nationality, the other state has a right not to recognise that nationality. As a consequence of non-recognition, the nationality does not have an effect in the field of international law.

As commonly known, there are two constitutive elements of customary international law: an objective criterion, the general practice of states, and a subjective criterion, the existence of *opinio iuris sive necessitatis*.<sup>67</sup> When the above-mentioned judgment was passed, states applied principles in their nationality regulations, which established a genuine link between the individual and the state.<sup>68</sup> It does not mean, however that their purpose was to create a genuine link in order to bring their regulations in conformity with the principle of effectiveness.<sup>69</sup> The general practice of states concerning diplomatic protection did not put emphasis on the lack of genuine link either.<sup>70</sup> In the *Nottebohm Case*, a reference can be found in the rejoinder submitted by Guatemala for the requirement of an effective

<sup>64</sup> The term “nationality” was used in a historical-biological sense and not as a synonym of “citizenship”.

<sup>65</sup> Constitutional Court Decision No. 40/2004. paras I, 2, e) and III, 3.

<sup>66</sup> *Ibid.* Dissenting opinion of Judge István Kukorelli, para. 1.

<sup>67</sup> According to Art. 38(1)(b) of the Statute of International Court of Justice, “international custom [is an] evidence of a general practice accepted as law”. “*Opinio iuris sive necessitatis*” means “opinion of law or necessity”, a belief of the state that its action is legally obliged.

<sup>68</sup> *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Second Phase, Judgment of 6 April 1955. I.C.J. Reports 1955. 22.

<sup>69</sup> José Francisco Rezek also mentions that the accordance of domestic regulations is not sufficient to establish the existence of customary international law. Rezek, J. F.: *Le droit international de la nationalité. Recueil des Cours*, 197 (1986) II, 357.

<sup>70</sup> *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Second Phase, Judgment of 6 April 1955. I.C.J. Reports 1955. Dissenting opinion of Judge M. Guggenheim, 55–56.

link, but it was not supported by the prevailing state practice.<sup>71</sup> According to the dominant view in contemporary literature, the rule based on the principle of effectiveness could not be considered customary international law.<sup>72</sup> Judges Klaestad, Guggenheim and Read voiced similar considerations in their dissenting opinions.<sup>73</sup>

In sum, the Court accepted the arguments of Guatemala, and its decision was influenced by other principles.<sup>74</sup> It based its judgment on considerations that were not reflected in the existing sources of international law, thereby taking a “hazardous course”<sup>75</sup> of judicial legislation. Following the publication of the judgment the principle appeared to be noticeably approved,<sup>76</sup> but later it was increasingly criticized. For instance, it was criticised that the question of effectiveness was determined on the basis of subjective criteria,<sup>77</sup> the vagueness of which could easily lead to arbitrary implementation.<sup>78</sup> A few years after the judgment in the *Nottebohm Case*, further objections were raised against the principle of

<sup>71</sup> Duplique présentée par le Gouvernement du Guatemala. 2 novembre 1954. *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Second Phase, 511–512. In her counter-memorial, Guatemala only referred cases of dual nationality in connection with the principle of effectiveness. See Contre-mémoire présenté par le Gouvernement du Guatemala. 20 avril 1954. *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Second Phase, 195.

<sup>72</sup> See Jones, J. M.: The *Nottebohm Case*. *The International and Comparative Law Quarterly*, 5 (1956) 2, 243; Parry, C.: Some Considerations upon the Protection of Individuals in International Law. *Recueil des Cours*, 90 (1956) II, 707; Kunz, J. L.: The *Nottebohm Judgment* (Second Phase). *American Journal of International Law*, 54 (1960) 3, 563; Makarov, A. N.: Das Urteil des Internationalen Gerichtshofes im Fall *Nottebohm*. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 16 (1955–1956), 414. See an opposite opinion of Fitzmaurice, G.: The General Principles of International Law Considered from the Standpoint of the Rule of Law. *Recueil des Cours*, 92 (1957) II, 206–207.

<sup>73</sup> *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Second Phase, Judgment of 6 April 1955. I.C.J. Reports 1955. Dissenting opinion of Judge Klaestad, 31. Dissenting opinion of Judge M. Guggenheim, 56–57, 59. Dissenting opinion of Judge Read, 40.

<sup>74</sup> Such as the prohibition of *mala fide* or fraudulent naturalisation and the prohibition of abuse of rights. Parry: *op. cit.* 707; Jones: *op. cit.* 244.

<sup>75</sup> Hersch Lauterpacht did not analyse the *Nottebohm Case* in his book, but he emphasised that judicial legislation is a hazardous course. Lauterpacht, H.: *The Development of International Law by the International Court*. London, 1958. 19.

<sup>76</sup> de Castro, F.: La nationalité, la double nationalité et la supra-nationalité. *Recueil des Cours*, 102 (1961) I, 582; Brownlie, I.: The Relations of Nationality in Public International Law. *British Year Book of International Law*, 39 (1963), 314, 349; Panhuys, H. F. van: *The Role of Nationality in International Law*. Leiden, 1959. 158; International Responsibility: Sixth Report by F. V. García Amador, Special Rapporteur. Document A/CN.4/134 and Addendum. Yearbook of the International Law Commission, 1961. Vol. II. Documents of the Thirteenth Session Including the Report of the Commission to the General Assembly. United Nations, New York, 1962. 49; Harvard Law School, Convention on the International Responsibility of States for Injuries to Aliens. Draft no. 12 with Explanatory Notes (reporters: Louis B. Sohn–Richard R. Baxter). Cambridge (Mass.), 1961. Art. 23 (3).

<sup>77</sup> Kunz: *op. cit.* 564; Makarov: *op. cit.* 418; Parry: *op. cit.* 711.

<sup>78</sup> Perrin, G.: Les conditions de validité de la nationalité en droit international public. In: *Recueil d'études de droit international en hommage à Paul Guggenheim*. Genève, 1968. 878. *Nottebohm Case (Liechtenstein v. Guatemala)*, International Court of Justice, Second Phase, Judgment of 6 April 1955. I.C.J. Reports 1955. Dissenting opinion of Judge Guggenheim, 55–56.

effectiveness in the *Flegenheimer Case*. The Italian-United States Conciliation Commission argued as follows:

“[W]hen a person is vested with only one nationality, which is attributed to him or her either *jure sanguinis* or *jure soli*, or by a valid naturalization entailing the positive loss of the former nationality, the theory of effective nationality cannot be applied without the risk of causing confusion. It lacks a sufficiently positive basis to be applied to a nationality which finds support in a state law.”<sup>79</sup>

In a case analogous to the status of Hungarians living outside the borders, the Conciliation Commission denied that the principle of effectiveness may be applicable to individuals having only one nationality. One of the main arguments of the Commission was that an individual who, in the mobility of modern world, possesses the nationality of a state, but lives in another state, where he is domiciled with his family and where his working place is located, “would be exposed to non-recognition”.<sup>80</sup>

Nowadays even the binding nature of the principle of effectiveness is in the centre of academic debates. The alteration of the bond of nationality in the modern world obviously rules out the inclusion of the principle in an international treaty as well as its establishment as a rule of customary international law. In 2000, the International Law Commission held a similar view in a report on diplomatic protection:

“The genuine link requirement proposed by Nottebohm seriously undermines the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of persons from the benefit of diplomatic protection. In today’s world of economic globalization and migration, there are millions of persons who have drifted away from their State of nationality and made their lives in States whose nationality they never acquire. Moreover, there are countless others who have acquired nationality by birth, descent or operation of law of States with which they have a most tenuous connection.”<sup>81</sup>

Following the survey of international treaties, it can be concluded that the principle of effectiveness has not been included in any agreement that could promote its consolidation. The analysis of the alleged customary nature of the principle also reveals that states do not refer to the principle of effectiveness as a basis of non-recognition of nationality.<sup>82</sup> Hence neither of the elements of customary international law prevails. There is no relevant general

<sup>79</sup> *Flegenheimer Case*, Italian-United States Conciliation Commission, Decision No. 182. 20 September 1958, para. 62. Reports of International Arbitral Awards, Vol. XIV. 377.

<sup>80</sup> *Ibid.*

<sup>81</sup> First Report on Diplomatic Protection, by Mr. John R. Dugard, Special Rapporteur. Document A/CN.4/506 and Add.1. Yearbook of the International Law Commission, Vol. II. Part One, Documents of Fifty-Second Session. United Nations, New York–Geneva, 2009. 229. Report refers also Hailbronner, K.: Diplomatischer Schutz bei mehrfacher Staatsangehörigkeit. In: Georg, R.–Stein, T. (eds): *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen*. Baden-Baden, 1996. 36.

<sup>82</sup> First Report on Diplomatic Protection, by Mr. John R. Dugard, Special Rapporteur. Document A/CN.4/506 and Add.1. Yearbook of the International Law Commission, Vol. II. Part One, Documents of Fifty-Second Session. United Nations, New York–Geneva, 2009. 229.

practice of states nowadays, which is also confirmed by the majority of scholars.<sup>83</sup> In the lack of general practice, however, the other element of customary international law, the *opinio iuris sive necessitatis*, cannot even come into existence. For these reasons, the principle of effectiveness may not serve as a basis for other states to declare a non-recognition of nationality of individuals, who possess only one nationality.

The diplomatic protection of dual nationals *vis-à-vis* to third states is analogous to the above-mentioned scenario. Similarly to the situation of individuals, who possess only one nationality, the third state may not refer to a lack of effectiveness of nationality of dual nationals in order to substantiate its claim of non-recognition of nationality. Therefore, diplomatic protection can be provided for dual nationals against third states even on the basis of an ineffective nationality.<sup>84</sup>

The lack of effectiveness may give rise to problems in one case though—if diplomatic protection is provided to a dual national by one state of nationality against the other. Suffice it to recall Art. 7 of the Draft Articles on Diplomatic Protection, which is considered by the International Law Commission as a rule of customary nature.<sup>85</sup> That article reads as follows:

“A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant [...].”<sup>86</sup>

In other words, the claimant state may prove that its nationality is predominant, and as such, it can provide diplomatic protection against the other state of nationality. Interestingly enough, a non-recognition of predominance may even impinge on an effective nationality, because there are exceptional cases, in which both nationalities may be regarded as effective. The lack of predominance does not necessarily follow a lack of effectiveness, but an ineffective nationality is most likely to serve as a basis for the other state of nationality to prove its predominance.

The establishment of this rule may result in exceptional situations, in which another state may exercise diplomatic protection against Hungary in respect of Hungarians living

<sup>83</sup> Geck, W. K.: Diplomatic Protection. In: Bernhardt, R. (ed.): *Encyclopedia of Public International Law, Vol. 1. Aaland Islands to Dumbarton Oaks Conference (1944)*. Amsterdam–London–New York–Tokyo, 1992. 1050; Randelzhofer, A.: Nationality. In: Bernhardt, R. (ed.): *Encyclopedia of Public International Law. Vol. 8. Human Rights and the Individual in International Law, International Economic Relations*. New York–London, 1982. 421–422; Sloane, R. D.: Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality. *Harvard International Law Journal*, 50 (2009) 1, 29–37.

<sup>84</sup> Article 6(1) of the Draft Articles on Diplomatic Protection of International Law Commission also states that “[a]ny State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.” International Law Commission, Draft Articles on Diplomatic Protection, 2006. Art. 6. State practice appears to be uniform regarding this provision, hence the text of Art. 6(1) can be considered as a generally accepted norm.

<sup>85</sup> International Law Commission, Draft Articles on Diplomatic Protection with Commentaries, 2006. 46. The first part of the sentence is a generally accepted norm of customary international law, but the exception appears to be a result of progressive development.

<sup>86</sup> International Law Commission, Draft Articles on Diplomatic Protection, 2006. Art. 7.

outside the borders and possessing the nationality of both states. Simply put, the other state of nationality may provide diplomatic protection against Hungary to a Hungarian national, which is hardly in interest of Hungary.

## VI. Obligations Assumed by Bilateral Agreements on Good Neighbourliness and Friendly Co-operation

Bilateral basic treaties were concluded by Hungary and several neighbouring states, namely Croatia,<sup>87</sup> Romania,<sup>88</sup> Slovakia,<sup>89</sup> Slovenia<sup>90</sup> and Ukraine,<sup>91</sup> between 1992 and 1996.<sup>92</sup> In these treaties states undertook that they develop their relations in the spirit of good neighbourliness, confidence and friendly co-operation, and they establish an appropriate framework for co-operation and maintain a dialogue in all fields of mutual interest.<sup>93</sup>

According to the obligations laid down these basic treaties, Hungary should have initiated negotiations prior to the amendment of the Citizenship Act. Matters of preferential naturalisation of Hungarians living in the neighbouring states and possessing the nationality thereof certainly constitute an area of mutual interest. Slovakia likewise should have negotiated with Hungary before its reaction to the Hungarian legislation with a view to base inter-state relations on good neighbourliness, confidence and friendly co-operation.

In order to ensure and maintain friendly relations, the states concerned should co-operate and consult in every field related to the preferential naturalisation of Hungarians living outside the borders. From the point of view of Hungary, an eventual amendment of the Citizenship Act or an expansion of citizenship rights by means of facilitating their exercise would undoubtedly call for consultations. Neighbouring states, on the other hand, which prohibit dual nationality, should also negotiate with Hungary concerning any future amendments of the legal consequences related to the loss of their nationality.

<sup>87</sup> Agreement on Friendly Relations and Co-operation between the Republic of Croatia and the Republic of Hungary. Budapest, 16 December 1992. Entry into force: 21. December 1993.

<sup>88</sup> Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good Neighbourhood. Timisoara, 16 September 1996. Entry into force: 27 December 1996.

<sup>89</sup> Treaty on Good-Neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic. Paris, 19 March 1995. Entry into force: 15 May 1996.

<sup>90</sup> Treaty on Friendship and Co-operation between the Republic of Hungary and the Republic of Slovenia. Budapest, 1 December 1992. Entry into force: 4 March 1994.

<sup>91</sup> Treaty between the Republic of Hungary and Ukraine on the Foundations of Good Neighbourly Relations and Co-operation. Kiev, 6 December 1991. Entry into force: 16 June 1993.

<sup>92</sup> In more details see Nagy, K.: Les règles de caractère soft law dans le traités bilatéraux de la Hongrie conclus sur la protection des minorités. In: Kovács, P. (ed.): *Le droit international au tournant de millénaire—l'approche Hongroise. International Law at the Turn of the Millennium—the Hungarian Approach*. Budapest, 2000. 18–24.

<sup>93</sup> Agreement on Friendly Relations and Co-operation between the Republic of Croatia and the Republic of Hungary, Arts 1, 8; Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good Neighbourhood, Arts 1, 5; Treaty on Good-Neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic, Arts 1, 5; Treaty on Friendship and Co-operation between the Republic of Hungary and the Republic of Slovenia, Arts 1, 7; Treaty between the Republic of Hungary and Ukraine on the Foundations of Good Neighbourly Relations and Co-operation, Arts 1, 5.

## Summary

Matters on nationality fall within the domestic jurisdiction of states, and form part of *domaine réservé*, in which states enjoy absolute discretion. Given that the discretion of states encompasses the undertaking of international obligations concerning such matters, the international legal framework needs to be analysed, as well.

Human rights obligations of states limit the domestic regulation of acquisition and loss of nationality in certain cases, particularly in view of the fact that the development of international law has led to the removal of human rights issues from the *domaine réservé* of states. Since the purpose of the right to a nationality was undoubtedly to eliminate statelessness, the phrase “[e]veryone has a right to a nationality” includes both the right to acquisition and retention of nationality. However, it can be construed neither as a human right of dual nationality nor as a prohibition of dual nationality. The prohibition of arbitrary deprivation of nationality does not cover dual or multiple nationals, who still possess at least one nationality after the losing of a nationality by way of deprivation. Consequently, the regulation of certain states, according to which persons lose their nationality in the wake of the acquisition of another nationality, is in conformity with international law. In the neighbouring states, a possible violation of the prohibition of discrimination may occur in Slovakia only. Discrimination between cases on facts may occur as a result of marriage, when the Slovak nationality can be retained even if the individual acquires another nationality at his or her request.

The purpose of the Hungarian amendment was primarily to provide a symbolic Hungarian nationality for ethnic Hungarians living outside the borders. Even so the lack of effectiveness may give rise to problems. It is unquestionable that non-resident Hungarians acquire an ineffective nationality, and Hungary is not obliged by international law to grant an effective nationality. Since the principle of effectiveness does not have customary nature in international law, Hungary may exercise diplomatic protection in respect of individuals possessing either one or dual nationality, but in the latter case she may do so against third states only. Problems may arise in a case of diplomatic protection of dual nationals between the respective states of nationality. A possible consequence of the lack of effectiveness of nationality of Hungarians living outside the borders may be that Hungary cannot exercise diplomatic protection in respect of them. The other state of nationality, however, can exercise diplomatic protection in respect of Hungarian nationals against Hungary. The nationality of an individual needs to be further analysed if he or she becomes an effective national owing to a permanent residency or a working place in Hungary, which ends his or her *de facto* stateless status.

The initiation of meaningful negotiations and the promotion of a constructive co-operation, as envisaged by the bilateral basic treaties, would be essential for the development of inter-state relations and for the protection of individuals, who have or will become Hungarian nationals. Without dialogue and conciliation in this field, only the emergence of further problems appears certain.

# KALEIDOSCOPE

BALÁZS HORVÁTHY\*

## Sustainable Development and Common Commercial Policy

### I. Introduction

The Treaty of Lisbon has essentially restructured the legal framework of the EU's external relations. The three-pillar system introduced by the Treaty of Maastricht has been integrated, and this unified model of the European Union made it possible to determine the Union's objectives and principles in the field of foreign actions in a uniform way. This meant at the level of the Common Commercial Policy (CCP), that the general objectives and principles of the EU external relations<sup>1</sup> must be taken into consideration in the area of trade policy as well. Consequently the Union has to take into account not only of trade liberalisation ideas, but principles outside the conventional trade policy which include the objectives of sustainable development and environmental protection, too.

Because of these major modifications, the question arises, how the relationship of the principles of CCP to the sustainable development and environmental policy can be described. Tension between these two policy areas is understandable, because many environmental problems are related to the growing scale of global trade activity. Consequently real problem is in fact whether the sustainability<sup>2</sup> as a principle of the EU's external relations can put a restriction on the CCP which is governed predominantly by free trade objectives.

To examine these issues in more detail, the first part of the article gives a general overview of the position of sustainable development principle in EU law as well as EU external relations (*II. Sustainable development and EU external relations*), after that the second main part focuses on the relationship between the sustainable development and the principles of the Common Commercial Policy in the light of the new structure of principles

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<sup>1</sup> See Art. 21 of Treaty on the European Union (TEU).

<sup>2</sup> The terms “sustainability” and “sustainable development” have common roots, but the “sustainability” may be used in reference to an objective or aim. On the other hand “sustainable development” is a process itself which can lead to “sustainability”. This article may apply these terms in similar meaning. For detailed analysis of the terminology, see Voigt, Ch.: *Sustainable Development as a Principle of International Law*. Leiden, 2009. and Schwarz, P.: *Sustainable Development in International Law. Non-State Actors and International Law*, 5 (2005), 127–152.

and objectives laid down by the Treaty of Lisbon (*III. Principles and objectives of the Common Commercial Policy*). Finally, the article is closed by concluding remarks (*IV. Conclusions*)

## II. Sustainable development and EU external relations

### 1. Sustainable Development in the Founding Treaties

The following analysis does not attempt to add anything to the extent and meaning of sustainable development, but it is essential to determine the appropriate term which is connected to the objectives and principles of the Union's founding treaties.

As a matter of fact, the first reference in this regard should be the definition made by the World Commission on Environment and Development since it had a considerable influence also on the later EC formulations. The Brundtland Commission introduced in its report "Our Common Future" the term "sustainable development". According to the oft-quoted definition "sustainable development" is a progress "that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>3</sup> It is commonly known fact that also the definition of report regarded the "sustainable development" as a complex phenomenon, since it referred also to the social, economic and environmental aspects of sustainable development<sup>4</sup> expressly emphasising the struggle against poverty.<sup>5</sup> Besides, the Brundtland Commission's term was an ethical tenet rather than a legal norm. This ethic was trans-border extended to all peoples; consequently it established a global ethical stance in relation to the global environmental problems. Moreover, this definition was a trans-temporal ethical principle knowing that it was extended across generations.<sup>6</sup>

The international debate on this issue and the preparation of the United Nations Conference on Environment and Development (UNCED) held in Rio in 1992 affected also the EC legislation; as a result, the Maastricht Treaty (1992)<sup>7</sup> introduced a term corresponding to "Sustainable Development" at the level of general objectives of the Community. The original EEC Treaty of 1957 specified that the Community has to promote "a harmonious

<sup>3</sup> *Our Common Future. From One Earth to One World*. Report of the World Commission on Environment and Development. Parag. 27. <<http://www.un-documents.net/ocf-ov.htm#1.3>> (20.09.2012).

<sup>4</sup> *Ibid.* "(...) The concept of sustainable development does imply limits – not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But technology and social organization can be both managed and improved to make way for a new era of economic growth. (...)".

<sup>5</sup> *Ibid.* "(...) Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes (...)".

<sup>6</sup> Hill, A. K. G.: Sustainable Development–An Ethical Construct in Search of a Multilateral Expression. *BRIDGES between Trade and Sustainable Development*, 5. (2001) 8, 13.

<sup>7</sup> See more detailed about sustainable development in Maastricht Treaty: von Moltke, Konrad: *The Maastricht Treaty and the Winnipeg Principles on Trade and Sustainable Development*. International Institute for Sustainable Development, 1995.

development of economic activities (...)”<sup>8</sup> which was modified to the formula “harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment”.<sup>9</sup> The Member States tried to avoid an obvious statement on “sustainable development” but the term “sustainable growth” with the emphasis of “respect for the environment” as well as the “balanced development” was a clear signal of a commitment to the sustainable development. Moreover, also the Treaty on European Union defines the objectives for the Union which included a quotation on “sustainable economic progress”, a synonym of the “sustainable development”.<sup>10</sup>

The Treaty of Amsterdam (1997) was not so modest as to hide the real term of “sustainable development”. Accordingly the modified Treaty on European Union ensured the aim of the Member States to promote “economic and social progress for their peoples, taking into account the principle of sustainable development (...)”<sup>11</sup> and specified as an objective that the Union has to encourage “economic and social progress and a high level of employment and to achieve balanced and sustainable development (...)”<sup>12</sup> The Treaty establishing the European Community was amended with a similar reference to the “balanced and sustainable development of economic activities”, meanwhile also “sustainable growth” remained an objective of the Community.<sup>13</sup> In addition the most noteworthy feature of the Treaty of Amsterdam was the inclusion of principle of integration as an overarching objective of Community policies. In terms of that, the Community was obliged to integrate environmental concerns into the implementation of policies with specific regard to promoting sustainable development.<sup>14</sup> The Treaty of Nice has not modified these clauses.

As the previous outline shows, the sustainable development is regulated in the primary sources of EU as significant objective and as a principle as well. The strongest ties were established between the sustainable development and external policies, specifically the Common Commercial Policy as a result of the principle of integration of environmental concerns. Accordingly the European Union mainstreamed sustainable development into different policy areas including also the diverse international trade relations of the Union.

## *2. The impact of Sustainable Development principle on the Functioning of EU external relations*

However, doubts were expressed about the binding of these formulations, the inclusion of references to the sustainable development in the Treaties obviously had favourable effects on the EU’s strategic decision-making mechanism.

<sup>8</sup> Treaty Establishing the European Community (EEC Treaty) Art. 2.

<sup>9</sup> EEC Treaty Art. 2 (emphasis added).

<sup>10</sup> Treaty on European Union (as laid down by the Maastricht Treaty), Art. 3b.

<sup>11</sup> See Preamble of Treaty on European Union (as amended by the Amsterdam Treaty), seventh recital.

<sup>12</sup> Treaty on European Union (as amended by the Amsterdam Treaty), Art. B (emphasis added).

<sup>13</sup> Treaty establishing the European Community (as amended by the Amsterdam Treaty), Art. 2 (emphasis added).

<sup>14</sup> Treaty establishing the European Community (as amended by the Amsterdam Treaty), Art. 6: “Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.”

Following that the European Commission made a proposal to establish an ambitious sustainable development strategy of the EU which was launched by the Member States at the Gothenburg Summit in 2001. The strategy was complementary to the Lisbon Strategy of economic and social renewal, adding a new, environmental dimension to that. The strategy proposed policy measures to overcome several unsustainable trends and set up a so-called new approach to policy-making which attempted to effectuate that the environmental, economic and social policies of EU mutually reinforced each other. In order to achieve this purpose the European Commission was obliged to submit new policy proposals to impact assessment.<sup>15</sup>

The European Council renewed the sustainable development strategy in 2005 which set out main objectives and actions for priority—mainly environmental—areas.<sup>16</sup> Besides in 2009, in the same year when the Treaty of Lisbon entered into force, the European Commission adopted a review of the EU's sustainable strategy and confirmed that Sustainable development remains a fundamental objective of the European Union under the Lisbon Treaty, but a number of unsustainable trends required urgent actions. In this regard, the review emphasised the need to additional efforts in the field of climate change policy, energy policy and biodiversity.

Following the EU strategic decisions making processes two concrete consequences can be highlighted from the perspective of the external policies. First, resulted from the sustainable development strategy, the Commission agreed to a policy framework for the external dimension of these questions,<sup>17</sup> and later the Council adopted a strategy on environmental integration in the external policies.<sup>18</sup> The strategy “Towards a global partnership for sustainable development” contextualised the sustainable development and took into consideration the position of the developing countries and the globalisation. In terms of the strategy, the priority objective of the EU was to ensure the contribution of the globalisation to sustainable development. To that end, the EU had to ensure that the developing countries are integrated equitably into the world economy as well as help them to gather the benefits of trade and investment liberalisation processes. Besides, the EU had to provide, within the framework of the external policies, incentives for environmentally and socially sustainable production and trade, and strengthen the international financial and monetary architecture and promote better and more transparent forms of financial market regulation to reduce global financial volatility and abuses of the system.<sup>19</sup> The sustainable management of natural and environmental resources was also a substantive priority of the strategy which covered also an ambitious aim to reverse effectively the current trends in the loss of environmental resources at national and global levels by 2015. The strategy also laid

<sup>15</sup> *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*. (15.5.2001). COM(2001) 264 final.

<sup>16</sup> Climate change and clean energy; sustainable transport, sustainable consumption & production; conservation and management of natural resources; public health; social inclusion; demography and migration; global poverty and sustainable development challenges. See *Review of the Sustainable Development Strategy—A platform for action*. (13.12.2005), COM (2005) 658 final.

<sup>17</sup> Koutrakos, P.: Legal Basis and Delimitation of Competence in EU External Relations. In: Cremona, M.—de Witte, B. (eds): *EU Foreign Relations Law*. Constitutional Fundamentals. 2008. 76.

<sup>18</sup> *Towards a global partnership for sustainable development* (13.2.2002), COM(2002) 82 final.

<sup>19</sup> *Ibid.* 3.1. The last objective is strangely interesting from the perspective of the actual financial crisis.

down objectives concerning the poverty and social development, the coherence between policies, better governance and financing the sustainable development.

The second consequence of the strategic decision was the setting up of the system of Sustainability Impacts Assessments (SIAs). Since 2001, the European Commission carries out impacts assessments of all trade agreements between third countries and the EU with external consultants. The assessment aims at identifying potential positive and adverse effects on sustainable development. The methodology is based on individual sustainability indicators in order to measure the impact that further liberalisation and changes in rule-making might have on sustainability. The indicators are balanced between economic, environmental and social fields.<sup>20</sup>

### III. Principles and objectives of the Common Commercial Policy

#### 1. *The reform of the Treaty of Lisbon*

The objectives and principles of the CCP before the Treaty of Lisbon were laid down in a homogeneous, consistent and relatively closed structure. This consistency was based primarily, as a leading principle, on the liberalisation, which allowed the legal and political framework of the Common Commercial Policy to develop according to the own logic in line with its free trade commitments to the international economic law and the legal order of WTO. However, the expansion of the external policy horizon of the European Communities and the introduction of new policy areas led to conflicts of objectives more frequently, causing tensions between the CCP and other external policy areas. Significant examples were the introduction of the Common Foreign and Security Policy, and the horizontal principle of integration in the field of the environment policy, which was indicated above.

The main actors, the European Commission as well as the Council were trying always to meet these “external” requirements, e.g. by means of the integration of sustainability principle into the trade policy or inclusion of foreign policy and human rights clauses in the bilateral trade agreements, but there were no clear Treaty provisions governing the relationship the internal principles of the Common Commercial Policy and these external principles and objectives dependent on other policy areas.

As a result of the Treaty of Lisbon, the Common Commercial Policy has become an integral part of the Union’s external action. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) have made it clear that the EU has to ensure consistency between the different areas of its external action and pursue and implement the general principles and objectives in the whole field of the EU external relations. Consequently the CCP is founded on a two-level structure of principles and objectives which encompasses not only inner principles like as the liberalisation but also the peripheral principles outside the trade policy including the sustainable development as well. In the following section this twofold structure—both internal and external fields—of principles are briefly considered.

<sup>20</sup> *Trade and Environment*. European Commission, Brussels, 2006. 7. < [http://ec.europa.eu/environment/integration/pdf/trade\\_envt.pdf](http://ec.europa.eu/environment/integration/pdf/trade_envt.pdf) >. (20.9.2012.). More detailed: *Handbook for Trade Sustainability Impact Assessment*. Brussels, 2006.

## 2. Internal principles of CCP: Trade liberalisation and uniformity

In context with the internal principles of the Common Commercial Policy first should mention the characteristics and the importance of the principle of liberalisation and the principle of uniformity.

The liberalisation principle was already inserted in Art. 110 EEC Treaty, and its extent was well shaped through the jurisprudence of the European Court of Justice (ECJ) quite early.<sup>21</sup> However, the ECJ stated that the principle of liberalisation did not establish “unlimited” duty to remove all trade barriers in relation to other trading partners. In other words, protective trade measures can be justified by other objectives of the Treaty, e.g. by reason of environmental considerations.

The principle of liberalisation has remained *mutatis mutandis* in the Treaty of Lisbon incorporated in the new Art. 206 TFEU. In terms of that, the Union has to contribute in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and foreign direct investment and the lowering of customs barriers and other barriers.<sup>22</sup> Comparing to the text of the Treaty of Nice, the wording of Art. 206 TFEU seems to be not only technically modified but formulated much stricter and more categorical. In accordance with the previous formulation in Art. 131 TEC,<sup>23</sup> the Member States “only” aimed to contribute to the progressive abolition of restrictions on international trade and the lowering of customs barriers, and in contrast, the expression of Art. 206 TFEU emphasizes in a more definitive form that the EU “shall contribute” to that. Besides it cannot be passed over that the reference to the “competitive strength of undertakings” in former Art. 131 TEC has disappeared from the modified Treaty text. It can be assumed that repeal of this paragraph does not mean substantial change; therefore it only has symbolic significance. It may indicate only that the emphasis on tariff elimination among the Member States, as well as its impact on the competitiveness is already obsolete today, contrary to the *zeitgeist* of the 1950s, when the Rome Treaty, as well as the previous formulation of the article were composed. That time the Member States needed strong arguments for the liberalisation programme in the internal market.

The principle of uniformity remains also an element of the Common Commercial Policy, such as Art. 207 TFEU Section 1 shows that trade policy shall be based on “uniform principles.” It can be interpreted as a requirement for the customs union, seeing that customs union and the internal market would be ineffective without the adequate, uniform regulation. In addition to that it is necessary to note that according to the case law of the ECJ, the uniformity principle concerns only the internal relations of the EU, consequently, a

<sup>21</sup> See the following leading cases: 5/73, *Balkan*, ECR 1973, 1091.; 112/80, *Dürbeck*, ECR 1981, 1095.

<sup>22</sup> Article 206 TFEU (ex Article 131 TEC): “By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.”

<sup>23</sup> Article 131 TEC (as amended by the Treaty of Nice): “By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers. The Common Commercial Policy shall take into account the favourable effect which the abolition of customs duties between Member States may have on the increase in the competitive strength of undertakings in those States.”

commitment to comply with external obligations such as an equal treatment of third states, non-discrimination or most favoured nations principle cannot be derived from this Treaty provision.<sup>24</sup> On the other hand, the principle of uniformity has also helped the ECJ to interpret the scope of exclusive competence character of the CCP. In this regard, the principle could play a crucial role also in the future, because the Treaty of Lisbon extended the limits of competence of the trade policy, but as highlighted above, the principle is inadequate to establish the incompatibility of the EU law with international regulations, e.g. obligations arising from multilateral environmental or trade agreements.

### 3. *External principles of the Common Commercial Policy*

As noted in the introduction of this article, the Treaty of Lisbon—as a remarkable innovation—linked the internal objectives and principles of trade policy to the general principles of EU’s external relations. In terms of Art. 205 TFEU, the Union’s action on the international stage—including the Common Commercial Policy—has to be based on principles, guided by the objectives and conducted in line with the general provisions of the Treaty.<sup>25</sup> In other words, the internal principles of CCP driven by the free trade concerns are not isolated anymore and as a result of the concept of uniform foreign relations introduced by the Treaty of Lisbon, also the general principles and objectives must be taken into consideration. These general principles and objectives are laid down in Art. 21 TEU,<sup>26</sup> which includes approaches e.g. to the human rights, solidarity, freedom and equitable (fair) trade, principles of international law,<sup>27</sup> and the most important from the current perspective is that the sustainability and the protection of the environment are incorporated, too. Art. 21 Para. 2 subpara. f) emphasises that the EU, working for a high degree of cooperation in international relations, helps develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.

This language of the principle does not explain the extent of the term “sustainable development”, but it is clear that the sustainable development in this formulation puts the emphasis on the environmental aspects. The term “international measures” is questionable because it can be interpreted in two ways. Its first reading could be that the “international measures” encompasses only cooperative, i.e. bi- or multilateral instruments which are suitable for ensuring the sustainable development. Although the article refers to the “a high degree of cooperation in all fields of international relations”, this interpretation would quite restrict the scope of Union’s external action. Consequently, my view is that the term “international measures” could be interpreted in a wider sense, specifically it can cover beyond the bilateral and multilateral measures also the unilateral actions of the EU (e.g. restrictions, taxes for environmental purposes etc.). Hypothetically speaking, it does not mean anyway that the article would provide reasons for justification of measures contravening international law, but its second interpretation would not disregard the

<sup>24</sup> See 52/81, Faust/Commission, ECR 1982, 3745.

<sup>25</sup> Article 205 TFEU: “The Union’s action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.”

<sup>26</sup> Cf. with Art. 21 TEU Paras 1 and 2.

<sup>27</sup> See commentary for the principles: Grabitz, E.–Hilf, M.–Nettesheim, M.: *Das Recht der Europäischen Union*. München, 2011. (via Beck-Online). Art. 21 EUV side-note 1.

possibility of taking unilateral actions in order to ensure sustainable development in advance.

Moreover, the sustainable development principle appears in another context, too. According to subparagraph d) the EU foster the sustainable economic, social and environmental development of developing countries with the primary aim of eradicating poverty. However, this formulation differs from the sustainable development principle in subparagraph f). On the one hand, this conception of sustainable development seems to be much wider, because not only the environmental but also the economic and social dimensions are referred. Second, it focuses on the social aspects, to be more precise, the accent is put on the fight against poverty. Third, this quotation is applied only to the relations established with the development countries; consequently the scope of this objective is restricted to a specific area of the Union's external action.

Even if this listing is not new,<sup>28</sup> but the relevance of these principles is recognized in the field of CCP first time in the history of EU law. Consequently, the Treaty reform made an important contribution to helping ECJ to determine the relationship between the internal principles and external principles, in particular the human rights clauses, social standards, environmental concerns from entirely new perspectives.

#### *4. The relationship between the inner and external principles of CCP – Possible conflict areas*

Following the strict consistency prescribed by the Treaty, the compliance of the internal and the external principles are required. For this purpose, the European Union has to ensure consistency between the different areas of its external action and between these and its other policies. The consistency requirement is reinforced by institutional cooperation as well, it obliges also the key players of external action. In other terms the Council and the Commission, assisted by the High Representative for Foreign Affairs and Security Policy, who have to cooperate in order to ensure this consistency.<sup>29</sup> The consistency requirement is still handled more clearly on the level of the Common Commercial Policy (and other external policies laid down in the TFEU),<sup>30</sup> because the provisions of Art. 21 on consistency, as indicated above, is repeated in Art. 205 TFEU.<sup>31</sup> In addition, the binding to the principles and objectives of Union's external action is stressed—unnecessarily again—in the Art. 207 TFEU.<sup>32</sup>

According to the grammatical and systematic interpretation of these provisions it is unquestionable that the inherent principles and objectives of CCP mostly governed by free trade ideas are already subordinate to the general principles of external relations, including the sustainable development. As a result, the Treaty of Lisbon affords chance for a well-

<sup>28</sup> Article 11 TEU. Cf. with ex-Art. 11 TEU Para. 1. (As amended by the Treaty of Nice).

<sup>29</sup> Article 21 Para. 3 TEU.

<sup>30</sup> See in TFEU Part Five: The Union's External Action. Title I: General Provisions on the Union's External Action.

<sup>31</sup> Cf. with Art. 205 TFEU.

<sup>32</sup> Article 207 TFEU Para. 2: "The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."

built harmony between the trade interests and other, external social policy concerns,<sup>33</sup> which can pave a way for establishing a value-oriented Common Commercial Policy.

If several principles and objectives are incorporated in a systematic order, the question concerning the potential conflicts between the different areas, principles and objectives are always arisen. This issue is specifically relevant in this case because the Treaty of Lisbon has inserted several principles and objectives which could be hardly reconciled with the logic of Common Commercial Policy and principally with the liberalization principle. Therefore, the expected conflict touches upon the trade and environment debate, which has importance not only at the level of the European Union, but also in the field of international trade, namely the World Trade Organization. The core argument of the debate focuses on the indisputable knowledge that the abolition of trade barriers may not have only beneficial impacts. However, the damaging effects caused by the liberalisation most often come up not in the field of trade but the areas of other social dimensions like as social policy or the environment.

This conflict potential is less concentrated at the level of the European Union than on the international field. It is because the EU, as indicated earlier, was always a dominant promoter of the environmental issues, and the introduction of the horizontal environmental integration principle by the Treaty of Amsterdam required itself a solution of the conflict between the environmental and trade policies of the European Union. However, there is a significant difference between the impact of the horizontal integrative clause and the new hierarchy of principles introduced by the Treaty of Lisbon. The idea of the present Art. 6 of TFEU (“Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities [...] in particular with a view to promoting sustainable development”) is established on a coordinated, parallel-like relation between the environmental and trade concerns. Practically, such integration is always depending on the “substance” in which it should be incorporated. In other words, the integrated point of the environment can have different impacts on the different policy areas. Contrary to that, the relationship between the environmental concerns and the CCP based on the new principle structure introduced by the Treaty of Lisbon is not a coordinative but a hierarchical relation. A hierarchy is a strict structure in this sense which cannot allow “trade-offs” or extensive balancing between the interest of the conflicting areas. As a result, according to this hierarchy no measures can be adopted within the CCP which is detrimental to the sustainable development and sustainability, i.e. negative effects on the environment can not be compensated by the benefit resulted from the trade liberalisation.

Following these considerations and due to the coherence requirement of the Treaty, the objective and principle structure allows solving the conflicts between the abolition of trade barriers and the environmental concerns, including the sustainable development principle.

It does not mean anyway, that the possible conflicts between trade and environment are conceptually excluded. At the Union’s level, institutional conflicts can be presumed. The European Parliament can be regarded as an area of conflict, since it has already made clear that the Union has to involve non-economic, sociopolitical approaches closely in its external action. Moreover, also the Union’s High Representative for Foreign and Security

<sup>33</sup> Contrary, the “politisation” of CCP is harshly criticised by e.g. Tietje, see Tietje, Ch.: Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon. *Beiträge zum Internationalen Wirtschaftsrecht*. Heft 83. January 2009. 20.

Policy has potentially to face tension, because she must solve the controversy between the Member States, Council and Commission.

It seems rather difficult to represent the external objectives and principles of the EU, including the related environmental concerns at the level of the World Trade Organization. In other words, what from the viewpoint of consistency of the EU external actions can be positively evaluated, it can be regarded as a "threat" from the site of the WTO and its trade liberalisation based principles. The question is how the environmental consideration and e.g. human rights, or social objectives can be brought into line with exceptions of the GATT–WTO legal order (e.g. GATT Article XX). An example for that could be a more recent disputed area within the WTO. The relationship between the law of the WTO and the multilateral environmental agreements which are encompassing also trade measures is actually a topic with high importance.<sup>34</sup> Regarding that, the EU as a strong environmental promoter, represents the concept of the supremacy of the multilateral environmental agreements over the WTO law, consequently the position of the EU is to hinder the legal possibility of review of these trade measures under the WTO dispute settlement rules. The EU's position in this example can be regarded as a result stemming from the strong environmental consciousness of the Common Commercial Policy. In other words, the concept of the CCP which is subordinated to the sustainable development fundamentally differs from the idea of the World Trade Organization,<sup>35</sup> which means a real conflict potential. However, it is a conflict, but not an *antagonism*, because it can be regarded also as an opportunity. Since the EU, the leading actor and *demandeur* for environmental issues can have a beneficial influence on trade and environment debate within the World Trade Organization in order to build up a framework which substantially integrates the concerns of sustainable development into the international trade law.

## Conclusions

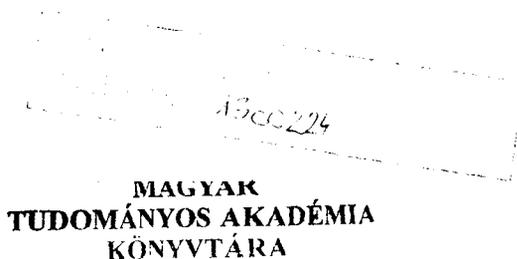
The present article has showed that following the Treaty of Lisbon, the Common Commercial Policy (CCP) became subordinate to the general principles and objectives of the EU's external actions. These principles embrace also the environmental concerns, namely the sustainable development and protection of the environment.

<sup>34</sup> See for the details, Vogel, D.: Trade and Environment in the Global Economy: Contrasting European and American Perspectives. In: Vig, N.–Faure, M. (eds): *Green Giants? Environmental Policy of the United States and the European Union*. 2004. 231–252; and Baker, S.–McCormick, J.: Sustainable Development: Comparative Understandings and Responses. In: Vig–Faure (eds.): *Green Giants? Environmental Policy... op. cit.* 277–302.

<sup>35</sup> Even though the WTO Agreement contains reference to sustainable development, but this preambular language is much restricted, see Voigt, *supra* note, 127–130. Despite of that, some authors are arguing that the sustainable development principle is incorporated also ideologically in the WTO structure, see for instance, Hartwick, E.–Peet, R.: Neoliberalism and Nature: The Case of the WTO. *Annals of the American Academy of Political and Social Science*. Vol. 590, Rethinking Sustainable Development (Nov., 2003), 188–211. Generally for the environmental background of the GATT and WTO agreements: Macmillan, F.: *WTO and the Environment*. London, 2001; Rao, P. K.: *The World Trade Organization and the Environment*. London, 2000; Charnovitz, S.: A New WTO Paradigm for Trade and the Environment. *Singapore Year Book of International Law*, (2007) 11; Charnovitz, S.: The WTO's Environmental Progress. *Journal of International Economic Law*, 10 (3) 2007. August.

As indicated above, the EU may have to face a twofold conflict in this regard. The sustainability must be reconciled with other objectives of the CCP, but the hierarchy between the sustainability and other goals of the EU can make definite solutions to the supposable conflicts. Also, the possible institutional tensions can be handled thus; the conflict potential should not be overestimated for the reason that the rules of the Treaty became clearer. In addition, it is hoping that the ECJ's interpretation will add much more to this relationship and meaning of sustainable development in this regard.

Moreover, the integration of sustainability in the trade policy of European Union presumably will lead to conflicts to be solved on the international level, e.g. within the World Trade Organization. Although the current agenda of the Doha Round includes also issues on "trade and environment", but it has not yet resulted in any agreement on that problems (nor on other subject, because properly speaking, the negotiations are inactive actually). If the negotiations get going again, the real question at stake would be how the EU could shape the debate in order to reach an agreement on trade and environmental issues. In this sense, the sustainability objective should not be regarded as a "conflict causer" but an opportunity to carry the environmentally conscious trade policy into effect not only in the EU's but also in multilateral level.



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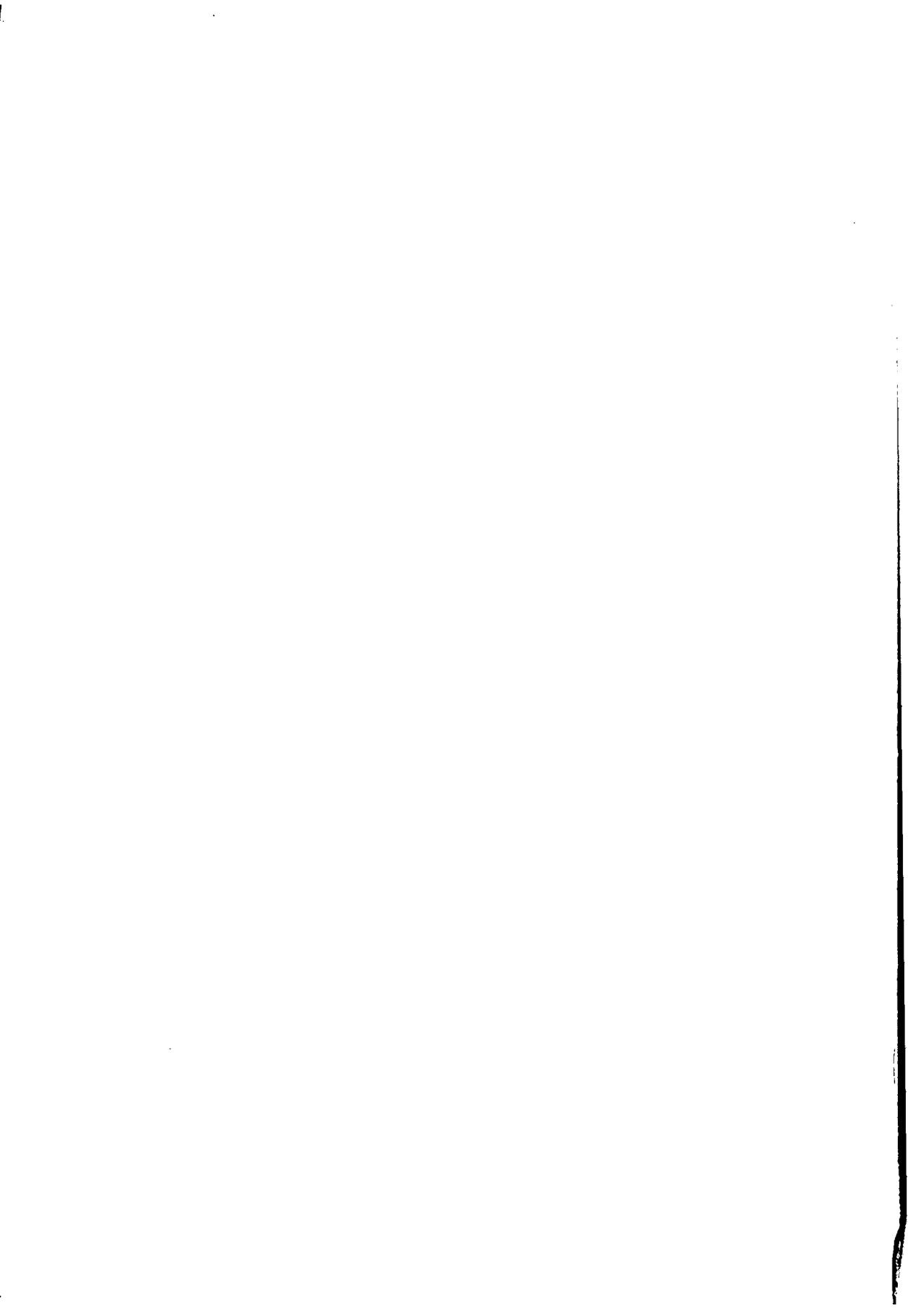
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