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CONTENTS

STUDIES

KALEIDOSCOPE

BOOK REVIEW

Acta Juridica Hungarica
1992 34 N° 1-2 pp. 3-26

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STUDIES

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One-Man Company in Hungarian Law

I. Historical Background

The one-man company is one of the latest institutions of Hungarian law.

1. For our internal private law, grounded as it is in Roman law, it is self-evident that a society (*societas*) must consist of several members [as is also expressed in the Hungarian equivalent of the term "associate" (*társ*)]. The idea of the one-man company did not arise in the legislative process started by the National Assembly of 1779 nor in Act XVII of 1792 or in Act XVIII of 1810. Quite the contrary, the notion of an association, which is conveyed by the very name "company" was underlined in the Act of 1810 on the "Legal Relationship of Companies Formed for Unlimited Partnership". No mention of the one-man company was made in Act XXXVII of 1875 on Trade, a law of a European standard reflecting a strong German influence.[1]

Since Part One thereof is entitled "Merchants and Trading Companies", thus conceptually distinguishing merchants, or one-man commercial forms from companies. Nevertheless, it was possible to have a one-man operation in the form of a joint stock company; a type of a company[2] covered by the act which did not refer to all shares being held by one man as a ground for terminating a joint stock company.

Permitting the operation of a joint stock company even in the case of a single shareholder was hardly a reason for the "silence" of the Act. Such intention of the

1 NOVOTNI, Z.: Társulási formák a magyar gazdaságban "német úton" (Forms of Association in the Hungarian Economy on "the German Way"), Élet és Tudomány, 5/1989. pp. 138-139.

2 In the case of companies possessing no juristic personality any change in the number of members automatically entailed termination of the company, the one-man company thus being conceptually impossible.

legislature cannot be inferred from the motivation to the Act, nor was any observation made to that effect during the drafting of the Bill, or at the conference on codification[3] which adopted the draft article on the dissolution of joint stock companies. Rather the text seems to reflect the German influence.

In its commentaries on and interpretation of the statutory text, jurisprudence recognized that the acquisition of shares by a single person created a new situation in contrast to he classical concept of a company. At that time, however, a contingency in which, on the one hand, a company "could not be regarded as dissolved *eo ipso*" and, on the other, "acquisition of shares by a single person interrupts the lawful operation of a company for the duration of the contingency, and the company itself is a conceptual impossibility" presented legal literature with a knotty problem.[4] "In an abstract sense, this fact causes a joint stock company to extinguish *a fortiori*, since the term 'company' presupposes the existence of at least two participants. This notwithstanding, absorption of all shares in one hand will not in practice lead to the dissolution of a company unless it occurs at a time when the existence of several shareholders is a condition *sine qua non* for the continuing operation of a company along a specific line of activity, particularly at the time of the general meeting or the election of officers, and when that condition is not fulfilled even *a posteriori*—i.e. in order to allow, where necessary, the transfer of shares to others—or unless dissolution is desired by the shareholder himself".[5] To cover such an eventuality, the law sought to devise an arrangement for creditors' protection,[6] namely to enable creditors to demand "the shareholder either to distribute his shares in order to restore the company status ... or to dissolve the joint stock company".[7] Judicial practice, however, clearly rejected the notion of the company, spelling out a year after the Act had entered into force that "a joint stock company must not exist if all shares are

3 The 33rd meeting on 29 January 1874 of the conference of 31 participants designated in April 1873 found that the Article (then Art. 239) on the Dissolution of Joint Stock Companies "give no cause for comment". Quoted by Hugó Kilényi in: Kereskedelmi Törvényjavaslat és a tárgyalására egybehívott értekezlet jegyzőkönyvei (The Trade Bill and the Records of the Conference convened to Consider It), Budapest, Löwinger, 1875. p. 201.

4 NEUMANN, Á.: A Kereskedelmi Törvény magyarázata (An Exegesis of the Trade Act), 2nd completely revised edition, Budapest, Athenaeum, 1892. p. 575.

5 NAGY, F.: A Magyar Kereskedelmi Jog Kézikönyve, különös tekintettel a bírói gyakorlatra és a külföldi törvényhozásokra (A Handbook of Hungarian Trade Law, with Particular Emphasis on Judicial Practice and Foreign Legislation), Budapest, Athenaeum, Seventh edition, 1909. p. 125.

6 Hungarian legal literature was evidently influenced by contemporary legislation abroad when favouring creditors' entitlement to initiate termination of a company. Under the British Companies Act of 1862 and the French Act of 1867 on Societés, creditors were free to exercise this right one year (six months, under the Belgian Company Act of 1873) after the date when the number of shareholders fell below seven.

7 NEUMANN, Á.: op. cit., p. 576.

held by one person, even though juristic".[8] That view was upheld by several judgements until the turn of the century. A contemporary jurist was right in stating that "under Hungarian judicial practice, a joint stock company is regarded as non-existent in case of such a share cumulation".[9] After the turn of the century, however, there occurred a radical change in the attitude towards shares being held by a single person. In a 1904 case it was stated that "if all shares of a joint stock company are held by a sole owner, any decision of the members' meeting held in such a contingency shall be cancelled *ex officio*, but the registry court shall still not order the liquidation of the joint stock company because, although the organic operation of the company is interrupted during such a contingency, the legal personality of the joint stock company is not thereby extinguished and the company may resume its organic operation as soon as the shares have been transferred to others".[10]

This judgement became a guide for future action to the point that it was cited as authoritative in related commentaries and explanations[11] and was used as an argument for the introduction of the "one-man company".

It should be mentioned that later draft laws on joint stock companies deliberately excluded, application to cases in which all shares were held by a single person as giving cause for liquidation of the company. (The reservations about a company consisting of one shareholder continued to exist is a different matter.) "The Draft does not regard acquisition of all shares by one person as a cause *ipso iure* for liquidation nor does it fix a minimum number of members for the continuance of a joint stock company... Considering the constant change of members of a joint stock company as a general rule under which the person holding all the shares may easily transfer his shares to others as well as the little practical relevance of the matter, the Draft leaves it to the court to decide,

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8 Judgement 2549/76 Dt. r. f. XXVIII. 258 of the Budapest Royal Court of Appeal is cited by Ignác Barna in: Kereskedelmi Törvény a Magyar Királyi Curia, a fennállott Legfőbb Ítélőszék és Semmitőszék, a királyi ítélőtáblák elvi jelentőségű határozataival (The Trade Act, with Authoritative Rulings by the Royal Hungarian Supreme Court, the Former Supreme Court of Justice and Court of Cassation, and the Royal County Courts), Budapest, Révai, 1894.

9 NEUMANN, Á.: (in op. cit., p. 676) refers to additional judgements, i.e. Royal Supreme Court Judgements 529/87 Dt.r.n.f. XIX. 6. s.k.l. and 1220/90/J. 1891. évf. 33. 1. in the case of the Savings Bank at Hajdúböszörmény.

10 Budapest, T. 2731/1901.

11 Among the explanations relying on that judgement, see Hiteltörvények (Credit Laws), documented with judicial practice and provided with notes and references by Dávid Papp, Third Edition, Budapest, Grill, 1906. SZENDE, Péter Pál: A kereskedelmi törvény és a reá vonatkozó joganyag kézikönyve (The Trade Act and a Handbook of Related Legal Materials), Budapest, Grill, 1927. Magyar Hiteljog, 1. kötet, Kereskedelmi törvény és a reá vonatkozó joganyag kézikönyve (Hungarian Credit Law, Vol. I, The Trade Act and a Handbook of Related Legal Materials), compiled by Jenő László and Péter Pál Szende, Budapest, Grill, 1929. A kereskedelmi törvény és gyakorlata (The Trade Act and Its Practice), compiled by Péter Pál Szende, Ödön Kuncz and Endre Nizsalovszky, Budapest, Grill, 1937. KUNCZ, Ödön–NIZSALOVSZKY, Endre: A kereskedelmi törvény és joggyakorlata (The Trade Act and Legal Practice), Budapest, Grill, 1942.

at its discretion, the cases in which a joint stock company should be declared terminated on the ground that it lacks the elementary constituent aspect of 'company'".[12]

A subsequent draft law recognized the continuance of a company with a single shareholder not only at the level of commentary, but, after enumerating the causes leading to the dissolution of a company, provided *expressis verbis* that "acquisition of all shares by a single person shall not by itself entail dissolution of the company".[13]

However, this draft never became law, so it "only" serves to reflect the development of the debate which moved from original rejection to acceptance of the existence of a company owned by a single shareholder.

2. The concept of the one-man company first appeared in Hungary during the preparation of Act V of 1930 on the Joint Stock Company and Silent Partnerships.

(a) The first publications[14] discussing in detail the German Law of 1892 did not yet emphasize the possibility of a one-man operation. The proposal to establish one-man companies was presented during the preparatory debates on the regulation of limited liability companies in Hungary.[15] The opponents of this institution argued that an arrangement under which individual merchants and craftsmen would not be liable after all their property, but their liability would be limited to a certain part of their assets, namely the shares contributed to the company, would serve to encourage people to.

(b) The one-man company was finally not included in the Bill, submitted in 1925, but the Bill allowed the continuance, in the case of joint stock companies, of limited liability where the company was originally established with several members, but eventually became a one-man company. "The number of members shall not be less than two, but shall not exceed thirty...; the fact that a company has but one member shall not be sufficient cause for its dissolution. In that case, however, the court may, at the request of any creditor seeing his interest jeopardized, order the compulsory liquidation of the company".[16] In the preamble to the Bill reference is made to debates on the subject in other countries. "In Germany, Austria and Switzerland there is much controversy about whether it is possible to tolerate the continuance of a limited liability company with a sole member. The view is rather common that reduction of the number of members to one is a cause *ipso iure* for the termination of a company, since one may only speak of a 'company' where are least two members. The Draft is of the view that the acquisition

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12 KUNCZ, Ö.: Törvénytervezet a részvénytársaságokról, a szövetkezetekről és a korlátolt felelősségű társaságokról (Draft Law on Joint Stock Companies), Budapest, Grill, 1926.

13 KUNCZ, Ö: Törvénytervezet a részvénytársaságokról (Draft Law on Joint Stock Companies), A Magyar Jogászegylet Kiadása, 195. § (Art. 195 in the Edition by the Hungarian Lawyers' Society).

14 NEUMANN, Á.: A korlátolt felelősségre alakult társaságokról szóló 1892. évi Német Birodalmi törvényről (On the German Imperial Law of 1892 Concerning Limited Liability Companies), Budapest, Franklin, 1893. GRÓSZ, Mór: A korlátolt felelősségű társaság (The Limited Liability Company), A jog, 42/1907. p. 304.

15 In 1905 Dávid Papp elaborated a draft on the mandate of the Hungarian Federation of Manufacturers and in 1917 Lajos Thirring prepared the Trade Bill, which covered the Limited Liability Company as well.

16 See fn. 12 for draft article 335.

of all shares by a single person is not by itself a cause for the dissolution and termination of a joint stock company, since such a situation may change at any moment and that, similarly reduction in the number of members shall not result in the dissolution of a limited liability company. True, a one-man limited company (Ltd) would virtually create, in a roundabout way, a 'limited liability firm of one man', an institution which is not desirable at all. However, the Draft takes into account the fact that, on the one hand, such a situation may at any moment change with the entry of new members and that, on the other, a one-man Ltd affects mainly the interest of the company's creditors. Therefore the problem at hand is resolved by providing that the court shall be authorized to order the dissolution of a one-man Ltd only when so requested by a creditor whose interest is in jeopardy".[17]

(c) Act V of 1930 ultimately opted for the least radical solution.

— In the course of the debates the idea of introducing the one-man company was discarded as being unripe and untimely. The general motivation to the Act similarly raised the question of "whether it is necessary to fix a minimum number of members and what approach should be taken in general to the so-called one-man Ltd (*Einmanngesellschaft*). The one-man Ltd is permissible under the law of Liechtenstein as well as under the judicial practice of Germany and Austria, whereas the English, French, Polish, Italian and Swiss laws require a minimum number of members".

"Without entering into a discussion of the extensive debates, both at home and abroad, about the one-man company, it will suffice to call attention to one consideration, namely the need to wait and see how a company requirement of several members will function in Hungary and to them decide, in the light of experience, whether the time has come to allow one-man function companies, which are 'one-man limited liability companies' pure and simple. And even then, the problem will not be settled by the one-man Ltd, but perhaps rather by allowing a merchant to limit his liability to a specified separate share of his property".

Despite the non-committal attitude to one-man companies the 1930 Act allowed a company to operate with a single member on a temporary basis (as is permitted by the current law and as will be discussed in detail in Section II/3 infra). Art. 16 of a Act V of 1930, provides, "The number of members shall not be less than two. If the number of members falls to one, the court shall invite that member to report a new member within three months or to apply for registration of his company as a one-man firm. Should he fail to do so the court shall *ex officio* terminate the company in extra-judicial proceedings".[18]

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17 See fn. for the Draft Law, pp. 437-438.

18 "In such cases the consequence must be dissolution under para. 1, subparagraph (3), of Art. 82 and liquidation under Art. 88", in: SÁNDORFI, Kamill: A korlátolt felelősségű társaságokról és a csendestársaságokról szóló 1930. V. tc. (Act V of 1930 on Limited Liability Companies and Silent Partnerships), Budapest, Franklin, 1930. p. 78.

It may be said that the 1930 Act holds a more conservative view of companies whose members are reduced to one than does the 1905 draft, which permitted a company whose members shrunk to one as a result of the transfer of shares to continue to exist as a limited liability company (Art. 3). Some Hungarian jurists would have accepted this more radical formula, although they were aware of its dangers. Assessing the German practice, they pointed out that "the commercial world, quickly realizing the enormous practical relevance of this principle, soon came to use that permissive rule to continue even one-man businesses under the cloak of limited liability, and to do so exclusively for the sole purpose of allowing merchants to limit ... their liability... to a certain predetermined amount".[19]

3. The legislation of 1875 and 1930 have proved to be time-honoured elements of Hungarian law. Until 1945 there were no amendments, since between 1945-48 it met economic needs, while during the period 1949-1960 the socialist planned economy, the mechanism of direct plan breakdowns, had no need for the operation of "companies", so the laws, having lost their practical functions, were not revised. What remained in force were only the provisions of Act XXXVII of 1875 governing joint stock companies and those of Act V of 1930 relating to limited liability companies. However the companies operating under the terms of these legislative provisions were only to be found at the periphery of economic life.

Despite the ideological reservations about company law, the institution of "the company" assumed a growing significance in agriculture from the early 1960s onward, and it needed and received separate legislative coverage. However, the methods of corporate formations open to cooperatives[20] consisted, as a matter of course, of several members, as did those which, rather diverse in both name and regulation, were called into being by the 1968 reform of economic management in other sectors of the national economy. Companies were still a marginal phenomenon at that time. Compared with 1,749 cooperative and state farms, in 1975 there was a total of 72 companies established by cooperatives.[21] Along with the figures, the "weightlessness" of these organizations is indicated by the fact in spite of their spectacular numerical growth[22] from 1982 the

19 BOZÓKY, G.: A korlátolt felelősségű társaság a külföldi és de lege ferenda a magyar jogban (The Limited Liability Company in Foreign Laws and de lege ferenda in Hungarian Legislation), Pozsony, István Éder Könyvnyomdája, 1914. p. 36.

20 See, inter alie, DOMÉ Györgyné: Gazdasági társulások a mezőgazdaságban (Economic Associations in Agriculture). A Népgazdasági Jogi Kutatóhálózat végtanulmánya, Budapest, 1985.

21 Statisztikai Évkönyv (Statistical Year-Book) 1987. Központi Statisztikai Hivatal, 1987. p. 136.

22 By 1987 there were 846 industrial and service cooperative groups, 12,487 intra-enterprise business partnerships and 3,590 business partnerships of private persons along with 1,043 industrial state enterprises and 1,392 industrial cooperatives. Source: op. cit. in fn. 21. p. 90.

companies without legal personality accounted for less than 1% of the value of industrial output.[23]

Law-Decree No. 16 of 1985 on the Registration of Firms, repealed the first and second sentences in Art. 16 of Act V of 1930, thereby ruling out the possibility of the one-man operation on a temporary basis. This implied no restriction in practice, but was a retreat of interest to our subject.

4. The subject of the one-man company was virtually absent from Hungarian legal literature following World War Two, the reason being "companies" had been displaced from economic life. The company as an effective form of organization for the pooling of assets and the cooperation of members came to receive attention again in scientific analyses of organizational systems of the economy during the 1980s. The relevant studies touched on the problem of the one-man company. "The general view in Hungarian law is that it does not recognize the one-man company even as a transitory phenomenon. A conceptual approach does not, however, solve every question, for reduction of the number of members to one does not constitute an objective situation which would concurrently justify the complete termination of company operation as well... In reality, where the number of members with proprietary rights falls to one, company operation can only be terminated by the will of members when they so agree in the case of withdrawal".[24] In cases where the interest of a member (or the national economy) requires the continuation of operations, the right to terminate the company is vested in the member as successor in title to the company, or eventually in a subsidiary company established by him, and it is equally conceivable that the member continues the company's activity without becoming a successor in title.[25] As can be seen, disregard of the one-man company gives rise to another legal problem, which was ultimately solved just as the Gordian knot had been cut.

5. Along with a series of highly important changes, Act VI of 1988 introduced the institution of the one-man company without any particular preliminary debate of the topic in legal literature. As is the case with anything new, there were reservations voiced about the one-man company as a "self-contradiction", but the one-man company received only secondary attention compared with the much more important questions covered by the Act.[26]

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23 The industrial and service groups and the intra-enterprise business partnerships together accounted for 0.6%, and the business partnerships of private persons for 0.3%, of the value of industrial output. Source: op. cit. in fn. 22.

24 NOVOTNI, Z.: A gazdasági társulások (társaságok) jogviszonyainak kérdései az ipar és kereskedelem területén (Questions concerning the Legal Relationships of Economic Associations (Partnerships) in the Fields of Industry and Commerce), Népgazdasági Jogi Kutatóhálózat Végtanulmánya, Budapest, 1985. p. 177.

25 For more detail on variants, see op. cit. in fn. 24, pp. 177 et seq.

26 "In substance, the concept has not changed much, but in what it has... there is not much to be gained by it. Such a change is ... the introduction of the nonsense institution of the one-man company", in: PETRIK, F: A siker sodrában (Drafted by Success), Valóság, 7/1989. p. 107.

6. This brief presentation of the development of company law in Hungary has been intended to show that the one-man company has practically no past in Hungary and that the relevant law is so recent that this author is not in a position to cite any particular experience and theoretical debates of note. For these reasons, in Hungary there is as yet no articulate position regarding this issue still in dispute in Western Europe. (We have not even come to raising the question of *de facto* one-man companies.) Therefore this paper will concentrate on presenting and discussing the relevant Hungarian legislation in force (Section II) and will give only incidental consideration to the theoretical aspects which are yet to be addressed by Hungarian jurisprudence (Section III).

II. The Hungarian Law Regarding the One-Man Company

1. The One-Man Company as Covered by Act VI of 1988

In Hungarian law the company is, as a general rule, a legal form of economic cooperation among several members.

The one-man company is an exceptional phenomenon and is regulated by law in two different situations. It may function:

(a) as a transitory phenomenon for the purpose and in the hope of involving another person in the company's activity during the grace period, thus reestablishing the company in its original form of operation with more than one member (see para 2).

(b) as a recognized form of company without any purpose or hope of terminating the company's one-man character. In this sense the one-man company is covered by regulations on the limited liability company and the joint stock company in cases where a one-man company was either established *a priori* as such, or a company originally established as one with several members but then becomes a one-man company without being required to cease to exist upon the expiry of a certain period of time (see para 3/a-f).

2. The Transitory One-Man Company

The one-man company existing as a transitory phenomenon is not actually covered by the 1988 Act. It is not regarded by the Hungarian legislation as a separate form of company and is not governed by special rules. This form of the one-man company is

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In his works Zoltán Novotni objected to the one-man company on the added ground that foundation of such a company fails to satisfy a classical postulate of civil law, the coordinate status of partners. "In the legal relationship between the founders and the company the latter, as a subject at law, has a subordinate role compared to the determinant position of associated members. In the exceptional cases where, under the rules of the new Act, one founding member established by himself a company (a Ltd or a joint stock company) the legal relationship is actually bipolar, but the coordinate status of the subjects is absent in view of the above consideration", in: NOVOTNI, Z.: A kodifikált társasági jog mint a magyar polgári jog megújulásának eszköze (The Codified Law of Association as an Instrument of Renewing Hungarian Civil Law), Jogtudományi Közlöny, 2/1989. pp. 68-69.

none other than an intermediate phase of existence of an original company and the subsequent company with several members, or, what is worse, it represents the agonization of the company. Article 46. (1) of the Act enumerates the cases in which a company must cease to exist, but in dealing with one such case it introduces a new desideratum into the earlier rule: "The company shall cease to exist when ... the number of members has fallen to one (with the exception of the limited liability company and the joint stock company) and no new member has been added to the registry court within six months". As can be seen, the new law defers the date of the company's termination by six months. At the moment the penultimate member terminates his membership the company may continue to operate without any special legal transformation. The company is to cease to exist six months later, but may continue to exist if at least one new member is added to the registry court within the required time-limit. Accordingly, all forms of corporate formation—with the exception of the limited liability company and the joint stock company—are recognized by law as one-man companies operating on a temporary basis. In actual fact, a transitory one-man company can also be imagined in the case of a limited liability company, since—as will be discussed in detail in para. 3 (b) infra—the legislation refers only once to a "one-man Ltd" (in our usage, a lasting one-man Ltd), namely when the number of the company's members falls to one and no new member is added to the count registry within six months. It will be noted that in practice there is a very small difference between a company operating with one member during the grace period of six months and the company termed by law as a (lasting) one-man Ltd operating during the subsequent period. Although the law considers only the latter to be a one-man company and hence the rules on one-man company do not apply in principle to a company operating with one member during the grace period, the conditions enumerated in para. 3 (c) infra automatically occur in respect to such a company as well.

(The reader is reminded that in regulating the joint stock company the legislature has opted for the simpler formula, namely it refers to a one-man joint stock company from the moment that the ownership of all shares has been acquired by a sole shareholder.)

The permissive rule for the transitory, one-man company is based on the below rationale.

It is economically justified to allow the continuance of a company with efficient operations whose members have been reduced to one for some reason like the death of a natural person, a partner, or the bankruptcy of a juristic person (i.e. often facts external to the company and not influencing its future efficient operation), but which is able to continue its economic activity with the entry of a new member.[27]

This principle is partly restricted in the case of the joint stock company. If the sole shareholder is a natural person, a joint stock company is not granted the period of grace enjoyed by the other forms of company to enable it to continue its operation with the entry of a new member.

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27 Also, A társasági törvény, magyarázatokkal és iratmintákkal (The Associations Act, with Explanations and Specimens of Documents), ed. KUN, T., Budapest, Láng Kk., 1988. p. 140.

3. *Lasting One-Man Company*

Under Hungarian law, the limited liability company and the joint stock company in the form of a "lasting one-man company", is the typical instance in which the one-man Ltd is established. The joint stock company appears to be subject to more restrictions, and even the liability rules applicable to the one-man joint stock company differ from those governing the (limited) liability of the general joint stock company. The differences between the one-man forms of the limited liability company and the joint stock company warrant a separate discussion of the regulations on these forms of company formation.

The lasting one-man company can be classified both by type of company and by the mode of formation. A distinction by mode of formation can be made between a one-man company established as such and one established with several members but becoming a company with one member by reason of a decrease in the number of its members. In Hungarian law, these two forms of joint stock company are covered by different regulations.

It is also a specific feature of the regulations on the joint stock company that the founder(s) does not necessarily become a shareholder, so establishment of a joint stock company either as a one-man company or as one with several members may be initiated even by a single founder. This case should be distinguished from the proper one-man company, but the permissive rule on the establishment by a single founder signals a change in company law as does the introduction of institution of the one-man company. So what we have here are institutions of the same stamp.

(a) *The company Ltd established as a one-man company.* The general rule, namely the requirement of at least two persons for the establishment of a company, applies to the limited liability company (Ltd) as well. By an express provision, however, the law allows a company to be formed by a single member. A one-man Ltd, company may be established by the State, juristic persons, natural persons and, under the general rule contained in Art. 4 (1) of the Associations Act, even an economic association with no juristic personality.

Since there is no essential difference between an original one-man company and one becoming a one-man Ltd company during its operation, the rules on one-man limited liability companies will be discussed together in subparagraph (c). However, the special rules on the establishment of the one-man company should be dealt with at this juncture.

For a one-man company to be established, a foundation document rather than a contract of association is required. Considering that no one can make a contract with himself, this rule is self-evident, but represents a departure from the general norms governing the Ltd company. Some kind of a written form, especially a document countersigned by a lawyer or a company solicitor is needed both as a special requirement under Art. 19 of the Act and for reasons of creditors'protection.

The rules governing contracts of association are applicable, *mutatis mutandis*, to the contents of the foundation document as there may arise obvious differences (e.g. no stipulation is required of the original contributions by members, and it would make no sense to regulate the voting rights and the procedure to be followed in case of an equal

number of votes, or to determine the due-time of contributions not yet paid in full). In other aspects the foundation document has the same function as the contract of association. This is why the law provides that regulations on the contract of association must be understood to apply to the foundation document as well.

Article 198 of the Associations Act provides that in the case of a one-man company, where the founder is a natural person, the foundation document may also stipulate that the founder is entitled to administer and represent the company. In that case the founder must be deemed to be the managing director. This rule does not, in fact, give larger freedom to one-man companies than to those with several members, although it would seem to follow from the wording, for under the general rule on the managing director of an Ltd company (Art. 197), the managing director (s) may be elected from among the members (representatives) or natural persons external to the company. Obviously, the founder could, without being elected, attend to business administration under this rule, but the general rule is that election must be for a definite period (of not more than five years). There is no such limitation in respect to the one-man company.

It should be noted that, according to the view of one legal sholar,[28] the law should not refer to a managing director in the case of one-man companies, for the founder automatically takes charge of business administration. In our view, the wording of the Act does not admit such a conclusion, and Art. 157 (1) similarly requires designation of the first managing director as a necessary condition. Considering that the business administration of the one-man company may also be entrusted to another person (e.g. the founder may hire the services of a qualified manager), it would not be prudent to make it an automatic duty of the founding member to be in charge of business administration).

The foundation of a company must be recorded in the registry court. In the case of the one-man company it must also be recorded that the company has but one founder.

An important difference of substance in comparison with the general rules on companies is that registration at the registry court cannot take place until after the full amount of financial contribution has been paid. (The general rule only requires payment of at least one-half of the pledged money capital. The regulation is uniform in that, in the case of all limited liability companies, capital other than money deposits must be made available in full to the company.) The stricter rule on one-man companies is warranted for the protection of creditors. The founder is not allowed to pay only one-half of the money deposit requirement at the time of the foundation and to get a respite of one year for payment of the rest. This rules out the possibility for unpaid (fictitious) contributed capital to be stated and for the company's partners to be misled regarding the real size of primary capital.

(b) *The company Ltd becoming a one-man company.* A one-man Ltd company may also come into being in such a way that the number of members of a company

28 KOLBEN, Gy.: Új elemek a korlátolt felelősségű társaság szabályozásában (New Elements in the Regulations on the Limited Liability Company), Külgazdaság, 2/1989. p. 22.

established in accordance with the general rules falls to one and no new member has been added to the court registry within six months (Art. 231).

A company normally ceases to exist upon the occurrence of these conditions except that, in the case of a Ltd company (and the joint stock company), such conditions create a one-man company. This solution follows automatically from the permissive rule of our law under which an Ltd company may be founded even by a single person. So, in the case of our example, it would be unnecessary complicated to first state the termination of a company and then to authorize the last member to found a one-man company for the same line of activity under unchanged conditons.

The "transformation" of a company into a one-man company takes place automatically, without any declaration and any procedure being required. The managing director(s) has but one duty, namely to record the fact of transformation (and the occurrence of the conditions leading thereto) to the registry court for the purpose of notice and publication.

Though this question is neither covered by the Act nor treated in the legal literature, it should be pointed out that the rules discussed above do not imply the duty of the last member of a company to continue the activity concerned. Under the general rules (Art. 46. 1/b), the company may decide its termination without a successor in title. For such a decision, in the case of Ltd, Company Art. 227 requires a three-fourths majority vote at the members' meeting. In the case of a company where the number of members fall to one, the remaining member may take the decision to terminate the company.

(c) *Special Rules, governing Ltd companies "established" as a one-man company" and "becoming" a one-man company.* The one-man Ltd company is not regulated by the Act in a separate chapter or under a separate title. The general rules are applicable except to certain aspects that are subject to different rules as expressly stated. Such different rules must be gathered together from various provisions of law. The differences in comparison with the general rules on Ltd companies may be classed as formal and substantive.[29]

Among the *formal* differences it may be mentioned that: the requisites include a foundation document (not a contract of association)[30]; there is no members' meeting (Art. 184), so the mandatory convening of the members' meeting is supplanted with the founder's decision (Art. 189; the founder's decisions are not required to be entered in the book of decisions (Art. 191), and they cannot be authenticated as provided for in Art.

29 Our classification is somewhat different from that in György Kolben's work (see op. cit. in fn. 28, pp. 21-22), but the main attributes are naturally identical.

30 This basically formal difference naturally has substantive aspects as well, namely the foundation document—as is rightly pointed out by Zoltán Novotni in his work cited in fn. 26, p. 70—"can only be regarded as one of a company to be established if the latter's name and line of activity are actually indicated therein".

194. (1), because there is no other member to do it;[31] and, finally, the founder himself is entitled to undertake the administration and representation in certain cases.

The regulations on one-man companies show a few differences of substance compared with the general rules on Ltd, companies which are motivated in part by the need to protect creditors, and in part by the simplification of the organizational pattern.

— The full amount of subscribed capital is payable at the time of foundation (Art. 161).

For reasons of creditors' protection, the founder of a one-man Ltd company is not permitted to pay only one half of the contributed capital at the time of the registration of the company.

— A one-man company must neither acquire nor withdraw any business share for its own purpose (Art. 181).

The motivation to the Act explains this prohibition by stating that acquisition of one's own business share for the company is liable to be abused. In respect to withdrawing a business share, the added argument is adduced that exclusion of a partner is not possible in the case of a one-man company, so the most frequent instance of withdrawal does not occur. Withdrawal is similarly impossible in the event of the member's death or termination of his membership, because the transfer of the business share to the successor in title is prohibited by the contract of association, but none of the members acquires the business share for himself.

— Election of a supervisory board is not mandatory in general (Art. 208). As a simple solution, the legislation provides for the mandatory employment of an auditor. Since, however, the sole owner of a relatively large Ltd company (with more than 200 full-time employees) is unable to have a full view of the company's activity, it is mandatory to set up a supervisory board in this case. This provision is probably related to the desire for workers' participation. It cannot be accidental that Art. 13 (1) specifies precisely the aforementioned minimum workforce in order for employees to participate, through the supervisory board, in controlling the company's operation.

— The appointment of an auditor is mandatory (Art. 215). His task is to control the administration in order to ensure the company's operation in accordance with the law.

The formal and substantive differences having been presented, we should note that, under the special rules, a company may operate as long as it really has but one member. If, owing to division of the business shares by reason of inheritance or other method of succession in title or an increase in the primary capital stock, it admits a new member/members, it must continue its activity under the general rules, i.e. transform itself into an Ltd company (Art. 223), elect its organs, conclude a contract of association and record the transformation to the registry court for the purpose of registration and publication, such notification is to be made by the managing directors.

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31 A similar position is reflected in the publication entitled A Társasági törvény a gyakorlatban II (The Associations Act in Practice), NOVORG Kereskedelmi Szervezési Intézet Munkaszervező Leányvállalata, Budapest, 1989. p. 339.

This procedure is much more complicated than in case of a transformation *vice versa*, inasmuch as no separate procedure and action—other than the obligation to notify the registry court is required in the case of an original Ltd company with several members becoming a one-man company.

(d) *Joint stock company "established" as a one-man company.* Hungarian law permits a joint stock company to be established by a sole shareholder. Such companies were subject to essential statutory restrictions in comparison with one-man limited liability companies. A sole shareholder could be just anyone, but only a budget-dependent state organ or a banking institution [Art. 198 (1)].[32] But these restrictions are no longer in force (Act LV of 1992).

(e) *Joint stock company becoming a one-man company.* A one-man joint stock company comes into being when the ownership of all shares is acquired by a sole shareholder [Art. 298 (2)]. Given the easy and quick transferability shares, a probably more frequent—though, according to the motivation to the Act, equivalent instance of establishing a one-man joint stock company is the transformation of an original joint stock company with several shareholders into a one-man company.

The two types of one-man joint stock companies are different. The difference between the two types of one-man joint stock companies lies in that the sole shareholder of a joint stock company becoming a one-man company has unlimited liability for the obligations of the joint stock company, if he fails in his duty to notify the registry court of such a transformation. The non-extension of the benefit of limited liability as an element of the joint stock company is a sanciton imposed for the breach of this duty. Unlimited liability occurs upon the acquisition of all shares.

(f) *Rules common to joint stock companies "established" as one-man and "becoming" one-man companies.* One-man joint stock companies are subject to very few common rules.

The common rules include a remitting norm stating that the provisions of the Act on joint stock companies must be applied, *mutatis mutandis*, to one-man joint stock companies. One exception being the provision concerning those entitled to exercise the powers of the members' meeting. Accordingly, such powers may be exercised by the founder in the case of a one-man joint stock company and by the shareholder in the case of a joint stock company transformed into a one-man company.

The provision on the application *mutatis mutandis* of the general rules means, *inter alia*, that the applicable rules will be those governing the foundation to the exclusion of outside subscribers.

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32 "Other economic associations and citizens do not have this possibility as the Act intends to lay the foundation exclusively for the operation of the so-called holdings". (Duty of holdings is the management of state property. The holding fulfils its duty thereby it has majority of the shares in other companies.—The author.) in: SÁRKÖZY, T.: Ezt kell tudni a Társasági Törvényről (What You Should Know about the Associations Act), Magyar Média Reklám és Propaganda Szolgáltató Vállalat, Budapest, 1988. p. 19.

III. Theoretical Questions Arising in Connection with One-Man Companies

Having reviewed the Hungarian legislation in force we have to deal in some detail with theoretical questions which have long been a concern of company law in Western Europe.

1. Reasons for the Legal Recognition of the One-Man Company

(a) In presenting the historical background we have mentioned that—apart from the debate during 1925-1930, the lessons of which were not acted upon by the legislation of 1988—the one-man company made its appearance in Hungarian law with no particular antecendents in local legal literature. This new institution of law was not introduced in response to critiques of previous arrangements or out of some specific dogmatic-theoretical considerations. The West European arguments which made a decisive contribution to the recognition of one-man companies were not emphatically stated in Hungary. With some simplification, the following factors may be stressed on the basis of the legal literature in Western Europe.

— The contradiction became increasingly evident between the prohibition of one-man companies and the permission of companies which have nominally several members, but with the decisive majority of assets actually held by a single person.

— The legal prohibition of the one-man company can be easily evaded in such a way that the actual founding member relies on the services of one or more persons formally undertaking some role in the company.

— Members involved in the company for the purpose of evading the prohibition but having no concrete function tend to become a source of later problems (e.g. their liability for company debts or the appraisal of contracts under which the member, having a symbolic share, undertakes to vote as indicated by the majority owner or to transfer his share of property at someone else's wish).

— A *de facto* one-man company functions like a company with one member, with the single member possessing the majority of assets or votes and asserting his will in important matters.

— The existence of *de facto* one-man companies has raised a series of problems which the legislature could not avoid addressing by the prohibition of the one-man company.

— The one-man company has a great advantage in presenting no need for regulation on minority protection, which it is rather diffiucult to cover in all aspects in a way meeting every requirement.

(b) Among the aforementioned arguments a certain—not too significant—role may have been reserved in Hungary for the fact that companies with several members were rather widespread, but their foundation and operation were determined mainly by only one of the owners. Still, what induced change in Hungary was not the strain caused by the contradiction between the law and the prevailing situation. The decisive causes for the introduction of the one-man company are as follows.

The first cause is economic necessity. The adoption of the Associations Act served to develop market relations, to encourage an open economy and to remove the mountain of obstacles to undertakings of indviduals and economic organizations through partnerships. The reregulation of associations served a useful purpose mainly as a means of revitalizing the economy. The political significance of the Act of 1988 lies in promoting the creation of a mixed-property economy and providing stimulus for economic openness to the outside world. Legal considerations paled in comparison to the highly important economic and political transformations, although the Associations Act was intended to be a momentous and long-lasting regulation by:

— codifying scattered provisions of law,
— raising lower-level regulations to the legislative level, and
— streamlining old rules and introducing new institutions of law.

The need for introducing one-man companies was not caused so much by legal theory as by economic policy motives.[33]

The one-man company is an institution which seemed fit to encourage enterprise. Its introduction served primarily to enhance motivation for potential entrepreneurs. In Hungary the one-man private undertaking of artisans and retail dealers existed even in the centrally planned economy. Along with previous ideological reservations and bureaucratic rules however, there was another restrictive factor, namely that the entrepreneur was liable with the whole of his property for eventual economic loss. The introduction of one-man companies has been intended to eliminate the discouraging effect of "built-in" unlimited liability. The more favourable extent of liability naturally applies only to the founder of a limited liability company, but the vast majority of one-man companies in Hungary can be expected to be established as one-man limited liability companies.

In allowing precisely natural persons to set up one-man companies in the form of limited liability companies it was the legislators's avowed intention to integrate into the economy a part of the population's savings previously used for consumption. In the future, potential entrepreneurs will have no reason to fear that they will lose all their property as a consequence of an eventual abortive business transaction. It is to be expected, therefore, that independent economic activities will also be undertaken by

33 "In particular, I should like to emphasize the economic policy possibilities inherent in the general institutionalization of the one-man limited liability company. Sharply disputed by the vast majority of the representatives of legal theory, this institution was gradually expanded in the course of preparation until it came to be generally recognized by the Act: it may be established by juristic persons and individuals, both nationals and foreigners, on an equal footing, since the one-man Ltd company may, *inter alia*, facilitate transformation of state enterprises into associations, leaves room for mending the existing deformed system of subsidiary companies with a sole founder, and allows artisans and retail traders to choose between the traditional business with unlimited liability (and subject to payment of a personal income tax) and the form of association with limited liability (and subject to payment of a tax on profit from the business)". In: SÁRKÖZY, T.: A társasági törvény elökészítése. Szubjektiv beszámoló egy törvényhozás anatómiájáról (Preparation of the Associations Act. A Subjective Account of the Anatomy of a Legislative Enactment), Valóság, 3/1989. p. 48.

individuals who, given their personal qualities, would refuse to take such risks in view of the frequent changes in Hungarian financial-economic regulations.

For enterprises, the one-man Ltd company offers the possibility to transform their existing subsidiary companies into this type of undertaking or to give greater autonomy to their subdivisions or units making consistent losses. In actual fact a considerable discouraging effect in relation to the subsidiary company could be observed in that the centre of the enterprise practically lost the decision-making power in daily business in respect to independent units, but if such a unit operated at a loss, the negative consequences were for the enterprise to suffer. In the case of the one-man Ltd company the risk is limited, whereas motivation increased through autonomy may result in a profitable autonomous operation of formerly loss-making units integrated in the enterprise organization.

As is stated in the general motivation to the Act, the legal policy objective was to promote the establishment of businesses. "There is a real need to allow the State, juristic persons and economic associations without juridical personality or natural persons to invest, under specified guarantees, a separate part of their property in businesses, with the risks limited only to that part of property." (Art. 5.) Accordingly, the following economic reasons are advanced in connection with Art. 156: "The regulation on the economic undertakings of natural persons (artisans, private dealers) is characterized by unlimited liability. The institution of the firm with limited liability is unknown to the Hungarian legislation in force, so the Bill has allowed its establishment under the law of association. Accordingly, in the future, a natural person wishing to set up a business may choose to operate, as an artisan or a private dealer, either subject to the stricter liability rules, but under simpler provisions of operation, or with limited liability, but under the stricter rules of the law of associations applicable to creditors' protection."

— Another group of companies consists of those originally operating with several members but transitorily becoming companies. Economic reasons can likewise be adduced for the law to have allowed the operation of a one-man company during the grace period, since the enforced termination of a prospering, profit-making company is not in the interest of either the member remaining alone or of the national economy. This is why the legislature has granted a grace period of six months in order to ensure that a new member may enter the company and that the company may carry on its activity. The relevant part of the motivation to the Act reads as follows: "In order to ensure the continuous operation of economic associations, to avoid the termination of viable companies, the Bill grants a grace period of six months also for forms of a company where the operation of one-man companies is otherwise deemed to be inadmissible. If during that period another member joins the remaining one, the company may carry on its activity without hindrance."

Another factor in favour of recognizing the company was the intention to draw on international experience. It was more than a century ago that companies in Hungary were covered by a coherent and comprehensive law. Both the intervening period and the importance of the question have justified the need for codification to take into account not only the requirements and specific conditions of the Hungarian economy, but also the

achievements of other countries where companies had formed an organic part of economic life over the past 40 years.

In addition to the German legislation, which has always influenced developments in Hungary, most of the countries taken as a guide have been characterized by the recognition in one form or another of the company.[34] The codification undoubtedly bears the mark of international influence, as is manifest, on the one hand, in Hungary realizing the need for legislative coverage of companies and, on the other, in Hungarian law-makers relying on concrete solutions to serve as a model.

As is stated in the general motivation to the Act, "Today the one-man company is recognized by most of the modern company laws *vis-a-vis* the traditional prohibitive attitude. We must not adopt a 19th-century law, but should, by relying on comparative analyses of law, incorporate in the Code as many modern solutions as possible ... Account has been taken of the most up-to-date solutions of the past 20 years, e.g. the organizational setup of the French *groupement d'economique* in the case of associations, the Common Market guidelines for one-man companies, the law of the Federal Republic of Germany regarding holding companies. The theoretical aversion to the company is naturally understandable, since such a company can be regarded as a notional absurdity. At the same time this form of company has been spreading rapidly all over the world. We, too, have included it virtually for technical reasons".[35] The first sentence in the motivation to the regulation of the joint stock company reads as follows: "Taking into account the international development of company law, the Bill has allowed the operation of the joint stock company, too". In explaining the increased liability of the sole shareholder compared with the limited liability of shareholders, the motivation to Art. 299 refers again to the experience of foreign legislation on companies: "In line with the development of modern company law, the Bill has allowed two exceptions to the general rule in view of the nature of company".

2. Questions of Liability

(a) In Western Europe there are serious debates on the appropriateness limited liability in the case of a single owner. The conceivable solutions include:

– the liability of the sole owner for the debts incurred by the company;

– the joint liability of the sole owner and the company;

– the joint liability of the sole owner only in cases where the company is unable to pay its debts.

Theoretically, we find the last solution to be correct, for once the company has been recognized, it becomes a separate subject at law from the moment of its foundation, and

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34 This is pointed out by, e.g. NOVOTNI, Z. in: Társulási formák a gazdaságban. A vagyonegyesítő társaság (Forms of Association in the Economy. Association for the Pooling of Assets). Élet és Tudomány, 1/1989. p. 117.

35 SÁRKÖZY, T.: op. cit. in fn. 33.

there is no reason for that subject at law to be exempted from the consequences of its own obligations.

The recognition of the company's liability raises the question whether its members should be liable jointly and severally with the company or should bear only secondary liability. (This problem is similar to the relationship between surety and joint and several surety.) The Hungarian law has opted for the latter solution, with the procedural advantage that the creditor may indicate in the Letter of Credit that he will assert his claim against the member(s) if the company's property is insufficient for payment of its debt. This expedites procedure, and fees are also favourable to the creditor, statisfies creditor's claims and is in keeping with legal theory that if the debt was incurred by the company (not the member), the company should be primarily liable to repay it. Para. (2) of Art. 75—stating that "[a] judgement against company property can only be passed if the members are not litigants, and against the members' property only if the members are litigants. Members can also be sued together with the company, without prejudice to their secondary liability"—relates to unlimited partnerships, but is applied on a broader scale.

(b) If we accept the secondary liability of a company's single member, the question arises as to what that liability should be. The possible solutions include;

— unlimited liability;

— limited liability;

— limited liability combined with liability for damages in tort caused by the member.

The member's unlimited liability resembles responsibility for the acts of others (e.g. the custodian's liability for damages caused by minors). It presumes no tort on the part of the member[36], but simply flows from the debt of a company established by the member and unable to repay it. This solution is satisfactory for companies in general, but contradicts the underlying reason that the limited liability company and the joint stock company have come into being precisely for the purpose of limiting the member's liability to the amount of assets contributed to the company. The question is whether departure from this rule is warranted in cases where the company has but one member.

The concept of limited liability is based precisely on the fact that the company's having but one member cannot bring about so important a change as to practically cause the company to transform from one type into another (extinguishing the limitation of liability as the core of the joint stock company and the limited liability company).

A former view in Hungarian jurisprudence denied the existence of a direct relationship between shareholder and creditor concerning debt repayment. "Considering that the shareholder's obligation consists in making available to the joint stock company the face value of property or non-pecuniary contribution, such liability is not only limited,

36 "In respect of associations, legal responsibility takes primarily the form of liability for risk, which cannot always be identified with the consequences of a tort; it is mainly liability for economic activities, and may be borne by the company and its organs *vis-a-vis* the members, or by the members *vis-a-vis* the company's creditors as well", in: NOVOTNI, Z.: op. cit. in fn. 26, p. 68

but also indirect. Moreover, one cannot even speak of 'liability' in this sense, because the shareholder's obligation is towards the joint stock company (not the creditors), with the company being entitled to invite and oblige the shareholder to comply with such an obligation. Creditors may never raise claims against the shareholder by invoking 'liability'. Even in cases where a joint stock company goes bankrupt, where the board of directors is reluctant to invite the shareholders to pay their contributions, the public trustee sues them as legal representatives, not of creditors, but of the joint stock company. On the other hand, the joint stock company as a juristic person is liable with the whole of its property for all its obligations."[37]

In actual fact, this concept can be traced even in present-day Hungarian law[38] inasmuch as para. (2) of Art. 319 provides that "liquidators may demand the shareholders to pay their contributions in arrears if required for repayment of the joint stock company's debt".

The third possible solution combines, as if by way of a compromise between the previous two, the member's secondary limited liability (quasi limited liability for the acts of others) with the member's own culpability constituting a separate class of cases. In certain typical cases specifically stated, the law lays emphasis on the member's tortfeasance and imputes directly to him the damage resulting from such misfeasance, rather than considering the company's debt to have been incurred by the company (as a result of its conduct). Under Hungarian law, which applies practically the same rules of liability for for breach of contract as for extra-contractual damage, we might say that in such cases the company is liable for breach of contract, whereas the member can be obliged to pay damages under the rules governing extra-contractual liability: the law thus taking a step forward in the series of causal relationships, but presuming actual damage rather than a contractual relationship between the member and the company's creditors. (The rules on liability for damage caused by breach of contract versus non-contract damages are essentially different in other systems of law, but perhaps the latter can also be said to state the member's liability for damage to hold for the creditor's loss of income as damage suffered by the creditor.)

(c) Hungarian jurispundence was exempt from theoretical debates over the liability of a company's single member. The questions involved arose in inverse order in Hungary. The problem did not concern the kind of liability to be borne by a member of a one-man Ltd company but the institution of the one-man Ltd company was introduced in order to limit one's liability in an effort to encourage economic undertakings. In our current concept, a one-man Ltd company without limited liability would be meaningless.

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37 KUNCZ, Ö.: A magyar kereskedelmi és váltójog tankönyve (Textbook of Hungarian Commercial and Exchange Laws), Budapest, Grill, 1938. pp. 158-159.

38 "Only the shareholder is in a relationship with the joint stock company and he cannot be obliged to pay except the face value of his share and/or its value of issue, but in any case *vis-a-vis* the joint stock company, not the creditors", in: CSANÁDI, P.—FÉNYES, L.: A társasági jog kézikönyve (Textbook of the Law of Association), Szekszárd, Babits Kk., 1989. p. 281.

The effect of the member's culpability creating separate liability is absent from Hungarian law unless we consider the rule on the joint stock company under which failure to record a company's transformation into a one-man company as entailing the shareholder's unlimited liability.

3. Protection of Creditors' Interests

(a) Protection of the interests of creditors is an essential endeavour of regulations on any type of company and assumes increased importance in the case of one-man companies. "As in the case of one-man companies ... there is a danger of damage being caused to creditors, it was necessary for the Bill to devise guarantees"—reads in part of the general motivation to the Act. This concern is shown by the fact that the Hungarian law provides for a series of measures, common to Western laws, to secure the creditors' position to the extent possible.

— In the case of a one-man company the contribution of assets must be made in full at the time its foundation (see Sect. II/3 supra page 11). (This rule applies only to the limited liability company. In the case of joint stock companies the legislature is content with the general rule, under which at least 30% of the primary capital must be paid before registration at the registry court.)

— The nature of a one-man company as such must also be notified at the time of registration (see Sect. II/3 supra page 11). The same rule applie to companies becoming one-man companies (see Sect. II/3 (b) supra page 34). The registry court enters the one-man nature of the company in the register by notation, and publishes it, and the register is open for inspection at any time.

— The sanction for failure to give notification as mentioned above entails the increased liability of the sole shareholder (see Sect. II/3 supra page 14). (There is no such rule in respect to Ltd company).

— Employment of an auditor to control administration is always mandetory (even at a company with several members in the case of joint stock companies, while, as is specifically provided for in law, only at a one-man company in the case of limited liability companies. Establishment of a supervisory board is therefore mandatory in one case, rather than in three, at a one-man Ltd company (see Sect. II/3 supra page 13).

(b) In addition to these generally known guarantees, Hungarian legislation seeks to prevent infringement of creditors' interests by imposing further restrictions on one-man companies.

— A one-man Ltd company must neither acquire nor withdraw any business share for its own purpose (see Sect. II/3).

— Of course, it would be possible to widen the range of provisions to improve the creditors' position. In principle, one could conceive of rules regarding contracts between the company and the sole owner which would disallow certain forms of regrouping of assets to the injury of creditors. It should be pointed out, however, that the rule of the

law of obligations spelling out the relative nullity of contracts aimed at draining away funds for cover (*Actio Paulina*) is applicable to this case as well.[39]

(c) The effectiveness of the provisions for creditors' protection is of varying degrees. (The mandatory payment of the full amount of contribution at the time of foundation, for instance, is no guarantee that the amount will be sufficient for a business to operate in such a way as not to expose creditors to excessive risks.[40]) However, we think that the set of provisions for creditors' protection is, on balance, suitable to serve the desired purpose, particularly if viewed in relation to the additional rules on companies with several members. Recent years have seen a radical change in the position of creditors. Over the past four decades, Hungarian law propounded the theory of unlimited liability of organizations.

— Until very recently, a role for the joint stock company and the limited liability company was reserved only to the domain of international relations.

— In Hungary, enterprises bore unlimited liability for the debts of their subsidiary companies or the associations established by them.

— It was a long-held view that in an economy based on state property an enterprise could not go bankrupt, with the state securing repayment of debts even in the case of mismanagement. That budgetary practice afforded an effective guarantee for creditors in addition to the security they enjoyed under the law.

The reappearance of the institution of bankruptcy and the general recognition of forms of company with limited liability brought creditors into a more defenceless position. By contrast, the additional risks involved in one-man companies are of a much narrower dimension, though not negligible.

4. Taxation

Tax rates may be an important consideration in one's decision to form a company. The current Hungarian tax legislation requires every taxpayer to pay an income tax based, on all his income, at rates graduated by scales of income. The tax rates are high even by international comparison. Dividend-like income is treated separately (i.e. it is not combined with income derived from other sources). Income from a company is subject to a uniform rate of 20% which is more favourable even if dividends are paid out after payment of taxes on profit. It should not be forgotten that business profit taxes subject to a variety of benefits and exemptions, so they are, especially in the initial period, not payable or payable only in part. For natural persons who would have to pay the highest rate of tax after a considerable part of income, it pays to found a company, because such

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39 Article 203, para (1) of the Civil Code reads: "A contract by which the claims of a third person have been deprived of the material basis for their statisfaction shall have no effect in respect to the third person if the other party acted *mala fide* or the contract resulted in a gratuitous advantage to him".

40 The minimum amount of primary capital as fixed by our current legislation is rather low: Ft 1 million for a limited liability company and Ft 10 million for a joint stock company.

a person will be better off even in the case of double taxation (after payment of a tax on company profit plus a 20% tax on personal income), by making us of the benefits and exemptions concerning the tax on company profit. Considering that the Hungarian system of personal income tax follows the West European pattern, it is still a novelty and subject to annual change, it can be expected that financial regulations will close this "loophole" sooner or later.

5. Termination of Transitional One-Man Companies

West European legislation differs widely in respect to the termination of companies which continue their activities as a company one-man when no new member has joined it during the grace period.

In some countries (e.g. Denmark) such companies are terminated *ex officio* by public authorities and in others (e.g. France) upon the action by an "interested" person.

Hungarian legal development has also produced similar results. (Article 16 of Act V of 1930 provided for court action *ex officio*, whereby the court terminated, in extra-judicial proceedings, a company after expiry of the grace period.)[41]

In Section I we referred to proposals and draft laws which discussed the possibility of joint stock companies and limited liability companies, which were transformed into one-man companies, could be terminated at the creditor's request.

Act VI of 1988 adopted neither solution, but provides for the automatic termination of companies by operation of law, with no request or action required of anyone. Some doubt is nevertheless left by the wording of Art. 46 (2), under which economic associations are terminated by eliminating them from the register of firms. This allows the conclusion that as a result of action by the registry court they are terminated at a date after the expiry of the grace period of six months as stated in para. (1), subpara. (d) of Art. 46.

This view is supported by the motivation to that Article reading: "An economic associaton shall be deemed to be in existence as long as it figures in the register of firms".

6. De Facto One-Man Companies

(a) In Sect. III/1 (a) we have referred to the position of Western legal literature concerning *de facto* one-man companies. These companies exist in Hungarian practice too. They are not deemed to be one-man companies in the legal sense, but the vast majority of their assets are held by a single person. For all practical purposes, the member possessing the majority of the assets directs the company's activity as if he were

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41 For a discussion and a presentation of legal practice, see LŐW, T.: A korlátolt felelősségű társaságok alakulása (Formation of Limited Liability Companies), Jogtudományi Közlöny, 32/1932.

the sole owner. (Cases in which the Hungarian law requires an unanimous decision are rare.)

(b) Such a situation can be produced in several ways.

— It may happen that the person deciding to found a company has not enough capital and is able to contribute the statutory minimum of capital only by admitting other members.

— It is common for future clients of a prospective company to join in the foundation with payment of a symbolic amount in the hope that the member interested in the company's profitable operation will give preference to the company in placing orders.

— Also, during the operation of a company, one of the members with originally equal shares in property may happen to become dominant (e.g. by exercising the right of preemption).

(c) The causes enumerated so far are of an economic nature, with evasion of the law not the motive. In view of the restrictions on the joint stock company as well as of the prohibition of one-man companies among unlimited partherships, deposit companies, joint ventures and associations one can imagine cases in which reliance on a second member is specifially aimed at circumventing such restrictions or prohibitions. Contracts of association made for that purpose are null and void on several grounds. On the one hand, contracts offending the law or concluded in evasion of the law null and void and, on the other, fictitious contracts are likewise null and void [para. (2) of Art. 200 and para. (1) of Art. 207, respectively, of the Civil Code]. This is a fairly long-held position of the law. In an article published as early as 1933[42] one can read that "if a contract is made through the mediation of a pseudo-partner (*Strohmann*), his involvement being designed to ensure that a company may be established by a single person, such procedure must be deemed to evade the law and is therefore inadmissible".

(d) Our legislation in force does not cover *de facto* one-man companies designed without the intent to evade the law in the manner described in subparagraph (c) above. No suggestion was made to apply the rules of the one-man company to companies with several members where the sole owner's share in property reaches, e.g., 90%. Nor would it be wise to formulate such a rule since the formal requirements of one-man companies (see Sect. II/3 at p. 26 supra) case to exist at the moment another member joins the company, no matter how small his share of property. However, consideration could be given to extend the application of the additional substantive requisites concerning one-man companies to those companies whose property is owned mainly by a single person.

In the absence of a prohibition in this respect it is at present easy to evade the provisions which require payment of the full amount of contribution by relying on the cooperation of a partner joining the company with a symbolic contribution and thereby establishing a limited liability company regarded by law as one with several members.

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42 LŐW, T.: A korlátolt felelősségű társaság semmissége (Nullity of the Limited Liability Company), Jogtudományi Közlöny, 47/1933.

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Boldizsár Nagy

Asylum Seekers and Refugees: Hungarian Dilemmas

Introduction

The 1956 Hungarian revolution caused the largest refugee wave in Europe during the past few decades.[1] Now, thirty years later Hungary has entered the road to becoming one of the most important refugee receiving countries in Europe.[2] This brief report intends to describe the developments leading to the present situation: the first wave of asylum seekers coming from Romania; the second wave flowing from the former Yugoslavia; and, the development of the Hungarian refugee law. It puts specific emphasis on the policy issues and dilemmas faced by the Hungarian legislator, including aspects of the possible third wave from the CIS or elsewhere and acute questions of neighbouring legal disciplines such as alien's law and human rights.

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1 In 1956/57 193.885 persons fled the country, most of whom were recognized—usually without an individual procedure—as political refugees. See the survey of the National Statistical Office completed in 1957, but only published in 1991. In: Regio, vol. 2 (1991) No. 4, p. 174.

2 In the years 1988, 1989, 1990 only Austria, Germany, France, Sweden and Switzerland have registered more asylum seekers than Hungary, but all of them (with the exception of Germany and France) were in the same range of 15-30.000 applicants per year. If successor states of Yugoslavia are not considered then in 1991 Hungary received the third largest asylum seeker wave of 54 000 only preceded by Germany (256 000), and the UK (57 700). For the data except for Hungary see: LOESCHER, G.: Refugee Movements and International Security, Adelphi Papers 268 London, 1992, Table V on p. 74.

Recent Events

Until 1987 Hungary did not differ from any other authoritarian East Bloc country thoroughly controlling its borders, excluding all aliens exempt for only a few thousand who could settle in Hungary, mainly under family unification schemes.[3] Twice the communist party had decided to open the count y for a limited quota of refugees; first for the Greek communists after the civil war and second for the Chilean communists, after Allende's fall.[4] In accordance with the purely political treatment of refugee affairs—except for a few ideological phrases—Hungarian law did not contain provisions on refugees or on asylum.[5] The rapid deterioration of the conditions in Romania and the mounting pressure on the approximately 2 million members of the Hungarian minority there have compelled ethnic Hungarians who were visiting Hungary to refuse return, or others, who lived in Romania to illegally cross the non-strictly guarded border and find refuge in Hungary. What follows are the statistics reflecting the first asylum seeker wave (see table 1).

It is remarkable, that—contrary to the expectations—the influx from Romania did not decrease soon after the 1989 December termination of the Ceausescu dictatorship. Rather it even grew after the bloody ethnic conflicts in Spring 1990, and only started to abate in 1991.

Unfortunately there had been hardly time to start to develop long term policies, concentrating on the integration of the more than 50 000 asylum seekers wishing to settle in Hungary, when the tragic civil war in Yugoslavia once again forced the Hungarian authorities to return to emergency planning, provisional measures and life-saving temporary solutions (see tbale 2).

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3 The number of legal immigrants for the eighties was as follows: 1980—1326; 1981—1254; 1982—1467; 1983—1606; 1984—2221; 1985—2122; 1986—2505; 1987—2835; 1988—12652; 1989—8176; 1990—2290; 1991—19955 (Applications, submitted).

(The numbers for the years after 1988 are somewhat misleading, because they include those who applied for a durable residence permit from within Hungary in a refugee-like situation...) Source: (with the exception for the year 1991) RÉDEI, M.: Magyarországon tartózkodási engedélyt kérők összetételének alakulása az elmúlt évtizedekben és a folyamat demográfiai következményei, in: Menekülők, vándorlók, szerencsét próbálók, Az MTA Politikai Tudományok Intézete Nemzetközi Migráció Munkacsoportja Évkönyve, szerk. Sík Endre, Budapest, 1992. p. 76. Her data are based on statistics provided by the Aliens Department of the National Police Directorate of the Ministry of the Interior. The same author uses somewhat different data in her report to SOPEMI, see: Trends in International Migration, OECD, 1992. p. 154. (Probably the cause of the larger number appearing in the SOPEMI report is that those figures include yet undecided applications for immigration.)

4 The number of the Greeks was less than four thousand, that of the Chileans approximately twelve hundred. See: NAGY, B.: The Hungarian Refugee Law, in: Refugees in Hungary, ADELMAN, H.—SIK, E.— TESSÉNYI, G., York Lane Publishers Ltd.—Toronto, 1993.

5 The Constitution in force between 1949 and 1989 has declared in section 67, that: "Everybody who is persecuted for his democratic behaviour, or for his activity to enhance social progress, the liberation of peoples or the protection of peace, may be granted asylum".

Table 1
The number of asylum seekers in the first wave

		until the end of 1988	1989	1990	until June 1, 1991	total until June 1, 1991
Total		13 173	17 448	18 283	2 629	51 533
	From Romania	13 098	17 171	17 416	2 103	49 788
Formally recognized as refugee		0	185	2 561	149	2 895

Source: Authors calculations based on data of the Refugee Department of the Ministry of the Interior.[6]

Table 2
The number of asylum seekers in the second wave

		June 1,1991-December 31, 1991	1992	total
Total		52 064	16 204	68 268
	From Yugoslavia	approx. 48 000	15 021	approx. 63 000
	From Romania	1791	844	2635
Formally recognized as refugee		285	472	757

Source: Data of the Refugee Department of the Ministry of the Interior.

6 Unfortunately there is a lack of consistency in the data provided by the Department of Refugee Affairs. Figures for the same period may differ in subsequent communications. Even interviews with the person compiling the statistics could not entirely clear the puzzles.

This new wave of asylum seekers differs characteristically from the first wave in the following aspects.

— The influx of the Romanian citizens was a response to the general "normal" state of affairs with steady deterioration and growing discrimination against the minority. The Yugoslavian citizens escaped from the civil war, frequently only saving their bare life, but losing most of their assets left at home.

— The people from Romania came from a country with which the political relations were and to a lesser extent still are—strained. Croatia, Slovenia and Bosnia-Herzegovina—the regions where most of the asylum seekers came from—are friendly countries and even Serbia—or the federal Yugoslav state—is not considered to be in conflict with Hungary.

— The asylum seekers from Romania were mainly poor people, with a real chance to improve their condition of life if settled in Hungary or in the West, whereas most of the asylum seekers from Yugoslavia have left some assets, frequently considerable wealth, behind.

— Consequently while most of the asylum seekers of Romania did not want to voluntarily return to their home country, the majority of the asylum seekers from Yugoslavia would return if their property survived the fighting and if the rule in their village did not fall into the hands of enemy groups (which might be Serbs or Croats depending on the location). Indeed, according to estimates of the Refugee Department 7-10 000 asylum seekers have voluntarily returned and 6 000 traveled to third countries.

— A major difference is that whereas 70-90 % of the Romanian citizen asylum seekers were ethnic Hungarians, only about 20-30 % of those who fled Yugoslavia claim themselves Hungarian, the overwhelming majority being Croat and Moslem.[7]

These differences warranted the different treatment of the asylum seekers coming from Yugoslavia. The overriding feature is the temporary character of their stay. Both the Hungarian authorities and the several tens of thousands of people concerned presume that no durable solutions within Hungary are necessary. This explains the difficulty with the statistics, since a significant portion of the asylum seekers formally never contacted the Hungarian authorities. Those who have found accommodation in private homes only receive limited financial support from the state budget,[8] and still others keep coming and going depending on the military situation.[9] The twenty temporary "camps" or refugee centers set up to meet the requirements together with the permanent refugee installations

7 21.3% of the more than fifty thousands asylum seekers were of Hungarian ethnic origin in 1991. The data for 1992 show 35.2% Hungarian share (Author's calculation, based on data provided by the Department of Refugee Affairs).

8 According to an unpublished government decision, each asylum-seeker is entitled to 600 Fts per week. (600 Fts are approximately 12 DM, i.e., 1/4 of the average per capita weekly income.) Families housing asylum seekers may be reimbursed for heating and electricity cost increases 2 000 Fts per month.

9 This does not apply to the case of active soldiers. Those soldiers who had crossed the border and sought refuge in Hungary were not allowed to return to Yugoslavia later. This was a measure to exclude repeatedly raised charges that Hungary allegedly served as a base for the Croat National Guard.

in Bicske, Hajdúszoboszló and Békéscsaba have hosted 12,200 asylum seekers from Yugoslavia during 1991, the other 40,000 persons being accommodated in private homes or living on their own account in commercial accommodations. In 1992 the situation has changed somewhat with the UN involvement and the calming of the conflict in Croatia, but the civil war spreading in Bosnia. Hungary repeatedly made efforts to control the inward flow which was taking a great array of routes anyhow. Since asylum seekers from Bosnia had to cross other countries (notably Serbia, or Macedonia, Bulgaria and Romania or Croatia) before arriving to the Hungarian border and because the West was firm on not opening its territories for Bosnian asylum seekers, Hungarian authorities were inclined to differentiate among arrivals. The authorities were receiving as asylum seekers only those, who explicitly claimed that they directly came to seek refuge in Hungary. Others sometimes were prevented from entering.

The Situation in 1992

Many members of the first asylum seeker wave have in the meantime regularized their status. Approximately 20 000 have received Hungarian citizenship, and many further applications are still pending, with a firm prospect of positive decision. More than 10 000 have chosen to apply for immigrant (permanently resident alien) status. Therefore the majority of the asylum seekers who have come from Romania have drifted into another status including several thousands successfully resettled in the West and other hundreds who voluntarily returned. The total lack of continuous record of former asylum seekers makes it impossible to produce precise statistics.[10]

With regard to the second wave of asylum seekers from Yugoslavia a communication from the Refugee Department[11] gives the following picture (see Table 3).

10 Since figures on naturalization and immigration include "normal" cases and asylum seekers one cannot simply deduce from the number of asylum seekers from Romania the naturalized or immigrated Romanian citizens. (As a matter of fact even statistics enabling this simple calculations are not available.)

11 "Összefoglaló adatok a Magyarországra érkezett és befogadott jugoszláviai menekültekről" (Summary data on refugees from Yugoslavia who have come and were received in Hungary) Budapest.

Table 3

Statistics used by the Refugee Department concerning the asylum seekers from Croatia, Serbia and Bosnia-Herzegovina in January 1993

Category	Number of persons
Asylum seekers living in one of the presently operating eleven reception centers	3 800
Asylum seekers receiving support from the municipal authorities, but hosted by families or living on their own account*	19 100
Non-registered asylum seekers *	20 300
Died	200
Voluntarily returned*	10 000
Resettled*	6 000
Recognized as refugee under the 1951 Geneva Convention	534

* = estimate

It must be added, however, that these figures were challenged by many, including the Representative of the UNHCR in Budapest. His local office in Pécs has conducted a survey in December 1992 among the Hungarian municipalities. The result differed sharply from the above figures claiming that only approximately 4 500 persons were privately accomodated in Hungary. (The number of persons in reception centers did not raise any doubt.) Not surprizingly the figure in a UNHCR survey of the implementation of temporary—protection also limits the number of privately accomodated to 5 000 not denying that there might be 20 000 unregistered.[12] Clarity is expected to come after the renewal of refugee identity documents to be completed on May 15 1993.

12 I am grateful to Mr. Thomas Birath, the representative of the UNHCR in Budapest, who not only provided valuable commentaries to this draft, but also furnished the information upon which this paragraph is based.

The Applicable Law

After protracted political struggles with the opposition, which at those times was not represented in Parliament yet, the Hungarian political leadership decided to reflect in law, what had become practice by 1989 Spring-Summer and laid the cornerstones of the Hungarian refugee law. The new rules include the 1951 Geneva Convention relating to the Status of Refugees (with geographic limitation to European events!) and its 1967 New York Protocol, a Cabinet decree on the recognition procedure, a Law-Decree on the status of recognized refugees, and—as part of the fundamental revision of the Hungarian Constitution—a new provision on asylum.[13] This says:

Section 65

"(1) The Republic of Hungary—in accordance with the provisions of law—grants asylum for those foreign nationals, who in their country of nationality, or for those stateless persons who in their residence, were persecuted for racial, religious, national, linguistic or political reasons.

(2) A person granted asylum cannot be extradited to another state.

(3) The adoption of the law on asylum requires the votes of two thirds of the Members of Parliament who are present."[14]

The system established by the other rules mentioned can be summarized as follows.[15]

Procedure

Anyone fleeing European events can make a statement concerning his alleged refugee status to any organ of the police or the frontier guard within 72 hours after the border crossing, having a further three days to submit a formal claim for refugee status at one of six branch offices (as they are called: local authorities), of the Department of Refugee

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13 The Convention and the Protocol together became Law-Decree No. 15 of 1989 (1989. évi 15. tvr.), see Magyar Közlöny (Official Gazette) 1989, No. 60, p. 1022 entering into force on 15 October, 1989, Hungary became bound by them on March 14 (Protocol) and June 12 (Convention). The Cabinet-Decree (101/1989. Mt. rend.) on the procedure was published in Magyar Közlöny (Official Gazette) 1989, No. 66, p. 1090. An unofficial and inaccurate translation of it can be read in Report of ECRE Biannual General Meeting, Budapest, 1991, Appendix 14, which reproduces the Council of Europe, European Committee on Migration document (CDMG) "Information on the main features of the situation with regard to refugees in Hungary" The Law-Decree on the status of refugees (1989. évi 19. tvr.), see Magyar Közlöny 1989, No. 66, p. 1090—just like the Cabinet-Decree on the recognition procedure has entered into force on 15 October 1989. The Law No. XXXI of 1989 radically reshaping the Constitution and enacting the new rules on asylum was promulgated on 23 October 1989. (Magyar Közlöny, 1989. No. 74, p. 1244.) An unofficial translation incorporating later modifications was published in a trilingual law publication called Hatályos magyar jogszabályok, Geltende Ungarische Rechtsnormen, Hungarian Rules of Law in Force, vol. I (1990) No. 26, p. 1625.

14 Author's translation.

15 More detailed description of the legal framework is to be found in NAGY, B.: The Hungarian Refugee Law [in: ADELMAN, H.—SIK, E.—TESSÉNYI, G. (eds.) Refugees in Hungary, York Lanes Publishers, Toronto, 1993 in print]. I'll offer comments and critical remarks after the unimpassioned description of the (legal) facts.

Affairs. That office should make a decision regarding the status within thirty days. In case of denying a claim for refugee status, an appeal is to be submitted within five days to the Department itself, which will decide within another thirty days. A negative decision by the Department, is subject to non-litigious judicial review which must be completed within 15 days. The judgement of the first instance court is subject to appeal. However this judicial review is limited to the control of explicit violation of legal rules by the authorities proceeding in the recognition procedure.[16]

Status

Those who can in the procedure "make probable that the recognition as refugee is justified"[17] and against whom no reason for denial[18] of the status can be substantiated are recognized as refugees in accordance with the definition of the 1951 Geneva Convention. This recognition normally extends to the closest family members, who do not have to verify that they personally were subject to or would be subject to such individualized persecution as foreseen by the said convention. Recognized refugees enjoy favourable status. Law-Decree No. 19 of 1989 (1989. évi 19. tvr.) on the status of recognized refugees defines the rights and duties of them in the following manner:

"For the purposes of application of provisions of law, the person recognized as refugee shall be considered as a Hungarian national with the difference that

a) he shall not have the right to vote on elections

b) he may not be engaged in jobs which—by force of law—may only be occupied by Hungarian citizens...".

Refugees also have privileges such as not being subject to compulsory military service, having a right to obtain a refugee travel document, participating in free Hungarian language education and being relieved of the three-year domicile requirement otherwise required for naturalization.

Termination of the status

According to Art. 17 of the Cabinet-decree on the procedure there are compulsory and discretionary reasons for termination of the status.

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16 Remarkably no public statistics exist on the number of appeals against first instance decisions and on judicial review procedures. According to unofficial communications to this author, very few of the first instance negative decisions are appealed (approximately fifty in 1991) and an insignificant portion of the second instance denials are brought to court. (Eight in 1991-1992. In three cases the application was revoked before the court passed a judgement.) The explanation for this may be twofold: Most of those refused are allowed to stay on humanitarian grounds. — The limited powers of the court are not promising.

17 Art. 11 of the Cabinet-decree on recognition (101/1989 Mt. rend.) as translated by the Refugee Department.

18 Compulsory grounds for denial are: the termination and exclusion grounds listed in Art. 1 C, D, E, and F of the 1951 Geneva Convention; and that the applicant's stay in Hungary interferes with the security of state, public order or public health.

The status *must* be withdrawn if any of the five grounds enlisted in Art. 1 C of the 1951 Geneva Convention emerge, or if already at the time of the recognition the person should not have been recognized since *ab ovo* reason(s) for denial[19] had existed, or the refugee renounces his status in writing.

The status *may* be withdrawn if recognition was granted on the basis of false or incomplete data, or if the behaviour or lifestyle of the refugee prejudices national security or public order.

Decision on the withdrawal is delivered by the local authority. One may only presume on the ground of a somewhat broad interpretation of Art. 18 of the Cabinet decree that appeal is also admissible against a decision concerning withdrawal.[20] Most withdrawals of the status were based on the fact that the refugee has re-availed himself of the protection of the country of his nationality, [Art 1 C (1) of the 1951 Convention] usually by voluntarily traveling back to Romania.

Unresolved Legal Issues

This rudimentary picture of the legal landscape is certainly not detailed enough to reflect all of the traps and obstacles scattered through Hungarian refugee law. What follows is a discussion of the most critical unresolved legal issues.

The lack of a formal de facto status[21]

Out of the approximately hundred and ten thousand asylum seekers who have put a foot on Hungarian soil in the last six years, less than five thousand were recognized as political refugees. Approximately fifteen thousand more may have left for third countries or voluntarily returned home and a further thirty thousand may have received immigrant status or become naturalized. The remaining seventy thousand asylum seekers have no formal legal status. They do not and will not meet the requirements set for aliens' stay and residence in Hungary,[22] neither are they able to produce the documents and

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19 See footnote 17 supra.

20 The uncertainty stems from the fact that of Section 18 states: "Against a decision made in connection with the recognition as refugee an appeal is admissible." Is withdrawal of refugee status a "decision in connection with recognition"? In my reading it is.

21 Participants of the International Seminar "Refugees and Displaced Persons in New Host Countries", Budapest, May 1991, have agreed that there was a need to establish such a category within the Hungarian legal framework, along the lines of the 1984 Cartagena Declaration or at least comprising cases covered by the 1969 OAU Convention governing the specific aspects of refugee problems in Africa. See, e.g., G. Tessényi's report, in The New Refugee Hosting Countries: Call for Experience—Space for Innovation (Peter R. Baehr, and Géza Tessényi eds.), SIM (Netherlands Institute of Human Rights) Special No. 11, Utrecht, 1991, p. 120.

22 The rules in force concerning the entry and presence of foreigners were adopted in 1982, and although modifications have occurred since then, they still reflect the spirit of a closed authoritarian society, giving almost unlimited and unchecked authority to the police to decide on permissions to enter and stay, and on the

evidence normally required from aliens, who migrate for employment or business into Hungary. They form three major groups in sociological terms.

a) The first group consists of those—predominantly ethnic Hungarian—persons who want to settle and integrate in Hungary. They may and should have a special treatment in the naturalization process and be relieved from certain requirements applicable to others (like a longer period of residence in Hungary).

b) The second group is composed of those asylum seekers who come in great masses, are of different national and cultural background and only seek temporary refuge because of the emergency in their home country. Normally their intention is to voluntarily return home as soon as circumstances allow. This applies to most of the asylum seekers coming from Croatia and Bosnia. Parts of the potential great influxes from the former Soviet territories will have this character in case of civil strifes or another Chernobyl-type environmental catastrophe. In this groups case, no individual determination procedure is needed; neither is it practicable with thousands appearing overnight. These groups could collectively be recognized by the Parliament or by another authority (government, competent minister or a mixed body including non-governmental actors as well) for a limited period of time and with limited—but well defined—rights, e.g., in the fields of employment, health care, social services etc.[23]

c) The third group is of those—mainly non-European—asylum seekers who are either excluded from the recognition of their refugee status because of the geographic limitation attached to the 1951 Geneva Convention by Hungary, or cannot prove that they qualify. The majority of these Asian, African but also Turkish groups normally do not intend to settle in Hungary. Their aim is to reach Western Europe and this country only serves as a take off base. The non-refoulement principle and obligations stemming from human rights documents—like the prohibition to subject someone to cruel, inhuman or degrading treatment or punishment—should be observed.[24] Therefore after individual procedure, these persons should get an "asylee" or "de facto" status which would not entitle them

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revocation of these permissions. According to a much criticized feature of the law in force, there is no appeal against an administrative decision of expulsion. The relevant rules are contained in Law-Decree No. 19 of 1982 (1982. évi 19. sz. tvr.) on the presence of foreigners in Hungary, and in the Decree of the Minister of the Interior No. 7/1982 [7/1982 (VIII. 26.) BM. sz. rend.] issued for the execution of the Law-Decree. Both are under reconsideration at the moment.

23 The temporary protected status in the United States could serve as a reference point contradicting to European developments leading to the abolition of such formal "intermediary" status like in Sweden. Section 302 of the Immigration Act of 1990 which became Section 244 A of the Immigration and Nationality Act of 1952 in the United States has established the temporary protected status for aliens who because of an ongoing armed conflict, or environmental disaster or other extraordinary and temporary conditions in their home state are prevented from returning there.

24 Article 7 of the International Covenant on Civil and Political Rights has become part of the Hungarian law on 22 April 1976 (Promulgated as Law-Decree No. 8 of 1976). Article 3 of the 1984 UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment expressly prohibiting refoulement or extradition of a person "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" became part of Hungarian law in 1988 as Law-Decree No. 3 of 1988.

to all of the benefits of refugees but would protect them from *refoulement* and enable their participation, albeit limited, in economic and social life.

The UNHCR representative and the non-European asylum seekers

As already mentioned, Hungary has limited the application of the 1951 Geneva Convention to European events, thereby excluding all non-European asylum seekers[25] from the Hungarian refugee status determination procedure. However on October 4, 1989, UNHCR and the Hungarian Government concluded an agreement[26] which in its preamble recalls "the function (of UNHCR) of providing international protection, under the auspices of the United Nations to refugees who fall within the scope of the Statute" (of the UNHCR) and states in Article III, paragraph 4 that

> "The (Hungarian) Government shall at all times grant UNHCR personnel unimpeded access to refugees and other persons of concern to UNHCR..."

What is the status in Hungarian law of that person, who fleeing a non-European event is barred from starting the procedure in front of the Hungarian authorities, but who is recognized as a refugee by the representative of UNHCR? Is he a refugee according to Hungarian law? The agreement itself is silent on this question as is the other agreement concluded between the Hungarian Government and UNHCR on the very same day on the actual forms of assistance provided by UNHCR in setting up the reception centers.[27] Annex A to the latter in point 2 mentions that the majority of the assisted "are refugees and asylum seekers coming from Romania", without specifying the country of origin of the minority of refugees and asylum seekers. Could that be a third world country?

Practice is scarce and totally informal. None of the two subsequent representatives of the UNHCR active in Budapest have recognized great numbers of applicants as refugees. Less than forty non-European asylum seekers were found to qualify according to UNHCR criteria since 1989. Their legal status in Hungarian law is unregulated at the moment. This entails the danger that if the representative of the UNHCR recognized refugees in greater numbers, the smooth cooperation with the Hungarian authorities and the liberal approach of the Hungarian side would terminate. Certainly this is an unhealthy situation where both parties can exert pressure on the other. A greater readiness to recognize non-Europeans by the UNHCR representative may lead to the denial of stay

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25 A word for the sake of accuracy. Strictly speaking one should always refer to persons persecuted in consequence of non-European events. They usually are non-European nationals, but in exceptional cases they could be Europeans as well, just as in the opposite case, where non-Europeans suffer from European events and qualify for protection even when the geographic limitation applies. Nevertheless, this level of precision would make the main text too cumbersome. Therefore, the phrase "non-Europeans" will *denote* "persons who because of events occurring outside of Europe are unable or unwilling to return to their country".

26 It was promulgated as 23/1990. (II.7.) MT rend. (Cabinet-decree) in Magyar Közlöny (the Official Gazette) No. 11 in 1990, p. 172. Exceptionally not only the Hungarian, but also the English text was published.

27 Published—without formally enacting into Hungarian law—as Communication from the Minister of Interior No. 4, 1989, in Magyar Közlöny (Official Gazette) 1989. No. 76, p. 1274.

and work permits which presently are issued to these persons regardless of the formal Hungarian rules in force. On the other hand, restrictions by the Hungarian authorities would undoubtedly reduce the willingness of the UNHCR to raise funds in support of the Hungarian state in its effort to cope with the displaced persons coming from Yugoslavia.[28]

Before attempting to find solutions one has to recall another feature of Hungarian law concerning non-European asylum seekers. This is Section 65 of the Constitution (quoted above) which speaks of "foreign nationals" without any reference to the geographic location of their persecution. The spirit of that constitutional provision definitely calls for the extension of the protection to non-European refugees as well.[29]

How could this confusion be alleviated?

Evidently the simplest method would be to withdraw the declaration on geographic limitation.[30] This would oblige the Hungarian authorities to deal with claims of non-European applicants as well, which obviously would mean that the costs of the recognition procedure and of the physical care of the applicants would fall on Hungary, instead of the UNHCR together with the Hungarian Red Cross and other NGO's that presently bear them. Even if the government was unwilling to revoke the geographic limitation, a solution could be provided by setting up refugee quotas. Those quotas set by the Parliament could then be filled with those non-European refugees, who were recognized by UNHCR's local representative, but who otherwise would not fall under the ambit of the Hungarian refugee law.[31]

The influx of non-European migrants, including asylum seekers, raises further problems, well known in other industrialized nations' practice. The most pressing of them derives from the inconsistencies of their entry into Hungary. Whereas significant numbers appear at Budapest International Airport precisely reproducing conflicts experienced at other European airports[32] the majority still comes by crossing land borders that Hungary shares with its neighbours. Not infrequently groups of Third World nationals choose to

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28 UNHCR has a growing share in covering the costs associated with asylum seekers. In 1992 funds provided by the UNHCR constituted approximately 30% of the total budget of the Refugee Department.

29 Certainly the phrase in that section requiring that asylum be given "in accordance with the provisions of law" leaves room for doubts. May it refer to the declaration containing the geographic limitation which became part of Hungarian law as Section 3 of the Law-Decree enacting the Geneva Convention and its Protocol into domestic law? Until this issue will be raised in court, there will be no final answer.

30 On several occasions including a public hearing on July 1, 1992 at the meeting of the Parliamentary Assembly of the Council of Europe in Budapest the Minister for the interior, Mr. Boross has anounced that the limitation will be withdrawn, and plans for this step are under consideration.

31 Obviously this would "tempt" the UNHCR representative to recognize approximately as many refugees as allowed by the quota, which of course is exogenous to genuine refugee recognition criteria, but it may still be the lesser of two evils.

32 See e.g. Report of ECRE Biannual General Meeting, Budapest, 1991, pp. 6-7; or Lord Mackie of Benshine's "Report on the arrival of asylum seekers at European airports", Council of Europe, Parliamentary Assembly, Doc. 6490, 12 September 1991.

enter illegally with the help of man-smugglers. The issues unsatisfactorily regulated are the followings:

— Should the representative of the UNHCR have access to each of them, or only to those, who claim that they are refugees. Where and when should the interview with the UNHCR representative—or his assistant—take place? Preceding legal entry at the border—if the person chose the normal crossing point, or he was caught by the border guard—or after granting entry into Hungary at the representative's premises in Budapest? How to act if nobody from UNHCR is available?[33] Practice now is inconsistent and not satisfying, since according to informal reports it is almost a matter of chance whether the UNHCR representative is informed of the appearance of a claimant at the border, and whether the representative is successful in convincing the border guard via telephone to let those people enter the country. With respect to those non-Europeans who already are in Hungary, it has become routine to direct them to the UNHCR representative's office if they apply for asylum.

— Would the return of some of these people to Romania, Czechoslovakia, Ukraine or Yugoslavia amount to *refoulement* or could the Hungarian authorities argue that these states were safe countries for the Sri Lankans, Kurds, etc.? Could Hungary argue that their return does not amount to *refoulement* because one could not prove that their "life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion" (Art. 33 of the 1951 Geneva Convention) in those neighbouring countries?

— What should happen to those, who have no legal title to stay? This problem will be discussed in the next section together with other issues falling on the borderline between refugee matters and aliens law.

Aliens: residence, immigration, naturalization

A much criticized feature of Hungarian law[34] is the lack of clear distinction between policies concerning the following issues:

— short term stay of aliens,

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33 Hundreds of further—partly even more technical—questions arise, from the vital problem of interpretation, to the nature of guarantee the representative could offer for the case in which someone only allowed to enter in order to see him would not qualify and thereby be under an obligation to leave, but unwilling to do so. The size of this paper does not allow taking them up here, but it should also be added that answers would really be difficult to find because of the lack of practice, and the absolute non-existence of publicly recorded cases.

34 See, e.g. NAGY, B.: Hetvenezer törvényenkívüli, HVG, 1992. február 15., and: Before or After the Wave Thoughts about the Adequacy of the Hungarian Refugee Law, International Journal of Refugee Law, Special Issue, vol. 3 (1991) No. 3, p. 532; TÓTH, J.: Towards a Refugee Law in Hungary, Paper, presented at the International Seminar "Refugees and Displaced Persons in New Host Countries", Budapest, 1991 May; TESSÉNYI, G.: The Development of Immigration and Refugee Policy in a New Host Country: the Case of Hungary, in The New Refugee Hosting Countries: Call for Experience—Space for Innovation (Peter R. Baehr, and Géza Tessényi eds.), SIM (Netherlands Institute of Human Rights) Special No. 11, Utrecht, 1991, p. 119.

— immigration of aliens who have no links to Hungary,

— repatriation of Hungarian exilees,

— immigration into Hungary of members of the Hungarian minority living over the borders, and

— treatment of asylum seekers.

Whereas the policy and its legal reflection concerning the entry, the residence and the immigration of simple aliens can and should be based on rational calculations using values derived from the national interest,[35] the procedure concerning the last three groups should not be based on a utilitarian calculus, but on the principle of solidarity.

In this period of growing migrational pressure it is normal that European countries elaborate aliens' policies which clearly reflect security concerns, the state of the labour market, the desire to cooperate with the neighbouring countries and with the European Communities. Immigration of simple aliens with no connection to Hungary should be based on criteria set by the Parliament and derived from the needs of the demographic situation, the state of economy, and other factors identified and evaluated by the Parliament.[36]

The policies concerning the repatriation of emigrees, the immigration of ethnic Hungarians and the treatment of asylum seekers should reflect the specific features of these groups. The cultural proximity of the first two calls for special procedures both in getting residence (domicile) within Hungary and in the naturalization procedure. These benefits granted to Hungarians who want to settle in Hungary would not run counter to any international legal principle and would be in harmony with similar national practices.[37]

With respect to the third group of asylum seekers, the basis of solidarity is humanity which does not leave room for any preference of ethnic or national character of the asylum seeker. It will not be easy for the Hungarian authorities to realize that the presumption upon which the Hungarian refugee law had been built was false. In 1988—1989 the concern for the Hungarian minority compelled the government to join the 1951 Convention but this must not lead to the flawed conclusion and practice of preferring certain asylum seekers over others.

Without suggesting further details concerning the five interrelated, but separate policies the importance of the start of a public discussion before it is too late, must be stressed. The mounting wave of hostility towards aliens, especially non-Europeans is

35 Although I doubt the existence of a homogeneous "national interest", the term is used here since the critique of the premises of current international relations theory is beyond the scope of this undertaking.

36 Since 1981 Hungary has a negative fertility rate. The accumulated natural decrease of population in absolute numbers is in the range of 100 000 (out of ten millions) for the last ten years. See BALÓ—LIPOVECZ (eds.): Tények könyve, 1991, p. 753. At the same time there is a growing unemployment. Whereas the first factor calls for immigration, the second at least qualifies it.

37 Germany, Turkey, France, Italy or Israel may serve as examples.

sweeping over Europe and bitter signs indicate that Hungary is no exception.[38] If one wants to avoid harmful spill-overs from one issue-area to the other and limit the instinctively intolerant actions of public, press and sometimes of the executive,[39] a public debate is needed, which would not be limited to discussions within the Parliament, but also involve NGOs and other interest groups (e.g. representatives of municipalities of specially affected regions in East and South Hungary).

The recognition of the need for the elaboration of these interrelated but separate policies was reflected in the establishment of an Inter-Departmental Committee in August 1991.[40] Although its formal denomination refers to "refugee issues", the tasks of this committee embrace the whole field of migration. It has competence for "immigrants", defined broadly for the purpose of the resolution as "recognized refugees, persons enjoying territorial asylum, repatriated persons, and migrant workers" (Point 1 of the resolution). The nine paragraphs enlisting the responsibilities of this committee include the task "to elaborate proposals for the Government for an immigration policy", to initiate legislation and other measures concerning the daily life and needs of the immigrants, to control the performance of obligations concerning these groups as codified in international agreements, to coordinate state action and to facilitate domestic and international assistance to the immigrants. Unfortunately this Committee has not produced any proposals to be discussed publicly, nor has it produced any document which would reflect the integrated approach. The influx from Yugoslavia causing an emergency only partly justifies this inaction. This is very unfortunate because the new law on aliens would replace the outdated regulations of 1982. Although this new law was expected in 1991, as of February 1993 the bill is still in a pre-parliamentary coordination phase. Similar uncertainty surrounds the new law on nationality which is to replace the regulation adopted in 1957.[41]

It has to be emphasized that whatever the outcome will be it should clearly separate the policy concerning aliens which may be based on domestic and foreign policy calculations, economic and social considerations, and the policy related to repatriation of former Hungarians and to immigration of ethnic Hungarians. Neither of these two must replace a well articulated refugee policy based on Hungary's willingness and obligation to participate in the global burden-sharing. Certainly there are legal norms regulating all

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38 1991 and 1992 have witnessed various conflicts of aliens in Hungary. The first involved illegal aliens who were kept in a much criticised closed establishment in Kerepestarcsa before forced return to home. The second type of conflict emerged between nationals of the Third World and rightist skinheads. The press regularly carried reports on these. See e.g. VARGA, K.: Ecc-pecc kimehecc... in: Beszélő, 1992, January 19, or the report in Budapest Week, Vol. 2 (1992) No. 32, October 15-21, p. 6. 7.

39 See e.g. the statement of Mr. Boross, Minister for the Interior claiming that the "refugee wave must be halted" by way of re-introducing entry—visas. Népszabadság, 1992 February 4, or the debate surrounding the establishment of a new reception center in Debrecen.

40 See the Government resolution on setting up the Inter-Departmental Refugee Committee [1037/1991 (VIII. 6.) Korm. hat.] published in Magyar Közlöny No. 89/1991, p. 1909.

41 1957. évi V. tv. az állampolgárságról (Law No. 5 of 1957 on Nationality).

of these fields, primarily those human rights obligations that set the minimum standard for the treatment of aliens, including the absolute prohibition of *refoulement*, or the wider obligation not to subject anyone to torture or to cruel or inhuman or degrading treatment or punishment. The right to privacy, the right to family and the right not to be discriminated—as interpreted in international practice—also belong to every alien.[42]

Procedural Aspects

At first sight the Hungarian status-determination procedure is critique-proof, providing three levels of review, guaranteeing the right of the UNHCR representative to participate in the proceeding at any stage, fixing short time limits for the delivery of the decision, granting protection against *refoulement* during the procedure, providing for a personal hearing and arranging for the presence of an interpreter.

Scrutiny of the practice, however, reveals that "living law" differs from the books. This is certainly not only understandable, but also desirable in times of mass influxes when even a relatively lax Central European bureaucracy has to increase its flexibility.[43] Nevertheless viewed from a broader, and hopefully more peaceful perspective, a few features of the practice deserve commentary.

One may wonder what happens to those "newcomers" who appear at the input side of the statistics but disappear before the numbers concerning formal recognition procedure starts. To take a non-exceptional year, preceding the flight from Yugoslavia, in 1990 18 283 asylum seekers were registered but only 3 513 procedures for recognition were started. What happened to 4/5 of the asylum seekers, to almost 15 000 persons? In their case a sort of "eligibility" procedure or preliminary screening has shown that their claim is manifestly unfounded. There are two basic groups involved.

The first comprises aliens, who because of the lack of information simply did not precisely know how to achieve their goal of remaining in Hungary. They might have approached the organs of the Refugee Department with a vague idea of their possibilities for remaining in Hungary and after receiving advice might have entered the normal route

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42 Hungary is bound by the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols which she signed in November 6 1990. On the procedure leading to ratification see: BÁN, T.: Előkészületek az Európai Emberi Jogi Egyezmény megerősítésére (Preparations for the ratification of the European Convention on Human Rights) Acta Humana No. 2 Budapest, p. 4, revealing further details from an insider's view. Certainly the recent practice of the Strasbourg institutions concerning articles 3, 5, 8 and 13 are of paramount importance. See e.g. *Bozano* 12 December 1986, Series A vol. 111; *Soering* 7 July 1989, Series A vol. 161; *Djeroud* 23 January v 1991 Series A vol. 191-B; *Moustaquim* 18 February 1991, Series A vol. 193; *Cruz Varas ond Others*, 20 March 1991 Series A vol. 201; *Vilvarajah and others* 30 October 1991, Series A vol. 215.

43 Interviews conducted by this author with officials working in the field had the recurring motive of having only one instruction from Budapest in times of extraordinary events: "Solve the problem within your own competence" having the meaning "proceed as you can and want".

of aliens desiring residence. No serious reservations should concern these cases since the persons concerned voluntarily observe the advice of the contacted organ.

The other group is composed of cases in which the asylum seeker is prevented from starting the procedure against his will. The authority may find that his application is simply repeating an earlier one and deny its processing or it may declare that it is manifestly unfounded or late in time. The effort to start a procedure may fail right at the outset when the alien does not succeed in convincing the border guard that as an asylum seeker he or she is entitled to enter Hungarian territory and submit a formal application.

In both cases no formal—and therefore appealable—decision is taken, everything happens in an informal, non-written way which by definition raises doubts. Only the adoption of public regulation of this preliminary screening procedure could clear this anxiety.

There are further dilemmas connected with the procedure. Officials of the Refugee Department and of the local offices repeatedly complain about the lack of firm information on which to base their decision. It is rarely possible to verify by external means whether the fear of persecution is well founded. Therefore the credibility—or alleged non-credibility—of the applicant becomes paramount. There are hardly any data banks and other sources of information within reach of the acting authorities to confirm or defy statements of the applicant. If asylum seekers come in great numbers from well defined areas of neighbouring countries this problem can be overcome by comparing reports and statements of the asylum seekers who frequently described the same events in terms allowing cross checking.[44] But in the case of asylum seekers coming from remote areas of the world—especially after the lifting of the geographic reservation—the authorities entrusted with the responsibility to decide will have to multiply their efforts in order to get access to information generated and transmitted by impartial actors. This task is already existing, even if the geographic limitation is in force, because the *non-refoulement* principle binds Hungary in relation to forced migrants, wherever they may have come from.

The problem of gathering information is related to the other one of publicity. As the authorities in satisfying their need for information could benefit from activities of national and international NGOs engaged in the protection of asylum seekers and refugees, so they should also increase the transparency of the Hungarian situation for the benefit of the NGO community. At present only the representative of the UNHCR and the counsel of the applicant—if there is any—are entitled to participate in the determination procedure. None of the almost five thousand decisions concerning refugee status were published; there is no kind of reporting system of the leading cases. This total secludedness of the authorities prevents the relatively underdeveloped national NGO community, as well as

44 According to recollections shared by officials active in local authorities in cases when Hungarians were persecuted in Romania in spring 1990, then after the first person's account of the events taking place in a village or similarly well defined location (pogroms, whatever) they could expect that further persons affected by the persecution would show up and frequently those persons indeed appeared within a matter of days.

the legal profession, from controlling the interpretation given to the 1951 Convention definition by the local authorities.[45]

Certainly it is high time that a form of free or at least non-profit legal assistance be made available to the asylum seekers to successfully overcome the hurdles of the legal and formal procedure. There are signs of growing interest in refugee and human rights law, but without a state or privately funded legal service which is independent one can hardly expect a substantial increase in the number of well-trained and problem-oriented lawyers willing to assist the applicants.

An institutional reform accompanying the redrafting of the relevant rules of refugee law and aliens law is also desirable. Whereas the law governing the asylum seekers position is relatively recent—albeit not statutory, but only on decree level—the law regulating the entry and short and medium term residence of foreigners is a reflection of the closed society of the '80s.[46] It is a duty stemming from the constitution to regulate the rights of individuals at a statutory level, through acts debated and adopted in Parliament. Unfortunately, the draft presently circulated on aliens' law does not respond to the repeated calls for a new institutional system, in which decisions concerning migration and decisions concerning asylum could be taken by a single agency unlike now when the aliens' police and the Refugee Department do not have institutional links.[47] This single, professional authority could build up a reliable information base, could follow the changes in the legal position of the asylees (persons enjoying temporary protection), could guarantee that members of the administration who encounter a potential refugee do not turn a blind eye to her or his claim. This authority could also effectively participate in the growingly intensive European cooperation.

European Challenges

The rapidly changing attitudes and techniques concerning refugees and migrants adopted and planned by Western European states and the EC pose an enormous challenge to the

45 As a matter of luck some of the senior officials of the Department of Refugee Affairs have the—almost personal—ambition to maintain good contacts with the non-governmental sphere. They indeed managed to keep relations with the churches, other humanitarian organizations and the opposition parties in an exceptionally peaceful and cooperation-oriented shape. Nevertheless these informal bridges of communication and mutual trust are threatened to collapse if the refugee situation worsens or if the already present xenophobic aspirations spill over to the so far unaffected refugee and asylum seeker population.

46 The rules in force were adopted in 1982, and although modifications have occurred since then, they still give almost unlimited and unchecked authority to the police to decide on permissions to enter and stay, and on the revocation of these permissions. The relevant rules are contained in Law-Decree No. 19 (1989. évi 19. sz. tvr.) on the presence of foreigners in Hungary, and in the Decree of the Minister of the Interior No. 7/1982 [7/1982 (VIII.26.) BM. sz. rend.] issued for the execution of the Law-decree.

47 It is also remarkable that no public regulation of the status and duties of the Refugee Department exists. Most of its powers and responsibilities are based on custom and tradition with the only exception of the recognition procedure and the administration of the reception centres, which are regulated by decrees.

Hungarian decision-maker. Moral and national security dilemmas are at the two ends, with several others in between.

The moral question sounds compelling: is Hungary free to close its borders before asylum-seekers and migrants driven by serious human needs, bearing in mind that there were periods when millions of Hungarians emigrated, seeking a safer world or better living conditions? Before and after World War I more than a million Hungarians set to road and hundreds of thousands escaped fascism and communism afterwards. Is the historic past without influence on present day "realpolitik" or should the decision-maker feel a moral obligation to return to the needy now what our nation has received from others when we, including our ancestors, were seeking shelter and safety?[48]

The public policy and security arguments are also forceful. Hungary cannot become the target country and destination of all those forced and voluntary migrants who are excluded from Western Europe. With a GDP five to eight times less than that of the EC member states, Hungary cannot assume the burdens Western Europe claims incapable to carry.

As a concentrated expression of these issues, it is worth to look at the agreement between Poland and the Schengen states.[49] The essence of the agreement concluded on March 29, 1991, by Belgium, France, Germany, Italy, Luxembourg and the Netherlands on one side and Poland on the other, which provisionally applied even before ratification by the parties, establishes the obligation of the parties to readmit their nationals and other persons who crossed their external borders and who are found to be irregular in the territory of one of the other state parties. The effect of such an agreement is that Poland becomes "an extended arm of the border guards of the Schengen territory" and would be compelled "on issuing a visa or in permitting entry at the external border to scrutinize whether an alien meets the national entry requirements ... of each and every one of the

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48 For those still sitting on the fence it may be instructive to read about Canadian motives for the reception of Hungarian refugees after 1956. Howard Adelman argues that the admittance by Canada of practically as many refugees as by the US (37 000 and 38 000 respectively) "was primarily motivated by a humanitarianism of Virtue". ADELMAN, H.: Humanitarianism and Self-interest: Canadian Refugee Policy and the Hungarian Refugees, in: The New Refugee Hosting Countries: Call for Experience—Space for Innovation (Peter R. BAEHR, and Géza TESSÉNYI eds.), SIM (Netherlands Institute of Human Rights) Special No. 11, Utrecht, 1991, p. 100.

49 The Schengen Agreement and the Schengen Implementation Agreement were concluded by France, Germany and the Benelux countries; see ILM, vol. 30 (1991) p. 68. Italy, Luxembourg, Portugal and Spain adhered later. They include provisions on control at outer frontiers, a common visa policy, carrier's sanctions, responsibility for dealing with requests for asylum and establish the Schengen Information System. Asylum seekers only have one single chance to be recognized. Refusal by any of the states is valid for all the other parties. This system is subject to severe criticism indicating that it will result in effectively preventing asylum seekers from submitting their application and generally limit the possibilities of free travel and movement of non-EC nationals. See e.g. MEIERS, H. at al.: Schengen, Internalization of central chapters of the law on aliens, refugees, privacy, security and the police, V. E. J. TJEENK WILLINK—Kluwer, 1991, and several notes circulated by the Dutch Standing committee of experts on international immigration refugee and criminal law. One of them describes and reproduces the agreement betweenPoland and the Schengen states, see "Readmission agreement between the Schengen States and Poland" undated photocopied note, reproducing the agreement in full in French.

Schengen States".[50] If one adds to this the resolutions adopted on December 1, 1992 in London by the EC ministers responsible for immigration matters on manifestly unfounded applications for asylum and on host third countries, as endorsed by the conclusions of the Edinburgh meeting of the European Council on December 12, then it can clearly be seen what enormous challenges the Western European steps pose. A Schengen–Poland type agreement can be concluded with Hungary as well. If Hungary is compelled to take back everybody who is returned because his or her claim is manifestly unfounded or is not to be processed because the applicant comes from a "host third country" (and Poland, the Czech Republic as well as Hungary would undoubtedly qualify as host third countries) then all the voluntary and forced migrants who have passed through this route to Western Europe would end up returned to one of these countries.

Outlook

So far Hungary has been fairly successful in finding a humane and generous response to the challenges posed by the two asylum seeker waves flooding over her borders. A historic feeling of obligation, the lack of bad experiences with asylum seekers, the wish to demonstrate her place among the asylum granting democratic European states, the desire to assist fleeing members of the Hungarian minority in Romania, Croatia and Serbia, all contributed to the decision to keep the borders open and to grant protection and assistance to more than one hundred and ten thousands persons seeking refuge.

Nevertheless as the available resources were put under increasing strain, most of these motives have lost of their power. Therefore an eventual third wave of the CIS states or greater numbers of asylum seekers from non-European territories will probably face a different kind of reception. The conclusion of agreements with Austria, Romania and Slovenia on the return and readmittance of illegal aliens[51] the intensive participation in the "Berlin process"[52] aimed at the prevention and checking of illegal immigration, the slowly but manifestly spreading intolerance and xenophobia of the Hungarian public and the diminishing chances of asylum seekers to have their refugee status recognized call for a reinforced vigor of the refugee and human rights lawyers. They must strive at resolving the pending legal issues by introducing into the Hungarian statutory law a temporary protected status for the victims of civil and international wars, by strengthening

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50 [Dutch] Standing committee of experts on international immigration refugee and criminal law: "Readmission agreement between the Schengen States and Poland" undated photocopied note, p. 2.

51 The agreement with Austria was signed on October 9, 1992, with Romania on September 1, 1992 and with Slovenia on October 20, 1992. None of them has been made public nor entered into force yet.

52 See the "Final communique of the Ministerial Conference on Measures for Checking Illegal Immigration from and through Central and Eastern Europe", adopted by the competent ministers of Albania, Belgium, Bulgaria, Czechoslovakia, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, the Netherlands, Poland, Portugal, Romania, the Soviet Union, Spain, Switzerland, Ukraine, the United Kingdom, White Russia and Yugoslavia in Berlin on October 31, 1991.

procedural guarantees and extending protection to non-European refugees as well. The costs and benefits of participation in the increasingly restrictive European harmonization process requires careful analysis.[53] This evaluation must take into account that the dilemmas faced by Hungary are not only legal and political, but at the same time and to similar extent moral as well.

53 Useful tools in the analysis may be publications of leading NGOs. See e.g. Amnesty International: Europe: Harmonization of asylum policy, London, November 1992; European Consultation on Refugees and Exiles (ECRE): Fair and Efficient Procedures for Determining Refugee Status, London, October 1990.

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The Law and Its Limits

In our century, there is an increase in the indications pointing to the dysfunctions which result from the *increasing control and influence,* indeed, omnipotence, of the state, as well as to the dangers of a state which generates and reproduces itself in more and more increased dimensions. Pondering about the social factors which are in play in the development of administrative action, the word of Roscoe POUND sounded once like an exclamation: "Even if quite unintended, the majority are moving in the line of administrative absolutism which is a phase of the rising absolutism throughout the world. Ideas of the disappearance of law, namely, that there are no laws but only administrative order; doctrines that there are no such things as rights and that laws are only threats of exercise of state force, rules and principles being nothing but superstition or pious wish [...]; and finally a theory that law is whatever is done officially and so whatever is done officially is law and beyond criticism by lawyers—such is the setting in which the proposals of the majority must be seen". I would only add the words of a sociologist addressed to Marxists with a rather critical tone, claiming that if Marx came amidst us, he would surely study *The State* instead of *The Capital.*

Indeed, in spite of the apparently well-founded development of contemporary social science, till now we have only considered to a rather limited extent to what degree the modern *technological arsenal* at the disposition of the human kind directly resulted in developments which are ordinarily looked upon as purely social a product. Namely, to what extent did the mass production of books, facilitated by the invention of printing, mould the tactics, as well as the outcome of the political struggles, of the Reformation? To what extent did the spreading of trashy, cheap paperback editions, through radiating both dissatisfaction and revolutionary agitation amongst the people, prepare to and assist in the breakthrough provoked by the French Revolution? To what extent did the appearance of bulldozers, as well as of new chemicals (faceless human

makes in themselves), facilitate to transform murder, both individual and of a mass size, into a quasi-industrial enterprise which could be undertaken in almost quasi-industrial proportions, analysed in terms of cost and benefit, as a political action? Or, quite recently, to what extent has the increasing availability of drafting, processing and spreading over messages by the means of type-writing, computerized word-processing, fast printing and mass-copying, as well as through telecommunication, stimulated the bureaucratic machinery to provoke new actions by initiating new courses through administrative measures and resorting to law as a panacea for achieving social reforms?

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In our age, law is both over-used and over-relied upon, as if it were driven by the bewildered passion of gambling. In an apparently uncurbable manner, economic, financial, moreover, cultural efforts try in an ever growing mass to assert themselves through the instrumentality of law. At the same time, one of the consequences is that the law's prestige is tapering away and the ethos of the law's distinctiveness becomes increasingly difficult to recognise. It seems as if a sort of legal magic were given a rebirth. Both politicians and the public at large look upon the legal instrumentality expecting laws to finally untie the knot ever more difficult to untie.

As is known, however, the knot cannot simply be cut. It can only be disentangled. And the job can only be done by disentangling of the threads which have since long been entangled in an increasingly chaotic manner.

Where does this *passion to regulate* come from? It seems to be a phenomenon cropping up in every civilization, in every age. But it can be found exclusively there and then—as the hypertrophy of the memory of past successful interferences—where and when, for some reason, a strong bureaucratic machinery, designed for being activated with considerable uniformity, has previously been established. However, any such hypertrophy could ever be partial and temporary at the most. Unless backed by specific reasons under pathologically shaped conditions, it is finally bound to fall into its own trap and perish. Therefore, as compared to the past, a new situation came about by the development of the *modern state*. For a bureaucratic machinery was established with the claim for omnipotency which, by an almost boundless coverage, realized an increasingly more complete control and interference.

For the modern state, a bureaucratic machinery is set into motion under the auspices of *formal rationalization* as one of its potentials. And as one of its actions, rationalization proceeds on by transforming all human objectives into legal provisions by prescribing, prohibiting or permitting externally observable human behaviours. As one of the consequences, human ambition striving for implementing ideas gets replaced by merely form-conform behaviour.

Formal rationalization was originally built into state action in order that the interference, control and influence it had had to exert were finally centralized. However, the state machinery which proved to be successful in control slowly extended its way

elsewhere and became step by step omnipresent. Thereby a vacuum was brought about around itself. Eventually, it even absorbed other scopes of action increasingly. Finally, its success made its presence the natural component of societal environment. Moreover, as a result of the acceptance of self-asserting conditions and inertia, it even developed our attachment to conceiving and realizing social intentions and desires for change through state machinery activating its law.

Let as take an example to see impacts in both broad contexture and spin-off consequences. In a society with one-party rule encompassing the entirety of social life, the law will necessarily diminish with it prestige and distinctiveness getting lost. Still, just because the law is kept on to be unchangedly recorded in a universal and unpersonal form, frequently also purely political actions are clad in a legal form. In consequence, a paradoxical situation may be brought about: as to its ultimate impact, the *hypertrophy of politics* annihilates the law. Still, all that appears in a form of the *apparent hypertrophy of the law.* It is just these hypertrophic appendages which are mostly sensed by both the public at large and students of law. They may have a variety of forms, ranging from over-reliance upon the law and its handling as a surrogate agent, through the cynical incorporation of the drafter's own doubts into his/her own enactments issued and the institutionalization of planning for social reforms through the mere enactment of laws as an independent branch, self-sustaining and self-fed-back, of the new industry of change, to the tendency of final instrumentalization reducing legal practice, too, to a merely subservient means.

What finally matters is that all this is not any longer a matter of pure fears and phantasm; all that has persisted to be true. Still, disentangling the knot must be started at a point where the knot is being tied, and not where the knot has already been completed. For especially during the closing period of the kind of enlightened absolutism which was imposed upon in the name of "actually existing socialism", legal scholarship was forced into a position of defence from the beginning, trying to explain—for that matter: in vain—that the law is not a panacea, not the exclusive agent of social reform, consequently, it is not its initiating and closing force, either. As if all the roles law has happened fulfilling so far have been equally conceivable, originating from the law's instrumental existence. Though we should know that, actually, all this was the result of a law forced into cripto-roles on the bordering line of getting involved in an abuse.

The stand of legal scholars is defensive also because their discipline, poor in results empirically verifiable and unsuitable for strict formulations, can only diagnose the pathology of practice, with a high degree of probability by the way. Legal sociology is only able to predict which extremities exhaust the threshold of malaise, without being able to formulate notwithstanding either the conditions of normal functioning or its features and characters. For the latter can mostly only be approached through the method of exclusion. It risks to appear as trivial evidence taken from everyday experience.

For that reason, one has to be rather careful by formulating only sketchy indication and exemplification through characterization. As a matter of fact, scholarly knowledge collected so far seems to indicate that in primitive societies, in classical antiquity,

moreover, all times up to the modern age, law was connected to *rites*. The law's connection to rites was not a result of underdevelopment but an issue of the law's distinctiveness. It is the law's social prestige that got expression in this way. Birth; becoming an adult; marriage; death; transactions of a decisive (exceptional) character in life; criminal actions risking of the upsetting of community life—these are the events crying for law as an agent of societal life, which sets up the framework of and conditions the decisive switches in community existence. What else may the law be? First and foremost, a strictly *community affair*. Ever since the struggle in ancient times for recording the law and making it accessible to any, up to the revolutionary changes in our century, the total social process, including mass movements in history, wanted to transform the law into the prime factor of society. And as if all these efforts were crowned by success. As if only *enactments*—together with the authority and legitimation their legal quality extended to them—could provide the *seal of finiteness*. Notwithstanding, in fact it was primarily a *symbolic gesture*. And its conclusion for the state machinery—i.e., that because of a legal enactment, the whole state machinery could be mobilized for guaranteeing its enforcement as a last reserve—could only count as an ephemeral addition compared to the strength of the total social process and the pressure exercised by mass movements and community publicity. Or, what is common of all this is that the *legal* reform is—and can only be—but one component of an overall *social* reform. It just adds to a genuine total motion. It is here that its organic unity with these processes originates from; moreover, that it cannot be disrupted from and become independent of the other components of the same motion. For it proceeds on its own way as its sanctioning power and/or the means shaping its form. In this way, the question of the *limits* of the law is not even raised, for law has no independent role to play. Its destiny is linked to the totality of the social processes concerned, and any (relative) autonomy of the law can only develop within the frame of its instrument role.

How far is it from this if somewhere a system of norms, reflecting an alien (European) intellect and instrumental skill, recorded in books as breaking down the complexity of social reality into a definite series of sharp conceptual classifications, is imposed from above onto the law and order of a community, inherited and preserved as the immemorial tradition of that community? If somewhere a French-typed Civil Code system of laws is replaced by a legal arrangement reflecting Common Law tradition, experimental mentality and construction, built upon a different level and orientation of abstraction, presupposing different sources and skills? Is the construction of law something like the engine of a car (which is reliable in case of the make being changed, too)—only provided that we fix the points which are relevant from the point of view of the vehicle's body and the engine connection?

Well, of course, points of connection (territorial and/or personal sphere of application, etc.) can also be legally defined. However, this does not change the fact that society is not a mechanism utilizing the energy of some added or in-built engine for driving or braking; moreover, in freely developing societies, it has no driver either to put it at the disposition of some outer will as its mechanism. For instance, a legal code formulated

with no regard to local traditions and roots can appear as a work of art by itself. But if it fails to adjust to the motion of society by offering a managing and manageable form to its actual processes, the social corp will throw it out sooner or later, as exemplified by a number of attempts at transplantation, otherwise professionally correct. And, then, we have not yet mentioned pieces of legislation aiming at social reforms, mobilizing people for the practical implementation of some betterment program, reducing society to the best of mere instruments, which, even if prepared by scholars, can at most provoke superficial external conformism, hardly sufficient even for own survival.

Taking into account background values and considerations, the conclusion which differentiates between the uses of the law as a model and as a programme is undoubtedly attractive. Accordingly, the law aimed at offering a model is a series of legally guaranteed possibilities to give a shape to social actions by providing them with advantageous statuses and, thereby, channellizing them in given categories. In opposition, the *law aimed at offering a programme* is the definition of the road solely and exclusively acceptable from a legal point of view. That is, instead of negative limitation, defining what has to be avoided in society (and offering patterns only if the meeting of some special privileges is meant), the programme is intolerantly positive, prescribing what is patterned for and forbidding what is not (putting, thereby, an end to social spontaneity).

Notwithstanding, it is questionable for me whether or not topical problems we used to have to face with in the last period of 'actually existing socialism' in Hungary and elsewhere could be traced back to this alternative, and whether or not the condemnation of them provided a solution for them. Let us take an example from England: Immigration, mixing of populations, aversions by the mastering populace, then, tensions of racial hatred—what is the solution here? It seems obvious to any observer that the tasks to be carried out include the arrangement of citizenship, determination of immigration policy, setting up quotas perhaps, introduction of economic and financial stimulation, socialization to the new situation. But each of the above is only efficient if inserted into a complex social program, spanning over several years or decades. Only one of the components of this, perhaps necessary but certainly not sufficient in itself, can be the one of enacting a law, preceeding prevailing tendencies of the process by providing them a form or standardizing the form already practised.

For obvious reasons, established practice cannot be reversed in a way that pressure groups make a law simply enacted in order that manifestations of racial hatred be sanctioned. Human enactments are unable by themselves to mobilize society to properly co-operate. They are not calibrated to substitute to measures resulting in a meaningful solution. Moreover, the control such enactments can initiate is not even sufficient for supervising their own implementation or establishing an agency efficiently enforcing it. Therefore it may easily happen that, for instance, a burden of initiating a procedure or presenting proof is established, namely a burden eventually intimidating those protected by the law against those violating it. And, considering the law's being obviously doomed to failure from the very beginning, the whole enterprise may finally appear as a factor

encouraging or legitimizing counter-forces as the repudiation of the original aim, even as a kind of mischivous winking in the eye of the unsuspecting citizen.

Therefore I believe that the programme is faulty, albeit not for the reason of its being a programme, but because it is not backed socially. That is, by reducing a genuine social solution to mere law-enactment, the claim of the efforts to find a reforming solution gets stuck *on the plane of mere appearances.*

Even radical revolutionary forces can only assert themselves if they are backed by a spontaneous mass from within the actual social total process. It holds true even if a wave of revolution leads to enacting programs. Anything can be turned to become a program: rights and/or religious doctrines of salvation, as well as the projection of any image of a communistic future into the present. However, any codification of them may only gain a legal meaning in so far as it advances (or sanctions) a social program which is also socially effective and asserted.

This is why I assume that in so far as it is socially backed, *a programmatic law can also be quite an adequate legal manifestation.* However, the smaller its social support is and the more dispersed and antagonistic the forces in play in society are, the greater the pression will be that it is conferred onto the law. Consequently, the more the question of its formulation either as a model or as a program comes into the foreground, too. For law has a chance to exert an influence by the force of its mere enactment only to the extent that it gives priority to socially otherwise desirable and supported alternatives—but it leaves the road open for the free game of social forces, including their option of not resorting to the law, even rejecting it.

And the question of *legal instrumentalism* has not yet been touched upon. This appears in a pure form when there are no genuine social forces behind changes that are desirable otherwise (as a result of the state of social conditions); perhaps the objective is not desirable enough and there may be no considerable force standing behind it either, for it can prove to be pure power-voluntarism manifested on account of a narrow elite approach. Then, finally, only law as a regulating form, destined to bring into operation the monopolized use of compulsion, would be relied upon. In such a situation, eventually, an *industry of changes,* described already in sociology, can in response develop in order to provide a *raison d'être* for the existence, and an excuse for the faulty operation, of the state machinery in question. That is, a series of so-called reforms acts, never thought over and through carefully, never taken seriously, still reiterated regularly again and again (trusting, maybe, in natural human forgetting, in the inexhaustibility of social credit, in the sufficiency of occasional filling up by merely ideological and propagandistic lip-services), will be the surrogate agent of *social* reforms, openly, too. Thus, kinds of sham-reform, in order to provide an excuse from the very start, can incorporate, as they were, the authors' own doubts in their applicability into their textual wording. This is a genuine surrogate action, at the same time an attempt at avoiding the responsibility to be borne for the failure, of any actual change.

Theory is obviously not in a position to set up value standards for the desirable functions of law, preferences as to the forms of regulation and ideal types for the

possible ways of how to institutionalize law. For if it were, it would from the outset be biassed by preconceptions. Eventually, it would even close the path of its own investigation. At the same time, independently of how much we want our description to be objective, we have to acknowledge from the beginning that the limiting points of practice indicate also theoretical boundaries. Consequently, law is able and have too operate between the extreme points of, on the one hand, subservient institutionalization of processes already taking place in society and, on the other, their idealization far from reflecting and even influencing actual processes. Within these limiting points, the law's actual impact is dependent primarily upon social components and correlations which are beyond the reach of the law. Accordingly, the *dilemma of the use of law either as a model or as a programme can only be raised in a meaningful way in the context of the concrete social situation.* This, however, inevitably leads to a paradoxical conclusion, namely, that the *limits of the law* are indeed identical with the *limits of the recipient medium.* In other words and in a paradoxical formulation, the law has nothing but limits, whose dissolution in any direction and on any degree, etc. can only be achieved by the social environment at any location and time. By the way, this formulation is nothing but the restatement of totality approach.

In this respect, totality approach means that even the most topically legal questions are confronted with social facticity. *Within the totality, law is conceived to be an instrumental phenomenon from the very start. While it is established and gets applied as an instrument, it will, however, display and assert its own mediatory values as well.* These values of meditation express the level of socialization society arrived at that time.

I believe that the most universal value of the legal domain (i.e., the most comprehensive one, touching upon the question whether or not legal phenomenon as such is socially a meaningful category) is the law's own prestige. On the one hand, the prestige of law presupposes the law's relative separation, autonomy, particularity and social dignity. On the other, it presupposes the law's social presence, efficacity and role-fulfilment. For all these are needed for that law can develop and survive amidst the day to day pushes of social movement as one of the factors moulding them, fed back into them, getting reformulated through them.

We have thereby reached the point where the question of the limits of law is connected to the ontological problem of legal existence. For, on the one hand, legal phenomenon can only be made socially meaningful through forms of regulation, control and interference which have definite chances to assert themselves through their building in the processes of society. On the other, however, there is a number of ideological and political considerations that may justify that one resorts to the legal instrument also at times when the conditions of its success are missing or the law concerned has not even been genuinely aimed at exerting actual influence. The latter is the case when shaw-reforms are introduced through mere law-enactment or a law is enforced with a merely symbolic purport. No matter what social or political considerations may stand behind such practices, they will surely ruin the fundamental value of law by undermining its chances to ever play an optimum role. For that reason,

the question of the limits of law is not simply a problem of legal technique. As one of the basic components of the prestige of law, at the same time it is *one of the most conspicuous factors of strengthening or annihilating the civilization value of legal phenomenon* as well.[1]

1 For the theoretical context of the paper, cf., among others, from the author: 'Macrosociological theories of law: a survey and appraisal'. III Tidskrift för Raetssociologi [Lund] No. 3-4 (1986), pp. 165-198 and A jog és korlátai: Antony Allott a hatékony jogi cselekvés hatásairól [Law and its limits: Antony Allott on the barriers of an a efficient legal action] (Budapest: Magyar Tudományos Akadémia Szociológiai Intézete 1985) 34 pp. [Elmaradottság és modernizáció: Műhelytanulmányok (Underdevelopment and Modernization: Working Papers)].

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The World Community and the Changing Notions of Universalism and Regionalism

One can witness all over the world dramatic changes in the pressure on the international normative system whose deficiencies have recently been manifestedly revealed. The core of the problem lies not only in the inability of the system's norms to keep pace with the changing realities but also in the unpredictable nature and consequences of these changes. Suffice it to say that one can hardly find an analyst or politician who could have, in due time, predicted the magnitude and swiftness of the changes in Eastern Europe. It is not possible either to predict the real consequences of other imminent problems (technological development, environmental hazards, energy issues, etc.) which beset the modern world. How, and to what extent, modern international law can react to these changes is one of the most challenging questions. The challenge is so serious that many of its institutions and principles need some reconsideration with the aim of finding perspective solutions.

There are also other kinds of strains within the international normative system the sources of which are related to recent quantitative and qualitative changes in the status and perception of the international community in general. There is no need for lengthy arguments in support of those views which have been trying to prove the existence of a universal international community. It has been convincingly shown by others that in modern times a new international society has emerged in the sense that it covers the whole world.[1] As for the question of origin, ways and methods of establishing this universal society (for example its Eurocentric nature) falls outside the task of this

1 See, for example: The expansion of international society. Ed. BULL, Hedley and WATSON, Adam. Clarendon Press. Oxford, 1984. pp. 117-126.

study. It seems to be more important to consider the characteristics and the evolving nature of this society, the possibilities of its structure and institutions to meet changed circumstances and new challenges.

The increase in the number of the main actors of this community is one of the most vivid manifestations of the quantitative changes. Since World War II more than 100 new nation-states have appeared on the international scene. Independent and sovereign nation-states are still growing in number. Thus, for example, one can witness a threefold increase in the number of UN member-states.[2] As a result of this rapid increase in the number of nation-states, the modern community of states has become extremely heterogeneous. The new states which entered the community have different political systems, cultural backgrounds and levels of development. This heterogenity of the main actors themselves appears as a very serious challenge to the international normative system. The basic problem is how to establish common standards, universally valid principles for each of the participants; how to overcome the contradiction between the need to use universally accepted standards and the above-mentioned heterogenity. From this follows that the term "universal international society", in relation to the main actors, means first of all club-membership, that is acceptance of every state as a member of the "club". The community of states itself has never been a universal one. Neither in the time when this community was exclusively perceived as European, nor later when non-European states were admitted to the so-called European club of states. This community has always consisted of diverse political, cultural and moral systems and sub-systems, and it would be totally wrong to assume that this plurality in the foreseeable future can be replaced by a community based on common culture and morals and unified political systems. Due to the intense interaction between the community members there is, of course, some sort of universalization, system-wide interpenetration, but the differences still remain.

When examining the modern international community one has to take into consideration other changes as well. These changes are of qualitative nature, the consequences of which are even more important than those of the changes in the system of prime actors. The international community has changed structurally; alongside its prime actors new subjects have entered the international stage. The most important event is the appearance of international organizations on this scene, and their acceptance as separate subjects of the international normative system. Their appearance was a very important step toward the erosion of the traditionally perceived international community being considered as a community of nation-states. International organizations have undercut the aspiration of nation-states for exclusiveness and omnipotency in the international system, and, notwithstanding the fact that there is still a tendency

2 As it is known, originally there were 51 states which participated in the creation of the UN. But in 1990 its membership totaled 170 nation-states.

to diminish their role and independent nature,[3] they are real players in the game with independent will and action.

One can witness also the widening of the modern international society and its normative system in another respect, namely, this society, beginning from the midtwentieth century, has slowly started to treat individuals as quasi "members of the club", having their own rights and interests separate from those of nation-states and international organization. The recognition of individuals as subjects of the international society, despite the very restrained and cautious steps taken in this direction, is another important change of a qualitative nature. The most vivid example of this trend is the notion of international human rights which has already started a process wherein individuals are entitled to be treated as direct participants of the international community. The legal personality of individuals at the level of the international community has become a reality. This has been recognized even by those who for decades had been denying the possibility of considering individuals as subjects of the international normative system.[4]

We are at the very beginning of the process of universal recognition of individuals as independent members and subjects of the international community, hence it is difficult to make long-term predictions as to its real consequences. But one thing seems to be quite obvious: this is a process which weakens the traditionally perceived international system based on nation-states, and undercuts the dangerous and selfish claims of states to be the sole and exclusive agents destined to manage world affairs.

The present international normative system is being challenged not only by membership-related changes but also by value- and status-related ones. The role of values which formerly were of utmost importance in determining the actual weight of every nation-state in the community (military might, population etc.) in the last decades has perceptibly lost its significance. Factors of another nature, such as economic capacity, levels of technical and technological development, stock of needed energy resources, have become first priority values. This shift among the values has a rather serious impact on the status of some states. Thus, for example, the economic backwardness and technological underdevelopment of the Soviet state has radically reduced its global interventionary capacity. Notwithstanding its enormous military might, it is permanently loosing its statute as a super-power, and it is quite evident that if this trend continues the CIS sooner or later will be treated as a third-rank power. But even accepting the assumption that in the foreseeable future the two superpowers (USA, CIS) retain their status, it is unlikely that they can cope with, or seriously influence, modern world problems. These problems are of a planetary nature which

3 It is customary to describe international organizations as derivative subjects, as actors who do not have their own will, independent from the participating nation-states' will.

4 See for example, ZAKHAROVA, N. V.: The individual as a subject of international law (in Russian).—Sovetskoye Gosudarstvo i Pravo, 1989. No. 11, pp. 112-118.

question the very existence of life on our globe,[5] and their solution needs world-wide actions based on a unified theory of global development.[6]

In light of these new challenges, the reevaluation of the role of the existing international normative system and its institutions is not the domain of utopian designs about a brighter future but a pressing imperative having direct relevance to human survival. This study does not contend to give precise answers to all of these problems facing the international legal system. A more modest aim is being persued, namely, to point out some of the disjunctions between exiting rules, institutions and reality, paying special attention to the notions of universalism and regionalism, and to the possible future trends of their correlation in a time when, due to increasing planetary interdependence, national barriers are breaking down, and nation-system has been considerably weakened.

In examining the notions of universalism and regionalism one has to face a lot of problems, including definitional issues and problems of a substantial character. These two notions as alternative ways of approaching and solving international issues have for a long time been on the agenda both in scholarly debates and actual practices of inter-state co-operation. However, the search for a precise definition of these notions is a vain effort; neither universalism nor regionalism has a unanimously accepted definition. This is not to say, of course, that there has been no attempt to clarify their meaning, or at least to establish an appropriate criteria for their conceptual clarification.[7] But most of the arguments so far advanced, that is the pros and cons of regionalism and universalism, belong to the field of excessive theorizing and generalizing. The advocates of both concepts concentrate on proving the feasibility of their choice in world-order building, trying to explain why preference should be given to one of the approaches. Regionalists usually claim that the co-operation of states within a specific region is the most effective one, since the homogenity of political systems, economic interests, cultural traditions and other common values constitute a natural basis for more closer relations between the participating states. They also warn universalists, on account that the latter fail to take into consideration the heterogenity of the world community, that the assumption of universalism is a premature idea. Even those regionalists who admit the deficiencies of the present world order based on

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5 On the so-called global or plantary problems see: Our common future. World commission on Environment and Development. Oxford University Press, 1987.

6 On the need for a united global theory for solving modern life-threatening problems see: Van WEIGEL, B.: A united theory of global development. Westrport-Praeger, New Work, London, 1989.

7 See for example: YALEM, R. J.: Regionalism and world order. University of Southern California. Public Affairs Press, Washington, 1965; Regionalisme et universalisme dans le droit international contemporain. Éditions A. Pedone, Paris, 1977; PENTLAND, Ch.: The regionalization of world politics.—International Journal, 1975. No. 4, pp. 599-630; Encyclopedia of International Law, Vol. V. North-Holland, 1983; DOLZER, R.: Universalism and regionalism.—In: The spirit of Uppsala. Joint UNITAR—Uppsala University seminar on international law and organization of a new world order. Walter de Gruyfer, Berlin-New York, 1984, pp. 513-533.

nation-states on regional groupings and recognize the need for the establishment of a universal/global world community, insist that such a community can be developed only through regionalism, regional experience of co-operation. On the other hand, universalists emphasizing the interdependency of nations and the magnitude of tasks facing mankind, point out the inadequacy of regional efforts, the impossibility of precise definition of regions, and the dangers of regionalization. According to them, regionalism provides the basis for rivalries and competition on a large-scale, prepares the path toward regional autarky and regional nationalism, leading to possibilities of very serious confrontations in the world. They firmly believe that only universalism can prevent the world from conflicts of regions and insist that priority should be given to universal interests and values and to a global sense of community.[8]

The relation between regionalism and universalism has not only academic but practical relevance to today's world order. These two notions have acquired an institutionalized form of recognition, hence, for the purpose of further comments, it seems necessary to examine at least briefly the related normative solutions.

The notion of universalism is actually a product of "one-worldism" ideas which started to flourish in the twentieth century, after the first practical steps were taken with the aim of creating world-wide security systems. The League of Nations was the first attempt to institutionalize universalism, that is to create an absolutely new type of inter-state system based on the solving of international issues at the world level (and not just at the level of some of its regions) by involving every nation in the related decision-making. Though the League of Nations had been created with the aim of acting throughout the entire world as a supreme co-ordinating agent of world affairs, this universalistic aim, due to historical circumstances and organizational (Covenant-related) deficiencies, has not materialized. As it is known, the universalism of the League was not a complete one even at the membership level. Suffice it to mention the controversial attitude toward the League by the two major powers, i.e. the US and the Soviet Union. The United States never applied for membership, and the Soviet Union, after a short period of co-operation, was ousted by its members. Here it is necessary to point also out the fact that the controversy over universalism and regionalism at the time of the League's activity did not reach such magnitude as it has today. At that time the forces favoring regionalism were not strong enough for institutionalization of regional claims and interests in the form of regional agencies. The conflict between regionalism and universalism occurred at a later time, when regional identity acquired institutional forms. This happened at the San Francisco conference where, after the experience of another devastating war, the representatives of the nations of the world sat down to formulate the Charter of the United Nations, the second universal

8 On the claims advanced in support of the supremacy of regionalism over universalism and vica versa see: BENNETT, A. L.: International organizations. Principles and issues. New Jersey, 1984. pp. 348-349.

organization. Owing to the pressure, of the mainly Latin American states,[9] the framers of the Charter could not by-pass regional interests, and though it basically favours universalism among its provisions, there are some which relate to regional interests (see Articles 52-54).

The system of world order created by the UN Charter is actually the most serious step taken with the aim of institutionalizing real universalism, notwithstanding the above-mentioned fact that regionalism has also acquired some sort of legitimization within its provisions. The war between universalists and regionalists has been won for the time being by the former. On the supremacy of universalism over regionalism one can find quite clear indications in the Charter's provision. Article 1 (4) explicitly underscores that for the attainment of the purposes of the Charter the UN acts as "centre for harmonizing the actions of nations". In Article 2 (6) of the Charter the organization has been empowered to enforce basic principles of the Charter even in relation to non-member states, when such enforcement is needed for the maintenance of international peace and security. However, the most clear manifestation of charter-centered universalism can be found in Article 103 which states that "in the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". These provisions clearly demonstrate that the framers of the Charter had in mind a world organization based on universalism, and on the universal applicability of the Charter-based principles.

This postulate has also been reinforced in the limited Charter provisions for regional arrangements, which subordinate regional interests to universal ones. These provisions can be found in chapter VIII which lists the basic principles of regional co-operation. They are the following:

a) the creation and existence of regional arrangements or agencies dealing with matters of peace and security is not a violation of the Charter, as long as their activities are consistent with the purposes and principles of the United Nations (Article 52/1);

b) participants of such regional groupings are encouraged to settle peacefully local disputes through regional agencies (Article 52/2-3); however, this encouragement in no way should impair the related rights of the Security Council (Article 52/4);

c) regional agencies with the exception of action against enemy states resulting from World War II, are not entitled to enforcement action without the authorization of the Security Council (Article 53/1);

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9 Apart from Latin American states there were also other advocates of regionalism. For example, the Arab states and even Great Britain provided some support for regional claims. As we know, Winston Churchill favored a world order based on regional councils (European Council, Asian Council, Western Hemisphere Council). On his proposals see in more detail, LUARD, E.: A history of the United Nations. Vol. I. Macmillan, 1982. pp. 20-22.

d) the Security Council shall be kept fully informed of activities undertaken or contemplated by regional agencies for the maintenance of international peace and security (Article 54).

The content of the above-mentioned provisions aim clearly at securing the supremacy of universalism over regionalism in the case of conflict between the jurisdiction of a regional agency and the United Nations. Actually it is a compromise solution on the compatibility of universalism and regionalism.

If one takes a closer look, however, as to how these two principles of order-building were put into operation, a rather disappointing and, to some extent unpredictable, evolution can be discerned.

The universalism declared by the Charter has never materialized. The promising perspective of forging a real universal community has disappeared under the pressures of harsh realities. The failure of the attempt has different causes, some of which are in direct connection with the concept of the Charter itself, and others have nothing to do with these inherent obstacles. The basic idea of the Charter was, first of all, loyalty of the participants to the entire international community. In other words, its founders designed it with the assumption that there would be a general solidarity among its members in maintaining the established order. But this solidarity from the very beginning was destined to fall because, in the conception of the Charter, many principles of the past—the content of which objectively run counter of such solidarity—has not been uprooted. The order established was still an order where the observance of community interest depended upon the discretionary will of the sovereign masters. The truth is that the importance of national self-interest based on such notions as sovereignty and non-interference in domestic affairs, received not only re-afirmation but was actually strengthened.

Naturally it would be wrong to attribute the failures in order-building based or universalism only to these aspects. Other non-charter related factors have also contributed to this process. Due to the unforeseen intensity of ideological confrontation in the forties and fifties, universal institutions were in fact paralysed. And hence it is not surprising that the dissatisfaction with universal institutions has prompted the main actors of the international community to seek other forms of co-operation. States reacted very quickly to this inadequacy and made considerable efforts to channel their relations into regional forms of co-operation. One can witness at this time an intensive regionalization of the world. The above-mentioned disillusion over universalism and the positive results in the activities of some regional organizations has only strengthened the strive toward regionalism. Thus, for example, in the middle of the 1970s, out of the 300 existing intergovernmental organizations two-thirds belonged to regional ones.[10]

10 See, supra note 7, PENTLAND, Ch.: Op. cit. p. 605

This regionalization of the world has rather particular features because in practice the principles of the UN Charter relating to regionalism have been eroded. The requirements about the supremacy of universalism and on the control of regional agencies by the Security Council has been undermined by the states through the discretionary interpretation of the Charter's provisions. On the one hand, for the purpose of avoiding the control of regional arrangements by the Security Council, states have managed to find escape clauses even in the provisions of the Charter directly related to regionalism. Through the interpretation of such notions as "enforcement action", "local dispute", the obligation "to keep fully informed" of the Security Council they often successfully by-passed the competence of the universal agency. On the other hand, states in their practice have tried to create such regional agencies which are not subordinate to the Charter's provisions on regional arrangements. For this purpose they have made use of Article 51 dealing with the right of collective self-defense served as an escape clause for creating regional agencies falling outside the Charter provisions on regionalism. Such regional security systems have been rather often correctly cited as dangers to peace and security rather than as agents for its attainment.

In connection with regionalism another factor should also be mentioned which further confused the issue of the correlation between universalism and regionalism. As it is known, the UN Charter contains provisions only on regional agencies dealing with questions of peace and security. However, the process of regionalization has moved in a quite unexpected direction, namely, in the direction of multifunctional regional organizations, the creation of which peace and security issues played a secondary role, or were even discarded all together. Other motives, such as economic, political, ideological, were the main force behind their creation. Suffice it to mention the economic regionalism (EEC) and the political-cultural regionalism (Council of Europe) in Western Europe and the burgeoning regionalism in the non-Western parts of the world. In the UN Charter this kind of regionalization has not been foreseen and, as a consequence, the universal organization has had to face new challenges. With the aim of meeting these challenges the UN reacted rather quickly; within its system a network of regional commissions has been created. The main purpose of these commissions has been to establish contacts and to provide guidance for multifunctional regional organizations.[11] The examination of the activities of these commissions is not the task of this study, but one general remark seems necessary. Taking into account the tremendous changes in the world and the experiences of some of those regional organizations which have established co-operational links with the UN, the relevant institutional forms of co-operation seem to be outdated.

The problems have their roots not in the UN efforts but rather in the nature of these regional organizations. The original purpose leading to the creation of some

11 See in more deatail, Regionalism and the United Nations. Ed. by B. ANDEMICAEL. UNITAR Oceana Publications–Sijthoff and Noordhoff, 1979.

regional groupings was basically political or ideological. Lessons of history show that such regional units are rather shaky ones, because there can be no real regional integration based simply on these considerations. The requirement for the maintenance of political and ideological unity put tremendous burdens upon such units and the real benefits of the participants are insignificant.

An organic regional entity should be a cost-effective functional unit where the rewards to the participants supersede the burdens of participation. The mere grouping together of states on the basis of ideology has little to do with real regionalism. The fate of the so-called socialist regionalism (CMEA) based primarily on ideological motives is a good example in this respect. The participating states failed to make operational the main, vague ideological principles of the grouping, namely, socialist internationalism and mutual assistance. In fact, due to the forcible nature of regional co-operation, in this part of the world there has never been real regionalism; the interest of the region as a whole have not been expressed and protected through the established institutions. The same ineffectiveness can be noticed in those regional systems where the motives of ideology prevail. For example the Arab League or the OAU based on negative ideological goals (the fighting of colonialism in the form of hostility against the Western world) have had few achievements. Their activity confirms that a united hostility against an outside force is insufficient for the creation of real regional unity.

There can be no clear-cut answer neither about the fate, nor about the main criteria to be applied in delineating regions in the future. It is likely that many existing regional systems would not withstand the burden of ineffectiveness, that, alongside the role of such traditional criteria as cultural homogenity, social and political unity, economic interdependence, geographical proximity, other new considerations and motives, might appear on the scene. Among these new considerations the positive motives of the participants would probably be of great importance. But whatever would be the motives for regional unity, the creation and function of regional groupings simply on the basis of regional interests and purposes poses a real danger. Considering the increasing interdependence in the modern world, pure regionalism might have unpredictable consequences. In our time it is a dangerous simplification to regard regionalism as good per se, and nourish hopes that through regional co-operation world problems can be solved in a more manageble way. Many of these problems are global ones, hence, for their solution, global efforts and intensive extra-regional co-operation is needed. Otherwise, as it has been pointed out quite correctly, "it is not an imaginary danger that regional organizations would develop into a sort of 'citadelles d'exclusivism' and might result in disintegration of international law into mutually alienated regional legal orders."[12]

12 See, Essays on the development of the international legal order. Sijthoff and Noordhoff, Alphen aan den Rijn, 1980. p. 218.

The reality of the above-mentioned interdependency has not yet been adequately reflected in the regional systems. If one examines carefully the statutory instruments of the existing regional systems, this requirement is mentioned only in a few of them. Regional solidarity, regional common interest and values are being considered as primary goals of the related co-operation.[13] In some of the regional instruments the participating states try to soften this "regional egoism" by making references to the "Consistency with the spirit of the UN Charter"; or confirmation of their faith in the principles of the UN Charter". But it seems to be rather a polite gesture toward universalism than a real commitment to it.

There is some hope, of course, that states sooner or later will arrive to a conclusion on the limits of regional solidarity and would raise the issue of solidarity at the global level. This kind of approach has been clearly expressed in the Charter of Paris, the participants of which stated: "Aware of the dire needs of a great part of the world, we commit ourselves to solidarity with all other countries ... we stand ready to join with any and all states in common efforts to protect and advance the community of fundamental human values".[14]

This kind of thinking has to be not only reflected among the purposes of all regional organizations but also transformed into the practice of their activities. With this in mind there is an urgent need to reconsider the relation between universalism and regionalism, or at least to specify the limits of their possible compatibility. There should be a limit up to which the extension of regionalism is a possible and desirable tendency but beyond which it has to be considered as a real danger to the international community. This can be done by taking into account political, moral, economic, legal and other realities of the changing world, and first of all those novel factors which imperil the very existence of mankind. It is evident that in light of those modern threats which do not respect boundaries and sovereignty and question the continuance of the human race, the need for a world order where global human interests are central is not simply a demand of ivory-tower theorists. It should be clear to everyone that civilization has reached a stage of development where the morality of survival is the most pressing issue. This morality must override national or regional interest and standards. The priority of these interests can be secured by strengthening universalism. The notion itself and its institutions should receive top priority attention and unrestrained support.

For the realization of a real universalistic approach it seems necessary to reconsider the existing standards and establish new ones of international law; to bestow new powers upon universal agencies, and, where needed, to create new institutions.

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13 A very strong accentuation of regional solidarity and interests can be found for example in the preamble of many Latin American and Asian regional units. The related documents see, Instruments of economic integration in Latin America and in the Caribbean. Oceana Publications, Dobbs Ferry, New York, 1975, vol. I; Basic documents of Asian regional organizations. Ed. by M. HAAS. Vol. VI. Oceana Publications, Dobbs Ferry, New York, 1977.

14 Charter of Paris for a New Europe, 16 November 1990. Section: The CSCE and the world.

The reconsideration of at least some of the existing standards should have the aim of weakening the traditional claim of states to be the sole judge of their own affairs. Today many of the so-called "own affairs" are no longer separable from the international ones, that is from the affairs of others. In the era of total interdependence where events and situations anywhere concern everybody, the idea about the existence of free, independent and equal states is an illusion. Hence those standards which support this idea—first of all sovereignty and non-interference into domestic affairs, only support this illusion. States are still very reluctant to admit this fact and are not ready to accept the idea of the necessity of limiting their sovereignty; they consider the principle of non-interference as a protecting shield behind which their freedom of action can be justified.

One has to be aware, of course, that these principles belong to the fundamental norms of the inter-state system, that they make up the cornerstones of state actions. Hence states consider any suggestions about the modification of the content of these principles as a direct attempt to dethrone them from their central position within this system. However, in reality, this is not the case; nobody wants to question the necessity of the state at the present stage of development. Those who raise these issues are simply aware of the disjunction between the established principles and reality. It is short-minded to behave as if nothing has happened since Westphalia and treat these principles in their original context. Modern societies are facing new problems which profoundly affect both national and international life. Economic, social and scientific advances make a mockery of the notion of territorial impermeability. Many forms of activities carried out at the national level have a direct effect upon other nations. For example, such problems as management of natural resources, protection of the environment, population policy, introduction of new technologies, at first blush may appear as issues belonging exclusively to the domain of domestic affairs. But it is an impermissible naivety to think that the handling of these problems has no impact at all upon other nations. The wasteful management of natural resources, ruthless destruction of the environment in a specific country might adversely affect a neighbouring country, or in some cases even a region. Such possible dangers dictate the need to limit the freedom of action of states based on sovereignty and non-interference.[15]

For the limitation of this freedom it is necessary to institutionalize, in a binding form, the notion of solidarity. The requirement for solidarity on the global level is being dictated by new situations and problems affecting the whole international community. Therefore solidarity has to be treated as a legally binding duty of individual member states, and groups of states, to respect the interests of the global international community.

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15 The need for limiting this freedom of action is clearly expressed in the Draft Articles on international liability for injurious consequences arising out of acts not prohibited by international law (1989, Article 6): "The sovereign freedom of states to carry out or permit human activities in their territory or in other places under there jurisdiction or control must be compatible with the protection of the rights emanating from the sovereignty of other states." (See, 1989. UN Doc. A/CN. 4./423.)

This duty has already received some recognition in existing international instruments. But unfortunately this community duty and the underlying requirement of global solidarity exists only in the form of a moral obligation.[16] This emerging feeling of solidarity in the international community should be formulated in the near future in the form of precise and operational legal obligations.

As for new institutions and reforms, on the one hand, there is an urgent need to strengthen the existing universal institutions. Due to the changing political and military environment, especially in the relations between East and West, there are some hopeful signs that states would be more willing to co-operate within the UN framework. They are slowly realizing that the international community as such should have the capacity to force its individual members in matters of universal concern. In order to avoid, as far as possible, direct forcible measures against an "unrully member" it is desirable to improve the operation of the international dispute settlement machinery. The wide acceptance of the compulsory jurisdiction of the International Court of Justice is the most urgent task in this respect. On the other hand, the existing universal institutions cannot cope with some of the arising problems. Thus, for example, for the management of the global commons and the practical enforcement of the "common heritage of mankind principle,[17] the establishment of new universal institutions seems inevitable. The same applies to another burning issue, namely the international protection of the environment. Without the creation of an international environmental authority and an international environmental court[18] this problem may run out of control in the very near future.

16 See for example Preamble (sec. 5) of the UN Declaration on Social Progress and Development (1969), Article 12 of the Rights of Peoples (Algiers, 1976), Article 27 of the African Charter on Human Rights (1981) which mentions also the duty toward the "international community", Article 31 of the Charter of Economic Rights and Duties of States (1974).

17 On the notion and practical problems of its enforcement see NAGY, B.: Az emberiség közös örökségének elve: kísérlet doktrina építésére (manuscript).

18 See, Per un tribunale internationale dell'ambiente. Ed. Amedeo POTIGLIONE. Giuffré Editors, Milan, 1990.

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Universalism vs. Regionalism—Ad Hoc Chambers of the International Court of Justice[1]

For centuries there have been various proposals to create some sort of an international tribunal for the settlement of disputes between States. Some of the drafts envisioned the establishment of special courts to decide particular categories of cases, while others—combined with certain federative concepts—articulated the need to form a court with general jurisdiction for the most diverse groups of cases.[2]

The authors of plans for the latter found it natural for the proposed tribunal to introduce some form of internal distribution of work similar to that done in national court systems, as they thought or hoped that such a court would deal with very different categories of international disputes. However, the method of distribution of work within courts was addressed by only a fraction of the proposals, which may be explained by the fact that their frames gave little attention to questions relating to the daily workings of courts and that most of them confined themselves to outlining the main features of the forum they envisioned. The most detailed conception about the distribution of work within the proposed international court is perhaps associated with the name of Kamarowsky, a one-time professor of Moscow University, who suggested in his book that the court should consist of four sections, viz. a Division on Diplomacy, a Division on War and Maritime, a Division on Private International Law, and a Division on International Social Rights.[3]

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1 National paper prepared for the 13th Congress on International Comparative Law.

2 Cf. REVON, M.: L'arbitrage international (Son passé—Son présent—Son avenir), Paris, 1892. pp. 352-368.

3 See KAMAROWSKY, L.: Le Tribunal International. A., Durand et Pedone-Lauriel, 1887. pp. 50-507.

The distribution of work within the future court was also a subject of subsequent international negotiations about the establishment of a permanent international tribunal. This question was likewise covered by the Convention for the Pacific Settlement of International Disputes, adopted at the Second Hague Peace Conference of 1907, which was a landmark in the development of international law, and by the draft relating to the organization of a *court de justice arbitrale* as outlined in the form of *voeu* at that same conference.[4]

During the discussion in the Committee of Lawyers, which elaborated the Statute of the Permanent Court of International Justice in 1920, plans were presented for the establishment of chambers specifically for the distribution of work within the Court.[5] According to the report on the deliberations of the Committee of Lawyers, which was prepared by Lapradelle and submitted to the Council of the League of Nations, the need was expressed during the discussions to empower the Court, in furtherance of international justice, to consider cases in chambers of five judges and also to reduce the number of judges from eleven to five in particular cases for the speedy dispatch of business and chiefly for reasons of economy.[6] Apart from this, however, the report virtually rejected the possibility for cases to be determined by chambers of judges, claiming that the related proposals would, if adopted, break the unity of the Court and that it was accepted only in international arbitration for the parties to increase or to decrease, as they wished, the number of judges sitting in a chamber. The report stated that, with a view to the speedy dispatch of business, the Court was empowered to form, at the request of the parties, "a chamber of three judges" to hear and determine cases by summary procedure. However, such procedure would consist only of a written part, as was provided for in Art. 30 of the Convention on the Pacific Settlement of International Disputes adopted at the Hague Peace Conference of 1907.[7]

Nevertheless, the views in favour of chambers ultimately prevailed and the Statute of the Permanent Court of International Justice allowed, in effect, two arrangements

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4 Cf. draft articles 6 and 18. Deuxième Conference de la Paix. Actes et documents. La Haye, Martinus Nijhoff, 1908. Vol. I. pp. 703-705.

5 See Baron Descamps'relevant proposal "Pour l'expédition des affaires, le Tribunal permanent de justice international se répartira conformément à un réglement d'ordre intérieur, dans les offices suivants:

1. une primère Chambre dite des vacations ordinaires de cinq juges effectifs avec trois suppléants;

2. une seconde Chambre dite des procédures sommaires composée de trois juges et de deux suppléants et à laquelle pourra être déférée en outre les parties estiméront qu'une jurisdiction de trois juges est suffisante;

3. un juge unique avec un suppléant, compétent pour les cas ou les parties, à raison de la nature de l'affaire, estiméront pouvoir lui soumettre de préference leurs litiges". Cour Permanente de Justice Internationale, Comité Consultatif de Juristes. Procès-Verbaux des Séances du Comité, La Haye, 1920. p. 49. Loder of the Netherlands argued for the formation of chambers by saying: "Une Cour composée d'un nombre restreint de juges travaille mieux qu'un tribunal nombreux; les discussions sont plus serrées et les membres ont un sentiment plus net de leur responsabilité", Ibid. p. 172.

6 Ibid. p. 719.

7 Ibid.

for the distribution of work in the form of chambers.[8] On the one hand, by virtue of Arts. 26 and 27 of the Statute, the Court may, at the request of the parties, appoint one or more special chambers, composed of five judges, and to be elected three years, for dealing with particular categories of cases, such as cases relating to transit and communications and labour cases.[9] On the other hand, the Court had to form annually—and this was the second arrangement under Art. 29 of the Statute,—a so-called chamber of summary procedure, composed of three judges, for considering any category of disputes.[10] For that matter, in the composition of the chambers it should be remembered that Art. 9 of the Statute states that the whole body should represent the main forms of civilization and the principal legal systems of the world. This provision was obviously included in the Statute in order to meet the concerns expressed by the Committee of Lawyers in 1920 that the decisions in chambers would break the unity of the Court.

During the more than two decades of existence of the Permanent Court of International Justice, the provisions of the Statute concerning the chambers remained a dead letter for the most part because, although chambers of summary procedure were regularly appointed, summary procedure was applied only to a single case involving a dispute between Bulgaria and Turkey about the Peace Treaty of Neuilly in the 1920s and the interpretation of the judgement given by the Court.[11]

After World War Two the provisions of the Statute of the International Court of Justice relating to chambers were doubtless influenced by the basically negative "experience" of the Permanent Court of International Justice in this respect. It is not an accident that the discussions about the provisions concerning chambers within the Court were rather short and, as mentioned by Shabtai Rosenne, the rapporteur of the item declared that the provisions on chambers were superfluous. Nevertheless, the participants in the discussions found it necessary to empower the Court to form, as it may deem fit, chambers for dealing with particular categories of cases or to form, at

8 Cf. HUDSON, M.: The Permanent Court of International Justice 1920-1942. Arno Press, New York, 1972. pp. 345-348.

9 Under the pertinent rules, two deputy judges had to be elected to these chambers and four technical assessors had to be appointed, without the right to vote, in those for labour cases. After 1922, chambers for labour cases and cases relating to transit and communications were appointed regularly, but no case was brought before them.

10 In 1936 the number of judges to be elected to chambers of summary procedure was increased to five, thereby opening a possibility for the parties to appoint judges *ad hoc*, as it was thought that States had to recourse to chambers of summary procedure because they were not entitled to choose *ad hoc* judges. Cf. GUYOMAR, G.: Commentaire du Réglement de la Cour Internationale de Justice. Paris, Editions A. Pedone, 1973. p. 98; and HUDSON: op. cit., p. 317.

11 It should be noted that the possibility was also suggested for the case of Serb loans (1928) to be determined by a chamber of summary procedure, but the relevant plan was rejected by the Serb Government pleading the importance of the case. Cf. HUDSON: op. cit., p. 347.

the request of the parties, a special chamber to decide a particular dispute.[12] For that matter, during the negotiations drafting the Statute, the idea arose of establishing regional chambers within the Court, but this was not accepted.[13] Finally, with regard to the question of chambers, it was decided that the new Statute retained, with some minor modifications, the provisions of the old Statute on special chambers, but it introduced the institution of *ad hoc* chambers, empowering the Court to form, at the request of the parties, such chambers for dealing with particular cases. Against this background, the Court may, under the new Statute, constitute essentially three types of chambers.[14]

(a) Article 26 also makes mention of special chambers but, unlike the earlier provisions, it leaves it to the Court to appoint them, the new Statute failing to specify various categories of special chambers and enumerating certain cases like labour cases and cases relating to transit and communications. Furthermore, the Statute does not determine the number of judges sitting in chambers, but states only that chambers may be composed of three or more judges. Such chambers have not yet been appointed by the Court.

(b) As has been mentioned earlier, so-called *ad hoc* chambers, to which the Statute of the Permanent Court of International Justice made no reference, may also be formed under the new Statute. In this regard, Art. 26, para. 2 provides that "the Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties".

(c) Lastly, mention may be made of chambers of summary procedure as the third type provided for in Art. 29 of the new Statute reading: "With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of five judges which, at the request of the parties, may hear and determine cases by summary procedure".

The provisions of the new Statute on chambers reveal two more differences of importance from the relevant provisions of the Statute of the Permanent Court of International Justice. Art. 27 of the new Statute states in a separate provision that "a judgement given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court". This sentence is construed by the American Stephen M. Schwebel as being meant to make it clear that judgements delivered by a chamber cannot be appealed before the full court.[15] Another difference between the two Statutes lies in Art. 9 of the new Statute stating that "At every election the electors

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12 Cf. SHABTAI, R.: The Law and Practice of the International Court. A. W. Sijthoff, Leyden, 1965, p. 201.

13 Cf. GUYOMAR: Op. cit., p. 102.

14 Cf. OSTRIHANSKY, R.: Chambers of the International Court of Justice, in: International and Comparative Law Quarterly, 1988. pp. 31-36.

15 See SCHWEBEL, S. M.: Ad Hoc Chambers of the International Court of Justice, in: American Journal of International Law, 1987. p. 833.

shall bear in mind ... that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured".

During the two decades or so following the establishment of the International Court of Justice the question of distribution of work within the Court was not raised, to our knowledge, in relation either to some kind of specialization of judges or to reduction of their workload, for the Court annually took up as little as two or three contentious cases or requests for advisory opinions, which presented no real problem for the members of the Court to cope with. In point of fact the whole matter did not return to prominence until the late 1960s and the early 1970s, and even then the underlying reason was not any overload of work, but precisely the opposite as the Court was hardly seized of any case at the time, and in professional circles there was much talk about ways and means to increase the role of the International Court of Justice in the peaceful settlement of disputes and, first and foremost, to pull the Court out of its crisis. "Revival" of the chambers was seen by many as a possible way out of the crisis of those years. One of the pertinent proposals was put forward by Sir Robert Jennings at an international conference held at Heidelberg on judicial settlement of international disputes. The prominent British jurist was of the view that some system of chambers of the International Court of Justice should deal with lesser cases of first instance and that their judgement would be reviewed by the full Court. As is stated by Jennings himself, this arrangement is based on the machinery of the Human Rights Committee and the European Court of Human Rights, the substance of which lies in a process of conciliation, investigation and amicable suggestion, with a possibility of appeal to the Court upon points of law, not abstract, but related to the dispute in hand.[16] Jenning's proposal found no echo, however, most probably because in interstate relations it is rather difficult to decide which matter is of importance or of lesser importance. Moreover, under the European system of human rights protection, it appears fully justifiable for the Committee to act as a forum of first instance, since that institution serves as a sort of "filter" before cases can be referred to the European Court of Human Rights. However, in the case of the International Court of Justice, there is no real need for such a preliminary filter, chiefly because the Court is not open to individuals. Otherwise there exists, in respect to the International Court of Justice as well, an institution acting as a filter just mentioned, and that function is performed by the Committee on Applications for Review of Administrative Tribunal Judgements with regard to certain categories of advisory opinions. Under Art. 11 of the Tribunal's Statute, a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal objects to the judgement on different grounds, may apply to the Committee asking to request an advisory opinion in the matter, and the Committee shall, within 30 days from receipt of the application, decide whether there is a substantial basis for such a request.

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16 See Judicial Settlement of International Disputes. Herausgegeben von Hermann Mosler—Rudolf Bernhardt, Berlin—Heidelber—New York, Springer Verlag, 1974. p. 38.

Now, back to the "crisis" in which the administration of international justice had found itself by the early 1970s, there were many who saw a way out in making recourse to proceedings in chambers somehow "more attractive" for States. Ph. C. Jessup, a renowned American jurist in international law, who served on the International Court of Justice between 1961 and 1970, wrote "that recourse to *ad hoc* chambers would prove more attractive to potential litigants if the election of their members, were to be based on a consensus between the Court and the parties".[17]

In revising its Rules in the early 1970s the International Court of Justice was mindful of this idea along with many other reflections and had regard to them in amending the Rules of the Court on the elections to chambers.[18]

The substance of the amendments adopted in 1972 is that whereas under the previous Rules the parties had a voice only in determining the number of judges sitting in chambers, it being determined by the Court with the approval of the parties, the new Rules require the President of the Court to ascertain the views of the parties regarding the composition of chambers as well.[19]

The new Rules of the Court elaborated in 1978 retained these provisions in essence and, under Art. 17, para. 2 the President of the Court "shall ascertain the views" of the parties "regarding the composition of the Chamber, and shall report to the Court accordingly". This, however, raises the question of what is to be meant by all the more so since, under Art. 26, para. 2 of the Statute, "the number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties".

Without going now into the related question of interpretation, of which more will be said later in this discussion, the amendments to the Rules of the Court have clearly increased the influence of States on the composition of chambers. In connection with the new Rules, Judge Petrén, a former member of the Court, noted at the time that "should the Court elect other judges than those suggested by the parties the latter could be expected to withdraw the dispute from the Court and set up an arbitral tribunal of their own as already happens in so many cases".[20]

Despite the fact that, according to Hambro, the new rule on the election of members of chambers did not meet with the unanimous approval of the Court,[21] the amendments to the Rules of Court referred to above received a favourable response both in literature and in Resolution 3232/XXIX adopted by the United Nations General

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17 Cf. JINÉMEZ DE ARÉCHAGE, E.: The Amendments to the Rules of Procedure of the International Court of Justice, in: American Journal of International Law, 1973. p. 2.

18 See ibid., pp. 1-22; and GUYOMAR: Op. cit., pp. 101-103.

19 Cf. Art. 17, para. 2 of the Rules of Procedure.

20 PETRÉN, B. A. S.: Some Thoughts on the Future of the International Court of Justice, in: Netherland Yearbook of International Law, 1975. p. 64.

21 Cf. HAMBRO, E.: Will the Revised Rules of Court Lead to Creater Willingness on the Part of Prospective Clients? In: The Future of the International Court of Justice, ed. by Leo Gross, Oceana Publications, Inc., New York, Dobbs. Ferry, 1984. p. 369.

Assembly on 22 November 1974 they were viewed as serving to facilitate recourse by States to chambers.[22]

Of course, there were also less enthusiastic reactions to the amendments, many fearing again for the unity of the Court said that "Revitalizing the Court through the use of Chambers *ad hoc* composed in conformity with the wishes of the parties could, of course, be considered as a step backwards towards an older type of international adjudication of disputes implying viz. the setting up of arbitral tribunals for particular cases within the framework of the Permanent Court of Arbitration, the wishes of the parties as to the composition of the tribunal being paramount".[23] No doubt there is some truth to these observations in a certain aspect, but we must agree with Rosenne's apt remark that, as it is sometimes put, the Chambers are a bridge between the full Court and arbitration, they are on the Court end of the bridge.[24]

As regards the practical application of the provisions on the formation of chambers, the related questions came into focus in the early 1980s, when it became known that after more than half a century two States, the United States and Canada, had agreed to submit their dispute on the delimitation of the maritime boundary in the Gulf of Maine area to a chamber composed of members of the International Court of Justice. The agreement was unanimously welcomed by experts, but enthusiasm about its implementation and the effect of the case on the future of the Court was far from shared by all.

At any rate, recourse to chambers became popular soon after the Gulf of Maine case, and in September 1983, shortly after the American-Canadian agreement, a compromise was reached by two developing countries, Burkina Faso and Mali, on bringing their rather acrimonious land frontier dispute before a chamber composed of members of the Court.[25] Shortly afterwards, the United States and Italy agreed to submit their dispute concerning the company Elettronica Sicula S. p. A. to a chamber and later, on 21 May 1986, El Salvador and Honduras signed a compromise on applying to a chamber composed of members of the International Court of Justice for the settlement of a land and maritime boundary dispute between them.

As concerns more particularly the Gulf of Maine case, the problem was caused by the fact that the Treaty on the Gulf of Maine boundary dispute settlement signed by the parties on 29 March 1979 and communicated to the International Court of Justice on 25 November 1981 had stipulated not only that a chamber of five judges should be

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22 See, e.g., the opinion of Dupuy, who emphasizes, among others, the flexibility of the new rules. DUPUY, R. J.: La réforme du Réglement de la Cour Internationale de Justice, in: Annuaire Français de Droit International, 1972. p. 274.

23 Cf. PETRÉN: Op. cit., p. 64.

24 SHABTAI, R.: The Role of the International Court of Justice in Inter-State Relations Today, in: Revue Belge de Droit International, 1987. p. 280.

25 This compromise is given added value by the fact that Burkina Faso (formerly Upper Volta) and Mali had not ben involved previously in any dispute before the Court.

formed on the basis of consultations with the parties and in accordance with Art. 26, para. 2 and Art. 31 of the Statute, but also that either party might denounce the compromise if the chamber had not been formed within six months from the entry into force to the compromise. Parallel to the compromise, the parties signed another document providing that if a chamber composed of members of the International Court of Justice was not formed within the set time limit and in the manner stipulated by the parties, the two States should submit the dispute to an arbitral tribunal to be set up by them. The parties exercised a great measure of care in agreeing upon the compromise and even covered an eventual vacancy in the chamber, thereby trying to secure their influence in the election of the new member as well. In addition, in November 1991, the two States sent a letter to the Court emphasizing the need for the chamber to be formed prior the next election of the judges of the International Court of Justice, which was scheduled to take place on 6 February 1982.

The view that the United States and Canada tried to take all necessary precautions against the Court appointing a chamber of a composition not to their satisfaction and, in case it should still happen, left the possibility open to withdraw the case from the Court can be said to be prevalent in literature on the compromise concerning the Gulf of Maine case.[26]

Considering that, on the one hand, the Court was requested, for the first time in more than six decades, to sit in a chamber in the Gulf of Maine case and, on the other, the new Rules governing the formation of *ad hoc* chambers were applied for the first time in that period, one should not be surprised that a great storm broke forth around the appointment of the members of the chamber which was to deal with the case. There is no doubt that the storm was attributable to the fact that the provisions of both the Statute and the Rules of Court relating to the formation of chambers are rather ambiguous. However, an added source of problems was the endeavour, already mentioned, of the United States and Canada to secure, for reasons easy to understand, their own influence in the formation of the chamber.

The passage in Art. 26, para. 2 of the Statute reading: "The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties" is susceptible of different interpretations. According to one version, the cited provision "does not in terms debar consultation by the Court with the parties as to which judges shall form the Chamber, and that there is no necessary implication of any such preclusion".[27] Stephen Gorove asserts that the word "assertainment" does not imply anything more than a determination of the preferences of the parties concerning the composition of the chamber.[28] In connection with the *ad hoc* chambers Judge Oda

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26 Cf. ZOLLER, E.: La constitution d'une chambre spéciale par la Cour Internationale de Justice, in: Revue Générale de Droit International Public, 1982. p. 311.

27 Cf. SCHWEBEL: Op. cit., p. 852.

28 See GOROVE, S.: Formation of Internal Subdivisions of International Tribunals–Some Comparative Highlights and Assessment, in: American Journal of Comparaitve Law, 1990. p. 357.

writes: "I myself cannot believe that anything other than the views of the parties can reasonably be taken into account by the Court in composing the Chamber".[29] Professor Gorove maintains that preferences may relate to the nationality or legal training or any other characteristic, without concrete names being mentioned.[30] It should be noted that we do not find this reasoning to be very convincing, since insistence on such preferences almost always implies an allusion to a particular person.

In connection with the compromise concerning the delimitation of the maritime boundary in the Gulf of Maine case and with the President of the Court's consultation with the parties about the composition of the chamber some members of the Court raised the problem whether this procedure was, as a whole, consistent with the Court's Statute and Rules. Working as it did under external and internal pressures, the International Court of Justice finally sent a letter to the parties in this matter. The reply and explanation given by the two parties apparently satisfied the Court and, by its decision of 20 January 1982, it formed a chamber of five members, the composition of which was fully in accordance with the wishes of the parties previously expressed.[31] At the time Judges El-Khani of Syria and Morozov of the Soviet Union strongly disagreed with the content of the Court's decision. In his dissenting opinion attached to the decision, Morozov stated "... en substance le compromis entre les Etats-Unis d'Amérique et le Canada parait manifestement de l'idée erronée que, malgré les dispositions de l'article 26 paragraphe 2, du Statut, les Parties qui demandent la constitution d'une chambre chargés de connaître d'une affaire déterminée pouvaient non seulement décider du nombre des membres de la chambre, mais encore choisir et indiquer formellement les noms des juges à èlire au scrutin secret, et même faire ces propositions à la Cour en leur donnant la forme d'une sorte d'ultimatum".[32]

The composition of chambers apparently did not stir up so great a storm in the cases brought before the Court subsequently.

In the Mali vs. Burkina Faso case, the compromise presented to the Court in 1983 did not indicate the number of judges to sit in the chamber and, although the parties did not put, to our knowledge, any particular pressure on the Court, the composition of the chamber met their wishes.[33] This time, however, all members of the Court agreed with the composition of the chamber. In the dispute between the United States and Italy concerning Elettronica Sicula S.p.A. Washington started the proceedings under the Treaty of Friendship, Commerce and Navigation signed between the two

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29 See ODA, S.: Further Thoughts on the Chambers Procedure of the International Court of Justice, in: American Journal of International Law, 1988. p. 553.

30 Cf. GOROVE: Op. cit., p. 357.

31 Sitting in the chamber for the Gulf of Maine case were Judges Ago, Gros, Mosler and Schwebel as well as judge *ad hoc* Cohen.

32 See ICJ Reports, 1982. p. 11.

33 This case was considered by a chamber of the following composition: Judges Ruda, Bedjaoui and Lachs as well as judges *ad hoc* Luchaire and Abi-Saab.

countries on 2 February 1948. After the submission of the application, in March 1987, the American Administration suggested to Italy that the Court should consider the case in a chamber. Italy agreed and, after the President of the Court had consulted with the parties, the chamber was formed with a composition conforming fully to the wishes of the parties.[34] After El Salvador and Honduras had submitted their dispute to the Court on 11 December 1986, the two States sent a joint letter to the Court informing it of the desired composition of the chamber, namely they proposed three judges by name and reserved two seats for judges *ad hoc* to be appointed by them at a later date. The chamber was formed accordingly.[35]

In connection with the cases decided in chambers to date, the point may perhaps be raised that it would not have been out of place for the Court to make some inquiry into the degree of influence the parties might exert on the Court in determining the composition of the chamber and to see whether the extent of the parties' involvement in some cases was acceptable at all. However, this aspect was disregarded by the Court and this high judicial forum was, as it had been in many other cases, very wise not to harp on apparently delicate issues such as these. In point of fact, had the Court refused the parties' wishes e.g. in the Gulf of Maine case, in the formation of chambers, which was excessive according to some views, such action would only have served to discourage States from having recourse to chambers and would doubtless have been conducive to the withdrawal of cases from the Court. This was alluded to also by Hambro in his article published in 1974, saying: "It would need very strong reasons indeed to set aside the formally expressed wish of the parties. If it should happen that wish is ignored the whole purpose of the procedure would fail".[36]

For that matter, the attitude of the United States and Canada to the formation of the chamber can be justified by the fact that these two States virtually broke new ground by reviving, after more than half a century, proceedings before a chamber and, what is more, a variant thereof to which no guide is to be found in the practice of the two Courts. As is well known, *ad hoc* chambers of this type did not exist at the time of the Permanent Court of International Justice, and the only case, the one concerning the Peace Treaty of Neuilly, considered by a chamber between the two World Wars was determined by one of summary procedure, the formation of which was governed by rules different from those applicable to the appointment of *ad hoc* chambers. As the consistency of the procedure followed in determining the composition of ad hoc chambers with the Court's Statute and Rules has been much discussed in literature,[37]

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34 The judges originally elected to this chamber were Nagendra Singh, Oda, Ago, Schwebel and Jennings. Upon the death of President Nagendra Singh in December 1988, Judge Ruda was elected to the chamber after consultations with the parties.

35 This chamber included, among the members of the International Court, Judges Sette-Camara, Oda and Jennings, with Valticos and Virally acting as Judges *ad hoc*.

36 Cf. HAMBRO: Op. cit., p. 369.

37 For more detail, see ZOLLER: Op. cit., pp. 312-322; and SCHWEBEL: Op. cit., pp. 813-818.

we shall not dwell on it now. Much more interesting is the question concerning the effect which proceedings in *ad hoc* chambers have on the entire workings of the Court and, first and foremost, the extent to which they serve to enhance the cause of peaceful settlement of dispute.

The formation of various chambers within an international judicial forum of a universal character was regarded by the Committee of Lawyers in 1920 as tending to jeopardize the unity of the Court. Such reservations were expressed about *ad hoc* chambers later on. It was widely held that the workings of these chambers would cause the International Court of Justice to fall into regional chambers sooner or later.[38] The chief argument of the opponents of *ad hoc* chambers was that these operated to break the universality of the Court, for every State or group of States sought to form chambers of a composition likely to deliver judgements acceptable to them, and such judgements were most likely to be given by judges of friendly nations or of States with a similar political and economic system. The current practice under which judges of countries belonging to other political and economic groups have been conspicuously absent in the consideration of disputes between States of the same political and economic groupings is, in effect, related to this claim, which is borne out by the composition of the chambers established so far: in disputes between developed countries, *viz.* the American-Canadian border dispute in the Gulf of Maine and the American-Italian dispute concerning Elettronica Sicula S.p.A., the chambers were composed of judges of developed countries with only one expection. Accordingly, the case concerning the delimitation in the Gulf of Maine was decided by Italian, American, Canadian, French and West German judges[39] whereas the case involving Elettronica Sicula S.p.A. was submitted to a chamber composed of American, Indian, Japanese, Italian and British judges. As can be seen, among the judges sitting in these two chambers, the Indian judge was the only non-national of a developed country. The border dispute between El Salvador and Honduras showed a wider dispersion as the chamber dealing with the case was composed of Brazilian, Japanese, British, Greek and French judges. In the formation of the chamber deciding the conflict between two African countries, Burkina Faso and Mali, preference was given mainly to experts from developing countries and, according to the wish of the parties, the chamber was composed of Argentine, Algerian and Polish judges as well as a French judge and a judge of Egyptian origin living in Switzerland, who acted as judges *ad hoc*. Thus no trend of regionalism in the classical sense of the term was present in any way in the formation of these four chambers and one may speak of chambers composed of judges from States belonging to some sort of a similar political and economic grouping rather

38 Cf. GREEN, L. C.: Is There a Universal International Law? In: The Canadian Yearbook of International Law, 1985. p. 27.

39 Originally elected to the chamber for the Gulf of Maine case were Judges Gros, Mosler, Ago and Schwebel, with Judge Ruda acting as President. Later, however, President Ruda yielded his seat to Judge *ad hoc* Cohen of Canada.

than of the emergence of regional chambers. More specifically, most members of *ad hoc* chambers made up of judges of the International Court of Justice were nationals of States belonging to the same political and economic grouping within the international community to which the parties to the disputes also belonged.[40] Expressly or by implication, what is lurking behind this practice is ultimately the fact that States sought to form chambers in which they had no reason to suppose bias or eventual enmity on the part of judges sitting therein.

Writings on the workings of the International Court of Justice have often discussed the measure of impartiality or partiality displayed by members of the Court in practice, and some of them venture to state that, indeed, the views of members of the Court in reaching a decision were greatly influenced in some cases by the political and economic grouping to which the States of which they were nationals belonged.[41] Since a study of similar assertions, either confirming or refuting their truth, goes far beyond the scope of this discussion, we confine ourselves to pointing out that in practice States take great pains to ponder and weigh in the balance the chances of a judgement they can expect to be given by each member of the Court and the reason why more disputes than one were not brought to the International Court of Justice is to be seen undoubtedly in the fact that some States had had no great confidence in the impartiality of some members of the Court. It is to be noted that there is no real ground for proving such "fears" and that, as is stressed by the author of an excellent work analyzing the voting practice of members of the Court, the votes cast by members of the Court cannot really be said to show, on the whole, any particular measure of political or economic commitment and the majority of judgements reflected a high degree of consensus. According to that author, the most that can be stated is that in certain periods some judges cast similar votes more often than others, but in fact there can be detected no constant pattern of commitment in voting which would have exerted substantial influence on the judgements of the Court.[42]

Returning to the problem concerning the possibility of the International Court of Justice falling into chambers composed of judges belonging to a certain similar political and economic grouping of States, one cannot apparently claim that this danger really exists. The reasons are several:

Along with *ad hoc* chambers, the Court sits as a full court and, as is shown precisely by practice in the most recent period, among the cases currently before the

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40 Interestingly, this same phenomenon can be noticed in a case before an arbitral tribunal in the second part of the 1960s, namely the Beagle Channel dispute between Argentine and Chile, which is often referred to in connection with *ad hoc* chambers composed of members of the International Court of Justice. Cf. HAMBRO: Op. cit., p. 367.

41 Cf. U. S. Terminates Acceptance of ICJ Compulsory Jurisdiction, in: Department of State Bulletin, January 1986. pp. 69-71.

42 Cf. BROWN WEISS, E.: Judicial Independence and Impartiality: A Preliminary Inquiry, in: The International Court at a Crossroad. Ed. by Lori F. Damrosch: Transnational Publishers, Inc., New York, Dobbs Ferry, 1987. p. 134.

Court, only one, the border dispute between El Salvador and Honduras, is being considered by a chamber, while the rest continue to be dealt with in a full court. The overstatement of the danger of the Court breaking into chambers is shown most clearly by the fact that since the first initiative for proceedings before an *ad hoc* chamber, namely the compromise in the Gulf of Maine case, States have requested the Court, *in the majority of cases*, to decide disputes in a full court and that only a small part of the disputes submitted to the Court are determined by *ad hoc* chambers.

Another reason why one cannot speak of the Court falling into chambers composed of judges of States with some similar political and economic systems is that *there is no question of stable chambers emerging within the Court* and that each of the four chambers formed so far had a different composition. The four cases determined by chambers to date have been considered by a total of 11 judges from among the members of the Court.[43] Of the 11 judges, six were elected to one chamber each, whereas 5 judges in all (Judge Ruda of the Argentine, Judge Oda of Japan, Judge Schwebel of the United States, Sir Robert Jennings of Britain, and Judge Ago of Italy) sat in two chambers.

On the basis of the foregoing we, for our part, are of the view that what presents a danger to the universality of the Court is in effect not consideration of a particular case by a chamber of a composition desired by the parties, but formation of such chambers always by States belonging to certain political and economic groupings, with other groups of States staying clear of the Court, for, in the light of existing experience concerning the composition of chambers, the litigants have usually preferred judges of States belonging to the same political and economic grouping as they do and it must therefore be admitted that certain members of the Court might easily happen not to be elected to any chamber: States of the same political and economic grouping will not resort to the Court, while those that do will but choose "by way of demonstration" an "outsider", a judge from a State external to the given grouping. As early as the 1970s, in dealing with eventual objections Edvard Hambro adverted in effect to related problems by stating that there might arise a situation in which the International Court would break into two categories of judges, those who will often be asked to participate in such chambers and the others. Hambro sees no problem by this happening, which he says is quite the same as the practice under which some members of the Court are more often elected than others to be members of the drafting committee set up to formulate judgments or advisory opinions.[44]

It would challenge this contention of Edvard Hambro by noting that these are aspects far from equal in importance, for if a member of the Court is not elected to the chamber wording the judgement or advisory opinion he nevertheless *participates in*

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43 Participating in the work of the four chambers were a total of 15 judges, but four of them acted as judges *ad hoc*, who are not members of the International Court of Justices, so they may be ignored in calculating the number of judges involved.

44 HAMBRO: Op. cit., p. 369.

hearing the given case, votes on a decision and, if his opinion on a particular question differs from that stated in the Court's decision, may express his dissent in a separate—individual or dissenting—opinion attached to the decision or advisory opinion. By contrast, a judge not elected to the chamber *is completely excluded from the consideration of the given dispute*, no one is interested in his opinion, and the most he can do is formulate and publish his thoughts on the case in a scientific essay.

Such "exclusion" from the work of chambers threatens in the first place judges of States, such as those in the region of Eastern-Central Europe, which have not yet applied to chambers composed of members of the world court. There is no doubt that the relationship of these States to the Court, and not only to chambers, was characterized by a certain kind of duality as, the International Court of Justice the principal judicial body, of the United Nations, judges of the states of that region are present in it, just as in other institutions of the United Nations, and some of them have taken a very active part in formulating judgements passed by the Court sitting as a full court as well as in giving advisory opinions. At the same time, however, these States were rather assiduous in avoiding the Court over the past decades and, until very recently, none of them made a declaration of submission to the compulsory jurisdiction of the world court, while the same States tried to prevent their disputes from being considered by the Court by making reservations to that effect in a whole range of treaties signed during the past 10 years. Recent years have undoubtedly seen significant changes in this field. In the past few years, most of the Eastern-Central European States, including Hungary, have revoked their reservations concerning the jurisdiction of the International Court of Justice in declarations of acceptance of treaties and conventions, and, on 21 September 1990, Poland and on 1 August 1992, Hungary even made declarations of acceptance of the compulsory jurisdiction of the Court. However, these developments do not alter the fact that the States of Eastern-Central Europe *as litigants* had no recourse to the Court down to the present. It is nevertheless to be feared that if these States maintain their previous attitude to the Court, they may in light of what has been stated before, be excluded from the work of the Court not only as litigants, but also as judges passing decisions on some of the cases brought before the Court.

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KALEIDOSCOPE

Struggle for Democracy During the Weimar Republic

(in Memory of Prof. J. V. Bredt of Marburg)

1. Towards the end of the 1920s German domestic policy was moving deeper and deeper into troubled waters. The Parliament was faced with a crisis. Constant internal friction presented chancellor Hermann Müller's government with increasing difficulties of its ability to function. In regard to this, Hermann Müller (1876-1931) was Chairman of the Social Democratic Party and in 1919 served as Foreign Minister of the *Reich*. There were cries for a strong man from both the left and the right. At this time, however, Hitler still played no significant role.

Owing to the Government's inaptitude, the Parliament's right of decision was vested mostly in the *Reich* President. The question arose concerning the structure of the Weimar Constitution's ability to measure up to the challenge of the time. The crisis was sparked off by an increase in taxes from 3.5 % to 4 % for unemployment insurance. Müller become weary of the Sisyphean task, was let down even by his own parliamentary faction, and therefore resigned his post on 27 March 1930. Then Heinrich Brünig (1885-1970), who serves as Chancellor from 31 March 1930 to 31 May 1932, was asked to form a government. He established a "presidential cabinet", which was joined by all Social Democratic ministers of the previous Müller Cabinet. The new ministers included Victor Bredt (1879-1940) as Minister of Justice, Gottfried Treviranus (1871-1971) as Minister of the Rhineland under occupation, and Martin Schiele (1870-1939) as Minister of Public Welfare. The Brüning Cabinet issued emergency decrees whereby the *Reich* President was authorized by Art. 48 of the Weimar Constitution to give the force of law, but which the *Reichstag* had powers to reject. Such an incident occurred in July 1930 when the *Reichstag* overruled one of the emergency decrees which had been put into force by the *Reich* President. After a lapse of 8 days the emergency decree was, with some modifications, again taken up by the *Reichstag*. The Social Democratic faction voted with the German National Party and the Communists, whereupon the *Reichstag* was

dissolved. The new *Reichstag* elections were set for 14 September 1930. Included in the results of the elections, the number of National Socialist representatives jumped from 12 to 114, the Communist representatives also grew in number, but votes were lost by the German Nationalists. At the first sitting of the *Reichstag* Brüning emphasized his intention to continue the Government's work along the previous lines, then the *Reichstag* adjourned its sessions for 4 months.

In the spring of 1931 the government wanted to improve the economic situation by entering into a customs union with Austria. France was opposed to the plan. The question was brought before the Permanent Court of International Justice, which ruled, by a vote of 8 to 7, that the customs union was incompatible with the existing treaties. Thereupon Foreign Minister Julius Curtius (1877-1948), who had succeeded Stresemann in that post, tendered his resignation. Early in October Brüning formed a new government, in which Interior Minister Joseph Wirth (1879-1956), a politician of the Centre Party, accepted no portfolio. The office of interior minister was taken over by Defence Minister Wilhelm Greener (1867-1939), who retained his existing post as well.

From autumn of 1931 the political struggles came increasingly sharper, with heated debates revolving particularly around Hindenburg's reelection. Reelected after all, Hindenburg wanted Brüning's Government to shift rightwards, but the latter refused to do so and resigned on 31 May 1932. He emigrated to the United States in 1934. One year earlier, former Interior Minister Wirth left for Switzerland, and J. V. Bredt returned to his university department at Marburg.

All these developments are treated at greater length in J. Broermann: *Als Presse-Chef bei Reichsminister Gröener* (Der Staat, Nr. 2 of 1983, pp. 281-241).

2. My job enabled me to take part in the winter semester of 1936, where I attended Prof. Bredt's lectures. During this time I was accompanied by Prof. Béla Kun Szentpéteri of Debrecen, who disseminated and highly appreciated Prof. Bredt's works. First I would like to note of few biographical facts about Prof. Bredt's life and works as are recorded in *Reichshandbuch der Deutschen Gesellschaft*, Vol. I (Berlin, 1930. p. 209), which was sent to me in a letter of 9 October 1989 by Prof. Werner Frotscher, latter-day successor to Prof. Bredt at Marburg University.

J. V. Bredt was born in Barmen on 2 March 1879. Between 1897 and 1898 he worked for *Barmer Bankverein*, then studied law and economics at Tübingen, Göttingen and Bonn Universities, and received his degree from the Faculty of Law in 1901. In 1903 he was a junior clerk of public administration at Koblenz and in 1904 he became a doctor of philosophy. He took a state examination in public administration at Marburg, where he also qualified as a docent in 1909. In 1911 he left the domain of public administration and become an associate professor at Marburg University. During the World War he was lieutenant of the second infantry guards regiment and was severely wounded. From 1918 he was professor at the Faculty of Law and Political Science of Marburg University. In addition, he held various public posts, secular as well as ecclesiastical. In 1924 he became a *Reichstag* member and during the period from 1924 to 1933 he serves as Chairman of the *Wirtschaftspartei*. As noted earlier, in March 1930 he accepted the post of Minister of Justice in the Brüning Government.

His scientific activities embraced economics, canon law and political law. His major works include *Die Trennung von Kirche und Staat* (1919), *Die Rechte des Summus Episcopus* (1919), *Neues evangelisches Kirchenrecht für Preussen* (two volumes, 1921/22), *Der Geist der deutschen Reichsverfassung* (1924). He published a book on the constitutions of the Calvinist Church in Rhine-Westphalia, which is a unique collection of documents. The Faculty of Divinity of Bonn University conferred on him the title of Dr. theol. h. c. in 1925. He died on 1 December 1940.

Bredt quotes the following phrase from Calvin's Institutes which serves as a motto of his work *Der Geist der deutschen Reichsverfassung*. The best form of government is determined by the prevailing circumstances. It would be a mistake and harmful to make light of applying a certain form of government to a different set of conditions (Institutes, IV. 20).

The importance of Calvinism for constitutional development was also emphasized in several works by Academician István Kovács, one-time Director of the Institute of Legal and Administrative Sciences of the Hungarian Academy of Sciences. Here I would refer only to his introductory study entitled "Human Rights in Documents" (1976). As he wrote, the revolution and war of independence of the Netherlands inscribed on its banner the Calvinist ideology. The Calvinists of the 16th and 17th centuries, when proclaiming the equality of all men, as members of the Church, within the Church, contributed to laying the ideological foundations of civil equality (p. 23). Embodied in the Calvinist Council's presbyterian constitution, this notion prevailed only in the Rhineland and Westphalia until the French occupation, and is evident in Bredt's work as well. After the occupation, the Prussian rule introduced the consistorial system even in those regions. Düsseldorf was granted a consistory, which, however, was strongly resisted by the original Calvinist inhabitants. That years-long discord was then brought to an end by a compromise, with the King promising restoration of their councils provided that the town was willing to accept Frederick William III's rules regulating religious service (agenda). As the majority of Calvinists responded favourably to that offer, the councils were really re-established by the Rhine-Westphalian church constitution of 1835. Now they consisted of an entirely different character from that which they had borne in pre-Napoleonic times, when the councils functioned as governing bodies as well. That attribute was now lost, thus they virtually became representative bodies of the congregation beside the consistory. The establishment of councils in the old Prussian provincial churches is linked with the name of Bismarck, who thereby wanted to strengthen Protestantism in his *kulturkampf* against Catholicism. While the councils in the Rhineland were veritable strongholds of Protestantism, this institution was not able to entrench itself due to the lack of such a long-established tradition to support it. From Bredt's book it may be inferred that as late as during the fourth year of WWI the public opinion concerning any radical changes which were to occur in the state after the war were unable to be detected. This is the only explanation for the fact that general and equal suffrage was voted down in Prussia. Bredt writes that he, as a free conservative M. P., voted for general suffrage and therefore came under strong attack from his own Party and from the right-wing press. He concluded his speech, delivered on 6 May 1919, with these words: "If the gentlemen on the right

choose to reject general and equal suffrage, let us talk again ten years from now and ask who, you or I, has pursued a better policy in the conservative sense" (p. 23). Then, when on 5 October 1918 Imperial Chancellor Max von Baden stated in his policy speech that parliamentary government had been introduced in Germany, Adolf Hoffmann, a socialist member of the *Reichstag*, who stood by Bredt, stated the following: "It is late, late, for you should have done all this before this will be of no use to you any more" (p. 25).

Bredt describes at great length the birth of the Weimar Constitution and the programmes of the parties which contributed to it (Democratic Party, Social Democratic Party and the Catholic Centre). Social Democracy implemented its programme to the extent that the Centre and the Democratic Party fulfilled theirs, whereas the Centre was likewise able to secure its positions in church and educational affairs to the degree attainable. In respect to economic policy, Social Democracy was the driving force, while the Centre and the Democratic Party acted as retarding factors, however in respect to cultural policy, the Centre was the driving force and Social Democracy the retarding factor. The Democratic Party outlined the groundworks for the structure of the Constitution and acted as a middleman between the Social Democratic Party and the Centre.

Bredt raises the question of the position taken by the Lutheran Church, in drafting the Constitution and points out that the self-management of the Lutheran Church did not reach a degree of development which would allow the Lutheran population as such to take political action, omitting the fact that in Germany there were 37 different Lutheran provincial churches *(Deutschkirche)* which did not maintain any noteworthy contact with one another. The Lutheran Church adopted no position whatsoever on the change, there was no "Lutheran concept of the State". Organized Protestantism existed along with organized Catholicism at the time, political developments could have taken a different course. As it became entirely clear later, the ruling government coalition began breaking up as soon as church affairs were involved. A portion of the Lutherans supported the German National Party, representing the "positive trend", while the Liberals tilted toward the Democratic Party (p. 70).

In illustration of the difficulties of the Weimar era, Bredt quotes from an article published in the 15 June 1922 issue of the periodical *Der Arbeitgeber:* "The Republic has been lacking power down to this day: the political parties wielding power are not acting constructively, but are agents and expressions of debates agitative in tone. Hence the desire for new forms of political life in which the healthy popular forces may be active and exercise their influence at the service of the community has developed" (p. 231). Soon after the publication of that article, the Party led by Hitler made its abortive attempt in Munich to seize power (known as the " beer hall putsch" on 8 and 9 November 1923), but at this time the putsch did not have any social base and was crushed by the army and the police, with Hitler condemned to confinement in a castle.

In his work Bredt stresses the importance of tolerance and refers to the 1789 Declaration of Human and Civil Rights, which found its way into nearly all newer constitutions. The provisions of the Weimar Constitution, too, rest on that Declaration, writes Bredt (p. 277). The imperishable value of the relevant provisions is amply

demonstrated by the inclusion of some of the (Arts. 136 to 139 and 141) even in the 1949 Fundamental Law of the Federal Republic of Germany. Those are rules on the freedom of religion and form an integral part of the Fundamental Law.

So, even though the Weimar Constitution was relatively short-lived, some of the principles it embodied were unquestionably progressive, representing an enduring value. For this very reason, its study through the work of a personality who was not only a scientist, but also an active politician of that era can serve a useful purpose even after a lapse of decades.

László TRÓCSÁNYI Sr.

Economic Criminal Law and Economy Policy[1]

The connection between economy policy and criminal policy is studied by criminal sciences and the study of this connection allots criminal sciences special tasks. The tasks are special, since a more distant, usually indirect, interrelation of politics and law becomes a closer one here. It is natural that the direct interrelations of *criminal policy and criminal law* and that of *economy policy* and the *law of economic administration* are studied by the theory of law of the particular field, and the particular branches of legal sciences actually do study these relations.

The task of criminal sciences is, in general, to study the relation between criminal policy and criminal law, but the problems of economic criminal law cannot be studied only in connection with general criminal policy. For, criminal policy concerning economic criminal offences is influenced by economic policy to such an extent that this influence appears directly in the specific rules of economic criminal law. The specific traits of economic criminal law, consequently, render the study of the interrelations of economic criminal law and economic policy an absolute necessity.

The changes in economic policy influence not only criminal policy in connection with the determination of the act to be fought with the means of criminal law in order to serve economic policy but the relation between the organs of economic administration and enterprises exerts an influence on the scientific definition of the object of the protection of criminal law.

1 Paper presented at the International Bar Association 3rd Eastern European Regional Conference on Trade and Finance in Central and Eastern Europe (Budapest, 21-24 June 1992).

In addition to the acts to be punished, the penalties that are to be applied are determined also by criminal policy. What sanctions should be employed is determined by the aspects of criminal policy. In the examined sphere, however, the most characteristic feature is that goals set up by economic policy are served by penal sanctions and administrative sanctions together.

It is frequently economic policy considerations that determine whether administrative or criminal law sanctions should be applied.

Administrative sanctions can be used against legal entities (enterprises) as well. The close connection between the sanctions of criminal law and of administrative law brings about the criminal liability of legal entities, which seems to be contrary to the principles of criminal law in the continental legal systems. However, it is thought by some authors to be an effective means from the point of view of criminal policy.

The state and social tasks of the struggle against crime are defined in the final analysis by the criminal policy of the state. It is criminal policy that decides what forms of behaviour should be declared criminal offences and how the provisions of criminal law should be applied. In the process of formulating the criminal policy principles of legislation and of the application of law, social, political and moral aspects should be considered, but the characteristic system of institutions of law and the mechanism of the traditional categories of criminal liability are not to be disregarded either. The expectations from criminal liability can be fulfilled only if the system of institutions of criminal law operate correctly. The system of the institutions of criminal law, the categories of liability, change only after tens of years, in certain parts they have the stability of centuries.

The state has been using criminal law for the protection of the basis economic interests since its own appearance. The means of criminal law have been used for the protection of property relations as the basis of the economic order, but together with that, they have been used to ensure the income of the state, to ensure the revenues of the treasury. The provisions of criminal law that are to protect these fundamental economic and economic political interests have become a more or less harmonically integrated part of the system of criminal law.

Although the rules of criminal law that are to protect the fundamental economic interests may be considered part of criminal law in the traditional sense, the theory of criminal law of the modern state has recognized that the principles of criminal policy do not prevail completely as far as offences committed in connection with economic activity are concerned. In connection with criminal offences related to economic activity, breaks have been demonstrated in the implementation of the criminal policy of both legislation and the application of law. The determination of the criminological category of white collar criminals is the result precisely of the recognition that there is a group of offencers against which the general aims of criminal policy are not effectuated.

The prevalence of the principles of criminal policy is hindered in modern society not only by the social position of the perpetrators of economic offences and by the inter-blend of the high echelons of politics and economy but criminal policy in this

realm is necessarily influenced by the economic system and by economic policy interests.

Antitrust laws show clearly the close interrelation between economic crime and views of economic policy and the system of management of the economy based on the latter. The prohibitions and the sanctions of their breaches show an extreme variety and there are countries that have no antitrust law. Even the countries that prohibit the formation of cartels allow various types of association if they are economically desirable or useful. Thus the prohibitions are enforced depending on economic policy evaluation because the formation of a cartel with the aim of dominating the market and various agreements aimed at surmounting an economic crisis should be judged differently.

Other socio-economic considerations have effects, hindering the complete effectuation of the principles of criminal policy. The enterprise that causes damage to the national economy in a certain way, ensures, at the same time, benefits and if these benefits do not materialize, the loss will be more significant than the damage itself. For instance, the growth of unemployment is considered such a loss and if the sanctions of criminal law were applied consistently, more enterprises than one should be wound up and that would result in the growth of unemployment.

Keen competition also may be a factor which compels whole branches of business to commit criminal offences so that they could stay in competition.

When criminal sciences try to find the optimal way of conciliation between aspects of economic policy and criminal policy, it must always kept in mind that inappropriate measures might undermine the economy.

For, in that system of a planned economy where the economic activities of the enterprises were controlled overwhelmingly through central state directives, the breach of the obligation prescribed by the directive could result in the establishment of criminal liability. In turn, in the economic policy of the economy that makes use of market relations and is based on independent economic decisions, central state directives have a much more limited role. The new forms of the economic activity of the enterprises do not drive out criminal law from the realm of the economy, but its role is much less significant.

We can consider it a fact that criminal law is pushed to the back and the reasons of that should be found in the relation between economic policy requirements and the system of the institutions of criminal law, in addition to the change of economic policy. Following the economic policy that ensures a broad scope for independent decision-making on the part of the enterprise, the economic management organs of the state use the method of incentives primarily to make the enterprise carry on operations which are useful to the whole national economy. And, economic incentives are precisely the opposite of punishment, thus criminal law prohibiting the action of the incentives, takes measures only against abuses. If the mechanism of economic management changes in accordance with changes of economic policy, the role of criminal law in the state control of the economy will also change by necessity.

Criminal law may not disregard the institutionalized distinction of economic policy between proprietary and public administrative economic management. It must be realized on the level of criminal policy that the independence of the enterprises, the right to make independent economic decisions is a proprietary right and not the right of public administration. Accordingly, the evaluation of the responsibility for independent economic decisions requires an approach of criminal law which is completely different from the one needed for the judgement of breaches of obligations included in directives. When criminal policy integrates economic risk-taking into the system of criminal responsibility it does nothing but admit the connection between economic policy and the criminal law protection of property.

The acceptance of an economic policy under which independent decision-making at the enterprise is preferred does not mean that economic activity is not controlled through direct means at all. In addition to the exercise of its proprietary rights, the state uses also the public administration method of economic management... Public administrative economic management by the state takes, as a rule, the form of statutes of an economic administrative nature. These statutes either establish the duties of those who perform economic activity or authorize the organs of economic administration to prescribe various duties. The statutes of economy administration express the policy of the state and change together with the changes in economic policy.

Finally, there are provisions of criminal law related to economic activity in the process of the application in which only criminal policy goals have to be pursued and the widespread use of the means of criminal law is only a signal for economy policy. As an example, economic corruption should be mentioned. It may happen that this type of corruption does not hinder, on the contrary, it enlivens economic activity, for it is able to put such forces into action that would not operate without corruption. Independently of the negative or positive consequences, criminal law fights against corruption. It may well be that the lack of certain goods is the consequence, of an "incorrect" economic policy and this situation gives birth to corruption. The increase in the number of the criminal offences, however, may be a signal for economic policy at most, the punishment of corruption is a traditional task of criminal law.

Considering the impact of economic policy on criminal policy, offences committed in connection with economic activity may be classified into three groups.

1. Criminal policy concerning offences violating property relations generally is independent of economic policy changes. However, a change in economic policy may have an impact on the forms of perpetration of certain traditional property offences. Experience shows that a changed economic policy may bring about new forms of fraud or emblezzlement. The change of economic policy, however, does not have such an impact in this field which would justify either the modification of the statutory provision or the alteration of the application of law or the interpretation of law.

2. Contrary to the previous item, here we have to assert that criminal policy concerning offences violating the economy-regulating activity of the state has to give due consideration to the requirements of economic policy and that is the point where criminal law is closely connected to the statutes administration of the economy.

3. Finally, there are provisions of criminal law the application of which only calls our attention to the tensions of the economic criminal law, however, operates primarily for other social interests (such as the purity of public life, the protection of the environment, the protection of life and health) than that of economic policy.

The three groups mentioned differ from each other not only in terms of their object of law but also because the economic policy considerations influence the selection of the sanctions used for the protection of the state's economy regulating activity.

The connection of economic criminal law with public administration amounts to more than the evaluation of economic policy being relayed to criminal law by the norms of administrative law. For the punishment of unlawful acts perpetrated in economic life the administrative sanctions from economic policy aspects appear frequently much more effective than criminal punishment.

The significance of administrative sanctions employed in economic life extends beyond the significance of administrative sanctions imposed by criminal courts. For example, in the USA, criminal sanctions are hardly used in the case of a number of fiscal offences. The significance of criminal sanctions is preceded by that of civil law suits by the injured parties and by the administrative proceedings conducted by the Federal agency which is to exercise supervision, or civil suit by that agency. There are provisions of criminal law which have not been in use for years, but scientific studies meet difficulties in this field because the federal agency empowered to proceed in such cases does not make the criteria public on the basis of which it is decided which one of the various sanctions would be selected. Administrative authorities investigating the violations of law committed in economic life have broad discretion also in other countries in deciding what sanctions they will apply or the application of what sanctions they will initiate. Among the possibilites, in addition to civil suit, there is the simple warning of the enterprise or financial settlement with the enterprises.

One of the reasons why criminal sciences study the relation of criminal law and administrative law sanctions is that the same offence is punished with criminal sanctions in one country and with administrative sanctions in an other. Comparative studies are justified also by the fact that certain organs of the EEC also have the authorization to apply sanctions. In principle, it is possible to impose a fine for cartel agreements but the multinational companies usually prevent the application of such sanctions through their ability to alter costs and profits.

The administrative measures that are to serve preventions appear to be more effective. For example, the Labour Government in Sweden introduced certain provisions, one of them entitling the representative of the police to sit on the boards of firms, other legislation obliged the management to keep workers in touch with various aspects of production.

In economic systems based on private ownership the state can influence the exercise of proprietary rights only through the administrative measures of the public authorities; and sanctions, should they be either of criminal law or administrative law, are an important, if not the most important, element of the effectuation of that influence.

The use of the administrative sanction, i.e. fine for an infraction, is, on the one hand, in accordance with the general principles of decriminalization and, on the other hand, is in accordance with the practice of sentencing for economic offences. The borderline between administrative and criminal liability is not always clearly drawn, the demarcation is frequently based on relative criteria.

Administrative sanctions are applied against such acts that violate or endanger the order of economic activity, but not in a realm or not to the extent that the application of a criminal sanctions would be justified. For this reason, behaviour serving as the basis of the establishment of liability is frequently similar in the case of application of a criminal or an administrative sanction. True, the theoretical criteria of the demarcation of criminal and administrative liability does not mean, however, that the demarcation in the statutes is also unclear. Legislators, as a rule, draw the dividing line between the two forms of liability by criteria determined in sums of money.

Administrative infractions are committed by economic organizations mostly in the course of their activities of production or service. The scope of violations of law committed in the course of economic activity and sanctioned by administrative law is extremely broad. It extends to the endangerment of all those interests that may enjoy the protection of criminal law. Yet, their characteristic trait is that they violate the norms of state administration (economy administration) relevant for the area and cause no violation of interest significant enough from the point of view of criminal law. The norms of administrative law regulate economic activity not only in a way related directly to this activity (i.e. to production, services etc.), they also include provisions that are to protect other important social interests such as health service, labour protection and fire regulations. If the violation of these regulations produces serious consequences, criminal sanctions may be applied. The offence committed by violating the mentioned administrative provisions is related to economic activity but it is not certain that it may be included in the sanctioned category of economic crime.

The significance of fines employed against legal entities is explained by two circumstances. First, in economic life decisions violating the law are made on behalf of the enterprise in a system which makes it difficult, at least for the outsider, to establish individual liability. Within enterprises the system of decision-making may be built in a way allowing the distribution of responsibility among the individuals participating in decision-making, thus their punishment would not be compatible with the principle of culpability prevailing in criminal law and in the law of administrative infractions. Second, the fine is a detriment for the whole collective of the enterprise, thus it induces the collective to prevent the violations of law. Thus, fines imposed on legal entities is a form of liability which is directed at the collective and not at the individual.

Such fines represent a financial loss which is to serve as a motivation of the activity of the organizations. If the activity of economic organs is evaluated from some point of view as socially or economically negative, the fine, as a sanction is connected to this evaluation independently from whether the economic organization can be blamed for the harmful result or not. For example, the fine for environmental pollution

has to be paid independently of whether the economic organ was not able to prevent the pollution of the environment. Fiscal organs also frequently impose fines if they establish that the enterprises do not perform their duty of paying taxes or obtained certain budgetary benefits unlawfully.

The aims of criminal policy and economic policy are adequately served by individual criminal liability and by the administrative sanctions that may be used against both individuals and legal entities.

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BOOK REVIEW

Studies in Criminology and Criminalistics, Vol. 29. (Kriminológiai és Kriminalisztikai Tanulmányok). Budapest, 1992. OKKRI

The long awaited publication of the yearbook of criminology and criminalistics is indeed a remarkable achievement. An examination of the essays contained in this volume which deal with the various aspects of this field of science would certainly prove to be worthwhile.

First of all, let us consider the essay by László Pusztai, who has dealt with the development of modern criminal procedure law in Hungary. In this essay a balanced description of the procedural problems along with an appraisal from a professional viewpoint are presented.

In his essay, Antal Patera addresses the proportionality between punishment and recidivism. The general views and regulations on recidivism can be discussed only in close connection with the general legal responsibilities, moreover the penal and coercive measures determined by the political, social and economic conditions at any given time in history. The research of the history of law proves that the institution of recidivism is a relatively recent phenomenon, established by the latest decades of the development of criminal justice. It was established mainly by the upcoming bourgeoisie seeking equality before law. In the classical criminal justice system, which has concentrated on the deed, recidivism was considered extremely dangerous; this view is easily recognized by the severe actions taken against the perpetrators of repeated crime, in proportion with the deed. Every convict is considered to be a special subject of law, who "personally" and "in advance" is obliged to assume responsibility for the legal consequences of a repeated offence against legal regulations. Anyone in this legal position committing crime should be considered a recidivist. The punishment received by such an individual is proportionate to the deed itself and the crime, regardless of the potential danger this individual could present to society.

According to László Tibor Nagy, who wrote about the sentencing of rowdy crimi-

nals, there are specific penal measures to be taken against such persons in the judicial practice. Following a brief overview of the previous practices throughout legal history, the author examines the actual act of sentencing such deeds in accordance with the 1955 definition of rowdiness. He mentions the different types of sentencing and penal measures, and evaluates the sentences passed since that time. Furthermore he examines the effects of changes in both the legislative rules and the judicial practice. With the aid of several charts, the author demonstrates the various trends in the judicial statistics concerning the felons convicted for rowdiness or crimes against the public.

Another outstanding essay is written by András Csalay, which addresses the causes of robbery. This essay presents the various trends and the causes behind them which prevailed during the eighties. This was accomplished by using the data obtained as part of a long-term research project on robbery, materials of legal historical studies and the author's own research. In this essay special attention is given to those qualitative changes in crime presently underway.

Mariann Kránitz' essay focused on the international efforts to prevent prostitution, which is presently of great concern. Her paper gives an outline of those international efforts aimed at preventing trading and exploiting prostitutes. The mere fact that the trends in Hungary are virtually the opposite of the international ones makes this subject matter unfortunately topical. The essay gives a brief historical review of the precedents, a detailed chronology of the last 100 years and presents the latest international measures taken by the different agencies and organisations of the United Nations and other international bodies.

The volume contains an essay written by Antal Bakóczi on the "price" of violence. In this contribution the author investigates and describes the various effects and aspects of violent crime (i.e. social, political, moral, economic, etc.) He points out that these crimes take a heavy toll on society and ultimately contribute to very grave social consequences. After a thorough analysis of the subject Bakóczi draws a conclusion reaching beyond the realm of criminal law.

Klára Kerezsi presents a comparative study entitled "The Legislation Concerning the Assistance of Victims of Crime in the U.S.A.". The essay examines the legal regulation of the services assisting victims of crime in the United States. The paper describes the way these services are organised, financed and run. Moreover it introduces the President's Task Force on Victims of Criminality (Grant Guidelines). It also characterizes the distribution of the so-called VOCA Fund by presenting the enforcement practices of three federal states and gives a detailed description of the legal regulation concerning victims' aid in the State of Maryland.

Last but not at least it is necessary to mention András Vág's essay on the publicity of Satanism. The article gives an analysis of the content of the press conference following four murders and suicides which were allegedly motivated by Satanism and occurred during the same time period. Adding to his analysis the author makes comments on the relationship between the committed crime and its press coverage.

Miklós UDVAROS

Ross K. BAKER: **House and Senate**, W. W. Norton and Company, New York—London 1989. 236 pp.

The author is a professor of political science at Rutgers University and a columnist for the Los Angeles Times, a frequent contributor to other popular and professional periodicals. A sustained comparison of the House and Senate is something that most people assume to exist. They are usually surprised that such book is not to be found. Professor Baker has filled this void. He conducted about sixty interviews in 1986-87 with four kinds of people: recent and former senators, among them such who were active earlier as representatives, with newsmen, who have covered both Houses of the Congress, the members of several different lobbies and employees of the Congress. He points out that while the senators represent their state for six years in the Senate, the members of House spend only two years in the benches of the House. This fact also put brakes on the characteristics of their activities, characterizes to a certain extent their dealings with matters. Nobody doubts that the two bodies actually are so far from each other as they were two centuries ago, although the law promulgated in 1913 regulated that the senators are also elected directly by the people. The two bodies are not only far from each other but mutually very sensitive and suspicious. They even avoid each other's premises though no law or regulation would tell them to do so. The members of the two—chamber Congress may be friends privately on Capitol Hill, they almost never socialize with each other.

In the first chapter we see interesting matters about the changes and the struggles for prestige between the two bodies. Also this chapter informs us on the divided and the exclusive rights and licences of these two bodies. The following two chapters deal with those characteristic factors which contribute most to the divisions and struggles between the congressmen and the senators. Baker points out that the House chamber is the largest parliamentary room in the world, about three times larger than the English House of Commons upon which it was patterned. The Senate chamber is much different. It is a rather small and elegant place. The general rule is to go for the "prime real estate"-seats located on either side of the center aisle. Senators located here can gain recognition to speak somewhat more easily than those located on the flanks or at the rear. The relations between the leaders and followers are also different. The large bodies are inclined to hierarchies and to accomplish the routine tasks in an effective way. The smaller bodies can utilize better the personal contacts, where the individual moves are more tolerated or even encouraged.

The American system of the legislature is based on the geographic representation, consequently no congressman was ever elected by present the whole nation. Only the voters of the fifty states or 435 congressional districts possess any direct control on the composition of both Houses of the Congress. Several critics say that uncountable number of different and very partial interests collide and the process as a whole makes it impossible to select those persons, who would be the best for the legislature of the nation. If the national interest would be identical with the

accumulated interests of 153 congressional districts, the situation would be considerably easier. In the next chapters we gain an inside look into the very complex system of relations of the Congress and the media. Nowadays none of them can live without the other; the television commentaries often have significant influence on the results of elections. The columnists and television anchormen actually do not deal with every member of the Congress, only those who are the most interesting, charismatic or controversial personalities. It would be difficult to see who is really "mediaworthy" among the members of the legislative bodies. The House let the television cameras and reporters enter the chamber in 1979, the Senate permitted the same only in 1986. The senators debate sometimes for hours, the members of the House get only five minutes each.

According to he lobbyists the personal contacts are very important, and the representatives are generally more accessible than the senators. Sometimes the members of the lobby could convince the staff of a senator and this way the senator is more easily persuaded. Generally speaking the lobbyists try to convince the legislators to support or kill some amendments, make some announcement in the debate, which is favourable for some lobby.

Another question appears, namely whether the Senate and the House come to look similar: whether the frequent changes in the institutional framework has caused a kind of convergence between the two bodies. According to some experts, the effectiveness of the House has decreased in the legislative process, meanwhile in the Senate the loyalty to the institution is in danger.

Last but not least the volume deals with the problems caused by the different working styles of the senators and representatives and the characteristics of election campaigns. The volume is supplemented by an extensive index.

The volume by Professor Ross K. Baker can be used very well by those, who dwell into the legislative process of the greatest Western democracy and the activities of the U.S. Congress.

Miklós UDVAROS

Sanctus Stephanus et Europa—Saint Stephen and Europe. Szent István és Európa—Sanctus Stephanus et Europa. Ed.: HAMZA, Gábor, Művelődési és Közoktatási Minisztérium, Budapest, 1991. 140 pp.

A volume of essays and studies has been published under the auspices of the Ministry of Culture and Education about the role St. Stephen played in Hungarian history, the foundation of the Hungarian legal system and its European connections. In this volume, essays, written by prominent figures in Hungarian cultural life and by a Spanish professor, can be read. Studies written in Hungarian are followed by summaries in French. The inscription in Latin to Pope John Paul II reminds the reader that the volume of essays was published on the occasion of "His Holiness" first apostolic visit to Hungary.

The first treatise of the volume is Professor Gábor Hamza's work, entitled *Saint Stephen's Laws and Europe.* Firstly, the author expounds the connection between state and religion in Europe during the period of Saint Stephen, presenting supremacy of religion above the secular power during the reign of Otto III. This emperor set himself up for *defensor fidei as imperator servus Jesu Christi* and that is why he considered the foundation of the *regnum* Dei his sacred duty. In the spirit of this notion and Emperor Iustinian's Novella VI which emphasises the unit of the *sacerdotium* and the *imperium,* he felt called upon to develop the Church structure. The author lays stress on the fact that the first King of Hungary though had a great sway in the religious as well as in the secular sphere, still cannot be regarded as *basileus autokrator,* like the most rulers of eastern states of this period.

The legal system set forth in the edicts of St. Stephen closely followed the precedents set within the Byzantine system in harmonizing secular and ecclesiastical law with one another. With his Laws which drew upon both the secular and ecclesiastical sphere, he could not, of course, comprehend entirely the legal regulation of all the spheres of life. Finally Gábor Hamza emphasises the fact that Saint Stephen could functionally combine the *universalismus* of his Laws and the tradition of the Hungarian *consuetudo,* whereby contributed a great deal to Hungary's integration into Europe.

The next study is Professor Péter Erdő's work entitled *Saint Stephen's Church Organisation and Europe.* At first, the author introduces the conventions and the canonical regulation in Western Europe of that period. Then with stating the foundation of the Hungarian dioceses, proves that Saint Stephen following Western European models, established the Hungarian Church organisation legitimately. Its graphic evidences are firstly that Saint Stephen worked on the Church's organisation as a ruler in compliance with the notion of the Caroline age that is symbolised by the crown, lance and benediction received from the Pope, and secondly the assistance of papal legates. The kingdom and the Church were intertwined according to the conventions in Western Europe and it is proved by the foundation of the royal chapel in the *Hungarian Aachen,* in Székesfehérvár. Finally, the author points out the success of the Pseudo Izidorian model in the domestic Church organisation which is indicated by the ten dioceses and the catching on the *privilegium fori* in Hungary. Saint Stephen's Church organisation activities were modern and European, even if the conditions of the country were not adequate to it in all, stresses the author at the end of his treatise.

The next essay is written by Professor Angel Sanchez de la Torre (Madrid) in Spanish, entitled *La simbologia de la Corona en los pueblos indoeuropeos.* The author emphasises the significance of the crown as a symbol which had embodied the power and the presence of God on earth since the antiquity. He introduces the role of Hungarian Holy Crown in Europe and stresses its importance as the embodiment of the Hungarian independence. The etymological meaning of the crown is dealt with in details. The author sums up in the conclusion of his treatise that the notion of the crown symbolises the origin of the political power supported from numerous sources.

The following study entitled *Europeanism of Saint Stephen's Legends* is written by Professor István Kállay. At first, the author introduces the religious movements

of that age and the effects of these movements as reflected in the Hungarian historiography. Subsequently Saint Stephen's international appreciation who is presented in the title of apostle meritedly since he had helped the preachers of religion as their leader and supervisor. The cult of Saint Stephen had been developed before his canonisation for the lawful days labelled as *leges beati Stephani* at Székesfehérvár had been held on the anniversary day of his death. This was encouraged by the so-called great legend which had been written on the instructions of Saint Ladislaus. It emphasises the piety of Hungary's first king and his Church organizing work. This legend corresponds to the ideal of *civitas Dei* of Saint Agustin. The Hartvik legend which had been written on the instructions of the King Colomanus derives the origin of the crown directly from God and it means that our country is only in God's hands and it cannot be influenced by emperors or popes. The aim of writing legends was not only to glorify the first king of Hungary but also to give evidence about the independence from the Holy Empire as the legends emphasise the offering of Hungary for Virgin Mary, without mentioning Saint Peter. The author finishes his study with an appropriate quotation to Saint Stephen from the legends: "if a wise man listens to a lecture he enriches his knowledge, and the sensible man gets to know how to rule".

The next study is Professor Iván Bertényi's work entitled *Saint Stephen and the heraldry.* The author presents the picture of Saint Stephen evolved in the Middle Ages from a new aspect. He expounds the various descriptions in the Chronicon Pictum and in Thuróczy's Chronicle and it was regarded as natural in that age that Saint Stephen had coat-of-arms as well, which according to the knowledge of heraldry of our time seems to be a mistake. Then the author deals with the appearances of Saint Stephen's portrait in certain arms of towns. In the end the writer emphasises the importance of Saint Stephen's figure in Hungarian heraldry which have remained deserving of continuous respect for a thousand years.

Thereafter Professor Ilona Sz. Jónás's work *The development of the European Saint Stephen Image* can be read. The author shows us the life of Europe at a time in which it is turning to God and through this the discovery of human dignity, the reaction of society in the struggle against fears and uncertainty. People needed God in everyday life and in progress, which was indicated by the *pax Dei* movements, the building of churches and the pilgrimages to Jerusalem. This meant the enlargement of the boundary of Christian Europe, the Europe which gave birth the Saint Stephen legends as its integral part. Saint Stephen supported Christianity not only in Hungary but also in Rome, Constantinople and Jerusalem by taking care of the Hungarian pilgrims at these holy places. He was a *Rex corde magnus, rex pacificus* and *rex iustus* whose name was known all over Europe, but was judged differently than his wandering ancestors had been. At the end of the study the author emphasises that Europe remembers Saint Stephen as the king who kept up with Western Christianity and led his nation towards God's Kingdom's coming which was symbolised by embroidered *Te Deum* on the coronation mantle.

Last treatise of the volume is Endre Tóth's work entitled *Facts to the History of Christianity in the Province of Valeria.* The author describes the Christianity of the Eastern-Transdanubian Province of Valeria supporting it with the results of archaeologi-

cal researches. On the strength of discovered relics the existence of Pannonian Christianity can be proved only from the beginning of the fourth century, first of all from the questioning records of the pursuits of Diocletian's age. Then the Transdanubian Church organisation is introduced on the basis of the sources available and the religious buildings of that time are described. Two types of buildings are distinguished according their function, the communal gathering-places and the mausoleums of cemeteries built in towns. The author emphasises that as the eucharistic gatherings were endured or pursued an unvaried structure which could be called God's House could not be established. A very important archaeological relic from that age is the *fibula* of Hetény which was made for gathering up and ornamenting the *pallium* which forms the bishops' badges. Through the written and material relics the reader can get an authentic picture of the early history of Christianity of Hungary.

This well-compiled multilingual volume of essays and studies illustrated with numerous photos deservedly demands the interest of the Hungarian and foreign professional public as well as the interest of the educated public in general.

István SÁNDOR

Thomas OPPERMANN: **Europarecht: ein Studienbuch.** München, Beck Verl., 1991. 787 pp.

If one classifies the member states of the European Community (hereinafter EC, formerly European Economic Community) in terms of contribution to the literature on the "Law of Europe", the Germans undoubtedly rank first: in 1990 there appeared three books on the subject (by *Bleckmann, Oppermann* and *Moersch, Schweitzer* and *Hummer*), while in 1991 *Th. Oppermann*, Professor of Tübingen University, published his book indicated in the title, summing up the results of several decades of work in this domain. The latter writing falls into 6 sections: European organizations; European Community; Common Market; traffic of people; external relations; new challenges.

Clearly worded in the way of a syllabus, this book has the benefit of offering the reader concise answers to, and some clear guidance on, the points discussed. Such is the basic question concerning the *nature of the Law of Europe*, which is defined as the sum of legal norms interlinking and binding not only the member states, but also the subjects at law living or operating in them. The law of Europe is one "intervening" between international law and the national laws of member states and, as regards its legal nature, standing closer to the national laws than to the classical international law (Rz 1).

Of course, the law of Europe should be understood to mean not only the so-called primary law (EC-Rome Treaty, EURATOM Treaty, Treaty Constituting the European Coal and Steel Committee), but also the so-called secondary sources of law (decrees, guidelines and resolutions of the Committee of the European Community and the Council of Europe as well as legal principles expressed in the legal practice of the European Court).

In cases of conflict between the Law of Europe and the national laws of member states, the former has *supremacy* over the latter, as has been consistently manifested in the practice of the European Court since 1963. This supremacy is both *ex tunc* and *ex nunc* in effect, meaning that the rules of *lex posterior* (national law of later date) do not prevail over earlier provisions of the Law of Europe (Rz 528).

This doctrine of "genuine Law of Europe" upheld by the European Court has been adopted over time by the courts of EC member states (the FRG's *Verfassungsgericht* in the late 1960s, the French *Cour de Cassation* in 1975, and the British *House of Lords* in 1980). The supremacy of the Law of Europe over internal law has in fact never been called into question in the smaller member states of EC (Rz 531).

A practical implication of the doctrine of supremacy of the law of Europe is that the internal laws of member states contrary to it are inapplicable ("*ohne weiteres unanwendbar*"), as has been stated in several decisions of the European Court (Rz 540).

The EC, consisting of 12 member states at present, virtually rests on 3 different systems of law: the Roman and German (the two may be seen as one unit), the Anglo-Saxon, and the Skandinavian. The dissimilarity of these systems of law is not confined to essential differences between legal norms, but has far deeper roots in the nature of legal thinking: continental legal thinking is characterized by abstraction, whereas insular Anglo-Saxon) legal thinking is marked by a pragmatic approach getting down to specifics. Seen from another angle, continental law may be said to be characterized by the supremacy of written law, while insular (Anglo-Saxon) law by the application of unwritten law.

Precisely in the face of these essential differences, economic integration can hardly be conceived of without an approximation between the widely differing national laws of member states. Therefore, under Articles 3 (h) and 100 to 102 of the EC Treaty, intensive efforts have been launched towards *harmonization of laws* in furtherance of concrete goals of economic integration.

Of course, the work aimed at the harmonization of laws has primarily embraced the areas where legal norms tend to impede economic integration (customs regulations, regulations on agriculture, legislations on settlement and change of residence, legal norms of a technical nature). However, in accordance with Art. 220 of the EC Treaty, harmonization of laws has recently been extended beyond the above "priority" areas to domains of relevance to economic or social development. Under this dynamic approach the EC is seeking harmonization, even if not unification, of the most important legal norms in the European region in an effort to lay the groundwork for a law of the European region (*Europäischer Rechtsraum*) (Rz 1067, 1126).

The technical feature of harmonization of laws is that a law harmonized remains national (Rz 1092) and that direct uniform norms of law are established by member states in exceptional cases only.

The chapter on external relations deals with questions of *accession to the EC*. Understandably, the reader's attention is aroused by this part of the book in the first place. Under Art. 237 of the EC Treaty, any European State may apply for admission to membership in the EC. Since the EC Treaty was concluded, however, practice has established but two basic conditions for accession: (a) democratic social order and (b) market economy and free competition.

The accessions so far have increased the number of member states, originally consisting of 6 founders, to 12, with the admission of Great Britain, Denmark and Ireland in 1970-72, Greece in 1975-81, Spain and Portugal in 1977-76.

The applications for membership currently under consideration include those of Turkey, Austria and Cyprus submitted in 1987, 1989 and 1990, respectively. An application was also submitted by Morocco in 1987, but it has little chance of acceptance as the country cannot be considered European either geographically or sociologically. The author refers to Poland, Czechoslovakia and Hungary, which are also seriously considering accession.

As regards applications for accession, submitted and to be submitted, the author says that probably there will be no new accession until 1993, when a single European inner market is expected to be established. By that time, however, the EC will have to have its own concept elaborated concerning the conditions to be met by new applicants, if it is to arrive at the European Union envisaged in the long-term plans (Rz 1883, 1910).

A loser form of association was used by the EC for Greece (before accession), Turkey, Malta and Cyprus, which, under Art. 238 of the EC Treaty, conclude each a *treaty of association* with the EC establishing "special and privileged links" and, in terms of international law, bilateral relations securing formal parity for them.

Of particular interest is Chapter VI of the book, which gives account of the extension of the law of Europe to new areas and of new challenges like education and training, research and technology, culture, environmental and consumer protection. By way of illustration, we shall highlight here the *development of environmental law.*

Legal development in this area was underpinned by four programmes of action for environmental protection which, adopted by the EC in the period 1973-1987, called for the elaboration and publication of some 200 legal norms, mainly EC guidelines. The major aspects covered by legal regulation include study of the carrying capacity of the environment, elimination and reduction of environmental degradation (protection of water, of air, regulations on wastes, hazardous wastes, grave accidents polluting the environment) and conservation of nature.

It is a fact that member states are constantly sued for breach of contract relating to inappropriate compliance with EC guidelines for environmental protection. This prompted EC member states to add a new chapter (VII), entitled "Environment", to the EC Treaty [Art. 130 (r) to (t)]. Its provisions are governed by two general principles: principle of prevention (*Vorbeugungsprinzip*), according to which pollution harm to, and behaviour damaging, the environment should be addressed at the source (*Ursprungsprinzip*), and principle of liability for damage (*Verurdsacherprinzip*).

Although EC member states are of one mind about the importance of regulating environmental protection, their legislations show considerable differences in establishing priorities between other tasks of public concern and the requirements of environmental protection, which in turn warrant efforts at an approximation between the environmental laws of member states (Rz 2027), because conflicts of interests of industry, transport and agriculture with those of environmental protection are an everyday occurrence. At the same time,

opinion polls show that in Europe environmental protection is precisely the area where, in contrast to other spheres of life, all-European measures are held desirable and accepted by the peoples (Rz 2032).

In summary, I confine myself to noting that for jurists outside the EC but taking an interest in its activity and legislative pursuits this work is a wealth of comprehensive knowledge, with its bibliographical references providing useful guidance for continued indepth research.

Alexander VIDA

Vanda LAMM: **A History of Judicial Settlement of Disputes Between States** [Jogtudományi értekezések (Studies in International Law), Akadémiai Kiadó, Budapest, 1990, 163 pp. ISBN 963 05 5612 X]

This study of the author is an attempt to present the historical development of a highly important institution of international law. International arbitration is perhaps one of the most controversial and yet one of the most interesting issues of international law. Behind the related set of problems are century-old disputes, and there are still divergent and often conflicting views on the role and possibilities of arbitration in the settlement of disputes between States.

The study traces both the practice of international arbitration as a means of settlement of international disputes from ancient times to the early years of the 20th century, when the question of institutionalization of judicial settlement of international disputes came to prevalence in interstate relations. In other words, the author inquires into the practices of epochs in which the introduction of institutionalized arbitration in the judicial settlement of disputes between States was not the order of the day. As a matter of fact, the present volume seeks to fill the vacuum left by the author in the domain of this subject in her earlier book published in 1984, a monograph dealing with the role and development of the institution of permanent arbitration and analyzing the relevant caselaw. [See Vanda Lamm: A hágai Nemzetközi Bíróság döntései, 1957-1982 (Decisions of the International Court of Justice in The Hague, 1957-1982), Gondolat, Budapest, 1984, 340 pp.] The two publications are mutually complementary and provide the reader with a coherent picture of experiments in the domain of international justice.

The writing under review consists of six chapters, with brief concluding comments by the author and with abstracts of arbitral awards handed down in the best known cases.

Chapter I deals with the historical antecedents to arbitration or, more specifically, with the emergence and progressive spread of this institution in the practice of States in ancient times and in the Middle Ages. An analysis of the relevant case-law reveals that while in earlier periods arbitration was often used to adjust differences concerning struggles for the throne by having recourse to the good offices of mediation of a third person, traces can also be found of the typical elements of international arbitration, particularly in the practices of the ancient Greek city-states. Moreover, there is clear evidence that the

international so-called clauses of *compromis* were present in international contractual practice (pp. 13-14). This cannot be said of the practice of the Roman Empire, where arbitration in private-law cases was rather widespread. However, that arrangement was not frequently resorted to in international relations at the time, as Rome had no need of it nor had it any particular interest in the "internationalization" of the institution. The Empire considered its eventual international disputes from the angle of its indisputable superior strength and "tried to put even the institution of arbitration at the service of its expansionism" (p. 17). Medieval arbitration bore the stamp of the Catholic Church aspiring to administer justice. Given the extremely strong influence of the Church, the Popes sought to make the head of the Church the chief arbiter of the Christian world. With the decline in papal power, rulers and certain institutions, including even private persons came to be involved in arbitration. Among the latter cases, awards of relevance to Hungary are also discussed at length by the author. Problems of legal delimitation of arbitration and mediation as well as definitions of categories like arbiter, arbitrator and *amicabilis compositor* are likewise enlarged upon in the same chapter.

Chapter II of the book gives a brief survey of arbitration in the post-Westphalian Peace period, explaining in the form of thesis the causes of this practice of dispute settlement slipping to the background in the 17th and 18th centuries. The declining role of the institution was a surprising and unexpected tendency, because the peace treaty had contributed greatly to stabilizing the balance of forces in Europe and had practically led to the creation of a favourable climate for the development of arbitration. This short chapter helps the reader trace the reasons—explaining the historical background looming behind them—why States made no use of this possibility.

In Chapter III the author deals with earlier ideas that emerged in different epochs as part of various scientific and political proposals for the peaceful settlement of disputes between States. A considerable part of such proposals had its roots in the illusion of European States about their verification in some sort of federation, and it is therefore not surprising at all that the related ideas stood little real chance of practical implementation. The proposals as outlined in this chapter carry rather instructive lessons about present-day aspirations to European unity as some elements of the essentially medieval proposals appear to attract a high interest in our days again. Among the proposals examined by the author, mention may be made of the plans of Pierre Dubois, György Podebrád, Émeric Cruse, William Penn, and Saint Pierre.

Chapter IV presents the theory and practice of international arbitration from the end of the 18th century to the First Hague Conference. This is perhaps the most interesting chapter of the volume, as it not only highlights the causes of revival of the institution of arbitration, but also subjects to precise and thorough analyses of concrete (and successful) case-law arrangements which in the second part of the 19th century played a so important role in promoting processes of judicial settlement of international disputes. The advance of the entire process is illustrated by a detailed analysis of statistical figures on experiments in international justice at the time. A subsection is devoted to an analysis of arbitral practice under international treaties as well as of the forms of compromise embodied in bilateral and multilateral treaties. Another

sub-section covers the related positions of national parliaments, world peace movements and scientific institutions as well as the views which were set out in international legal literature during the 19th century.

Chapter V of the volume discusses the decisions of the Hague Peace Conferences of 1989 and 1907, which were epoch-making, at least from the point of view of arbitration. The author highlights the basic motive behind the convening of the Conferences as well as the interesting and unexpected shift of emphasis from disarmament issues, which had figured as the original subject for consideration, to questions of peaceful settlement of disputes. After a thematic presentation of the proposals made and the ideas raised at the two Conferences, the author concludes that "the greatest accomplishment of the First Hague Peace Conference was the establishment of a Permanent Court of Arbitration", implying that "international justice had grown from a sporadic phenomenon of international relations into a permanent institution of international law" (p. 99). Of particular interest in the sub-section on the results of the Second Hague Peace Conference is the author's discussion of reactions by States to the introduction of compulsory international adjudication. Along with reviewing the achievements of the Conference, the author analyzes the so-called Drago-Porter Agreement (Convention II of the Second Hague Conference) and Convention XII creating the International Prize Court (pp. 106-110).

Chapter VI is a summary account of arbitral practice during the period following the Peace Conferences up to the outbreak of World War One. The author devotes special attention to evaluating the activity of the Permanent Court of Arbitration. An analysis of its practice leads Vanda Lamm to disagree with views that questioned the positive effects of the achievements of the Hague Peace Conferences, or rather tried to prove that the States which were fraught with political tensions as well as the States which were bound by alliance had not resorted to arbitration despite the Hague conventions. In the author's view, the figures prove just the contrary. Her reasoning is supported by the added fact that, under the impact of the documents adopted at the Hague Conferences, there was set up a permanent international judicial forum in the American continent in 1907. The work of the Central American Court of Justice is likewise analyzed in this Chapter.

As I have noted earlier, the author has provided her study with an appendix giving a brief review of arbitral awards on the major subject-matters. Interested readers may gain an insight into the cases often referred to in special literature, such as the Alabama Claims, the matter relating to the fish-pond of Tátra, the Venezuelan Preferencial Claims, etc. Lack of space has not naturally permitted but a general outline of this work, but the volume contains a plethora of other information which I have not covered and which interested readers and university students alike will find it useful to consult. The inclusion in the Appendix of the case-law in the Hungarian language offers a highly useful source material especially for university students.

Viktor MAVI

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HUNGARIAN LEGAL BIBLIOGRAPHY

1991 1st PART

Edited by Katalin BALÁZS-VEREDY

This bibliography contains legal works of Hungarian authors issued as monographs in Hungary between the 1st of January and the 30th of June 1991, including books, material of periodicals (articles) and studies published in collective works.

The material for the period 1945–1980 is resumed in the following publication: Bibliography of Hungarian legal literature, 1945–1980. Budapest, Akadémiai Kiadó, 1988. 429 pp.

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Articles

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Vol. 34 **1992** **N° 3–4**

CONTENTS

STUDIES

KALEIDOSCOPE

BOOK REVIEW

HUNGARIAN LEGAL BIBLIOGRAPHY

Acta Juridica Hungarica
1992 34 N° 3–4, pp. 127–137

Akadémiai Kiadó,
Budapest

STUDIES

Zoltán Novotni

New Trends in Hungarian Company Law

Hungary is currently going through a period of change. The transformations are characterized by permeating all spheres of the economy and society and are aimed, as is also spelled out in the Constitution, at creating an independent and democratic state governed by the rule of law. For a state of law to be established, it is necessary to build a system of institutions under a well-thought-out and comprehensive concept articulated for that purpose. All this, however, calls for a thorough revision of our legal system. The legal order should be in keeping with the actual economic and social reality and the law should reflect and regulate the real sets of existing relations for, in the words of Gusztáv Szászy-Schwarz,"Law is the sciences of practical life, the only criterion of which is its practical serviceability".

In evolving the institutional system of a law-governed state the following criteria should be met:

1. This country needs a fundamental law, a Constitution, to provide a lasting legal regulation of power and political relations, and, along with laying down the rules governing the structure and functioning of the state organization, to set forth the fundamental human and civil rights and duties, while devising guarantees for the exercise of these rights.

2. There is a need, in the first place, for an enactment to regulate the levels of law-making, ensuring that the basic principles of legislation are no mere declarations present in the background, but rather are actually observed in the process, and to govern the different sets of socio-economic relations on a lasting basis, while preserving the consistency of the legal order.

3. The most comprehensive reform is called for by the administration of justice, an area where, in several aspects, there are but mere concepts regarding the direction of

change. The foremost goal is to establish a judicial system which is independent of every other branch of power and in which the avenues of legal remedy, acting as a control mechanism, remain within the frameworks of an independent judicial organization. Additionally, legal remedy is provided by ways and means other than protests lodged and fines imposed.

4. It is necessary for a Constitutional Court to be set up and to function effectively in order to revise, by acting as an organization of control, the legality of the legislative process and to interpret the provisions of the Constitution.

5. It is necessary to set up, within the judicial organization, a registry court which would act as an instrument giving effect to the legal order securing the frameworks of economic life.

6. Establishment of a "new" type of court, an administrative court, its functioning serving to secure a balanced harmony between central state administration and local self-government. This would exercise control over decisions of administrative, or executive organs on the one hand and would afford protection for the rights and lawful interests of citizens and other subjects of law on the other.

7. The Constitution and legislative enactments should determine the ways and means of, and eventual restrictions on, the exercise of human and civil rights. An appropriate regime of legal remedies should be evolved to provide for citizens legal means against violations of their rights. Devising a real system of legal assistance to citizens would make it possible to abandon the existing Hungarian practice, namely the systems of complaints, notifications of public interest, and recourse to the press. It is necessary to create frameworks for the representation of interests by the ombudsman and for the realization of public interests.

It is worthwhile, however, to compare the status and modalities of implementation against these goals as outlined above.

First, this country has no stable fundamental law, as the Constitutional is amended by the ruling parties to suit the power relationships existing from time to time. What is needed is a comprehensive and well-considered concept to replace patchwork and modifications. The prevailing legal system is anything but a "system"; rather it is a mass of competing and contradictory laws and regulations made in disregard of the basic principles of legislation.

Second, the Constitutional Court has become first and foremost a general forum of complaints, which litigants and complainants look on as the last resort in seeking remedy to their grievances, real or perceived.

And third, the reform of the judicial system, or the judicature has been broadly outlined, but certain institutions already established under the relevant concept do not have the substance as planned and expected. Cases in point are the introduction of authorities of an administrative type and the functioning of registry court in a way that betrays a smuggled-in state recognition of legal personality.

This leads us to ask what a registry court should be like and what kind of activity it should carry out, as there are various solutions at hand. Thus, for instance, the registry court may take over the role of the economic police, may act as an organ of supervision

over competition, or, as a guardian catering to the needs of the state, may be assigned responsibilities similar to those of a lawyer or a property agency.

The registry court should function first of all as a court, because the latter is independent, watches over nothing but the enforcement of law, is capable of generating recognition, constitutivity by its decisions, shapes the mould of legal relations between parties, and establishes and terminates such relations.

The registry court is *not necessarily* a separate part, with an independent status, of the judicial organization. In empowering the law-courts or the country courts to perform the functions of a registry court, the practice of earlier decades was intended to ensure that the responsibilities of the registry court would not be separated from the other activities of the court. In all states where registration of firms is assigned to the court, that responsibility is not carried out by a separate organization.

Under the special system now prevailing, the tasks of the *registry court* can be divided into 4 categories:

a) keeping a register (of firms) is either compulsory or non-compulsory with respect to certain economic actors;

b) the performance of acts is of *constitutive* nature, including recognition by the state, with rights created or shaped, with respect to corporations with or without legal personality, state enterprises, cooperatives, other undertakings or businesses;

c) the exercise of *judicial powers* serves to *shape the pattern of legal relations* exclusively with respect to economic corporations;

d) *"legality control"* is exercised with respect to economic corporations. Associations and foundations are registered and cancelled, by way of exercising functions of the *country court,* in extrajudicial proceedings. In addition to its responsibilities as a court of registration, the court's tasks in *lawsuits* include dealing with conflicts arising out of legal relations between associations, more specifically legal actions involving impugnment of decisions, enforcement of rules on minority protection, suits against senior officers, etc.

Concerns and problems encountered with respect to specific tasks of the registry court will be:

a) keeping the *register of firms.* The register of firms is a public and authoritative institution requiring security of business and information on the market. Keeping it is a task for the court in the laws of several states (Germany, France). But, even in countries where registration is assigned to another institution, an enterprise registry office (e.g. in Great Britain), the head of that institution is vested with quasi judicial powers, such as control over suspension and termination of enterprise activities, *ex officio* cancellation of firms, and the like.

The register of firms derives its character as a public record from the *protected status of firms* in business transactions (competitive position, goodwill), the documentation of their *operations* and the declaration of firm property.

In our judicial practice of old, a main purpose of a commercial firm was to provide an opportunity for anyone wishing to contact a particular firm to obtain reliable information about, e.g., the ownership of the firm (*Kuria*, 21.778/1893), from the register

of firms and other documents serving as the basis for registration. Judicial practice established the *documentary principle* along with those of *public authenticity* and *publicity* ("the court shall enter into the register nothing but facts supported by declarations made in legal form by persons entitled thereto"; *Kuria*, 322/1887). On the other hand, publicity is also limitative of the contents of the register of firms, because internal transactions not destined for the public must not be entered (*Bpesti Tábla*, 2101/1883).

In connection with conflicts between the protection of *business secrets*, publicity, and the *need for market information*, the question is this: what can be made public? Under our old law, the data in the register of firms was open to inspection, and copies thereof as well as of other documents kept in the archives could be issued. Among them was the official certificate of annotations in the register with an indication of their dates of validity, and the negative certificate to the effect that a particular annotation did not figure in the register of firms.

Our present-day law embodies all of the principles and rules mentioned above, but it also refers to the possibility of excluding publicity, laying down rules relative to non-public registration. At the same time, it combines the *documentary principle* with a peculiar misconceived notion, also evidencing the professional standard of law-makers, inasmuch as both the relevant Law-Decree and Decree are consistent in referring to void documents. This reference is ignorant of the fact that the document itself is not rendered null and void by simply putting a void legal transaction into writing, particularly when nullity, for instance, results from a failure to meet the requirement of written form.

The whole body of current regulations allows the conclusion that the Gazette of Incorporated Firms is the primary source of information, whereas inspection of firm-related data and the possibility of applying for certificates of incorporation or copies thereof are subsidiary to the former.

Basically, despite its socio-economic significance, registration of firms is no function of the court, but rather an activity subject to supervision by the court, while *examination of the validity of legal transactions and facts of law serving as a basis for incorporation* clearly presuppose possession of special legal and judicial knowledge and powers.

Nevertheless there arise a few ideas, with some conclusions to be drawn.

A) It is insufficient to examine legal transactions connected with and supporting incorporation in the domain of *invalidity*, because public authenticity and presumption of good faith exhibited by new legal transactions in honouring the facts registered also require examination of *inapplicability* (not only of the rules governing conditions as to time, but also of *inapplicability to persons*, e.g. the existence of *contracts draining away resources for debt coverage*). The examination of inapplicability is of particular importance since more and more frequent of transactions and contracts "founding incorporations" designed, along with documenting extension of fictitious credit, to divert sizable enterprise assets from satisfying proprietary claims of the state, on apparently valid and even legislative authorization (e.g. by resembling arrangements as regulated by Art. 23 of Act X of 1988).

B) Nullity as an incident of *invalidity is hard to recognize merely by examination of documents.* Also needed are background information, knowledge of materials pertaining to other transactions, and disclosure of the foundation process. Here are some cases in point:

— A *contract is null and void if contrary to law,* e.g. when it was made it was done so through abuse of economic superiority and contains unilateral advantages (Art. 20 of Act LXXXVII of 1990 on Competition). A host of corporations which had forced workers of certain workshops, sections, and shops to join them were formed under the pressure of economic superiority, exposing workers to unemployment. Unfortunately the registry court is hardly in a position to recognize, in the light of what has been stated above, the unlawfulness of such contracts and the fact of economic superiority;

— A contract is *null and void* if made *by evading the law.* Such is the case, for instance, of founding a joint venture when, for the purpose of manipulating Hungarian interests and voting power, half the property is shown to be other than contributed capital, or partnership fund. Rather the founders agreed that the Hungarian partner should grant the use thereof the corporation to be established, whereby that share of capital would not embody Hungarian participation, but instead would become common property of the venture with different property shares. This arrangement apparently conforms to the law, but what else is it if no evasion of statutory regulations? Yet how can such designs be detected in the foundation deeds that appear to satisfy the rules?

— A contract is also *null and void* if it *obviously* runs counter to *social interests.* Any commercial or service activity which cannot meet compulsory and accepted guarantee and warranty liabilities because, given the lack of capital and the declaration of limited liability, no funds are available for satisfying such claims is obviously contrary to the interests of society. Any undertaking constituting a source of increased hazards and capable of causing large-scale or massive damage, is subject to unlimited liability by operation of law. But of this undertaking is being prevented by its minimum original registered capital from satisfying claims against it, is likewise contrary to all interests of society.

In such situations, the court acting as a registry court could in principle establish the nature of limited liability as contrary to social interest and hence its nullity, but only if it were able to see and determine the real field of operation, the actual economic activity of an incorporation or a firm. However, instead of regulating matters in this direction, Decree No. 13/1989 (XII. 16) of the Minister of Justice currently in force is based on formalism, a system of statistical figures, and its set of requirements, *completely veiling* as it does *real and shared goals and spheres of activity,* does not enable, nor can it enable, the court to establish nullity;

— Also to be regarded as null and void is a *fictitious* or a *concealing contract,* namely a transaction stipulating rules instead of specifying a result really intended by the parties. Accordingly, any contract of corporation concealing agreements embodied in contracts of the parties that refer in name to syndicates (consortia, firms of like nature, etc.), but have not been presented and actually govern and organize relationships between

parties in respect of, e.g., assessment of contributed capital, extend and countervalue of accessory collateral services, and stipulation of pre-emptive rights is null and void.

However, disclosure of an intent to conceal and full knowledge of pertinent facts are impossible precisely because of the nature of concealment and the hidden content of concealed contracts.

It remains to be pointed out that invalidity and hence nullity can often be *corrected,* the cause of invalidity can be removed *a posteriori.* The fact of subsequent remedy is nevertheless impossible to clarify by examination of a single document, so a declaration at law which has already become invalid is seemingly void.

b) *Constitutive acts of the state as facts generative, formative and terminative of rights* are consequences and manifestations of state power, more particularly of judicial power.

In exercise of his/her power the judge creates and terminates subjects at law, creates, modifies, enforces, and dissipates rights and obligations. This series of actions results in recognition by the state, namely in approval by the state of the shaping, existence and operation (economic activity) of social formations instituted by human will.

Judicial decisions are based on the *public interest.* State acts of recognition, performed to protect and apply the law, may be instrumental in and supportive of establishing economic organizations, associations, and foundations that are useful to society as a whole, embody social interests, are capable of economic operation, are of advantage to the community, and are within permissible limits according to criteria of community service and interests.

The *boundaries of judicial acts* are demarcated by specific provisions of law as well as by constitutional principles, accepted principles of civil law, and norms of public policy known to and accepted by all (good morals, honesty).

However, judicial recognition presupposes:

(aa) appropriate expression of the parties' real common will (consensus);

(bb) clear and unambiguous statement of common goals;

(cc) putting all this into writing (deed); and

(dd) choice of the appropriate mode of legal recognition (e.g. firm with legal personality) and indication of operational conditions.

Add. a) Often, the real will of the parties is by no means to set up an economic corporation; they are prompted to do so by tax rules, available credit lines, new benefits extended to entrepreneurs, because a new undertaking is granted special tax exemptions as the former restarting credit was intended for new "forms of undertaking".

The model of one-person limited liability company, with no conditions and guarantees attached to its establishment, has led to the mass emergence of irresponsible, nominal organizations as against the preferable real *individual firm.* Along those same lines, derogative treatment of general partnerships as a form of incorporation, retention of the denomination "economic partnership", and absence of actual partnerships have tended to produce a dumping of limited liability companies established without effective capital, with declaration of formal contributed capital, in quest of benefits, economic and financial support from foreign participants. The establishment of one-person joint stock

companies and ones limited to a narrow range of formally several shareholders covers no real partnership and no effort at pooling of capital, but implies an endeavour to escape burdens, to secure managers' livelihood and to increase their income unrelated to performance, while keeping in existence state enterprises doomed to bankruptcy.

The necessary attributes of a real incorporation include:

1) corporate property—independent, or separate *common property*—resulting from *partners' voluntary limitation of their respective shares in property*;

2) a corporate goal, as a determinant factor of activity, set by common accord and motivated by shared interest;

3) aspirations for *lasting* cooperation, for lasting economic and organizational links;

4) the principle of *shared risk*; and

5) a hope for common economic gain to be acquired through joint efforts.

In the absence of these criteria one cannot speak of any association, of any common will.

Add. b) A *common goal* is an indispensable notional element of association and should therefore be expressly stated.

A common goal should be *realistic,* permissible, and accepted by every partner, so, in building relationships of partners, it is necessary to appraise economic preconditions, the property background, immaterial factors, market opportunities and operating conditions in order to ensure that the corporate goal is not contrary to the legal order and the accepted rules of the market and competition, is not prejudicial to the interests of the external market, to the environment, etc.

As our current law of procedure dispensed, as it were, with the requirement of fairly clarifying the said goal in all these aspects and actually expressing it, it does not provide for registration of real possibilities open to business activity and *hence rules out a priori* the possibility of real judicial recognition as well.

Add. c) The actual will to establish an association (society, foundation) and the actual goal of a new organization can only be stated in an appropriate document, usually in *contract form.*

The decline of our contractual culture during the past decades, as is manifested in the stereotype filling up of formal documents, has reduced the effort at raising to the legislative level the *free self-regulatory will of the parties*—one of the greatest achievements in modern times of mankind in the process of embourgeoisement and liberalization—to a bureaucratic act, to paperwork, to the status of a worthless file to be disposed of. In the contract, the rule of the *Code Civil*—in keeping with the doctrine of Kelsenian legal positivism as well—raises in fact to the status of enforceable law *a legal norm or a norm of conduct established by the free will of interested parties* rather than under compulsion by the state. Of particular relevance is the recognition of the parties' contribution to norm creation in respect of complex contracts of incorporation, the function of which consists not only in regulating individual (single) legal relationships, but also in governing and settling on a lasting basis a mass of diverse and complicated legal relations overlaying one another. Indeed, such contracts are supposed to be able to do so, but not under the relevant Hungarian legislative concept and established practice.

Self-regulation covers the lasting system of relations, the permissible courses of conduct and their effects, trying to eliminate the impact of possible conflicts, disputes and diverse interests as, in addition to laying down stipulations, it determines legal consequences as well.

However, the Company Act, *not even referring to* the possible content and function of *contract of corporation*, enumerates, as it were, the compulsory and occasionally necessary elements thereof. Related practice is of no value as it has created patterns in a process which, not conforming to reality and the needs of parties, has been further strengthened by the formalist rules of the registration procedure and practice of registry courts keeping closely to the requisites determined by law, although the question is there of:

— how to transfer the ownership of any property to the corporation without the contract regulating in detail the transfer and acceptance of things, the contribution of immovable property and the mode of acquiring property, stipulating guarantees for proper use, indicators of suitability, etc.;

— how to contribute legally protected intellectual property (patent, trademark, know-how, etc.) without regulating all questions concerning the scope of and restrictions on licence, the protection of secrets, the modalities of royalty payment, and the conveyance of rights;

— how an "accessory" service becomes part of a business share without the contract which determines a partnership interest laying down the relevant rules (e.g. for the use of municipal services, warranty of quality, sharing of obligations for maintenance and repair, rent, and claims for reimbursement of expenses in the case of business premises made available).

I should add that the problems concerning the inheritance of business shares, stocks and property shares, and the joint membership of co-heirs are unregulated, and the rules governing the exercise of corporate rights held by co-owners go unformulated in the system of stereotype regulations centred on the filling up of printed forms.

Add. d) A judicial decision creates a *new subject at law* or modifies the status of an existing one.

In the majority of cases, the constitutive decision of the judge creates *legal persons,* i.e. organizations separated from the founders, capable of independent transactions, and having names and personalities of their own, which, under the specific solution devised by the Hungarian legal system, possess *absolute legal capacity.* This means that, *with the exception of prohibited activities,* they *may acquire any right,* may undertake any obligation, and may conclude legal transactions without restrictions. If such is the case, the question arises of why it is so important to have the *scope of activity* strictly specified, to view with suspicion any operations outside that scope, and to threaten them with prejudice and sanction.

A review of European changes in the conceptual approach to the status of corporation as subjects at law permits us to state that, apart from the break in the previous rigid doctrine of *ultra vires*, inner restrictions on the activity of economic corporation and on the rights of representation in the directives of the European

Community and the legislations of the Communities based thereon do not generally obtain in relation to *bona fide* third persons, but the limitations on the scope of activity as recognized by the state determine *a priori* the room of economic corporation for manoeuvre.

Despite the conceptual regulation by the Civil Code, Hungarian legislation and legal practice have so far failed to effectively recognize the validity of actions by legal persons overstepping the boundaries to the scope of activity. Suffice it to refer here to the substance of the relevant provisions of law and to judicial practice concerning economic fines. As matters stand, it appears justified to effect some change in the concept of the Civil Code regarding economic corporations with legal personality, to devise a system that will recognize, as a general principle, the registered scope of activity, but will, as an exception, allow activities beyond that scope.

It is absolutely warranted to widen the range of *registered firms without legal personality.* An individual firm can be conceived of in the form of either limited or unlimited liability (the latter would eliminate the notional absurdity manifest today in the formation of one-man "corporations"). It would be necessary to grant recognition to partnerships, an internationally known form of corporation, which means no separate subject at law (proprietory organization operating under its own name and capable of suing and being sued), but only a legal relationship between its members in the nature of mutual representation, which is characterized by a shared goal of profit-making and shared risk-taking. On the other hand, as concerns the legal capacity of incorporated firms without legal personality, it is desirable and practicable to apply the doctrine of *ultra vires,* to declare the scope of such firms do not appear warranted and lawful except within bounds accepted by the court.

c) *Shaping the legal relationships of corporations within frameworks authorized by the court.* The settlement of conflicts arising between partners or between members and an incorporation in the course of legal relations is divided, with or without reason, by our Company Act between the court acting *in contentious proceedings* and the *registry court* performing *extra-judicial functions.* The Act also assigns responsibilities of registration and record-keeping in general, in relation to firms (incorporation, supervision, cancellation).

Whereas it is a task for the court acting in lawsuits:

— to supervise decisions of an economic corporation at the request of any member (Art. 44);

— to consider unlawful decisions of the corporation (Arts. 45, 116, 139, 279);

— to settle disputes between the person in charge of final settlement and members of the corporation (Art. 53);

— to establish the validity of exclusion (Arts. 78, 122, 150, 182);

— to settle legal disputes between corporations and senior officers (Art. 290;) and

— to establish the unlimited liability of a majority-share joint stock company in favour of the creditors of an corporation subjected to control (Art. 326),

it is the function of the registry court:

— to have the decision-making body of the corporation convened (Art. 42);

— to have the person in charge of final settlement designated, in the case of an corporation dissolved, at the request of members representing not less than one-tenth of the votes (Arts. 48, 318);

— to order, in exercise of the prerogative of the general assembly and at the request of members representing not less than one-tenth of the original capital, expert inquiry into the balance-sheet of a limited liability company and other aspects of its activity (Art. 195);

— to instruct managers to provide information for members of incorporations and to allow them to inspect the books and documents (Art. 203);

— failing a manager, to convene the general assembly of a limited liability company (Art. 206) and

— to convene the general assembly of a joint stock company in exercise of the management's prerogative (Art. 273), acting instead of members and according to their status.

The above rules empower the registry court to perform legal acts which are supposed to belong to the province of members or organs of an incorporation. However, the function of the registry court here is to *remedy missing legal declarations by the parties.* The registry court comes to play a role in settling disputes on their merits when it orders senior officers (managers) of an association to pursue a specified course of conduct within the frameworks of the corporation's legal relations, namely of the underlying legal relationship between a member and the association. This function in dispute settlement is very similar to a situation in which the validity of a decision of the corporation is considered in a lawsuit or which involves judicial settlement of a conflict arising in charge of final settlement and members. As can be seen, the Act is inconsistent in the separation and distribution of functions, particularly so when it treats the registry court as a unit separate from the judicature, from the organization exercising judicial functions.

d) *Some questions of legality control.* Once the system of a law-governed state has been fully established, so-called legality control cannot be upheld as a special concept. It is for state organs, primarily the courts, to secure the operation of the legal system, whereas the responsibility to enforce certain rights in the public interest may be assigned to spokesmen and perhaps to the procuratorial organization.

It is known in the modern capitalist economy that the right of supervision of organizations which control like a holding for the economic or internal activity of corporations operates as a regulatory and moulding factor capable of working efficiently and successfully. The right of judicial organizations or registry offices functioning also as registry courts to exercise supervision and to take measures is an important state prerogative recognized throughout the world, but continuous supervision over the operation and decisions of firms cannot be a task reserved for the court. (It was only the system of direct guidance over the planned economy that sought to impose similar responsibilities on members of arbitral tribunals which existed to decide economic disputes.) In any case, as we have seen, random examination of documents, submitted or ordered to be sent in, can hardly give an idea of the validity, defects and nature of a legal transaction.

There can be no doubt that the court (not necessarily the registry court) may, *at request* or *on motion,* take appropriate measures to see that the operation and decisions of a particular economic organization conform to the provisions of law. However, it is unwarranted, and incompatible with judicial power, to hint at the possibility open to action *ex officio* (Sect. 19, para. 2 of Law-Decree No. 23 of 1989). It is a different matter that if supervision by the tax office over the economy, supervision over the market and supervision over securities as well as the avenues of prosecutor's action appear to be insufficient beside the system of internal supervision as required by a market economy, the need may also arise for introduction of an insurance regime for firms.

Today the development of our legal system is marked primarily by an unsystematic process of adopting an unbelievable mass of incoherent enacments scientifically unsubstantiated and not based on the fundamental law, a process which produces a congeries of confused norms admitting of no scientific analysis and systematization, its features recalling the extent and incoherence of administration by decree. Our laws and regulations are characterized not only by confusing legal relations with their external form in respect of nullity, but also by adoption of Acts in which the notional elements of voidableness and nullity are intermingled like a mazy tangle impossible to disengage (see Art. 84 of the Securities Act).

It is a most important professional task of judges dealing with firm-related matters to apply the law in its interrelationships and in accordance with its basic principles, subordinating the letter of the law to the principles of the legal system. On this score, it is well worth bearing in mind the words of Gusztáv Szászy-Schwarz: "The less we understand the law the more laws we need. Jurisprudence is the science of how to do without laws. Had Nature as many laws as the State, not even God would be able to govern with them".

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"Law", or "More or Less Legal"?

1. Law as Interaction

In *Greek* legal culture, justice as manifested in actual cases was called *dikaion,* and this became the basis of the concept of *ius* in Rome (VILLEY 1967, p. 11). On the ground of such a tradition, the change from the jurisconsults' and the praetors' personal and individual contribution to the rigidifying codification of case-law during *Justinian*'s rule was radical indeed. But it is even more radical a change that, from the teachings of *Christianity* and only in the West, under the influence of the Evangelists' parable-like writings and St Augustine's brooding *Confessions*, a St Thomasian *Summa Theologica* could evolve, that is, an idea of the establishment of a system of thought, which was of an axiomatic character and which made an attempt *more geometrico* at providing social and moral ideas with scientific foundations and with the pretension of consequentiality, deriving from a kind of abstract internal necessity or the logic of a system—as it was apparent in Grotius, Hobbes, Spinoza, or Leibniz (VARGA 1979, section 3).

Judaism in the form of Talmudism, *orthodox Christianity* in the form of theological development, *Islam* in the form of rites marking off from one another in accordance with different interpretations—well, all of them followed a pattern both in religious thinking and law that was striving for generalization but did not attempt at deductive establishment of a system. Their norm-statements were always embedded in inductive contextures: they were to guide and not to conclude the course of thinking. The binding force of such a mental tradition can be well illustrated by the example of *China*. Not even in time of socialist revolution did minds of China cease wavering between ancient traditions and the European way of thinking; they only broke off with traditions for the period when—depending on Soviet–Chinese relationship—the adoption of foreign patterns predominated internal development (VARGA 1975, pp. 129–132).

"Abstract rules" can only be regarded as the characteristically Western "folk category of law" (POSPISIL 1971, p. 20) in the context of *modern formal law*. For it is only at this very stage that *modern statehood* lays the foundations of a bureaucratically organized and operated system of legal institutions. As regards the law's formation, it is being done by the criterion of *formal validity* (attributing legal quality to the outcome of definite procedures of definite state organs instead of criteria of contents); as regards the law's functioning, by the criterion of *formal legality* (attributing legal quality of derivation to the outcome of definite procedures which do observe definite rules laid down by definite state organs, instead of criteria of contents or the social justness of the case). This is the contexture in which, in the spirit of formal rationalization, formalization is carried to the extreme in respect of both the reduction of law to mere rules and its operation, and, as an ideology of the professional practising of the law, the juristic world concept that postulates the principles of formal validity and formal legality to become determinant factors in the law's actual life, gets also institutionalized. In a legal system like this, the *own system of fulfilment* (that is, the postulated requirement according to which social goals are to be attained through the execution of legal enactments) necessarily develops its own *incongruencies* (that is, the disparities between the requirements of the system and their realization in practice) and *dysfunctions* (that is, the presence of effects counteracting and even spoiling the value of expected social effects), too (VARGA 1983).

It is obviously unjustified to call upon foreign cultures in accounting for a given (legal) ideal, as both cultures and ideals are definite products of historically concrete social and historical developments.

This is, however, no reason for another polarization, e.g. for Pospisil's question (POSPISIL 1971, chapter 2) whether the law is composed of "abstract rules", "abstracts from actual behaviour", or of "principles upheld by legal decisions". It is widely agreed upon that the set of actual behaviours is to be considered a sheer facticity, not law. But if legal decisions are nothing else but manifestations of power without *is* and *ought* being contrasted in them, they are matters of sheer facticity, too, that can only arbitrarily be called legal decisions.

Thus, the question arises: *what is normativity involved in?* If it is either in social evaluation or in the influence evaluation exerts with a certain regularity on practice that we are identifying its essence, we are relied exclusively on facts as subjects of investigation. For endowing either some features of actions or of institutions with the quality 'legal', it results in a theoretical reduction, since we will not arrive at a substantial answer in return for postponing the problem itself. Any solution chosen, we do rely on facts so that we should be able to infer an evaluation or to reveal a regularity that allows for formal institutionalization or plays the part of an institutional system, or is capable of playing it without being formalized and institutionalized.

In my opinion, in the case of communities identifying the law with rules, an *ideological concept of the law* can be outlined, which conceives of the boundaries of the law as delimiting one area which is covered by legal regulation, and of the two areas which are covered by actual behaviours and authority decisions "realizing" the law respectively, as domains within the former one. As it is a matter of the ideology of an institutional

system and of the profession called to its operation, this is an ideal that gets reflected in it. Theoretically, the realization of that ideal is not impossible but in practice—due to the more complex definitions prevailing in life—most frequently only its approximations can be materialized. Thus, in communities identifying the law with rules, norms established and fixed in a given way are the predominant vehicles of legal normativity (Figure 1).

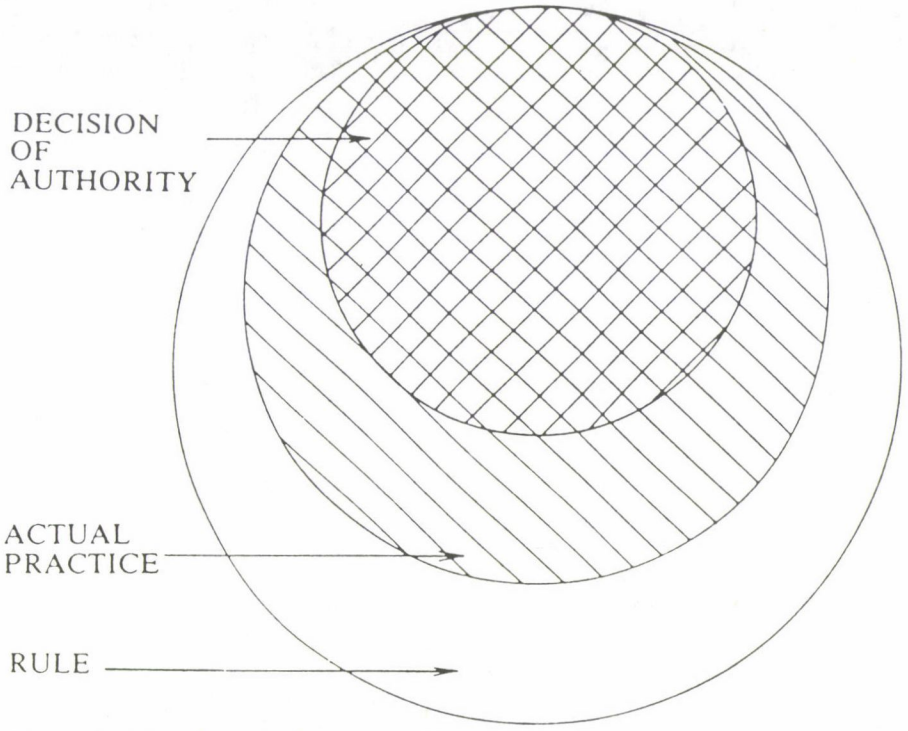

Figure 1. *The ideological concept of law*

The solution of conflicts is said to be of crucial importance in the existence of law. Not simply because it stirs all the forces of society, but because it is a test of practice that might or might not prove that the alleged vehicle of normativity is the actual vehicle. Notwithstanding, one can ask what does it happen if there is no conflict in the area covered by the law, if the conflict evades legal decision, or if the decision departs from the rules identified with the law? Would it be a genuine solution with the effect of all such cases getting excluded from the domain of law? Certainly not. And, what is more, it is not altogether unlikely that a practice departing from the rule is nevertheless regarded as legal by the community; it may even occur that the authority makes a decision concerning such a practice and the decision, although refuting actual practice, will be arbitrary, not following from the rule.

Thus, as regards its *ontological existence,* law is a complex phenomenon composed of interactions, interpretations and temporary separations, that is, the complex motion is made up of at least three factors, namely, *rule, authority's decision,* and *actual behaviour.* Anyway, law is not homogeneous or with itself statically identical a phenomenon. It may be reinforced or weakened equally, that is to say, rendered more or less legal by the intertwining and separation of its components, since, ontologically speaking, the phenomenon which gets supported not only by its enacted nature, but also by the practice of the coercive measures by the state (taken in the name of the law and, eventually, also made accepted by society), is obviously "*more legal*". That is, the more completely it comprises the three components, the more completely it will display the features of law. At the same time, law is *dynamic* a factor of reality; its components respond to external challanges in an ever renewing manner, and this brings about internal shifts of emphasis, too. On the one hand, this approach avoids the danger of replacing one simplification with another: the reduction to rules with the reduction to conflicts. On the other, it tries to make it clear that the rule is by far not simply an incidental element of the law. Not so much its presence as its part played in the complex called 'law' is liable to change (Figure 2).

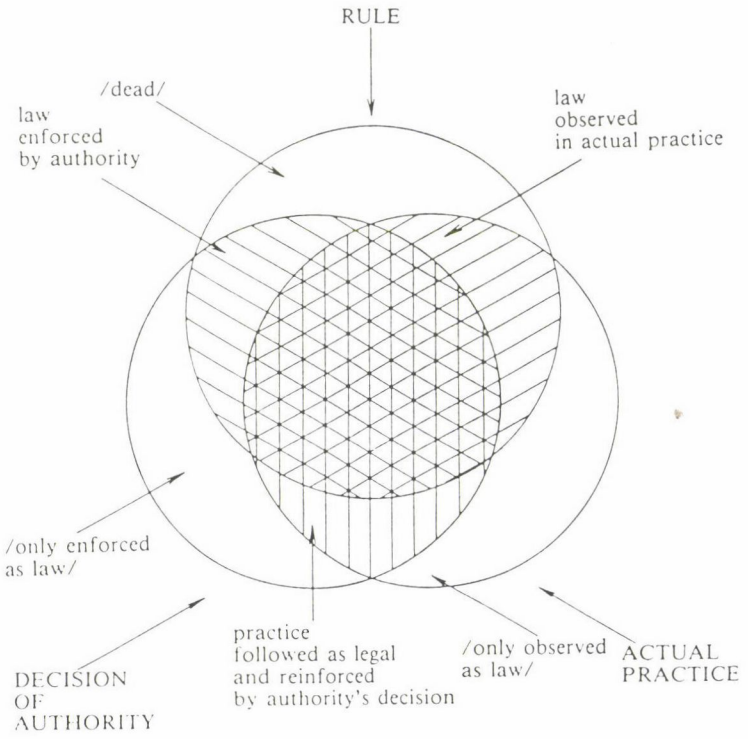

Figure 2. *The ontological concept of law*

2. *Law as a Social Function*

"Both states *and* chiefdoms have the most necessary ingredient of law, a central authority that can create rules of behaviour, enforce them, and judge the breaches of them" (SERVICE 1975, p. 90). It may, however, be objected to the statement above that a simple identification leads to a sham historicity only, since it neglects just the facts arrived at by several thousand years of civilizational developments. In connection with Bachofen's "Mother Right", Engels wrote the following: "I retain this term for the sake of brevity. It is, however, an unhappy choice, for at this social stage, there is as yet no such thing as right in the legal sense (Recht im juristischen Sinne)" (ENGELS 1884, p. 476).

Notwithstanding, both theoretical analysis and conceptual classification need at least attempts at the law's social functional definition. Allowing for sociological and anthropological considerations, I propose concluding the following criteria:

(1) *law is a global phenomenon integrating society as a whole.* According to this, criminal gangs (mafia, Cosa Nostra), economic associations (guilds), secret societies (religious or political: early Christians, Garibaldists) and other club- and party-like organizations fall outside the domain of the law in so far as society is *territorially* organized. Providing that social organization is still *personal*, the ground of separation is whether a given organization is exclusive or it theoretically involves all in compliance with the personal categories. The next consideration is that

(2) *law is a phenomenon settling conflicts of interests that emerge in social practice as fundamental.* Law is expected to regulate relations which are sufficiently fundamental so that it can establish a society (e.g. by drawing its boundaries). In European urban development, this can be claimed for the regulations in and by a guild in case they acquire a universality embracing society as a whole. If regulations remain restricted to partial relations (life within the guild, or the order of external relationships relevant to guild activity), they can as best be regarded as a system of rules integrated into the law or parallel with it, but, anyhow, to be of a different kind. In situations of transition, i.e., in times of the dissolution of state-organized power machinery, political associations and parties can become the main regulating factors of society which fill in the vacuum that has arisen. In religious communities, characterized by sect-like claims of exclusiveness and aiming at the assertion of their own commands in all fields of life, it may occur that, by organizing themselves as self-supporting communities, they make use of their respective norm-systems as legal systems. This was attempted, e.g., by the Quaker communities either in their withdrawal from civilization (as in case of 18–19th centuries' British emigrants) or by their separation within civilization (as in case of 19–20th centuries' settlements in America). Finally,

(3) *law is a phenomenon possessing the supreme regulating and influencing power in a given society.* When several systems of norms assert themselves in society, the legal norm-system is the one whose procedure may in situations of conflict be resorted to in

order to enforce the ultimate solution in the expectation of a success. Naturally enough, procedural efficacy cannot assert itself in a pure and directly legally relevant form.

Therefore, a number of questions arise. Is the legal character of Estonian or Texas law derived from the superimposition of USSR or USA law on them respectively? How is the supremacy of national procedure to be interpreted if we may have a direct recourse to international legal authorities in minority or human rights affairs? What if criminal gangs, secret societies, political or religious organizations attempt to win acceptance for their claims by coercively (e.g. by assassinations) preventing their conflicts from being presented to external authorities?

The significance of all social considerations like the ones exemplified above may at the most be that of mutually reinforcing components of a cluster. Or, the more completely they are manifested, the more probably we may talk about law in a sociological and in an anthropological sense.

Marginal cases are, however, to be found not only among past instances; they have also presented themselves more recently. How shall we interpret Eugen Ehrlich's experience at the turn of the century of the customary law of Galician *ethnic groups* that, reinforced by century-old traditions, reproduced itself as the community's own *comprehensive, fundamental* and *supreme* regulating system—since, due to the sovereign power's lack of either strength or interest, while they became politically subdued, their life remained intact from re-organization based on the law of the sovereign power? The fact, therefore, that in Czernowitz Ehrlich, founder of legal sociology by his *Grundlegung der Soziologie des Rechts* (1913), could see the court of the Austro-Hungarian Monarchy and the Austrian General Civil Code applied in questions brought before them was (apart from some urban centres) insufficient for him to discard the traditional arrangements as the actual legal regulating power of the communities of several hundred thousand people. Or, how shall we think about a sovereign power exercising a sham rule, with his activities confined to issuing mere *laws of phantasy*? There are, e.g. in Ethiopia, stone age tribes still untouched by anything like state power. Moreover, due to the primitive nature of the established state power, the illiteracy of population, and the religious and ethnic divisions within the population, the legal reforms of the last Emperor only proved effecting in the capital. Well, has the promulgation of their own imposed Civil Code abolished the legal character of the tribal laws that have predominated for thousands of years? Or, can the survival of these customary laws prevent the same Civil Code in Addis Abeba from being a law? Or, how shall we understand *gypsies* regarding themselves as forming their own society, ignoring stately given law and refusing to be considered subject to that law since they have their own magistrate in the person of the voivod and also further authorities that inflict punishment on them and provide for the prevelance of justice? On the grounds of any stately formed law it is obviously impossible to question whether such a thing as gypsy law can exist or not. Still, sometimes there may be even more than that at issue, that is, such a degree of conscious separatism that groups are not simply endeavouring to evade state law, but they take cognizance of it as a merely incidental phenomenon in their environment that threatens and may even bring pressure on them to bear, precisely like other environmental

conditions that they must take cognizance of in order to be able to live their lives, but with no more personal attachment and identification than, say, the fundamental laws of physics? *Military occupation* may provide us with a further case history. How are we to qualify the results, when an occupation, successful in terms of operation, is met by (or produces as a counter-effect) the activity of powerful *guerilla communities* that exerts a pressure on the whole population so that the latter, in their abhorrence of collaboration, will not even in their affairs of the most civilian nature rely on the authorities of the occupying (or the co-operating) state-machinery (as in the case of the Ukraine or Serbia during World War Two years)?

Anthropological approach to law attempts to grasp the core of the phenomenon 'law' by treating each organization as having the open chance of entering the competition for creating a society by ensuring, within its framework, the supremacy to its own regulating system.

3. Conclusion

Now, if as a recapitulation we conclude that both the written and normative text-enactment bearing the seal of "juridicity" and the results of the state authority's adjudication practice performed in the name of the law with certain permanence, and also the communal practice considered legal and enforced as legal, are to qualify as viable forms of the appearance of the law, we arrive at a concept of law that is grounded on the interaction of various sides and presupposes an uninterrupted dynamism. Its distinctive feature lies in its genuinely heuristic nature. It cannot be identified through formal definitions to tell which structure is "distinctively legal"; nor are definitions of the law divided sharply from the non-legal, calling for a definition of similar rigidity.

The characteristically 'legal' is from the outset regarded as a product of interactions, of a complex process in the course of which it is always from the mutually reinforcing/weakening interactions of the "more" and the "less" legal (and, at the same time, as seen from differing points of view, "the" legal according to the selected point of view) that a kind of core phenomenon starts developing which will finally be, in one given society at one given time, considered the "most", or, the "par excellence", legal.

In addition to conceivable theoretical impacts, such a conclusion may have an effect on actions of legal policy as well. For instance, if the use of the law as an instrument for social change is at issue now, it is by no means without interest to know whether law is to be understood as a choiceless process with the clue of change in the *legislator's* hands (with all other factors playing a subordinate role at the most), or there is an *alternative strategy* in reserve displaying the legislatory law reform as one among several ways that can be equally chosen; *for it is always available to initiate and/or provoke social change through influencing either the authority's practice of adjudication or the communal and individual ways of using and practicing the law as well.*

The possibility of an alternative strategy in law has already been revealed by the ontological reconstruction of legal processes that has attempted to analyze law as a text

in the given contexture, that is, in the linguistic and socio-political settings of its interpretation. The recognition of the law's own complexity enhances the potentialities of how to make use of it. Or, in the ontological process of social motion, developing within the frame of the social total complex through its partial complexes featuring ever increasing particularities and interactions, it is those and only those teleological projections of man, consciously preparing for social transformation, that can most influentially integrate into these processes, which are well adapted to the particularities and actual motions of the complexes participating in interaction at any given time, that is, which are most organically integrated into the processes of social (self)determination, of which all we are authors and vehicles at the same time (VARGA 1985, chapter V and, as to the topic in a broad general context, VARGA 1986).

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Contemporary European Constitutional Development and the Hungarian Public-Law Legislation in 1848

1. In these years, when framing a modern system of public law indispensable also for economic recovery has been a foremost aim of Hungarian society, it does worth the attention to recall those times when in 1848 a successful attempt was made, with its influence felt for long decades even after the Compromise with the Hapsburg Monarch in 1867, to bring the Hungarian constitutional system into line with the developed part of contemporary Europe.

2. In the middle of the last century the Hungarian reform endeavours in public law drew their nourishment primarily from the ideas which in the course of bourgeois transformation had appeared in British constitutional practice and, despite frequent changes over time, in the French Constitution of 1791, the first constitutional charter of Western Europe, and later in the Belgian Constitution of 1831 in particular, setting the most important examples, through German theory in some of their elements, for laying the public-law foundations of a bourgeois society.

(a) The bourgeois constitutional system of England, which had established itself at the end of the 17th and during the 18th century, indisputably exercised a decisive influence on public-law thinking in Europe, chiefly because the Bill of Rights adopted in the wake of the bourgeois revolution and the subsequent restoration, after the parliamentary coup (the bloodless or, as is referred to in England, "glorious revolution") dethroning James II, threw overboard the absolute monarchy and introduced such a new system of power under which the Parliament, an elected representative organ, took precedence over the king in legislation. And in fact that Parliament had been functioning already in earlier times as a general representative organ rather than a representative body of Estates, though given the strongly limited franchise, one could hardly speak of actual popular representation before and even well after the Representation of the People Act of 1832.

In connection with ministerial countersignature, which had emerged in previous centuries, also the constitutional custom became established in England under a House of Commons charge the House of Lords, i.e. a parliamentary court, could condemn, in a quasi criminal procedure, a minister for offences and later for grave errors causing damage to the country, and indeed, the Parliament had frequent recourse to that procedure as a weapon against unpopular royal policies during the 17th century. So this process gave birth to the institution of ministerial responsibility put into effect by Parliament through responsibility under the criminal law. Moreover, from the 1780s onwards, the constitutional practice grew up that the king did not participate personally in government activity, the governance and the execution of the laws were the functions of the cabinet, which in turn bore collective political responsibility to Parliament, meaning that Parliament might withdraw confidence from the cabinet, which had to resign in such a case. It was for the first time in 1782 that a cabinet resigned for an obvious failure to enjoy the Parliament's confidence.

The process of bourgeois transformation witnessed significant changes in the British administration of justice, too. It deserves, e.g., attention that the independence of judges was institutionally guaranteed through safeguards against removal in 1701. Trial by jury in criminal cases became practically general from the end of the 17th century. It is very interesting to note that in estimating the importance of that development *William Blackstone*, a contemporary jurist, went so far as to say that the jury preserved in the hands of the people that share which they ought to have in the administration of public justice, and prevented the enekroachments of the more powerful and wealthy citizens.

However, among the forward-oriented elements of the contemporary British constitutional system, mention should also be made of the fact that the Bill of Rights of 1689 attached fundamental importance to the assurance of human rights and freedoms.

(b) Legislation by the French revolution relied upon the sets of ideas of the Renaissance and the French enlightenment as well as upon the experience of British constitutional practice for outlining the public-law foundations of a new social order in the 1789 Declaration of the Rights of Man and of the Citizen and in the Constitution of 1791, setting an example for continental Europe as a whole. Outstanding among the central ideas of the Declaration and the Constitution were these:

— clearing away the trammels of feudalism, they proclaimed, in accordance with the system of liberal ideas, the equality at the law of individuals as well as their rights to property and to personal and political liberty;

— as against the sovereignty of the absolute monarch, they proclaimed the sovereignty of the nation, spelling out that exercise of political power derived from the nation alone;

— embracing *Montesquieu*'s theory based on the British constitutional practice, they introduced a strict separation of legislative, executive and judicial powers with a view to prevention of arbitrary rule and assurance of freedom;

— abolishing the representation of Estates, they declared legislation to be an expression of the public will and proclaimed the right of all citizens to participate in legislation personally or through elected representatives (popular representation), even if

the franchise was limited, for it was confined by property and other qualifications to a relatively narrow range of "active" citizens;

— the form of government was monarchical, the executive power was exercised under delegated authority by the king or, on his behalf, by ministers and other officials bearing criminal responsibility (without, however, being politically responsible to the National Assembly);

— they abolished the manorial courts and introduced a uniform system of state courts, while putting trial by jury in criminal cases into general use;

— they enunciated the basic principle of legality, according to which "nothing shall be prohibited except by law and no person shall be obliged to do what is not ordered by law".

After the abolition of the monarchy in August 1792 the frequent political changes were followed by new constitutions adopted at relatively short intervals, namely the Jacobin Constitution of 1793, the constitutions of the *Directoire* and the Consulate, and, following upon the fall of imperial rule, the constitutions of the restoration, i.e. the constitutional charters of 1814 and 1830, which, however, could no longer return to the power system of the *ancien régime*, but rather institutionalized some sort of a limited—constitutional—monarchy. Back on the throne, the monarch himself was constrained to acknowledge that assurance of certain fundamental rights and constitutional limitation of the power of the Head of State constituted an inevitable reality of the new bourgeois society.

(c) Also, attaining independence in the most industrialized region of Europe, Belgium's Constitution of 1831, which was liberal in guaranteeing human rights on a wide scale, reconciled national sovereignty with the monarchical form of government but rejected "excessive" demands prejudicial to the interests of the bourgeoisie in power, proceeded from that reality and postulate. For this very reason, that Constitution was long regarded as the "model constitution", or " constitutional standard" of a constitutional state by contemporary Europe in the process of embourgeoisement, including reformists in Hungary, keeping uppermost in mind that, within the meaning of the Constitution:

— the monarch does not rule by divine right and enjoys no privileges, but is only vested with such rights as the Constitution or enactments based thereon may confer on him; that monarchical system differed only formally from the republic in that the post of head of state was for life and hereditary;

— all power derives from the nation (people), and the bicameral legislature (both chambers, unusually at the time) is elected on the basis of popular representation, although the franchise was strongly limited by rather strict property and other qualifications;

— effect is given to the principle of separation or, more accurately, division of powers;

— the king is formally the head of executive power, but may not act except through his responsible ministers impeachable by the representative organ;

— the term of office of judges if for life, and a judge may not be divested of his office or suspended in the exercise of his functions except by court order; all crimes,

including political misdemeanours and those of against press-laws, are cognizable by the jury;

— as against attempts at centralization typical of France, emphasis is placed on recognition of rights for local self-government organs elected on the basis of popular representation.

3. The spring of 1848 afforded opportunities for thorough-going constitutional changes in numerous countries of Europe. Owing to the revolutionary movements, the public-law system in virtually the whole of Western and Central Europe appeared to change in keeping with the postulates of bourgeois constitutionalism, as was also indicated by the European wave of constitutional legislation in 1848–49, just as by Hungarian legislation in March 1848.

(a) In France, the revolutionary struggle of workers, petty bourgeois, and students against the bourgeois monarchy in open crisis and for their rights—which was seen by *Tocqueville* as the continuation of the struggle launched in 1789 for liberty, equality and fraternity and by *Marx* as the beginning of the revolutionary class struggle of workers—was the general signal in the enfolding revolutionary movement of Europe. The Second Republic was born on 24 February. Then, already in the days of the "low ebb" of the revolution, but, in several aspects, still under the impact of the previous achievements of the bourgeois democratic revolution, the Constitution of 4 November was adopted laying down the republican form of government, the principle of sovereignty of the totality of citizens, and the universal suffrage of citizens over 21 years of age in possession of political and civil rights. For a long time that was seen as a unique development in France, if only for the reason that, in contrast to the Jacobin Constitution, the elections to the National Assembly based on universal suffrage were really held in 1848. The Constitution provided for the separation of powers and recognized certain economic and social rights also (e.g. rights relating to work) among the civic rights, which, however, were "more moderate" compared to those set forth in the legislation enacted in the first days of the revolution. The Constitution ultimately shared the fate of the Republic when Louis *Bonaparte* made himself dictator by his coup of 2 December 1851.

(b) In the divided Italy the most important of the constitutions adopted under the impulse of the Italian revolutionary movements in 1848 is perhaps the Constitution imposed on Piemont–Sardinia by *Charles Albert* on 4 March 1848, if for no other reason than that it survived the reaction of 1849 and became the Constitution of the united Italian State in 1870 and remained one practically until 1947. By the way, this constitution followed only the model of the French constitutional charters of 1814 and 1830, since *Louis Philip* had not been dethroned until 24 February 1848. Nevertheless, it did not proceed from the sovereignty of the monarch, but rather rested, implicitly, on the principles of national sovereignty and the responsibility of the executive power. It bore the stamp of the influence of the Belgian Constitution of 1831 as well, first of all in the regulation of citizens' rights and duties. It is perhaps equally noteworthy that the Constitution of Piemont reflected a rather flexible concept of constitutional legislation in that it made its amendment subject to no specific conditions and allowed amendment

through ordinary legislation at any time, just as the British or the Hungarian "historical" constitution did, whereas the French constitutional charter of 1814, which it followed as an example, was framed for all times to come and virtually was not to be modified except under pressure of revolution or in case of change in the dynasty, and other constitutions, e.g., the Belgian Constitution, generally required a special procedure for their amendment. It was precisely for this reason that the Constitution of 1848, amended many times by ordinary legislation, could formally remain Italy's constitution down to the adoption of the Constitution of 1947.

(c) A confederation, a loose union of states, for long centuries, Switzerland was forced by *Napoleon* to adopt a federative state structure. After *Napoleon*'s defeat, the cantons first sought to restore the old confederation. The Congress of Vienna, which guaranteed Switzerland's neutrality as well, approved the new pact of confederation under which the cantons regained full sovereignty. Although there emerged a common Diet, the institution of common executive power was abolished. Then, during the '30s, certain cantons underwent significant democratic transformations, but a similar constitution embracing the whole confederation—just as close cooperation (e.g. the establishment of common currency, customs system, post), which was increasingly urged for by economic reasons—was as yet prevented by the resistance of conservative cantons. With the ascendancy of liberal forces, such a change occurred in the spring of 1848 when, in the era of the French, Austrian and German revolutionary movements, intervention was impossible even by the foreign powers formerly "tutoring" Switzerland. Although the cantons with different nationalities, tongues and traditions retained their sovereignty by virtue of a decision of the great majority of cantons represented in the Diet, they relinquished, under the federal Constitution of September 1848, a measure of sovereignty to allow the rise of a genuine federal state with an effective bicameral legislature (one house of which was to be elected on the basis of popular representation) and an effective federal executive power. Notwithstanding that foreign examples had not been studied as thoroughly as they had been by the German Parliament of Frankfurt, they were taken into account in framing the new constitutional system. So were in the first place the federal state structure as established by the USA Constitution of 1787, the first constitutional charter, and, despite its monarchical form of government, Belgium's Constitution, which was relied upon particularly for formulating the rights of citizens. Yet framers of the Constitution could not remain insensitive to the revolutionary development of contemporary France either. For instance, the effect of the Decree of 5 March 1848, which introduced universal suffrage in France, was obviously felt. The September Constitution of Switzerland relied on it, too, for introducing the universal suffrage of Swiss citizens or, more accurately, men. Such reserve, however, was no surprise at the time, since Wyoming State of the USA was the first in the world to recognize women's suffrage as late as 1869.

(d) The spring of 1848 opened a hopeful possibility for the creation of a constitutional national state in divided Germany as well. Under the impact of the July 1830 revolution in Paris, the liberal movements pressing for constitutional change had grown in strength in several German states, but a real breakthrough did not occur until February

1848, when, in response to an initiative of Baden, demands for popular representation and a federation on the American model gained currency, as if by magic, in the German states. It was not until after two weeks that the first news came of *Louis Philip*'s fall in France, but they gave rise within a week to a revolutionary situation throughout Germany. Programmes for transformation of the constitutional system were drawn up under the leadership of Karl Theodor *Welcker* and Friedrich Christoph *Dahlmann*. By the way, it was also *Welcker* who had previously propagated the term "state of law" (*Rechtsstaat*), so frequently used in Central and Eastern Europe nowadays, and the demand for a state of law or, more precisely, constitutional state. then, in the spring of 1848, the Vorparlament of Germany envisaged convening, in May 1848, the National Assembly based on universal suffrage for men. Indeed, the famous Parliament, assembling "professors" (or, more accurately, lawyers), met in Frankfurt and framed Germany's Constitution in 10 months, placing the country's state structure on a federal basis similar to that of USA and Switzerland. The federal executive power was vested in the Emperor, who, however, was to act through responsible ministers. The representative system (Lower House) rested on popular representation, i.e. election on the basis of universal suffrage for men. On the Belgian model, fundamental civic rights were widely recognized. However, the delay of 10 months in drafting the constitution by March 1849 was fatal for the implementation thereof. The reaction had by then regained strength in Germany, as in Europe in general, and the resistance of monarchical forces prevented the Constitution from going into effect.

4. Unlike several countries, Hungary adopted no constitutional charter or "written" constitution even during the period of the revolutionary movements of 1848–49, but the system of public-law ideas which had undergone a radical change in Europe in the wake of the French bourgeois revolution of 1789 had exercised a decisive influence on constitutional thinking already during the reform era preceding the revolution. It was in that range of ideas that the draft criminal laws were discussed in 1843, when in the dissenting opinions expressed on the bills the Opposition led by Ferenc *Deák* practically outlined its entire programme for evolving a bourgeois state organization. The Manifesto of the Opposition adopted on 5 June 1847 as well as the Address by the Parliament of Estates which was worded by Lajos *Kossuth* and presented to the monarch on 3 March '48, were conceived in the same sphere of thought.

When at the news of the French revolution in Paris the situation had become strained also in Vienna and the revolution had broken out there on 13 March, the meeting of the Parliament at Pozsony in an agitated atmosphere decided on a motion by *Kossuth* to have the Address of 3 March taken by a delegation to the monarch. On 11 March the demands of radical youth, drawn up in 12 articles by Sándor *Petőfi*, Pál *Vasvári*, József *Irinyi*, Mór *Jókai*, and Gyula *Bulyovszky*, were also published in Pest. The demands included freedom of the press, responsible ministry, annual sessions of Parliament convened on the basis of popular representation, equality of religions, equality before the law, common sharing of taxation, abolition of serfdom, release of political prisoners, establishment of national guards, reunion with Transylvania, and swearing of the army to the constitution. The revolution broke out in Pest on 15 March.

The fate of national independence and the planned public-law reforms was decisively influenced by the revolutionary events in Hungary and the support by revolutionary Vienna. Under the pressure of these developments the king accepted the demands contained in the Address on 17 March, and revolutionary legislation began in Pozsony the following day.

When in November 1847 the last session of the Parliament of Estates assembled in Pozsony, hardly any of the deputies would have thought that the legislative programme for bourgeois transformation was to be implemented by that session, which would draft and adopt a whole series of the necessary enactments in a few days of "shock-work" during March 1848. In the same way as the old-type Parliament, sitting in a new international and internal situation, had laid the basic for a comprehensive transformation of the constitutional system in a rather short time in 1989 and 1990.

Of outstanding importance among the legislative enactments aiming to evolve a new public-law system was the adoption of Act III on the establishment of an independent Hungarian responsible ministry, with the relevant bill worded by *Kossuth,* Bertalan *Szemere,* and Palatine Prothonotary Kálmán *Ghyczy* between 20 and 22 March, drawing chiefly upon the British practice, the Belgian and French constitutions previous to the revolution of 1848, and the parliamentary debate of 1843–44 on ministerial responsibility in connection with the bill on substantive criminal law. Following the dramatic disputes with the royal Court and the subsequent modifications, the Act of the National Assembly was approved by the monarch on 8 April. It provided that the king was to exercise the executive power through an independent Hungarian responsible ministry and that the validity of decrees, orders and decisions of, as well as appointments by, the king and his regent (palatine) was subject to the signature of one of the ministers having his headoffice in Pest–Buda. For that matter, the responsibility of the ministry (government) or ministers meant, under the regulations then common in Western Europe as well, the minister's special "criminal" responsibility to a parliamentary "court". The government's political responsibility to Parliament was not governed by the Act. But it is necessary to note that the principle, later considered as a fundamental one of parliamentarism, according to which a government not enjoying the Parliament's confidence has to resign was not formally provided for by any basic law in the European continent up to 1875.

Under Hungarian legislation, ministers were accountable for any act or decree prejudicial to national independence, constitutional safeguards, existing laws, personal freedom or the sanctity of property, if committed or issued in their official capacity, as well as for misappropriation or unlawful utilization of funds and other values entrusted to them, and for omissions in the enforcement of law, provided that these ones could be prevented by the enforcement devices made available to them by law. Impeachment of ministers was to be ordered by a general majority of votes in the Lower House. Justice was to be administered in open procedure by a court which was to be elected by secret ballot by the Upper House from among its own members and was to mete out punishment proportionate to the offence committed. Ministers were subject to the *droit commun* in respect of other offences committed in other than their official capacity.

Act V on the election of deputies to Parliament on the basis of popular representation, another essential law concerning the new constitutional order, was probably based on a draft by *Ghyczy, Kossuth* and *Szemere*, although according to sources of the royal Court it was explicitly the result of *Kossuth*'s drafting work. By virtue of the Act, the Lower House resolved itself into a National Assembly of popular representation. The Act, nevertheless, recognized suffrage only for men and even subjected it to either property or income or educational qualifications. Suffrage was thus extended to as little as 800,000 persons out of Hungary's 11 million or so inhabitants, forming 7.3% of the population. It should be kept in mind, however, that, apart from universal suffrage recognized for men by the French and Swiss Constitutions of 1848, the afore-mentioned extent made ours perhaps one of the most democratic suffrage in Europe, since e.g. in the same period of time the corresponding ratio was about 4% for England, 2.5% for Piemont, and as low as 1.5% for Belgium.

Together with the establishment of a Parliament of new type and a ministry responsible to it, transformation of the county and local organizations became a central concern of legislation. In the end, the relevant Acts (XVI, XXIII and XXIV), responsive to István *Széchenyi*'s fears of a baleful penetration of nationalities, provisionally maintained the county organization of nobility, but placed election of the organs of royal free boroughs and corporate towns on a basis of popular representation. It is to be noted, however, that views on the question of maintaining the old county system were in sharp conflict at the sittings of Parliament between 28 March and 3 April. *Kossuth*, who as a bourgeois municipalist said he preferred the British and American solutions to French centralization, pointed out the incompatibility of a parliament of popular representation with a county system based on the nobility's privileges. Moreover, just as during the debate on the draft criminal laws of 1843, the issue was also raised, in the context of the long dispute between municipalists and centrists, whether the autonomy of the county and local organs was reconciliable with the government's responsibility. *Kossuth* reasoned along these lines: there were matters which it behoved the local authorities to decide and there were others within the competence of central power, the ministers' responsibility extending to the latter, not to the former. There was a dividing line to be drawn between the two kinds of relationship. Then, in reply to the Speaker's question whether to give up the municipal structure or to stop efforts at introducing the institution of responsibility, he said that, since he did not find the two to be incompatible, the county structure could be upheld as it had for long centuries served as a guarantee of our freedom, while the case for the government's responsibility could also be won as there are bounds to everything.

The legislative process in March envisaged a few reforms also in the administration of justice to lay the foundations of a new bourgeois judicial organization. Act IX abolished the manorial courts, Act XXIX provided for removal of judges only by virtue of law, and Act XVIII made offences against press-laws subject to trial by jury. For that matter, *Deák* came out strongly for introduction on the French model of trial by jury in criminal cases as early as the preparation of the draft criminal laws in 1843.

Among the legislative enactments of 1848 we find no separate declaration, common in contemporary bourgeois legislations, on the rights of man and citizens, but several

enactments such as those on general sharing of taxation and abolition of tithes and manorial courts spelled out in clear terms the equality at the law of the citizens, the most important of such rights. A separate Act covered the freedom of thought and the press, the freedom of academic teaching and learning, and free exercise of the legally recognized religions.

For all these reasons, when the last Parliament of Estates concluded its work on 16 April 1848, Móric *Szentkirályi* and Lajos *Kossuth,* two deputies of Pest County, rightly stated, in reference to the attainments of the revolutionary transformation as embodied in statutes, that "this is not all, enough to govern the future of the entire nation, but the foundation of our future development". Indeed, this became the benchmark for creating a modern Hungary.

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Crimes Against the Environment in the Hungarian Criminal Law[1]

I. Environmental Law in General[2]

1. Provisions in Hungarian law protecting the environment

In Hungary today the legal rules of environmental protection are being revised since the valid system of rules was formed in the last decades of the past regime.

In this system a basic act was used to lay down the legal principles and the main general rules of environmental protection as well as to set the legislative directions of the particular rules. To enforce the basic rules many legal provisions on the lower level of the central legislative power (government, ministries) were brought regulating in detail the particular legal objects.

Act II of 1976 on the Protection of the Human Environment is the basic act of the Environmental Law. The Act concerns the human environment in general. It also stipulates the elements of the environment to be legally protected: land, waters, air, flora and fauna, landscape and the settlement environment. "Settlement environment" is an environment created by man in an artificial way while other environmental objects consist of the natural environment. Any environmental object worthy of protection may be included in one of these general categories.

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1 Hungarian National Report to the XVth Congress of the A.I.D.P.

2 by M. BITTÓ

Protection of environmental objects is necessary for preserving the human environment. The purpose of the Act is to lay down the fundamental rules relating to the protection, preservation and planned shaping of the human environment in order to protect human health and improve systematically the living conditions of the present and future generations. Accordingly, human health and living conditions of the present and future generations are such interests that should also be protected. Yet, certain considerations take priority under the Act to the detriment of environmental interests. It is declared that the tasks of environment protection shall be accomplished gradually in accordance with the national economic plan, the order of their social importance, and in proportion to the development and capabilities of the national economy. Accomplishment of tasks of environment protection shall be coordinated with the increase of production and the systematic improvement of living standards. However tasks of environment protection, having a favourable effect on the condition of man's life and health, shall be accomplished in the first place. These provisions made it legally possible in the last decades that the interests of environmental protection were systematically pushed to the background by economy and agouty. Even human health as an interest having unconditional priority, was defined in a manner that gave unlimited possibilities to enforce evaluating aspects.

Environmental objects are protected by the Act against actual as well as threatened harm. Regarding environmental objects, it is difficult to distinguish between harming or endangering them. One can state in general that the endangering of legally protected objects of the environment can be realized by actually harming, or destroying physical objects in the environment. In exceptionally serious cases such as total destruction of a protected landscape one can speak about the actual harm of the legally protected object as well. Undoubtedly, in the case of the pollution of a river, the damage relevant in the application of the Environmental Act does not equate with the value of, say, some perished fishes.

Here the harming result to be taken into consideration is the endangering of waters as the legal object that can be characterized by the degree of pollution. For instance a question arises in this case as to what degree of detrimental effect qualifies as pollution. Here the limiting values defined in the different environmental standards must be considered. The Act declares that for its purpose, pollution or harm shall be considered damaging or dangerous if it exceeds the limiting values defined in special statutory standard provisions.

The Act specifies that the environment is defended against the following incidents:

- pollution, damage or other harmful effect altering natural properties adversely or deteriorating human living conditions,
- damage due to natural forces,
- generating vibrations, oscillations and radiations as well as making activities connected to biological, chemical or radiating substances in such a manner that they may damage or endanger man or protected objects of the human environment.

2. *Penal and administrative provisions in the environmental law*

The Act and the other legal rules related to the environment are of an administrative nature. Violation of prohibitions and obligations protecting the environment results in the application of legal consequences according to different branches of the applied law. The provisions of the Act regulate the legal consequences of an administrative nature only. Penal provisions protecting the environment can be found in the Criminal Law and also in the Contravention Law.

In the Hungarian Law all crimes are embodied in the Criminal Code (Act IV of 1978, C.C. hereinafter), so environmental crimes are regulated also in this Code. For the time being a single disposition punishes the environmental crimes in the Criminal Code. "Damaging Environments" (Section 280 of C.C.) is regulated among the offences against Public Health. It is committed by the person who, to a significant degree, spoils, deteriorates or destroys an object under protection of the natural environment. The punishment is deprivation of liberty of up to three years. It is an aggravating circumstance if the damage gives rise of a danger to life. Then punishment is deprivation of liberty of up to five years. A person who commits "damaging of environments" through negligence, is punishable for a misdemeanour, with deprivation of liberty of up to one year, or with reformatory and educative labour, or with a fine, in case of aggravating circumstances with deprivation of liberty of up to three years.

The Hungarian Criminal Law does not recognise the category of regulatory (quasi-criminal) offences. All the crimes in the Criminal Code are regulated by the reason of the same principles, regardless whether they are traditional offences or administrative offences (i.e. the violation of an administrative rule is one of the elements of the criminal disposition). Our legal system is characterized by the existence of Contravention Law or Administrative Criminal Law which is separate from the Criminal Law. As a result of decriminalisation, the Contravention Law comprehends contraventions, the minor and bagatell-crimes as well as other law violations. Consequently, the contraventions may have the nature either of traditional crimes or of mere violations of administrative law. The sanction of the contravention is a fine in general which is not imposed by criminal courts but by administrative authorities. Bypassing the courts is the main reason why the Contravention Law must not be considered part of the Criminal Law but that of the Administrative Law. The contraventions are regulated in the Act I of 1968 on Contraventions and in the Order of the Government 17/1968 (IV. 17.) on the Particular Contraventions. The latter includes several Environmental Contraventions which punish the breaching of the administrative provisions on the protection of the particular environmental objects.

Environmental administrative provisions are enforced by special administrative agencies. Authorities of environmental administration control compliance with the environmental prohibitions and obligations. When exposing omissions these authorities may apply legal sanctions against the failing person: the obligation to limit or put an end to the pollution, harm or damage caused by him, or the obligation to provide for adequate

protection, restriction or prohibition of the activity causing pollution, harm or damage. Since 1991 an action before the court may be taken against the order of the authority (establishment of justice in administrative cases). The authorities of environmental administration may also apply sanctions of a penal nature, i.e. different kinds of environmental fines (sewage, air pollution, noise, vibration etc. interdicts). The payment of a penalty for environmental protection shall not exempt anyone from further criminal or contravention liability.

3. Legislating level of environmental penal provisions

Since Hungary is not a federal republic we do not have any federal arrangements. From this point of view there is no reason to make a difference between central and regional legislation. However, there is a certain hierarchy of legal rules which are issued by different levels of the legislature. On the top of that hierarchy acts are issued and on the lowest level the orders of local authorities can be found. There are fundamental questions that may be regulated on the top level only, by the Acts of Parliament. Regarding Environmental Law, one can find a number of legal rules issued by the Government and the responsible Ministries. The governmental orders and those of ministries, although made by central legislating powers, are below the acts in the hierarchy of legal rules. The legislative actions of a local authority (municipality) are valid only in their region of competence. In the matters of environmental protection the local orders may regulate questions of local importance. The socially important matters of environmental protection are not given a large scope for local legislative action, since the legal provisions on these matters are regulated in the legislative actions at the central level.

In the sphere of the penal provisions it is necessary to differentiate between Criminal Law and Contravention Law from the point of view of the legislating level. It must be guaranted that criminal offences shall be defined by act exclusively. Consequently, the acting power belongs to the Parliament as far as criminal offences are concerned. The act is the primary source of law regarding the contraventions as well, but, the particular contraventions may also be defined by the order of the Government and local (municipal) authorities. The Special Part of the Contravention Act includes few dispositions, since most of them are to be found in a governmental order. All environmental contraventions are in the latter.

4. Protection of the environment in the constitutional provisions

The constitution of the Republic of Hungary declares in its general part that the Republic recognizes and validates the rights of everyone to a healthy environment. Apart from declarative statements the Constitution also formulates the essence of environment protection as a human right. It declares in the chapter of basic rights and duties that those living in the Republic have the right to the highest possible health of body and soul.

Indirectly, as a part of the right to physical and mental health on the highest level, this provision recognizes the right to a decent environment.

The next paragraph leaves no doubt when it enumerates constitutional tools for enacting these rights. Accordingly, the rights to the best physical and mental health are realized through labour safety, public welfare organizations, health services, body culture and through a quality natural and artificial environment as well in the Republic of Hungary.

Another constitutional provision may be mentioned here which includes the right to a decent environment. The Constitution mentions among the basic rights that in the Republic of Hungary people have the right to life and to human dignity from which no one can be deprived of. Realization of this statue can be perceived through the disposition of the Environmental Act that all citizens have the right to live in a decent environment for man.

Albeit constitutional disposition it is still in the Environmental Act that the Republic of Hungary promotes the defence of the human environment in the framework of cooperation in international treaties, too.

Our constitutional provisions do not recognize the right to any property that may limit legal protection of the environment. On the contrary, a property right or elements of it in defined acts (e.g. in the interest of environment protection), can be restricted. The Constitution gives such power for the expropriation of property which ensures that an act from the point of view of the public interest, under strict conditions, commands expropriation. It is a general law principle laid down in the Civil Code that rights be exercised as to their disposition and cannot be misused.

By prescribing obligations in the interest of the protection of land the Environmental Act limits the users or owners in their land-using. Accordingly, every user of land shall maintain and improve the productive capacity of the soil, and further shall provide and apply soil-protective methods, means for preventing damage caused by natural forces. The lines and methods of cultivation shall be selected and employed accordingly. In the protection of the living environment forests may be reduced, cleared or liquidated in cases and ways defined by statutory provision.

5. The review of the current Hungarian environmental law

Recent Environmental Law is under totally new codification. The outlines of the new Environmental Code (EC hereinafter) are ready and is being discussed by the proper commission of the Parliament. The new EC intends to record as a basic principle humans' right to a healthy environment and the duty of saving irrecoverable natural resources. Conditions of the elements and of the effects of the environment are defined accordingly. Emissions and their limits, compulsory environment effect studies are prescribed before governmental, administrative and economic decisions which exert substantial effects on the environment can be made.

The planned code strives at making punitive sanctions more effective. For the time being neither contravention nor criminal responsibility are effective enough to fight injustice to the objects of milieu. Contravention fines being extremely low are unusable to prevent violations of environmental rules. Environmental infringements are usually committed by an employee of a company, exercising some business. In the costs of a venture administrative fines are easily included.

The application of criminal responsibility has practical and verification drawbacks. An important element of the criminal disposition is a "substantial damage" to the environment. Substantionality has to be proven and the procedure requires costly expert examinations. An expert's opinion has to be appended to the report by the rapporteur since this is the basis of the sound suspicion of the crime, which in turn is a prerequisite to launching an investigation. Attorney's offices are deprived of material tools usually, so they do not initiate expert examinations, and the rapporteur, especially if private, has even less budget for such purposes. Furthermore it is a practical problem where the precise limit of a serious measure of pollution that can be judged as a criminal offence is. It is a relatively simpler case when emission limits define the quantity of polluting material emittable in the surroundings.

But an effective call to account is hampered by the problems of proving the other elements of disposition. Primarily we aim at aggravating cases here. This can be realized if as a consequence of an offence where one or more person's life is endangered. Here the proof of causality and the evaluation thereof might be raised, which shall be discussed later on in detail. Criminal responsibility will be *ab ovo* meaningless since by the application of ruling culpability dogmatics, the responsibility of the criminal can be established in a careless commission mostly.

II. Criminal Law: General Part Considerations[3]

A. Liability

1. Subject of criminal liability

Following the practice of the Continental Law our Criminal Law cannot handle the enterprises or other groups, associations, collectives with or without legal personality as liable for a crime. This would not only fit to history of our criminal law but also to the whole recent structure of law. All elements of a crime are tailored for a natural individual. For instance the definitions of the perpetrators, the offence and the culpability refer to a real person and his actual mind set. There are not only historical and structural argue merits against the imputability of the corporate personalities. Let us recall the ancient roots of the criminal law mentioned in the foreword of the questionnaire. They include traits fitting only to an individual person. This individual having infringed the absolute orders

3 by M. Bittó: 5 and 6; by S. Fülöp: 1, 2, 3, 4, 7 and 8.

of the community has to face a ritual proceeding in which the society expels or at least stigmatizes him. This process is not full of our primordial common psychological entities called archetypes. The common archetypical unscientific plays not a diminishing role in our recent societies as the historical ethics seem to be weakened and are becoming more and more relative. Bringing in the imputability of enterprises could eliminate this psychological factor of the criminal law as do other steps that shift it closer to the civil law; a crime has to remain a real sin so as not to change to a business transaction. Accordingly, the psychological essence of a criminal procedure is the tragical collision of the lonely person and the whole of concerned society. This drama cannot take place in the case of an offender who represents a community, too.

Which are the legal problems urging the imputability of the corporations and whether we have no other solutions for them?

In a "corporate committed crime" sometimes one can hardly find any liable person amongst the managers or other employees. In some instances one employee represents the mental elements of the crime and another person the material ones; that is the first person has ordered and the other person executed the harmful conduct. This is not a difficult problem even in the old legal framework. If the executive person knows about the harmful effects of his conduct at least partly, or should know, he will be a joint actor or an independent negligent actor. If he does not know about the effects or other essential circumstances, he will be an innocent agent that a crime is committed with.

On the other hand the person giving the order usually has committed a crime through an innocent agent, in our terminology as an indirect offender, and he represents a prime offender or a furtherer. If this person does not know about all the important details of the consequences, the negligent form of the crime will take place on his side. Finally if this person does not order but only suggests the harmful conduct to the other employees or simply accepts the benefits from such a (usually regular) conduct, he will be a furtherer of the crime in issue, or in a case where the conduct is exceptionally singular, his responsibility will be based on the connection to the crime.

In other cases we could find a very sophisticated structure in a corporation, organised so shrewdly that nobody has immediately a meaningful personal connection to the crime "committed by the corporation".

For quite different reasons our criminal law literature has already worked out the basic principals of the manager's responsibility. For instance as early as the sixties dr. Miklós Kádár stated that everybody is subject to responsibility in a corporate offence who is entitled to take measures with independent liability, that is the leaders of those departments who perform qualitative control otherwise.

This is why it is crucial in the draft of the new overall environmental code to determine in every corporation the person of the environmental officer. The draft rules detail that case when the firm fails to appoint this officer, and who will standby for him. In a way the draft makes it clear in the forward who will take the final responsibility for violating the environmental rules. It is not a legal presumption, but creates a legal duty for controlling the environmentally important steps of the facility, and the later criminal liability will be clear on the basis of the omission of this duty.

The next argument for enterprise liability is that once we have imprisoned a couple of the managers or other employees of the corporation, the corporation itself will continue the pollution of the environment. This problem leads us to the question of the interdisciplinary nature of the environmental law. Not the criminal nor the civil or administrative law can achieve by self the goals of the protection of the environment in the legal system. The new overall environmental code regulates parallelly all the legal consequences of the encroachment of the environmental laws and regulations. The interdisciplinary nature of the environmental enforcement involves structural and procedural aspects, too. There has to be an organisation with authority to develop or initiate administrative, civil and criminal cases at the same time if it is necessary.

Consequently, we would rather change a few decades old legal situation of the environmental law and its enforcement, than to give up the several centuries old legal practice of the Continental System of personal responsibility in the criminal law. Once we are in the position to enable us to begin sound civil law cases against the leaders, it could be deterring enough and would prevent the further pollution efficially. The less strict rules of liability, the eventual reversal of the burden of proof, the different view of causation, the possibilities for the absolute or absolute-like responsibility and others make the civil law a very useful tool in those environmental cases where the strict personal responsibility of the criminal law has met with difficulties.

In the legal practice of those countries like the United States of America which assume criminal liability of corporations we can experience that this type of responsibility frequently seems to be too strong means against them: the stigmatized firm tends to loose its "good will" almost totally, that its industrial, commercial and consumer connections are broken and the firm is headed to bankruptcy.

This is what was pointed out to be avoided in the European Community Recommendation which otherwise proposes the instalment of corporate liability.

Let us add that by punishing an enterprise in such a way we are punishing a lot of innocent employees with the loss of work and the social surroundings, with loosing tax revenue and other allied advantages.

Another American experience is warning us to be very cautious with this type of criminal liability. Although it is required, there are a lot of cases in which the individuals of the corporation can escape responsibility through corporate liability. In the plea bargaining between the prosecutors and corporations there is a frequent point which excludes the further, individual investigations of the managers or any other employees of the corporations. This phenomenon also underlines the importance of having separate clear-cut levels of civil and administrative law steps in the same case.

2. Can criminal liability be imputed to persons other than prime offenders?

Under our law criminal liability can be imputed to persons other than prime offenders, according to the General Part rules, which constitutes a whole system, so–with the help

of the legal practice—all the socially dangerous conduct connected with the special stages of a crime can be punished.

In the categories of perpetrators there are the principals (the actor and the accomplices) and the accessories (the instigator and the aider). The difference between them is ruled by the legally defined elements of the crime. Accordingly, the actor is the one who, and the solely, accomplices or one who jointly, accomplishes these elements. Accessorie are those taking part in the causal chain of the crime by promoting or persuading. The promotion can take place by physical or psychical aid.

The several phases of committing a crime are punishable in our Criminal Code as follows. The definition of preparation is given in the General Part, but the cases where it is punishable and the punishment itself are embodied in the Special Part.

As concerns the attempt, it is fully punishable in all crimes by the force of the General Part. In the legal literature it is criticised that the total amount of punishment is applied to the attempt, too, because this seems to be less of an incentive for not finishing the crime, although the voluntary desistance (in the case of so-called not finished attempts) and avoiding the occurrence of the result (in the case of perfect attempts) cannot be punished.

It is also criticised that committing through an innocent agent is not regulated in the Code, although the criminal law practice is unambiguous in this question, that it represents not a furtherer but an independent actor, likewise in other cases when the offender uses any unanimate tools.

Conspirators are regulated within the framework of preparation. The organisator of a crime does not have a distinct role amongst the perpetrators but it is not a problem for even if he is only an accessory, the same punishment is available, as that for principals, and in the individual cases the judge will assess the heightened role of an organisator of a crime although he is only an accessory.

All the mentioned types of offences are available for crimes against the environment, except regarding "preparation". It is not excluded theoretically and later, when legislation will realise the overwhelming importance of the environmental crimes, their preparation will be also punishable. The importance of the well worked out legal institutes of perpetrators and stages of a crime could be seen in Point 1, where we tried to clarify the possible individual responsibilities in a sophisticated decision and execution structure of an enterprise.

B. The Material Elements

3. Requisites of material element (actus reus) *of a crime*

Our criminal law does not contain written General Part conditions for the excluding or allowing of responsibility for an omission. In our law a crime can be committed by positive conduct and by inactivity as well. The omission can be specially criminalised in

the Special Part in cases of the so-called "openly defined crimes", there is only a result in the definition of the crime and one can commit it by an act or omission previously undetermined by the law. In this case there has to be a definite "legal duty" which picks out the offender from the mass of persons not having prevented the harmful event.

These legal duties comprise:

(a) legal rules other than criminal law ones

(b) civil law contracts

(c) labour law or professional rules

(d) responsibility for third persons, like children, mentally handicapped persons in a family etc.

(e) undertaking a protection function, like fireman, etc.

(f) a behaviour or act before facts.

Point (f) may need a further explanation: somebody who placed himself on the field of illegality, is himself required to avert the consequences of his conduct. The action which placed him in this position in some instances can be negligent, or even can happen by chance, like in Unlawful Appropriations, where the person appropriates the property of another which has come into his hand by chance or by error and fails to return it in eight days, following the proper procedure as it is written in the administrative law rules regulating the case of lost properties.

From our viewpoint, points (a) and (f) are of especial interest. Seeing that our environmental crimes belong to the groups of openly defined crimes, the harmful result can derive from action and also from any omission. The necessary "legal duties" are represented mainly by the rules of administrative law, first of all the recent Environmental Code. The details are given by the widespread administrative law rules for each media. This recent overwhelming mass of environmental rules raises the question as to whether somebody is able to know all of them. In such cases the legal practice turns for help to other rules of "general reason" or of ethics. This situation brings us to less certain territories than the criminal law standards would require. The new overall environmental code containing all basic duties will help to solve this problem.

Point (f) is important because some previous conduct, having been harmful or perilous to the environment, can bring one to the situation in which new duties are owed by him. Their omission will heighten his responsibility added to the responsibility for the original conduct.

As concerns the systematic activity, there are three legal solutions to this problem: The first and second ones are regulated in Section 12 of the Criminal Code. As it is seen both the cumulation of the offences and the continuousness of offences, have their material and procedural conditions. The third solution frequently takes place in the case of the openly defined harm causing crimes. In such crimes the systematic activity can count to be a natural unit, that is a single crime. The border between the continuous offences and this natural unit is not clear-cut so it is decided by the judges case by case.

4. Causation in the Hungarian criminal law

Our criminal law does not contain special rules on causation, but the criminal law practice seems to stand on the base of the "sine qua non" theory, that is we tend to accept all the possible causes which have influenced the result in a meaningful amount. It is already the question of the mental elements which will give rise to responsibility or not.

As concerns intervening factors we could hardly derive general statements from the practice of the environmental crimes, since our police has developed extremely few of such cases for reasons we cannot detail here. The few environmental criminal cases have been clearly proven and have no causational problems.

As the causational problems arise from the "modern crimes" connected somehow with the technical developments of our age, we could gain relevant findings in the traffic crimes, a much more widespread crime recently. It is unequivocal in the practice of the traffic crimes that no intervening factor snaps the causational chain once the offender's act is available itself to trigger the harmful event, and it would not have been the same without the offenders activity.

Furthermore the strict casual chain seems to be loosened in the traffic crimes cases, when the judge sometimes decides the driver, using that civil law like argument that he should have known all the important parameters, the actual state of his car, and should have made it secure once he had undertaken the driving. Yet we cannot agree with the modification of the causal view of the criminal law although it is true that it mirrors the last century understanding of causality. As we argued in point I, we prefer the civil law solutions of the cases in the civil law itself.

C. The Mental Element

5. Requisites of mental element (mens rea) *of a crime in Hungarian law*

Hungarian criminal law always strictly refused the idea of crime without culpability. It is related to this that the Hungarian criminal law does not recognize the responsibility of legal persons. Accordingly only natural persons can act guilty, and the mental element is one of the necessary elements of crime. It can be stated that criminal lawyers here agree that criminal responsibility without culpability would take our criminal law back to a barbarian medieval state. The appearance of regulatory offences in modern criminal law in many countries blew a hole in the application of the classic principles of criminal responsibility and led to the formation of unconventional regulatory criminal laws. This did not happen here but the doctrine of careless criminality went through certain changes in that context that the *professional regulations* attained a decisive role in determining culpability through negligence.

The disposition of damaging the environment does not hint to the breach of environmental protection regulation. Environmental protection rules prohibit contamination, damaging, and demolition of objects under environmental protection (which are the *actus*

reus of crime) and also prescribe safety rules which have to be obeyed in practicing a milieu of endangering activities. These activities, especially if they result in such negative consequences which reach the measure of crime, are usually production, business and management related. The environmental protection regulations do not usually address private persons but the one in the capacity of carrying out a given activity. In the criminal law this appears such that the perpetrator violates professional regulations.

There are two types of mental elements: criminal intent and carelessness. An offence can be committed through carelessness only if the disposition of the offence also punishes careless perpetration, as for instance the disposition for damaging of the environment. According to the C.C. an offence is committed through carelessness if the perpetrator foresees the consequences of his conduct, but is *recklessly* confident that they will fail to occur, or if he fails to foresee such consequences because of a lack of care and circumspection that may reasonably be expected. Thus, recklessness is one kind of carelessness and negligence is the other one.

In the case of *recklessness* the perpetrator takes an impermissible risk. He foresees the consequences of his conduct but is recklessly confident that they will fail to occur. If he were confident without foundation, his culpability could be determined as intention in the form of *eventuality* (it means that he resigned himself to such consequences). If he was confident with solid reasons, he was not careless, consequently he did not commit a crime. You can see that in practice it cannot be too frequent that damaging of environment will be committed by recklessness. The one, who foresaw that e.g. the dust emitted by his chimney-stack working without filter pollutes the air, was aware of the fact that he does not comply with the statutory provisions defining the standards of the air-polluting works. Being aware of those provisions, by what reasons is he confident that the consequences will fail to occur? Theoretically the only acceptable viewpoint is that no one may take any risk against professional regulations. Recklessness can be realized virtually in such instances when provisions of the Environmental Law allow consideration, e.g. they do not specify the proper measures for protecting the environment, and the perpetrator wrongly estimates the effectiveness of the measures taken by him for protecting the environment.

Recklessnes is first of all a question of producing evidence in the Hungarian criminal law. The perpetrator may declare that he did not know the legal rules or did not properly know them. Then the prosecutor must prove the opposite, at least that the perpetrator foresaw the consequences of his conduct (e.g. the industrial investment altered detrimentally the character of the protected landscape, or the industrial dust emitted to the river harmfully pollutes the waters). The problem of proving the recklessness is that the operation of industrial and other enterprises go together with the use of the environment and so they pollute, by definition the environment. The law has to tolerate this to a certain degree defining the limits in statutory provision (standards). The perpetrator has a good chance to defend himself if he did not foresee the consequences beyond the tolerated, admissible ones. Even negligence is confined by reasonable expectation. It means, that anyone who acts dangerously may not be

called to account for "everything that happens" on the ground that in theory "everything can be foreseen".

The Hungarian criminal law does not differentiate between the degrees of negligence (*culpa lata, levis, levissima)* so it does not make a difference between gross and ordinary civil negligence. The ordinary civil negligence faces the professional (occupational) negligence and logically the professional negligence qualified as gross negligence in the old criminal law in Hungary. It was the basis of the more serious qualification that the professional has to give more diligence by his special knowledge than the ordinary civil man without expertise and by this reason the specialist has to bear more serious responsibility for lacking that special care. But there were only two cases noting the difference (i.e. homicide and bodily harm).

Professional negligence as grave culpa was not valid too long. It was recognised that professional regulations not only create the obligation of exercising special care but their knowledge also provides the capability to do so. And this means that raising the requirements of care in itself is not to be equated with putting a more severe liability on the person practising an occupation. Criminal law requires average care only of lay persons, it requires the care that the average person is able to display on the bases of general experience of life, while the practitioner of an occupation is required to show the average care he is able to meet on the basis of the professional regulations. It was unjust that professional negligence carried a heavier punishment than common negligence, although the basis of punishment for both cases was the violation of the duty to take care.

Different kinds of professional regulations (environmental law regulations among them) represent that only the spheres of obligation are different, but not the degree of culpability. The professionals responsibility is increased since he may be called to account for his negligence when a layman would not be liable. All this does not necessarily mean that his culpability should be considered automatically to be higher than the common (ordinary) degree.

Common (ordinary) experience imposes a minor duty of circumspection than does special expertise, but the minor duty does not mean that the person having it is in a privileged position. He may show gross negligence in the same way as it is impossible to exclude the perpetrator's slight negligence in the case of his failure to fulfil special or increased care. Even today public opinion regards the negligence on the part of a practitioner of an occupation as being more serious and condemnable. This belief gives ground to the view that recklessness, as compared to negligence, is grave form of carelessness. It is in general special expertise or special training that renders the perpetrator able to foresee what the layman is not able to. However, acting in spite of anticipated the consequences (i.e. risking the outcome) does not increase negligence by necessity. On the contrary, it may involve circumspection and consideration.

It must be emphasized that non-compliance with due diligence does not automatically mean culpability of the perpetrator because his negligence is well-founded only on the condition that he in person would have been able to comply with due diligence.

D. Defences

6. About some defences in connection with the environmental crimes

Environmental crimes must be judged by the application of the provisions, including defences of the general Criminal Law, so there are no separate defences. *Physical impossibility* is unknown in the Hungarian C.C. Here one can imagine the consideration of other defences (such as necessity) instead of physical impossibility. Over and above those there is no reason to exclude punishability because the possibility exists for anyone not to commit any crime. Regarding environmental crimes some exceptional cases can be mentioned if the legal or statutorial orders to protect the environment are impossible to be realized in a given case, or the given industrial enterprise would not be able to work if the operation satisfied the environmental requirements. One can hardly imagine, nevertheless, in the mentioned cases that technological or other solution to protect the environment could not be found. Inasmuch as needed expenses would be out of all proportion, the given case can be judged considering the justifiable risk as a defence.

Mistake or ignorance of fact is defined in the Criminal Code as follows: No perpetrator can be punished for a fact he was not in knowledge of at the time of the commission of the offence. Error does not exclude punishability where it is produced by negligence and the law also punishes commission through negligence. On the side of perpetrators of environmental crimes error in causality occurs most frequently in practice. In that case the perpetrator was not aware that his activity caused the damaging of the environment or he did not know that the steps made by him in order to protect the environment were not sufficient. It is also an error in causality if the perpetrator did not know that the measure of his damage to the environment was significant or unlawful.

The mistake or ignorance of fact excludes automatically intention (wilfulness). The intention (wilfulness) is excluded even if the knowledge of the environmental regulations was a professional, occupational duty of the perpetrator. Anyone may excuse himself by mistake or ignorance of the environmental regulations and if he does so, the intention must be proven against his defence. Any presumption concerning the mental element (mens rea) is unlawful in the Hungarian criminal law.

Mistake or ignorance of fact does not exclude the negligence. The violation of due diligence is proven by the violation of the environmental regulations if the knowledge of these regulations was considered to be professional duty of the perpetrator. But there is another element of the negligence and that must yet be proven. Namely, it is to be proven that the given perpetrator was in the position of knowing the professional rule in question, in other words, whether it could be expected from the given perpetrator as well the due diligence. In practice, it is the perpetrator who is forced to prove that he was not in the position to know the rule or to know it properly, respectively, the due diligence could not be expected from him (for instance he was informed erronously, he was kept from important documents etc.). In my opinion proving will only be exceptionally successful.

Mistake or ignorance of fact should be examined from one more aspect, i.e. if the perpetrator was mistaken in the legal object: He did not know that the objects of the environments are protected by criminal law. This kind of mistakes resembles the error in law. The error in law is called error in social danger in the Hungarian criminal law and is regulated the same way as the error in facts. Accordingly a perpetrator who commits the act under an erroneous assumption that it is not dangerous to the society, and has solid reasons to belive it so, is not punishable. Error does not exclude punishability when it is produced by negligence and the law also punishes commission through negligence. The knowledge of socially dangerous exists if the perpetrator is aware of being prohibited his activity whether the law and in detail the criminal law or only the administrative law prohibits it, or it is a moral ban, or he knows only about the dangerous nature of his activity, all these are the same. Since everyone is supposed to know about the danger of the damaging of the environment, that the pollution of the environment is not allowed, one can hardly prove the contrary of that presume, namely that he has *solid reasons* to believe that the damaging of the environment is allowed, is not wrong, so do not present a danger to the society.

Regarding the environmental crimes all this explanation is more complicated because the pollution of the environment is allowed or tolerated *to a certain degree*. Limiting values in the standards of environmental protection define the limit of the emission not to be exceeded. It raises the question of the erroneous knowledge of the legal rules and statutory provisions again, which shall be judged according to the discussed rules of the mistake or ignorance of facts. I mention here one more defence which is accepted by our criminal law, although is not regulated in the C.C., i.e. the justifiable risk.

For instance in a village the people are supplied with bread by the only bakery and its smoke pollutes seriously the air. Or for instance dust emission of a giant cement factory destroys the environment around the plant. Closing the factory would yield in loss of jobs for the town and the economy of the country would have no cement. It arises in this context the issue of physical impossibility mentioned in the introduction. Though these examples one may illustrate the lack of financial conditions rather which can be evaluated in terms of different defences.

In Hungary according to the C.C. necessity is restricted to *emergency* situations. Accordingly, a person who acts to save his own person or property, or other persons or their property, from a danger directly imminent that could not possibly be averted by any other way, or does so in the protection of public interest, provided that causing of danger cannot be imputed to him, and his act produces slighter harm than which he tried to avert, is not punishable. It is to decide, therefore, that by causing the damaging of the environment the person averted an even more serious danger than that or he did not. If the person intended to avert only damage in property, the post-comparing with it is not easy since the damaging of the environment to a significant degree cannot always be expressed in money. The judging is much easier if in an emergency situation the person had to decide on the damaging of the environment against of endangering human life. If, in the extraordinary situation requiring immediate decision, the person considered wrongly, still he can be excused from liability as the C.C. says: a person, who produces

a harm equal to, or in excess of, that which he tried to avert, for he is unable to recognize the extent of the harm, due to fear or to excusable emotional agitation, is not punishable either.

The *permission* for the polluting activity based *on statutory provisions* or given *by public authorities* is a reason to exclude punishability although the Criminal Code does not define it.The limiting values of emission which are defined in environment standards represent such a legal permission, though it must be added that there is no way to visualize provisions which would enable such amount of pollution that would reach the level of environment crime. The same applies for the permission of authorities which is a prerequisite of all activities spoiling the environment.

Superiors' orders is a recognized excuse only in military crime, but even there it has strong restrictions. No one can be instructed to commit any other crime. Labour law regulations subordinate has to deny a superiors order if it is for committing crime. It is a different situation when a subordinate has to fear the loss of job when contradicting. Threat is a proper defence, i.e. it means holding out the prospect of a grave detriment, fit to arouse serious fear in the threatened person. It is questionable that the fear from loss of job complies with these criteria. The instruction giving superior is held responsible anyway for perpetrating the environment pollution.

E. Sanctions

7. Sanctions available for crimes against the environment

The two environmental crimes in our C.C. under Sections 280 and 281 involve practically all general sanctions we can find in the Code. The intended forms of the crime "Damaging Environment" are punished with deprivation of liberty up to three or in the case when the damage of the environment is associated with endangering life, too, up to five years. The crime of "Damaging Nature" shall be punished with imprisonment up to one year or with reformatory and educational labour or with fine. The more dangerous form of this crime shall be punished only with imprisonment up to three years. The negligent forms are punished in both crimes with all the three main types of the general sanctions.

In the cases when in the Special Part there is only imprisonment as sanction, the court can use the reformatory labour and fine too, according to the so-called alleviating section of our Code. In the few recent environmental criminal cases we have, this section is mostly employed, because our judges are reluctant to punish white collar criminals with imprisonment nor with its suspended form.

There are not any special forms of sanctions available for the environmental crimes. Amongst the secondary punishments the interdiction from exercising a profession seems to fit specially to our cases but recently the court experience has not developed yet in this direction.

There are several measurements, too, which would be specially available for environmental crimes, like the confiscation of the properties having been used for purpose of a crime. When the court wants not only to prevent the further crimes but in the same time to cause a meaningful economic harm to the defendant, it will confistance a part of his property as a secondary punishment. Our Code practically enables both ways of sentencing in the environmental cases as well.

By the time we will have more broader environmental criminal practice, it will be quite necessary to have further special sanctions against this type of crimes. Some of them will be connected with the restoration of the previous state of the damaged environment and with the compensation of those who has suffered harm by the environmental crime. This purpose of restitution could be served well by a very light modification of the recent rules of the suspending of the execution of the punishments. It would be useful to broaden the possibilities of the imposing of the behaviour rules during the time of the suspended loss of liberty or fine. The unwillingness of doing the restitution works, or not proper finishing could be regarded as the trespassing of these rules.

The aim of restitution could be promoted in a more earlier phase of the criminal procedure as the sentencing. In other place of the Criminal Code there is a very useful solution, at the crime of Unlawful Missing of Maintenance. Until the sentencing stage, the father could pay the sum having been missed, and so creates a Special Part form of the causes ceasing the responsibility, or in the more severe case, of unlimited mitigation of the punishment. This idea would be very useful in the case of the environmental crimes too. The ceasing of the pollutioning conduct, or the serious evidences in the behaviour of the perpetrator for the change in his environmental policy and important steps towards the restitution, all could serve as reasons for the exclusion or the diminishing of the punishment.

F. Jurisdiction

8. Crimes under courts' jurisdiction

The courts exercise jurisdiction to all criminal offences committed in Hungary and in special zones adjoining it (aircraft, ship) , and to all offences committed by Hungarian citizens anywhere. The Hungarian Chief Public Prosecutor has the right above these for the institution of criminal proceedings against aliens having perpetrated crimes abroad, mainly in the cases against mankind, or Hungarian State, or in the case of crimes that has to be prosecuted under international conventions. (The first chapter of the Code). This last mentioned rule raises the thoughts concerning the future tasks of the cooperation of the Central and Eastern European countries. The environmental situation of these little sized countries highly demands cooperation in the field of the environmental protection. The new wave of the economic alliance has to accompany with the international environ-

mental regulation even in the field or the environmental criminal law as well. The scope of our criminal jurisdiction already enables this.

Summary[4]

The legal provisions of administrative nature related to environment protection have been laid down in several legislative actions with the principal Act II of 1976. Environmental crimes are embodied in the C.C. while petty offences in the Contravention Code. The Constitution declares the rights of everyone to the healthy environment and formulates the essence of environment protection as a *human right*. Recent Environmental Law is under totally new codification. The planned code strives at making punitive sanction more effective. Hungarian criminal law does not recognise legal persons as liable for a crime since all elements of a crime are tailored for a natural individual. Everybody is subjected to the responsibility in a corporate offence who are entitled to take measures with independent liability, i.e. leaders of those departments who perform qualitative control otherwise.

The C.C. constitutes a whole system making possible to punish all socially dangerous conduct connected with the special stages of a crime. In the company of perpetrators there are the principals (the actor and the accomplices) and the accessories (the instigator and the helper). The attempt is fully punishable in all crimes, while the preparation is punished if it is ordered in the Special Part (preparation of environmental crimes is not punishable).

The environmental crime can be committed either by activity or by inactivity. In both cases any breaching of legal duties has to be found which picks out the offender from the mass of persons not having prevented the harmful event. The relevant legal duties are defined (outlined or detailed) in the provisions related environment protection of legal and administrative authorities.

The C.C. does not contain special rules on causation, but the practice seems to stand on the base of the *"sine qua non"* theory accepting all the possible causes which has influenced the result in a meaningful amount. In the practice the few environmental criminal cases are plain in the proving matters and have no casuistical problems.

Hungarian criminal law refuses the idea of crime without culpability. Environmental crimes are committed mainly in the form of carelessness moreover by negligence in most cases. If somebody violates his legal duties knowing to inducing environmental damage, practically it may qualify as a crime by intention in the form of eventuality. The reason is, that no one may take any risk against professional regulations.

The C.C. does not make difference between gross and ordinary civil negligence. Different kinds of professional regulations (environmental law regulations among them)

4 by M. Bittó

represent that only the spheres of obligation are different, but not the degree of culpability. A professional may be called to account for his negligence when a layman would not be liable.

Regarding environmental crimes there are no separate defences in the C.C. Instead of physical impossibility we may consider other defences such as the necessity. The mistake or ignorance of fact excludes intention even if the knowledge of the environmental regulation was a professional duty of the perpetrator, but does not exclude automatically the negligence. The mistake in the legal object resembles the *error in law* which does not exclude punishability excepting if the perpetrator has solid reasons to believe that the damaging of the environment is allowed, is not wrong, do not present a danger to the society. In the C.C. necessity is restricted to emergency situations.

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Financial and Statutory Constraints on Public Administration

Introduction

Science is averse to addressing topical issues. In our days, however, there are few subject areas that command so much attention as provision of finance for public administration (its different branches) does. Here we have in mind not only the case of Hungarian Television,[1] but—since they have reached the stage of regulation by respective draft laws or concepts thereof—higher education,[2] research (HAS),[3] communal development,[4] and

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1 The term case (*l'affaire* in French) is of so many aspects (applicable law in force; substance of legislation by Parliament concerning the media and its legal implications for financing the operation of the institutions in question; substantive content of supervision over the media; whether blocking of appropriations for the mass communication media is violative of the freedom of the press, etc.) that we feel impelled to explain what we have in mind. Uppermost in our mind is the reason why this case is of particular interest to legal and financial scholars, namely because it has highlighted what it would be highly important to realize: our uncertainty about the type of *criteria* for financing public services.

2 In respect to higher education, for which the drafters of the Bill sought to formulate an objective criterion of finance (number of students), the Finance Ministry's observation is justified: if the criterion for budgetary subsidy cannot be planned, expenditure may increase steeply, ruling out provision of sufficient finance for the subsystem. Cf. 1197/1992. MKM, Előterjesztés a felsőoktatásról szóló törvényjavaslatról (Submission concerning the Bill on Higher Education), p. 67; Általános és Részletes Indoklás (General and Detailed Motivation), p. 18; and Emlékeztető a Tudománypolitikai Bizottság 1992. IX. 23-án tartott üléséről (Memorandum on the 23 September 1992 Meeting of the Committee on Science Policy), p. 30, with noteworthy observations to be found especially on the last page.

the police[5] as well. Still, returning to the case of Hungarian Television, let us point out how clear an indication it is, from a theoretical aspect, that the problems of public service media fall—unfortunately for them, as it were—between the domains of administrative sciences and public finances, meaning that state-financed radio and television broadcasting remains within the domain of public finances even though the radio and television become self-governing public corporations and thereby fall outside the scope of public services in the strict sense. This brief digression is justified by the need to make the point that, often, science makes a wry facer even in cases where subtle theoretical questions present themselves. Thus, for instance, is an organization qualified by the extent to which it is financed from taxes; can its status be decided by claiming it would be unable to function without state support, etc.; or can qualitative expectations be raised in return for state finance?

Quality in general can of course, and indeed should, be a consideration in public administration. There are two prevalent views we have encountered in connection with public or professional control over public administrative activity. One is that the State should make funds available, but it should then refrain from intervention (in the activity

3 In the Bill worded by us we proposed quadrennial and annual negotiations and contracts, practically on the model of the French contract administratif, with regard to research, which is indeed too delicate an area to be financed according to normatives (e.g. number of researchers). This does not, however, preclude the possibility for the State and public bodies to agree in goals and areas, with the resultant solution ensuring the transparency of the former and autonomy for the latter. 1991. évi Törvény (Tervezet) a Magyar Tudományos Akadémiáról. Kézirat (Act [Bill] of 1991 on the Hungarian Academy of Sciences. Manuscript), MTA ÁJI, 1991. p. 12; 1. sz. Melléklet (a törzsvagyonról) és Indoklás (Annex I [on Original Stock] and Motivation), p. 16.

4 In wording the Bill concerning communal development, which we prepared for the competent ministry, we were confronted with the problem of whether it was proper to propose compensating mechanisms, without which it is more difficult to prevent the decline of certain regions, but it is equally true that methods provide by themselves no safeguard against inefficient utilization of public funds. Cf. Elmélkedés és szakirodalom a területfejlesztésre vonatkozó törvényhozási tárgykörről. Kézirat (Reflections and Relevant Literature on the Subject-Matter of Legislation concerning Communal Development. Manuscript), MTA ÁJI, 1992, p. 54; and Szövegjavaslat a területfejlesztésről szóló törvény tervezetére (Proposed Wording of the Bill on Communal Development), MTA ÁJI, 1992, p. 5. The concept of regulation approved by the departments was published in the journal Magyar Közigazgatás.

5 According to sources available to us, considerations providing a financial underpinning for the performance of functions—apart from legal aspects, the significance of which cannot be emphasized strongly enough—received scant attention during the debate on the Police Act. We hoped to find in the latest literature on the subject at least one study estimating the costs of public safety, a question we regard of great importance. Although the technical term, i.e. price of the service, had been used in an interview, the respondent wandered from the point and began to describe the difficulties of securing appropriate income, ignoring an earlier question of the reporter about controllable norms required to govern the utilization of public funds. Cf. DANYI, József: Az államháztartási törvényről és a költségvetésről. Interjú Bencze Miklóssal (On the Finances Act and the Budget. An Interview with Miklós Bencze), Rendészeti Szemle, No. 2 of 1991, pp. 48–54. Basic information concerning the substantive (and, for us, financial) aspects of the police service may be gained from the writings of NYIRI, Sándor and TÚRÓS, András: A bűnözés és bűnüldözés helyzete 1990-ben (Situation with Regard to Crime and Crime Control in 1990), Rendészeti Szemle, No. 3 of 1991, pp. 3–7; and A közrendvédelem aktuális feladatai (Current Tasks of Maintaining Public Order), Rendészeti Szemle, No. 8 of 1992, pp. 3–8.

or profession itself). On the other view, however, public administration is under obligation to examine utilization of funds and its results upon their merits too. The main argument of the first view is that professional control (e.g. over financial matters) is superfluous, because the law of the market, namely that better performance is bound to increase demand,[6] operates everywhere (in culture, e.g. theatres, or in education, concretely in the change in curricula). On the other hand, the second view has it that the supplier of public money has the same rights as the owner: he has to be careful about the recipients of funds and has to ponder what he gets in return.[7]

On solving the dilemma

It is a fact that central administration and even local self-governments (public bodies in general) are not skilled in everything as, given their composition, their staffs may eventually consist only of laymen on the one hand and, on the other—even if such is not the case—many observers would, in their subconscious, kick against appointed or elected persons having the grab on all categories of matters. The former case may be called the dictatorship of bureaucracy and the letter an excess of democracy. Is there a happy medium? We think there is, and one called self-constraint. No doubt, a kindergarten, a police office, a primary school, a clinic, a university department, etc. need independence for professional reasons, namely to perform their tasks, while the users of public services and public goods (citizens and public institutions) need equivalence (or, in case of differences in quality, their indication) and predictability of services. Conversely, it is a duty of supervisory bodies to see to it that these two criteria are met.

Contrary views are oblivious to the fact that control (i.e. internal control) alone may cause eventually necessary intervention to come too late, not to mention that if the supervisory bodies are not in a position to obtain information on a particular organ, there comes about a black hole of information in the social cosmos. Precisely for this reason—not questioning the significance of internal mechanisms of a particular public service institution, even if their existence can be verified sociometrically—we find no ground for objection to external control, be it professional or financial in nature.

The other question put is whether the supplier of money or, frivolously, the patron can want anything in exchange. There is but a single answer, a bit rabbinical one: if the supplier of money (provider of finance or remitter voting for allocations) is ignorant of what he will get, how does he know the quantity of money he should give? If the answer is that he has no way of knowing it, the first question can be answered in the affirmative,

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6 The Subsection of the Board of Trustees of Project V for Renewal of the Teaching Profession held discussions that provided useful lessons.

7 Without knowing the details, we refer to the supposed introduction by the Australian Government of a system of financing public administration that is governed by entrepreneurial criteria for provision of finance for budget-dependent organs.

from which follows (can be inferred) the need to state the justifications for all expenditures.

If we now say that such is not always the case, we feel we do not offend the administrators of public revenue. While, from the point of view of financial law, it would be desirable that the general and special motivations to draft laws should indicate the nature of expenditures or, *horribile dictu*, each item of appropriation should correspond to a particular clause (i.e. the law-maker's or a minister's will), we are mainly concerned now, not with this, but with the question of whether public administration can be expected to produce in return for provision of finance some record of performance measurable by an indicator.

Performance—financing

In principle, at least in view of the foregoing, the expectation that the activity of a public administrative (public service) organ should be transparent is not without any basis. If transparency is a requirement, the demand for the performance (not the shortfall in financial performance) of an institution (a group of institutions) or a chapter of the budget to be traceable cannot be said to be too much out of touch with reality.

It is extremely important to see that competence to determine the content of performance—and here we refer neither to financial performance, namely to eventual shortfalls in discharging tasks, nor merely to quantums of revenues and outlays (in respect of which the parliamentary committees cannot but voice surprise every years, because planned revenues are recurrently far below the actual figures)—is allotted not to the Parliament or the State Audit Office alone. If on this score (i.e. the content of public service performance) someone, e.g. the present author, were to mention the competence of the Finance Ministry as well—the forum for which are provided by negotiations about budget chapters and the documents of which are the minutes taken of those negotiations—he would promptly incur the charge of financial terror.

Is that charge true? According to Anatole France (in "Island of Penguins"), the best charge is that which has no proof, so it cannot be rebutted. If we are very partial and want to expose the problem too sharply, we should say that the accusers in this case practically follow the same course of action, albeit not necessarily in bad faith, yet in keeping with their perceived interests. On the other hand, they call into question the right of financial organs (which do not but fulfill their duties) to ask questions of a professional nature about the performance of some public service (consumption of medicine, passenger traffic, teacher/student ration, etc.) and, on the other, they themselves believe that the financial organs cast doubts on the autonomy of departments or budget chapters by demanding or recommending reforms of an organizational nature.

It is a fact that the stalemate, presenting as it does a typical problem between chapters and the financial cabinet, has also arisen and come into the focus of professional and public-law debates in other countries (e.g. in Italy), in short, in every country where the prime minister has no sufficiently strong power to decide disputes between departments

and finances, and/or where the finance minister does not play a hegemonic role in the budgetary procedure (e.g. planning, preparation, decision, implementation), the problem is bound to emerge. In our own judgement, there has arisen in Hungary a specific situation in which, although the prime minister's position is strong, the finance minister is unable, at least in our view, to push through his own conception about a reform of the large distributive systems, because he has no hold on the budgetary process and does not have the necessary means to perform his classical function (i.e. keeping the budget in a state of equilibrium), or, put otherwise, his legal status is not defined clearly enough to ensure enforcement of the Government Decree on the Minister of Finance.[8]

The provisions of law on nearly all organizations, if good or not blurred (e.g. the draft laws on the Hungarian National Bank, national defence, the police, or higher education), clearly specify the tasks thereof. And the more public administration takes on the character of public service, the related expectations and powers should be defined in advance the more clearly, or else appropriate financing is impossible and, in the case of ministries, one cannot speak seriously of ministerial responsibility. For that matter, the latter problem cannot be either dismissed or solved by claiming that political issues in Hungary cannot be raised except against the prime minister. Therefore, on the one hand, there is a need for a legislative enactment allowing the Government not too wide a scope of action—as Thatcher put it, "It would be too bad if the police had to be instructed and they did not do their job in accordance with law"—and, on the other, disregarding the prime minister's primacy, the law should allot to the members of government independent spheres of competence *vis-à-vis* the "first minister" and chiefly the other members of government, or else there is no resistance to granting demands for credit (allocations, subsidies) represented by departments, the finance minister acting as a lonely cowboy and becoming a target of the 13 little Indians (at best he may count on the Great White Chief to deny demands that are excessive or impossible to finance. The paradox is that the system (public administration and, with it, public services) does function for all rightful irony. The only question concerns the degree of efficiency, adequacy to the purpose of what is called a social market economy. After all, if the answer is negative, the problem can be settled by saying that in a situation marked by a shortage of funds the possibility of improving public services is ruled out, and even the mere result of keeping them in proper trim is a miracle.

True, one may retort, but while other branches of the national economy (industry, agriculture, the tertiary sector) pay a heavy toll for the period of transformation, the public services sector, including the large distributive systems, is yet to fight its way through the big change.

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8 The prime minister's decision-making power between the finance minister's hegemony and competing departments is, in our modest judgement, a private-law pillar of, e.g., the modern Italian and French States. ZALMA, G.: L'hegémonie du ministre des finances dans le droit budgétaire de l'État, Revue du Droit Public, 1985, pp. 1653–1658; PEREZ, R.: La riforma del bilanco dello Stato e la legge, n. 468 del 1978, Rivista Trimestrale de Diritto Publico, No. 1 of 1979.

On the other hand, this statement may be countered by claiming that society's response to the opening of yet another new front (namely after industry, agriculture and commerce) would have been predictably incalculable. At the same time, one should not overlook the possible occurrence of events (e.g. referendum on the dissolution of Parliament)[9] the outcome of which is, in spite of everything, equally impossible to foresee at present. Hence the financing of public administration is, contrary to all appearances, no professional question, because the events of the 1990s in Central Europe have shown that security is a value ranking right after change.

On national defence

If such is the case, it is equally true that a certain order of priorities among the departments should be recognized. It will not naturally solve the very important problem of financing public administration, for the big issue is not this, as politicians and MPs should be aware, but the type of challenges (refugees?, terrorism?, nationalism?) to be met. There appears to be an end to concentrating finance on the former armed services, where privileges were accorded to troops of great fire-power. The principal emphasis has shifted from them to the so-called rapid deployment forces, with the obvious implication that two armies will emerge, the classical one being able to provide no more than some sort of logistic support. Strategy will consequently be not a concentric, but a random-oriented one, defensive and focusing mainly on weak points. It stands to reason that, in the current situation when none of the departments can expect more funds, the conceptual question concerns the types of expenditure (allocations) to be reduced. From this it would follow that any equipment difficult to deliver or transport is to lose its function.

At the same time it is evident that adoption of so far-reaching decisions involves a risk of restructuring tasks. The effort should nevertheless be undertaken, with assistance by the so-called zero-base budget, which is apt to give a clear picture concerning the financial implications of this new approach to national defence.[10]

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9 The Constitutional Court award of 19 January 1993 (handed down after the writing of this manuscript) has settled the legal aspect of the dispute, but he problems concerning state responsibility (and the tasks of public administration) towards persons living below the poverty line are still at issue. As regards modalities of financing, we would not underplay the established European customs by which the vulnerable groups are refinanced from time to time. For a fuller discussion, see LOVAS, Margit: A franciaországi szakmai egészség-pénztárak kialakulásának és működésének leírása. Kézirat (A Description of the Establishment and Operation of Occupational Health Societies in France. Manuscript), Paris, P_x Ltd., 1990, p. 36.

10 The present author does not naturally consider himself qualified to make competent statements on questions before the Military Committee. (The best he can suggest is reading the professional literature properly so called. See, e.g., BOGNÁR, Károly: A biztonság és biztonságpolitika hazánkban (Security and Security Policy in Hungary), Társadalmi Szemle, No. 1 of 1993, pp. 39–48). All we wish to indicate is that for sufficient finance to be secured for a branch of public administration (such as national defence), it is necessary to formulate very clear and, in given cases, very moderate objectives. In order to give some cause for self-congratulation, let us quote two ideas. First, "...However, for objective reasons like the capabilities of the existing defence potential and the absence of external security guarantees, we are a mile short of possessing such an effective defence

On the police

The internal security forces (police, national security) cannot be expected to call for so profound a change in approach. As is commonly known, reinforcement of the front-line has been recommended by foreign experts as well. For one thing, this implies a need to devise a system of financial incentives to taking charge of conflict management.

We believe that the present economic situation does not permit setting too ambitious goals and that up to 1996 one cannot aim at more than combating primitive crime. (Perhaps I am not too mistaken in pointing out the existence of social demand for such effort.) The kind of financial planning and reallocation of resources needed for campaigning against refined structures present a different question. Just as in the case of national defence it would amount to over-confidence to presuppose the absence of contrary views, it would be a mistake to think that option for a new budgeting will not encounter opposition. If arguments have any role to play in such a dispute, one cannot but claim that the illegal market has a capacity for absorbing labour.

To sum up, public administration functioning in the field of personal safety and material security has no alternative but open confrontation with direct crime and seeking out and uncovering hidden crime. This dual goal calls for dual financing: while in the first case one should proceed from the degree of infection, in the latter one should be equipped to cope with crime likely to burst to the surface in the second part of this decade, producing results by that time, which presents the need to prepare a cost-benefit analysis concerning the former and to draw up a programme budget for the latter task.

On labour questions

Unemployment is a new phenomenon, just as the emergence of small states along our borders (which have lost their potential aggressivity militarily, i.e. their capacity for offensive military operation) and the appearance of organized crime are. It will be stressed once more that, with tendencies to continuing scarcity of funds prevailing, one cannot entertain dynamic concepts or, in financial terms, nothing but passive (defensive) techniques have any reality. In other words, during the period up to 1996, when no meaningful increase in GDP can be expected, active (preventive and generally financial) methods have no reality, not even in the blueprint stage, although only schemes of the

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system...", and second, "It is necessary to work out defensive measures suited to the different forms of threat..." (PERJÉS, Gábor: A parlament Honvédelmi Bizottsága kétéves működésének tapasztalatai és a továbbképzés lehetőségei (Experience Emerging from Two Years of Functioning of the Parliamentary Committee on National Defence and Possibilities of Further Training), in: Special Issue No. 1 of Akadémiai Közlemények és Rendészeti Tanulmányok: A fegyveres erők és a társadalom (The Armed Forces and Society), pp. 53 and 55). It is to be noted that, in our view, nothing can be said of the capabilities of our existing defence potential until after the costs incurred by different forms of threat have been estimated.

latter type can be efficient in respect to either labour questions or communal development, industrial policy and the like.

Politically motivated terrorism, primitive and organized crime, and unemployment (particularly its sudden growth) involve so-called risks which (especially when emerging simultaneously) cannot be staved off except by a change of concept, formulation of new programmes, revamp of organizations, and personnel with new attitudes of mind in public administration. These cures are necessary, but—it is no great wisdom to say—ineffective without new arrangements for financing.

Let us begin by making two statements in passing. Firstly, the peak of unemployment affecting 900.000 people corresponds to the country's level of economic development. Secondly and consequently, one must accept the fact that this figure may be modified or reduced by certain manoeuvres, but cannot be done away with. Efforts should therefore be concentrated in areas promising results, e.g. on higher education, which may serve transitorily to absorb young labour. The foregoing makes it also clear, however, that the next 2 or 3 years cannot be expected to witness any profound shift in financing techniques in the province of any department, because the reform itself (the financial one too) will cost money.

On education

Subject to the above restraints, we may now enter upon the problems of financing the educational sector. Well, as is becoming a matter of common knowledge, higher education has an excellent absorbing capacity regarding unemployment, but, due again to shortages of funds, unfortunately this will not by itself allow a modernization by European standards of graduate and postgraduate training within a system consisting of some 80 institutions to take place during 2 or 3 years. Nevertheless, the intervening period will perhaps make it possible to assign clearly defined responsibilities to the department involved (e.g. in increasing student numbers), with particular emphasis on the young unemployed. The need for financial support to future efforts by universities and colleges is clearly in evidence: what is needed is for the financial system practically to incorporate a set of incentives that will recover the extra costs incurred by a larger number of students and perhaps even those of improving the quality of education. Unfortunately, however, this will not help tackle all problems of finance.

In dealing with state subsidies for higher education (not with maintenance of the sphere of university, college and postgraduate training) one may note two striking differences in the situation of institutions, namely disparities in the teacher/student ratios and in the infrastructure itself. Improving the first, i.e. raising the nationwide ratio of 1:5 to 1:10, would obviously be a goal of the State which may be expected to face resistance by certain autonomous organizations in spite of such government responsibility tending to work against unjustifiable differences in performance. For that matter, it is appropriate to point out on this score that budget finance for any public service achieving a status independent of the State will impose an insoluble task on the financial planning apparatus

if the institutions required to furnish data, i.e. the organs eligible for state support, have unlimited freedom regarding certain cost items (e.g. number of teachers or change in their classification).[11] Such arrangement will of necessity be conducive to a cost explosion, namely formulation of demands for credit that cannot be granted. This leads us to state our view that the sectoral ministries—whatever the public service (e.g. higher education, research, public health, local matters), which is ultimately organized by the self-governments—must not turn away from the Ministry of Finance, but, on the contrary, must devise a very elaborate system of performance measurement highly sensitive, on the one hand, to what autonomous organizations give in return for public funds and, on the other, to secure finance for a particular public service, i.e. keeping its development in step with sources of revenue that can realistically be expected to be available from time to time.

For this very reason, a new approach is needed to reducing differences between institutions and maintaining the operation of the infrastructure. The obvious problem in this respect is that, as regards provision of budgetary finance, we have rather ineffective devices for measuring the depreciation of buildings, equipment, etc. Under conditions of scarce funds the management of every budget-dependent institution and even the organs of supervision lay emphasis on operation as a matter of course, and this often leads to the phenomenon that buildings, students' hostels, machinery, school equipment, etc. are, to use a rather crude phrase, reduced to tatters. This nationwide state of affairs could only be changed by separating compensation for depreciation of infrastructural facilities (e.g. renovation of water- and gas-pipes) from provision of performance-related finance for a particular institution, because there is no strong correlation between the two.

More specifically, the first aspect involves mere adequacy to functions determined by deeds of foundation (legislative provisions) and the second is simply a matter of protecting property (initial capital). Such a cardinal settlement of the problem would necessitate appraisal of operation as per invoice on the one hand and, on the other, inventory of property and survey of technical conditions, evidently with a view to assessing real financial needs.[12] Everyone is aware that this is a massive and costly undertaking and that, to make a commonplace remark, the large distributive systems cope with scarcities of funds and exhibit wasteful spending behaviour at the same time. This phenomenon can only be kept in check by Hungarian public administration adopting the systems established in other countries for dealing with the problem.[13]

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11 Cf. fn 2.

12 A felsőoktatás jövedelemnövelése és költségfedezete. Kézirat (Increasing the Income and Covering the Expenditure of Higher Education. Manuscript), MTA ÁJI, Budapest, 1990, p. 74.

13 BÉTHUNE, Emmanuel: Etude relative à la détermination de critères objectifs pouvant servir à la répartition du Fonds des Communes. Manuscript, Bruxelles, 1962, p. 26, and Annexes, p. 82.

On public health

Of course, from the point of view of financing, the really sizable item in state subsidies is not represented by higher education or research, which need not more than an annual amount of 100 billion forints, calculated with a wide margin. For that matter, the volume of spending for the police and armed forces is about as high, while unemployment is estimated by some to cost not more than 120 billion forints in 1993. The really large items, several times the above figures, include outlays for health services and pensions.[14] There is not much to be done about the latter, which may be reduced or kept within manageable limits, the only course open being extension of the retirement age limit by claiming it is higher in western countries, an argument which, however, may be opposed on the ground that, by contrast, average age is lower in Hungary. If we are to keep strictly to our subject of financing public administration and public services, we cannot enter into either this or other debate, chiefly because, in our way of looking at it, the basic goal should be today (and will remain up to about 1996) to prevent through budgetary finance the emergence of unstable situations on a nationwide scale (national defence) or on a regional scale (unemployment, crime, growth of territorial inequalities, drastic deterioration in the national health service) and also to ensure that provision of finance will not result in an unmanageable volume of deficit.

It must be spelled out that the latter goal cannot be achieved expect through very radical schemes, and let me add that such future series of measures, which are likely to provoke a social shock, will make their beneficial effects felt with a long delay after their introduction. What we have here is simply the need for public administration to choose the last of its means (penalty, reward, persuasion) to drive home to users of social insurance benefits that in future it will have to make continuing delivery of the same services subject to satisfaction of certain additional conditions. In the simplest terms, it should envisage payment of added contribution to the Social Insurance Fund in certain cases of health-impairing behaviour, that is to say that prophylactic care should be enhanced even if the toll to pay is higher initial costs. The other option is to reduce the range of cost-free services rather than to have health care wrecked completely.[15] This option would naturally call for encouragement to the voluntary form

14 A resumé of literature on problems relating to social insurance: Fraternité-jelentés a társadalombiztosítás reformjáról (Fraternité Report on the Social Insurance Reform), Fraternité Corp., Budapest, 1991, p. 359.

15 We too have it clearly on mind that he who proposes today cutbacks in government spending is meddling with the no small fire of recession. Evidently, a reform of state finances can only be sustained by a stable economic structure, as it appears to have been demonstrated by events in the Western Europe of the 1970s, when overspending by public administration entailed harsh restrictive measures. The research worker outlined the facts and professional literature concerning the *ways and means* by which the situation was dealt with [A közpénzek modernizációja és a közigazgatás finanszírozásának reformja (Modernization of Public Funds Management and Reform of Financing Public Administration), in: A pénzügyi kormányzatról. Kézirat (On the Finance Cabinet. Manuscript), MTA ÁJI, 1990, pp. 349–442], but he had to rely on private predictions of trends

of supplementary insurance as a basic condition, just as it would be a basic requirement in our view, one that should apply to any arrangements, to introduce at last a scale of health-care charges for all medical interventions, naturally governed by the principle of accountability.

Summary

Space forbids discussion of questions concerning finance for all branches of public administration, but I may perhaps be permitted to make a few concluding remarks.

As becomes clearly evident from the foregoing, the internal problems of financing the different branches of public administration need analyzing in much greater depth than is permitted by an article in a journal. They are nevertheless preceded by the question of whether there exist some *general principles* deserving consideration prior to allocation of funds for any ministry, central state-financed organ, self-government, public body or public institution. Put otherwise, are there any *standing criteria* which the Parliament, the Government and the Ministry of Finance should take into account before deciding on the utilization of public funds? (I should note that problems regarding the practicability, legality and efficiency of financing public administration are inevitably of concern to the heads of the state audit office and even the central bank in any country.)

1. Provision of finance for public administration is always related to some record of *performance, or output,* whether the *substance* of activity is constituted by exercise of administrative functions or by delivery of some *public service. 2.* Without *measurement of results* concerning the substance of activity, such measurement to be entrusted only to an organ of *control external* to the organization receiving finance (State Audit Office, Ministry of Finance, Central Statistical Office), real budgetary subsidies cannot be established as the "self-control" of organizational systems cannot be based on anything but supplementary data. *3.* Such data are practically worthless without *international comparison,* so expenditure on wages, operation, investment, etc. should always be cross-checked and the main figures for a homologous foreign organization should be presented at least to the appropriate parliamentary committee. *4.* The output of the large distributive systems should be compared to the country's *level of economic development.* Comparisons with countries producing volumes of GDP several times that of Hungary will lead to unrealistic demands. *5.* While it is true that budgetary revenues are *spent in advance,* decision-makers have their hand tied strongly, but this phenomenon, which we have lived with for decades, would necessitate a *review* of the legal system in the context of finance (expenditure). *6.* Neither the MPs nor the Finance Ministry personnel may act as *agents* of public servants and public services once it should be taken for granted that the departments will never throw up a barricade to claims for finance from the budget. What

in decision-making concerning the question of *when* [Szakértők és politikusok, avagy Magyarország '94. Kézirat (Experts and Politicians, or Hungary '94. Manuscript), MTA ÁJI, 1992, p. 22]. It will be noted that the Finance Ministry's calculations regarding the future pattern of GDP were also published in the daily press.

is therefore needed is primarily a change in approach under which the Ministry of Finance is seen, not as simply an organ existing to plan the spending of public revenues, but as one of the State responsible to Parliament for the utilization of public taxes, receipts from customs duties, public charges, fees, etc. 7. As can be seen, the problem is not a mere technical one, albeit it seems to be certain that a reform of the *state accounting* system, a strict regulation of *public procurements*, and revival of the *auditing system* would operate in a direction we believe to be desirable.

On financial constraints on public administration in general

As we have seen, the financing of public administration is, in principle, governed by quality and output as well as by the importance of the goal pursued. (Of course, these categories are not always relied upon for allocation of funds, but are indeed used as arguments, for example during debates on the budget.) Whatever the technique of financing public administration, certain it is that the operation of the aforementioned principle is checked by some factors, even on the plane of abstraction. A grouping of these factors will reveal that the constraints in question are either raised by interest groups active in the bureaucracy or by representatives of economic and financial sciences or by facts of the past, or have their source in international relations or in national law. Let us look at each of them.

Interest control groups acting as constraints

Interest control groups (parties, trade unions, associations, public bodies, etc.) formulate certain goals mainly in their programmes, but also in their by-laws, goals that may exercise decisive influence on different state responsibilities or state-aided tasks, thus shifting the main thrust of financing, even at the expense of the classical functions of public administration. (Such shifts of emphasis may be "positive" or "negative" in the case of a particular department and from its point of view.) A government is therefore "captive" to a given programme before it takes office, so an analysis of party programmes even allows predictions of trends to cuts in separate appropriations for particular sectors. (The extent to which the government will then actually implement the party programme is a question apart, often depending on the influence of the international organization affiliating similar parties, inter-party cohesion, etc.) Tendencies for extra-bureaucracy interest groups to "enhance" certain goals (including ones with eventually negative financial implications) can also be forecast, thus permitting us to register further constraints on the government's future utilization of resources.

A no less important role is played by interest groups within the bureaucracy, which are interested in planning the smallest possible revenues, but obtaining as much support as they can for their respective appropriation lines.

Constraints emanating from economic and financial sciences, or facts of the past

The government's freedom of action is far too limited, not only on the side of public expenditure, by the working of the above factors, but also on the side of revenues on account of, if you like, certain economic observations and considerations of state finances. It is a rather widely held view, for instance, that cutbacks in government spending "release sizable resources" for inducing economic growth. As against this, several cases have been registered in which such cuts led to continuing shrinkage of the economy.[16] As the same time, another observation suggests the impossibility of easing the fiscal pressure as one wishes. The fact that state expenditure is an unflexible variable relative to GDP for a particular economic era may obviously be regarded as an added constraint emanating from state finances, since the volume of GDP, the country's export performance, and debt servicing burdens may put a further constraint on any government. One might as well say, in effect, that governance rests on respect for or recognition of certain proportions, as it can hardly be disputed that there exists a strong correlation between GDP and unemployment, export performance and credit-worthiness, budgetary deficit and social insurance outlays, inflation and unemployment. (At a later stage we shall illustrate that, in view of such correlations, the law explicitly operates with figures.)

There are also views that making a fetish of these correlations is a political error. (A Hungarian opposition party which does not consider it impracticable to increase the volume of debt for the sake of economic re-expansion is after all of this same position.) Early in the 1970s, when accused of having placed Austria in debt, Chancellor Kreisky retorted that "True, we have a debt of 200 billion shillings, but my generation has rebuilt the country. It is fair that the debt should be paid by them". So there is no doubt that a government may take any step, but its timing is not a matter of indifference. As for Hungary, this country began running into debt nearly 20 years ago. Backbiters have it that it did so deliberately in order to steal out of the camp. Regardless of whether or not that was the ulterior motive, the country has by now developed a kind of state finances in which social insurance, welfare, housing, educational, health-care and economic expenditures surpass those of Denmark, Germany and the United Kingdom in terms of their respective shares of GDP. Consequently this is a constraint emanating from state finances and hard to remove, for which creditor can be supposed to finance efforts at continuing to increase that share?

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16 In Hungarian literature addressing the problem at the comparative level, see LÁSZLÓ, Csaba: Mekkora valójában az államháztartás szerepe az újraelosztásban? (What Is the Real Role of State Finances in Redistribution?), Közgazdasági Szemle, No. 1 of 1993, pp. 63–79; RUBICSEK, Sándor: Fiskális diktatúra (Fiscal Dictatorship), Pénzügyi Szemle, No. 12 of 1990, pp. 922–949; VÍGVÁRI, András: Az államháztartás helyzetéről (On the Situation of State Finances), Bankszemle, No. 9 of 1992, pp. 10–35.4

Constraints emanating from international law

It is a matter of public record that the prime rationale of agreements with the International Monetary Fund lied in its serving as a signal for commercial banks, or, more specifically, lack or suspension of a country's agreement with IMF is not a good portent for links with other foreign banks. Therefore question of whether or not a government manages state finances in the spirit of such an agreement is not of marginal interest. I should stress that it is not the Bank that needs Hungary, but conversely. The agreement consequently means voluntary limitation, one that is of international significance, or is from without. The fact of governments facing external constraints (emanating from an international treaty) is not some sort of East European bad luck. By signing the Treaty of Maastricht, West European governments have also undertaken, *inter alia*, to reduce their budget deficits, to check inflation, etc., or, in one word, to place restrictions on government spending.[17]

Constraints emanating from national law

The most important statutory constraint on government spending is virtually imposed by laws which the Parliament had passed before the Government took office. Let me refer here to the Social Insurance Act, which, in the last analysis, undertakes a guarantee for paying social insurance deficit.[18] Such constraints may also be imposed by regulations adopted after a government takes office, since the latter "create state responsibilities which the Finance Bill, to be submitted by the government after all, cannot avoid covering".[19] One could enumerate a total of some 200 legislative enactments laying down state commitments, or special tasks. Enactments of this type incur expenditures and, if need be, public debt.[20]

As against this, one may rightly argue that there exist techniques to "restrain" government spending already in the planning stage. Indeed, there do, such as those

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17 The Treaty of Maastricht contains figures as well: the rate of inflation in any member state must not surpass the best average rate in three member states by more than 1.5%; the budgetary deficit must not exceed 3% of GDP, and the debt servicing ration must be lower than 60% of GDP. Le Traité de Maastricht. EIS Bruxelles, April 1992, p. 24.

18 Art. 5 of Act II of 1975: "A contribution shall be payable to cover social insurances outlays. The State shall guarantee payment of benefits as determined by this Act even in cases where outlays outstrip revenues."

19 E.g. Act XXII of 1992 on the Status of Public Servants; Act XXIII of 1992 on the Status of Public Employees; Act XXIV of 1992 on Partial Compensation, Aimed at Settlement of Property Relations, for Damage to Citizens' Property Unjustly Caused by the State on the Basis of Legislation Adopted in the Period from 1 May 1939 to 8 June 1949; Act IV of 1991 on Employment Promotion and Provision for the Unemployed.

20 Such is exactly the case today. Hungary's public debt is supposed to have increased by Ft 400 billion in 1993.

designed by Art. 115 of the German Basic Law[21] and the American Gramm–Rudmann–Hollings Act (as amended by Balanced Budget and Emergency Deficit Control Reaffirmation Act in 1987).[22] To arrest the so-called incremental budget is a great ambition of conservative politicians as well as of those focusing on the private sector, but it has so far been impossible to devise an automatism to regulate the trends of expenditure in keeping with the changing pattern of GNP.[23]

Also known is an institutional constraint which similarly begins to operate in the period of planning (prior to parliamentary decision). Such is the State Audit Office itself, if empowered by law to examine the soundness of the budget.[24]

However, such an arrangement carries high risks, for if an organ external to the executive power states its views on the budget, it may easily incur the charge of "ambition to co-governance". Such charge can be refuted, but the problem involved is not a pseudo one, as a great many governments are averse even to Parliament inserting amendments in the annual Finance Bill. It is a fact that both the State Audit Office and MPs may place certain limits on government ambitions.

With the annual budget adopted, the government finds itself in a different, post-decision period, in which it has authorization to act, but faces fresh "obstacles" in the course of action. Hungarian law, just as the Belgian, made it a responsibility of the State Audit Office to guard against government overspending under any item of budgetary appropriation. In 1990 the opposition noticed such endeavours, and its leader submitted an application to the Constitutional Court in the matter.

The Government acted under an authorization by Act II of 1979.[25] The application substantiated the illegality of such action by invoking the principle of *lex posteriori derogat priori*,[26] and the Constitutional Court was requested to repeal the statutory authorization because it allowed overspending as against the relevant enactment of later date.

Obviously, the Government did not observe the provision of subsequent legislation, violating the spirit of law by acting on a legal bases created by the statutory authorization of earlier date.

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21 "Receipts from credit shall not exceed budgetary appropriations for investment, exceptions to be allowed only for the purpose of eliminating imbalances in the economy as a whole."

22 STANFORD, Karen: State Budget Deliberations: Do Legislators Have a Strategy? Public Administration Review, No. 1 of 1992, pp. 16–25.

23 The present author has also attempted to draft such a bill, but the professional world was, to put it mildly, cool on his effort. Törvénytervezet az ország társadalmi-gazdasági tervéről. Kézirat (Bill on the Country's Socio-Economic Plan. Manuscript), MTA ÁJI, Section of Public Administration, 1993, p. 8.

24 In Hungary it is so empowered by Art. 2 (1) of Act XXVII of 1989.

25 Acting on that authorization (Art. 17 of Act II of 1979), the Government issued a decree [Decree No. 23/1979. (VI.28.) MR] enabling it (Sect. 15) to resort to cost overruns.

26 Decision No. 386/B/1990 of the Constitutional Court.

It was equally indisputable, however, that if the expert opinion and the ensuing award of the Constitutional Court were to go against the Government, namely the enabling clause and the government decree involved were to be repealed, state finances would become paralyzed for a long period of time. (A clause granting reallocative powers is urgently needed for the conduct of state affairs, but it should be embodied in a law, not a decree. It should be added that, as was to be foreseen, foot-dragging caused the State Finances Act to be adopted long after the incident.[27]

Why do we deem it important to deal with this point? We do so because it carries a very useful lesson for government spending. The lesson is not that "expenditures must be kept within budget". This is a general rule, a statutory constraint imposed by national laws, or, if you like, an axiom of law concerning implementation of the budget. The lesson is that neither "hamstringing" the government nor restricting government spending may ever be an end in itself for any segment of the opposition, of the reasonable elite.

Bismarck is supposed to have said that representatives had no right not to vote the budget. One may ponder the message of that saying for a good while. Evidently enough, the message cannot suggest that representatives should adopt the version submitted by the government, but that they should state some view some time, for they have no authorization to cripple the State.

A government should therefore be allowed a relative measure of manoeuvre, or else the helm of the State's vessel cannot be turned. What, on the other hand, should be open to debate is the measure, the possibility of turning the steering wheel. We maintain that in 1989 the Hungarian Parliament took a wrong decision by agreeing that public servants should be subject to control subsequent to authorization of expenditures rather than on a permanent basis. That decision did not serve to change the system, as it neither provided for strict accounting by public servants nor established any set of requirements for the career system in public administration, the promotion of public servants thus depending on the will of their patrons alone. We believe that during the period of transition a more useful purpose would be served in all East European countries by introducing a system similar to the French *Cour des Comptes* under which the auditor and the public servant bear responsibility separately. Continuous and prior control is badly needed for the territorial self-governments as well, where the shape of things will give the penny press ample food for raking up past events after a change of government. (We know full well that the cost of setting up regional audit offices would run to billions of forints, just as introduction of control over self-government spending by private auditing firms would.)

There can be no reform of state finances without screening the organs performing public functions.[28] Indeed, in the absence of such screening, the provisions of the State

27 Act XXXVIII of 1992 on State Finances.

28 László Muraközi's words are highly instructive in this respect: "Sidestepping the question (i.e. those relating to the situation of state finances) is unacceptable, since failure to make analyses and decisions is itself a hard economic policy decision fraught with consequences". Also, he points out on this score: "The heated

Finances Act restricting government spending are of no avail. Among its numerous provisions, Art. 24 (1) states that the central budget must show, by specified lines of appropriation, budgeted costs under separate headings for wages, transfer of social insurance contributions, materials, special-interest programmes, and certain special investment and renovation projects.

Art. 26 places a ceiling on the amount of general reserve, which must not exceed 3% of the sum total of expenditure of the central budget. The Act limits utilization by the government of the general reserve fund by providing that not more than 40% thereof may be used in the first part of the year

Again, government spending is restricted by the provision that, with certain exceptions, transfer of funds between lines of appropriation must be subject to parliamentary decision, the government having no absolute freedom to reallocate funds even within chapters, because the Parliament may reserve itself the right to modify certain lines of appropriation.

We shall conclude the listing of constraints on government spending by referring to ill-famed Art. 108, under which assets connected with the subsystems of state finances (i.e. central government, separate state funds, local self-governments, social insurance) must not be transferred without valuable consideration and claims by subsystems must not be renounced except in the manner and cases defined by law.

Conclusion

In connection with financing the various branches of public administration there arises a basic question, that of whether there are at all priority areas within the system, which faces all rationalizers. Some claim that there are none, namely that if, for instance, expenditure on the public sector should be reduced, cuts in budgeted costs should be by equal percentage points for all items.[29]

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debates of the Hungarian Parliament on the budget in December 1991 and the soaring deficit in 1992 signalled also for the wider public—not for the first time and supposedly not for the last—that the system of state finances as a cornerstone of a new economic order on the road to a market economy was utterly unstable. It proved true that transformation of state finances was a most difficult socio-economic problem of the entire transitional period, first and foremost because the enormous scales of state expenditure and redistribution, burdening the country over the past decades, had been organically built into the workings of the Hungarian economy and society, and any significant change, including its ripple effects, was likely to provoke chain reactions hard to predict. Secondly, and closely related to the former, each item in the budget is linked up with a network of complex interest relations, constancy on the surface conceals a complicated balance of forces between social segments and groups in a stronger or weaker position to control their interests, and any intervention tends to cause a 'nuisance' to a significant part of Hungarian society". MURAKÖZY, László: Az államháztartás a kilencvenes évek Magyarországán (State Finance in Hungary during the 1990s), Közgazdasági Szemle, No. 11 of 1992.

29 The Hungarian Government has set up a committee to rationalize public administration. The Committee has to present its report by mid-1994, so its findings can be expected to be considered for the first time in the course of preparing the budget for 1996.

For our part, we are of the view that there certainly are priority areas. We think this view is defensible in spite of knowing that no discrimination may be made among norms marking out specific tasks since, for instance, metrology is just as important to state life as the question of refugees is. Still, governance, or exercise of the art of the moment, demands means of attaining its short-term goals. Therefore the first level of conflict is between parliament and government, because the latter always seeks to undertake commitments for a term longer than that of its mandate and allotted powers; hence, and secondarily, because the government tends to shift emphasis (through spending), which operates to change the complexion of the State, it is necessary to place restrictions on government spending. The second level of conflict is between interest groups, lobbyists and the finance ministry, the first wanting more support and less taxes, and the latter striving for just the opposite. On these pints, bargains are naturally struck with the green lobby, state enterprises, the tobacco industry, professors, and trade unions. The modern concept of law no longer rejects bargains within the State and between the State and private entities,[30] the only condition being that such deals must be fair. This, however, will be the subject of another study.

30 Bargaining, or conclusion of agreement between the authority and private undertakings, as a legal institution was established by slow degrees in Western Europe as well. Its application is now being learnt in Eastern Europe.

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KALEIDOSCOPE

Some Reflections on the History of Private International Law

I

1. Whether we can speak about private international law in *Imperium Romanum* is one of the questions, qualified as the *"crux interpretum"*. It is not surprising that the Romanists' viewpoints on this issue fall into two camps. According to Romanists of the first camp, the Roman law—and this applies to the law of the ancient peoples in the *Mediterraneum* generally—private international law, taken in the modern sense of the word, is not recognized.

This is the standpoint of Savigny,[1] Jörs,[2] Theodor Kipp,[3] Jolowicz,[4] Buckland,[5] Fritz Schulz,[6] Schönbauer,[7] Lübtow,[8] Schwind,[9] and Hans Julius Wolff.[10] Adherents

1 SAVIGNY, C. F.: System des heutigen Römischen Rechts. vol. VIII. 1. Berlin, 1849. p. 29.

2 JÖRS, P.: Römische Rechtswissenschaft zur Zeit der Republik. vol. I. Berlin, 1888. p. 141.

3 KIPP, Th.: Das Römische Recht. In: R. STAMMLER: Das gesamte deutsche Recht in systematischer Darstellung. Berlin, 1930. p. 130.

4 JOLOWICZ, M. F.: Historical Introduction to the Study of Roman Law. 2nd ed. Cambridge, 1952. p. 101.

5 BUCKLAND, W.–McNAIR, A. D.: Roman Law and Common Law. 2nd ed. Ed. by LAWSON, F. H.: Cambridge, 1952. p. 25.

6 SCHULZ, F.: Classical Roman Law. Oxford, 1951. pp. 78 ff.

7 SHÖNBAUER, F: Studien zum Personalitätsprinzip im antiken Rechte. ZSS (Rom. Abt.) 49/1929/ pp. 372 ff.

8 LÜBTOW, U: Das römische Volk, sein Staat und sein Recht. Frankfurt a. M., 1955. p. 491.

9 SCHWIND, F.: Internationales Privatrecht und römisches Recht. Labeo 11/1965/ pp. 311 ff.

10 WOLFF, H. J.: Das Problem der Konkurrenz von Rechtsordnungen in der Antike. Heidelberg, 1979. pp. 7 ff.

of this rejecting opinion refer to the fact that in Rome, the mental and more importantly the political conditions of the law of collision were absent. Apart from Roman law, the knowledge of the law of ancient peoples has namely been, from the beginning, very imperfect. In addition, the particular politic-administrative structure of the *Imperium Romanum* has always excluded the assumption of the law of peoples equal in rank. The opinion of Maridakis is worth mentioning, as well, in this relation. According to this, private international law, again in the modern sense of the word, is not known in mutual connection with the Greek *poleis*, either. Perhaps the best explanation for this lies in the fact that the ancient Greek legal *koine*—excluding the essential differences between the law of the single city-States—hardly enables the norms of collision to be created.

2. The line of thought ignoring the existence of ancient private international law rests fundamentally upon *three* pillars. The first presupposes the more or less complete isolation of the law of the single ancient peoples from one other. On the other hand, it also emphasizes the lack of the necessary political conditions. Finally—though this is only valid for the world of Greek *poleis*—it emphasizes the considerable similarity of the legal norms of the single ancient peoples to one another.

3. The number of scholars recognizing private international law in Antiquity is also considerable. Adherents to this school include: G. Beseler,[11] Siber,[12] Volterra,[13] Wesenberg,[14] Triantaphyllopoulos,[15] Kaser,[16] Santana,[17] Lewald[18] and Sturm.[19] The scholars mentioned, refer to the possibility that the conflict of norms of law or systems of law of different peoples was known in Greco-Roman Antiquity. Lewald treates the problems of private international law in greatest detail, not restricting his investigations solely to the field of Roman law. According to his supposition, in the world of the Greek *poleis*, in Ptolemaic Egypt and in the *Imperium Romanum*, the claim and requirement of using the foreign law presents itself in a much too concrete form. In a particular way, however, none of these theorists analyse the causes which led to the

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11 BESELER, G.: Beiträge zur Kritik der römischen Rechtsquellen. IV. Tübingen, 1920. pp. 82 ff.

12 SIBER, H.: Römisches Recht. II. Römisches Privatrecht. Berlin, 1928. p. 9.

13 VOLTERRA, E.: Quelques problèmes concernant le conflict des lois dans l'Antiquité. In: Travaux et Conférences. Université Libre de Bruxelles. Faculté de Droit. Vol. III. 1955.

14 WESENBERG, G: Zur Frage eines römischen Internationalen Privatrechts. Labeo 3/1957/ pp. 22 ff.

15 TRIANTAPHYLLOPOULOS, J.: Lex Cicereia. Engyetika. Vol. I. Athenai, 1957. pp. 13 ff.

16 KASER, M.: Das römische Privatrecht. Erster Abschnitt. Das altrömische, das vorklassische und klassische Recht. 2nd ed. München, 1971. pp. 202 and 214 ff.

17 RUILOBA SANTANA, E.: Conflicto de leyes y "ius gentium" en el mundo juridico romano. Vision retrospectiva desde la dogmatica permanente de Derecho internacional privado. In: Estudios juridicos en homenaje al profesor Santa Cruz Teijeira. Valencia, 1974. Vol. II. pp. 341 ff.

18 LEWALD, H.: Gesetzeskollisionen in der griechischen und römischen Welt. In: Zur griechischen Rechtsgeschichte. Hrsg. von. E. Berneker, Darmstadt, 1968. pp. 666 ff.

19 STURM, F.: Unerkannte Zeugnisse römischen Kollisionsrechts. In: Festschrift Schwind. Wien, 1978. pp. 323 ff. and Idem: Gaius I 77 und das römische Kollisionsrecht. In: Maior Viginti quinque annis. Essays in Commemoration of the sixth lustrum of the Institute for Legal History of the University of Utrecht.

formational law. While the representatives of the negative standpoint emphasize those international factors which prevent the formation of private international law, the partisans of the positive opinion ignore these economic, social and political preconditions, which unquestionably are important factors.

II

4. The condition creating modern private international law, according to the prevailing viewpoint in literature,[20] is the formation of a well developed international exchange of commodities; that is to mean transferal of goods and persons, presenting itself in the relations of States based upon different private law systems, mutually recognizing the law of one another as co-equal.

According to our assumption, in Graeco-Roman Antiquity the aforementioned fundamental premises of private international law do exist and are to be found. The existence of the international economic-political connections is, namely, an irrebuttable fact. On the other hand, there are considerable signs of the recognition of the equality of rank of different States (political units). And finally, owing to the fact that the concept of private law is not exclusively connected with Romans, the different nature of the private-law systems of the various ancient States is also a given fact. It is, further on, our task to investigate also some questions from which—though possibly in an embryonic form—the conclusion can be drawn that theirs was a private international law (law of collisions).

5. The signs of a Roman law of collisions can be demonstrated by more than one source. One of the fields where the so-called law of collisions presents itself is seen in the scope of the role held by personal and real securities. Particularly a few sources, taken from Ulpian's work, entitled *"Fragmenta disputationum"*, give valuable information concerning this question.[21] In the fragments, edited and commented upon by Lenel,[22] the matter in question is whether the *sponsor* the holder of a pledge may refer to the *exceptio annalis Italici contractus,* later revoked by Justinian and replaced by the *exceptio longae possessionis,* known in the *Provinzialrecht* which took into consideration the local particularities.[23]

The question is, concretely, who is entitled to refer to the *exceptio.* As it became clear on the basis of the analyses of the D. 44,3,5,1 (Ulpian), it is by no means the

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20 MÁDL, F.—VÉKÁS, L.: The Law of Conflicts and Foreign Trade. Budapest, 1987. p. 28. Cf. more recently HAMZA, G.: Comparative Law and Antiquity. Budapest, 1991. pp. 116 ff. and 128 ff.

21 Cf. Ulpiani Fragmenta disputationum III, 3; III, 4; and III, 6. Cf. in the recent literature, summarily: STURM, F.: Unerkannte Zeugnisse. pp. 325 ff.

22 LENEL, O.: Weitere Bruchstücke aus Ulpians disputationen ZSS (Rom. Abt.) 25/1904/ pp. 368 ff. and Idem: Zur exceptio annalis Italici contractus. ZSS (Rom. Abt.) 27/1906/ pp. 71 ff.

23 The *annalis exceptio* is quashed by Justinian, with attention to the several *"moles altercationum"*. Cf. CJ. 7, 40, 1.

pledger himself who has the active legitimation. The situation is different if the *exceptio* is referred to by the successor in right (heir) of the pledger. Owing to the *exceptio,* the exception from the prescription of the seizure of something as a pledge becomes possible. The problem of collision presents itself only in connection with the duration of *exceptio.* In Italy, the legal successor could, namely, acquire an exemption from a pledge already after the passing of one year (this is the so-called *exceptio annalis*) and—on the basis of *lex Furia*—he could also be exempted from the obligation of security, as well.

Now, it is questionable, on the basis of which criteria it can be decided whether the right of pledge was created in Italy or in a province (in provinces).

On the basis of Ulpian we may conclude that the *lex loci solutionis* as a link—principle of the law of collision—does not come into consideration. The *lex loci actus*—and, in the case of *sponsio*, the *lex loci sponsoris accepti,* and in cases of *pignus the lex loci pignoris contracti* applies in the form of *exceptio,* as an enforceable exemption. It is worth mentioning, as well, that if the right of pledge is renewed, the effective connecting principle is, consistently, the *lex loci renovatae pignerationis.* It is, therefore, decisive in the sphere of the personal and real guarantees of obligation equally, where the law of security or pledge came into being at first, in Italy or in the *provinciae.* It is, therefore, obvious that, from the point of view of referring to the *exceptio,* the place where the basic obligation came into being is of no concern.

6. On the basis of the above facts, it can be established that Ulpian connects the effectiveness of the norms of law and their point of origins with particular emphasis. In this way, it is not the site of making the basic obligation or just that of the *lex loci solutionis* which comes into consideration but the site where the securities of the *obligatio* have been created.

This solution, even measured by the standards of modern private international law, establishes a *norm of collisions.* It is, of course, another question—as it follows from the particular constitutional structure of the *Imperium Romanum* that this is a norm of "interprovincial" character rather than of international one.

7. It is to be noted here that, as in the recent literature referred to by Sturm[24] as a result of the Justinian's conception what was, as a matter of fact, in a number of regards intolerant, forcing at any price the uniformity of law—several norms of collisional nature fell very probably victim to the codifying activity of Compilers of the Justinian's Codification.

8. The *conflictus legum* also plays a role in the law of inheritance, having a personal law background. A place of the Institute of Gaius is, in this respect particularly noteworthy:[25]

"Itaque si civis Romana peregrino, cum quo ei conubium est, nupserit, peregrinus sane procreatur et is iustus patris filius est, tamquam si ex peregrina cum procreasset.

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24 STURM, F.: Unerkannte Zeugnisse. pp. 327 ff.

25 The detailed analysis of this source cf. STURM, F.: Gaius I 77 und das römische Kollisionsrecht. pp. 155 ff.

Hoc tamen tempore e senatusconsulto quod auctore divo Hadriano sacratissimo factum est, etiamsi non fuerit conubium inter civem Romanam et peregrinum, qui nascitur iustus patris filius est." (Gai. Inst. 1, 77)

This source contains two facts. In one of the cases the matter in question is that a *civis Romana* contracts a marriage with such a *civis Romanus* who has *ius conubii.* The child, originating from this marriage does, namely, not obtain the *civitas Romana* but he is legitimate and is to be considered as a child whose mother is a *peregrina.* But what is the situation—Gaius continues—if the *peregrinus* father has no *ius conubii?!* Hadrian decided in the way that, apart from the necessity of *conubium,* the child is, of legitimate birth in this case as well. This *senatusconsultum,* originating from the emperor himself, is something particular because the marriage, seen *stricto iure,* is null and void (non-marriage or an apparent marriage) due to the lack of the *conubium.*[26]

9. The novelty of Hadrian's disposition is in the fact that, ignoring the principle of *personalitas* entirely and regardless of the *ius conubii,* it considers as valid every *conubium.*

For Hadrian to which ethnic group the partner in marriage (having no *civitas Romana*) belonged and which *Volksrecht* applied to her was of no concern. The emperor created, in this way, a kind of "supra-national" law. The *lex originis, ius civitatis* of the wife had no part at all.

It is true that this regulation—as distinguished from the Ulpian-fragment, investigated above—fundamentally does not have the nature of collisional law.

This *senatusconsultum* has contents of collisional law only in so far as that by leaving *a limine* out of consideration of the regulations by the many-coloured *Volksrechte,* differing from one another.

It created a uniform rule of law which was diametrically *opposed* to the norm (norms) of the local law. Creating this uniform rule which broke with the principle of personality and obtained such a great in Antiquity (in whose legal-political background support for hereditary laws favouring children concealed itself), Hadrian renders unnecessary the law of collisions itself.

III

10. It cannot be our task here, to analyse the very complex problem of the ancient (Roman) private international law comprehensively. The aim of these reflections is to refer to the facts which serve or can serve, in principle, as the basis in the Mediterranean

26 As to the specifics of Hadrian's policy of law, motivated by his method of exercizing power cf. HÜBNER, H.: Zur Rechtspolitik Kaiser Hadrians. In: Festschrift Seidl. Köln, 1975. pp. 61 ff. and JUST, M.: Rechtspolitische und rechtsphilosophische Grundsätze der kaiserlichen Rechtsfortbildung in der römischen Klassik. In: Recht und Staat. Festschrift Küchenhoff. Vol. I. Berlin, 1972. pp. 71 ff.

world for the appearance of the private international law on a certain level.[27] It is to be established on the basis of the sources cited that, within the *Imperium Romanum*, having a heterogeneous structure of public law, the outlines of a *private "interprovincial" law* developed. As it can be traced to the striving of the Compilers of the Justinaian's Codification to establish a unity of law, the number of useful sources at our disposal is unfortunately very limited.

The well-developed interchange of commodities, the almost entirely undisturbed *symbiosis of ius civile* and of the local *Volksrechte* which manifested itself within the *Imperium Romanum*—and from which the heterogeneous structure of law originated—at any rate needed a supranational regulation, with collisions of larger volume, and exceptionally without any collision. However, the dearth of sources prevents an extensive, or even limited, reconstruction of this regulation today.

Gábor Hamza

27 We do agree with Cheshire who states: "The state of things which necessitates a system of private international law, namely, a number of conflicting territorial laws, certainly existed in the Roman Empire, but the texts do not throw a great deal of light upon the manner in which the law of Rome resolved the conflicts." CHESHIRE G. C.: Private International Law. 6th ed. Oxford, 1961. p. 18.

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BOOK REVIEW

L. W. SUMNER: **The Moral Foundation of Rights**, Oxford University Press, Oxford, 1993. 224 pp.

The arguments brought forth in this study begin by setting out a moral concept and with a moral theory formulated, the relationship between the two being the main subject of the book. The author claims that rights have, after their own fashion, gained international currency as a means of payment in terms of morals and have a particularly important role to play in political debates. In liberal and democratic societies these fundamental rights keep increasing in value, each of them having proved to be of imperishable value both in politics and in philosophy.

In his introduction to the book the author refers to a considerable spread of rhetoric on rights, while emphasizing that, practically speaking, there is no single area of these rights without heated and one-sided debates going on about which rights are to enjoy priority over others, which rights come into collision with others, and what type of social conflicts and even tragedies may be precipitated by the process of achieving this or that right in the political field. He points out that in the international arena the right to national sovereignty is in conflict with the rights of oppressed minorities, and the right to protection of domestic industry. The economy is in conflict with that of free trade. And "the rights" of maritime nations is in conflict those of landlocked countries. In his view, even the Universal Declaration of Human Rights, which he considers to be the best-known international catalogue of human rights, is attended by contradictions and tends to give rise to additional problems to be addressed. The author maintains that the different lists of rights are perforce incomplete and give preference to certain rights and certain groups of human beings, which leads the nihilists to the straight conclusion that there exist no such rights in reality. These rights come under attack from many sides and are made the subject of reservations. Also, in parallel with the emphasis laid on fundamental rights, which have been brought into

vogue in political and public life, it has become fashionable, as it were, to question and discredit these rights or at least with respect to narrow their range. There is no doubt that the "proliferation" of rights has an inflationary effect of its own in that rights tend to lose their argumentative force. In like manner, the complexity of concepts about personality or interests is a significant contributory factor to devaluing those concepts or at least with respect to the current versus previous status of these rights appearing as a loss of value in the public mind. The present-day philosophical literature likewise offers astonishing examples of an enormously expanding yet fading notion of rights. In the debate on abortion, for instance, both sides agree in that the central issue of the debate concerns the moral status of the embryo, the interpretation of its existence. Yet, at the same time, the debate is increasingly confined to the question of whether or not the embryo has any rights, namely the right to accept or reject a concept of some sort.

The author of the book attempts an analysis of rights and the conditions for their implementation, trying to find, in the maze of what is prohibited and permitted, a moral "happy medium" where rights prevail within the bounds or reason. He analyzes Hohfeld's views, in which the basic concept is virtually constituted by interpreted, nor even imagined. Along this line of reasoning he cites examples to illustrate conflicts of rights and aspects of their enjoyment in society. According to the author, rights mean unlimited freedom of choice and unlimited possibilities, with the added need for respect for the interests of others.

Rather interesting is the discussion of differences existing between conventional rights and those not recognized by legislation. The author offers possible models of protected interests and protected choices, pointing out that the modern law-governed state is trying to find the conditions for the existence and application of laws and regulations and that, in general, some sort of enumeration of "primary rules" is an indispensable concomitant of a legal order. However, the unity, the internal coherence of a legal system cannot be judged by the values of the so-called primary rules. On this score, the author deals briefly with diverse law enforcement patterns and related social traditions by country and region.

The next chapter on contractual rights may provoke debates. According to the author, the prime motive of contractual rights is convenience rather than morality and it is even questionable whether those rights reveal the presence of morality in one form or another. In this connection he discusses John Stuart Mill's ideas about the relationships between morals and rights and about the relationships between morals and rights and about the collection of "moral rights". Unlike him, Bentham makes no distinction between moral and natural rights and, moreover, virtually claims that all that is involved are terms as applied in political rhetoric. According to Hobbes, judging the value of these rights is a matter of approach. His follower, Buchanan, is of the view that there exists a hypothetical agreement which is applied to the formulation of fundamental moral rights and that both can be relied upon later for the establishment of additional rights. Buchanan calls this "natural distribution", which can never be egalitarian in character.

In the next chapter the author addresses the so-called "consequentialist rights". He contends that the inflation of rhetoric about rights results in various formulations of

fundamental rights on the one hand and also in the emergence of a related apologetic on the other.

Last but not least, the author deals with aspects of legal theory, warning of the limitations of rights-related methodology and discussing in this vein, changes in the orders of social values and changing systems of social institutions. He states that the ultimate and determinative dimension of rights is constituted by their force, durability and respect in society.

The volume is complete with abundant bibliographical notes. The author's reasoning, train of thought, and explanations are suggestive and holds much of interest for those taking concern with topical issues of legal theory.

Miklós UDVAROS

Alexander VIDA: **La preuve par sondage en matière de signes distinctifs**, Paris, 1992, Librairies Techniques, 191 pp.

This study has been published, in collaboration with the Centre of Education in the International Protection of Industrial Property (C.E.I.P.I.) based in Strasbourg, as part of a series of books dealing with topical issues of industrial property protection.

The preface to the book begins with a commendation by Professor J. J. Burst, a renown French jurist and the Director of C.E.I.P.I., who notes with pleasure that the work in question will, in his view, be a worthy addition to the aforementioned series of books.

Although the study covers the American, German and French legal practices, its subject can also be said to be well-chosen and of current interest to Hungary, as it includes judgments of Hungarian relevance (*Ungarische Salami*) on the one hand, and on the other, techniques of evidence little known in Hungary.

The book consists of *two main parts*, describing the *American* and then the *German* methods and practices of public opinion research.

Both parts follow the same structural pattern, discussing the conditions for taking evidence by public opinion polls and then the areas in which the findings, thus produced, can be criticized.

With respect to the conditions for taking evidence by public opinion polls, the study shows signs of parallelism in its treatment of both aspects, and is arranged under the following subject headings:

— terms used in the procedure;

— section of the population ("mass") to be covered by public opinion polls;

— criteria for population sample selection; and

— the technique of public opinion polls.

The main part entitled "Areas of Evidence Produced by Public Opinion Polls" embraces the following types of legal cases;

with respect to America:

— assessing the danger of misleading the customers;

— evidencing the degree of trademark familiarity to customers; and

— inquiring into the transformation of trademarks into indications of brand; and

with respect to Germany:

— assessing the degree of customers' familiarity with unregistered trademarks;

— evidencing the degree of customers' familiarity with well-known and highly valued trademarks;

— producing evidence of misleading the customers; and finally,

— assessing the danger of misleading the customers.

The study is complete with an exposition of the legal situation in France and a presentation of notable American and German judgments ("Beefater", "National Football League", "Exxon", "Maggi", "Pralinenumhüllung").

On the whole, the study may be said to be marked by a logical arrangement of subjects, which helps the reader to find the theoretical questions discussed and the legal cases of practical relevance.

The treatment of each separate subject starts with a theoretical approach followed by a discussion of practical aspects.

In point of fact, the book can be divided into *"logically separate sections"*, describing the theoretical and methodological aspects of public opinion research in the field of trademarks on the one hand and, on the other, featuring practical cases in which public opinion research has produced conclusive evidence concerning the degree of familiarity with a particular trademark, its misleading nature or other characteristics.

Although public opinion research is not an element of judicial proceedings in Hungary, it can be imagined that, with the greatly enhanced significance of trademarks, persons with legal title to trademarks will find it worthy to have access to such research.

Public opinion research in the highly industrialized countries is a means of evidence applicable under the rules of civil procedure.

The costs of public opinion polls in the United States of America are estimated to be between, 5,000 and 100,000 dollars per survey and are to be advanced by the trademark owner instituting proceedings for the purpose of producing evidence, ultimately such costs are payable by the losing party.

The provisions of law on public opinion polls contain numerous statutory safeguards to the effect that:

— the section of the population to be covered by a survey must be subjected to preliminary pilot inquiry and the appropriate sample must be selected in such a way as to ensure that the interrogation of persons may give correct results;

— the representative sample of interviews and the substance of questions put them must be determined without the involvement of the lawyers acting in the lawsuit and

— the interviewers must not be familiar with the given legal dispute or the objectives of the public opinion poll ordered.

It is practicable to include 100 to 1,500 persons in the population sample to be selected for a public opinion poll.

A major role in sample selection is played chiefly by practical rules like the following:

— investigators should keep in view the section of the population affected by a trademarked product and then contact the public opinion poll contrast those individuals e.g., housewives or young girls or boys;

— the public opinion poll may cover potential customers, but it is more appropriate to question a group of persons who have already purchased the particular product;

— it is important to have regard for the geographical (territorial) conditions under which the public opinion poll is conducted;

— the section of the population or the area to be selected for a poll should be determined according to whether to trade-

mark involved is generally known or is of local interest;

— with regard to the selection of population sample in the case of trademarks of local interest, it appears sufficient for public opinion polls to cover an area not larger than a few square kilometres;

— interestingly, it is held practicable to exclude from public opinion polls, groups of dealers with above-average knowledge of goods;

— the sample may be selected in a variety of ways. Great importance is attached to proportionality, that is to the need for the persons selected and interviewed to adequately represent the population's average stratification by age, education, interest and other criteria; and

— selection may be random, with interviews chosen from the telephone directory or by computer on the basis of a predetermined principle, with their range limited to average individuals. This is possible in cases where interest for a particular product (e.g. toys) is shown by persons other than specific age cohorts.

Given the technical facilities of public opinion research, the following aspects should be given paramount importance:

— formulation of questions;

— education of interviewers;

— reproduction of circumstances in which goods are purchased; and

— checking of survey results.

Special significance should be attached to those of the legal cases studied which are of the greatest relevance to evolving the Hungarian legal approach, streamlining the methods of inquiring into trademarks, and establishing rules prohibitive of misleading to customers and of unfair conduct in the market.

The analysis of the danger of misleading the customers has furnished a body of experience and knowledge that can be used with great advantage.

Specifically, experts on public opinion polls know the danger of misleading the customers in the narrow sense, including that of direct acts of misleading.

Provided in this study is a case of two similar trademarks which the average buyer may think to be one and the same despite an insubstantial difference between them. The author describes related legal disputes in which the danger of directly misleading the customers was supported by evidence disclosed by public opinion polls. A case in point is the conflict between the protected mark "Eveready" and the registered on "Ever-Ready", both put on incandescent lamps.

The author makes the pertinent remark that buyers are under a delusion (i.e. falsely believe that both products are made by the same manufacturer) because they have no opportunity to have a parallel view of two such products one with a registered trademark and the other with its counterpart.

Another instance of the danger of misleading the customers in the narrow sense (indirect danger) is that in which the buyers concerned do not confuse the two marks, but rather the common elements thereof give rise to such a danger with respect to the trademark owner. In such cases the buyer misguidedly believes that the products involved are those of one and the same manufacturer.

In this regard, even the indication "Rheumalind" used on blankets and the one "Frencolind" used on sheets are easily assumed to both contain the element "Lind". The similar label on bed-clothes may lead

the buyer to believe that both products are made by the same manufacturer.

Public opinion research has disclosed that in this particular case buyers believed the products to belong to a single trademark family (Rheumalind, Thermalind, Domlind, Porolind, Klimalind, Frencolind). Actually such trademark family was non-existent and was only coined for purposes of public opinion research, but was toward to exist because of the use of the word "Lind".

Additionally the author discusses the interpretation of the danger of misleading the customers in the referring to cases in which two trademarks have two different owners, but the similarity of the two indications may lead the buyer to conclude that there is an economic or an organizational link between the persons with legal title to the registered trademark and its counterpart.

It was also found by public opinion research that, with respect to trademarks with the registered word and symbol "Sonne" (the German for sun) on canned fruits and vegetables, the fact that the common compound-forming element of the indication "Sunpearl" was a word of the same meaning (sun as the English for *Sonne*) carried no danger of confusion despite the coincidence of labels.

The work under review is a study of scientific standards primarily on trademarks, one that offers a great deal of new information for patent agents, persons concerned with trademark protection, and other specialists.

The study inquires into the set of relationships prevailing in the domain of sharp economic competition between countries with an advanced market economy. The considerable amount of productive capacity and property represented by trademark owners allows and even calls for public opinion polls to be conducted in questions of trademark control involving fine distinctions. Within a few years, trademark fraudulent imitators and forgers will probably fell compelled to resort to public opinion polls in Hungary as well.

The book is written in French, under an exacting approach, but it also contains a list of the relevant American and German terms. An added strength of the study is the harmonization of various modern terms used in three world languages. Thus, for instance, the fact that a trademark has obtained a wide celebrity has different renderings in the world languages:

— French: *Le fait que la marque se soit imposee dans le commerce*;

— English: secondary meaning;

— German: *Verkehrsgeltung.*

In commending the merits of this work one should not overlook the fact that the preparation of a subject-specialized study by a Hungarian author with competent knowledge of the native language of a French-speaking country deserves recognition as an impressive accomplishment.

Finally, mention is perhaps deserved by the not unimportant fact that the series of 36 volumes on industrial property protection published by C.E.I.P.I. includes a single Hungarian author, that of the present study, whose second work has now been found worthy of publication.

Levente TATTAY

J. SCHWARZE and E. SCHMIDT-ASSMANN: **Das Ausmass der gerichtlichen Kontrolle im Wirtschaftsverwaltungs- und Umweltrecht**, Edited by Nomos, Baden-Baden, 1992. 281 pp.

In Hungary, as in other countries, the legal community has become inreasingly interested in the juridical review of administrative decisions, which go back nearly 25 years, concerning patents granted and trademarks registered by the National Patent Office. Recently, juridical review of decisions passed by the Office for Economic Competition in cases involving cartels and abuse of economic superiority has attracted the attention of members of the legal profession. Similar cases, calling for complex examination, present a new task for the courts as well.

It cannot be seen as accidental that, following the entry of Act LXXXVI of 1990 relating to unfair practices in the market, there occurred changes in the competent jurisdiction of courts in such matters. Unfair practices with market were formally addressed by economic divisions. Now however they addressed by administrative divisions, presumably on the basis of foreign experience.

Against this Hungarian background, it would be noted that the two renowned German authors have offered a cooperative essay, jointly with the co-authors J. C. Hélin (of France) and P. M. Efstartiou (of Greece), in the analysis of four sets of problems indicated in the title of their book. The subject areas covered are not completely identical of course, but the resultant comparison of law is nonetheless worthy of attention.

This review will not follow the order of exposition of the subjects in the book (German, French, Greek and EC laws), but rather will begin by giving an account of the study on the law of the European Community, by Prof. J. Schwarze, on of the most prominent German scholars in European law. This topic is becoming increasingly important for Hungary.

With respect to *EC law,* court review means reexamination by the European Court of Luxembourg of measures and decisions of the Common Market Committee based in Brussels. The jurisdiction of the European Court derives from Arts. 164 and 169 to 178 of the Treaty of Rome and may, in individual cases, result in overturning measures of the Common Market Committee (para. 2, Art. 173).

J. Schwarze discusses the legal practice of the European Court in five of the following special fields: the laws of the European Coal and Steel Community; the Customs Union: the law of anti-dumping procedures; the law of the agricultural market; and the law restrictive of competition.

Because the relevant provisions of Hungarian substantive law conform to, or literally agree with those of Arts. 85 and 86 of the Treaty of Rome.

The establishment of guidelines for judicial practice concerning the restriction of competition is of particular interest to Hungary.

Therefore, questions relating to court review similarly arise in Hungarian law as well.

According to Schwarze, whenever the European Court reviews measures violative of the *prohibition of cartels* (Art. 85 of the Treaty of Rome), it examines whether the Common Market Committee has observed the relevant rules of procedure in adopting its measures. Thus, for instance, in the

Papier Peints case, the European Court overturned the Committee's decision because the latter confined itself by referring to an earlier decision instead of giving a detailed statement of reasons. In the AEG-Telefunken case, the Court pointed out that the Committee had errect in basing its decision on documents the existence of which had not been made known to a party in due time. This omission resulted in the party not being in a position to state its views on such documents.

The standing practice of the European Court requires the Committee to support its decisions with reasons of substance that will make their review by the Court possible. (Carm and Hoeckst cases.)

Of course, this implies no obligation to carry statements of reasons to excess. In its decisions in the Ford an Remia cases, the European Court argued that "the Committee...is not obliged to amply explain all advantages and disadvantages of a selective marketing system if there is reasonable ground to assume that the manufacturer used that system to impede exports, thereby artificially dividing the Common Market".

An especially noteworthy aspect of judicial practice concerning the *prohibition of abuse of economic superiority* (Art. 86 of the Treaty of Rome) is presented by the proceedings in the Hoffmann–La Roche case. In this case, the European Court, after a careful examination of 30 contracts, based its decision on a comprehensive review of the Committee's findings. In like manner, the European Court made a thorough review of facts in the Continental Can case. These and similar examples consequently lead to the conclusion that in matters involving restriction of competition, the European Court will subject the Committee's decisions to a full-scale review.

This prompts Schwarze to draw the conclusion, which we also consider to be valid, that with respect to the law restrictive of competition, the European Court resorts to comprehensive review. This review embraces the aspects of both the establishment of pertinent facts and the correctness of their appraisal.

Let us now proceed to examining and how these same matters arise in *German law,* as is discussed very briefly (on one and a half pages) by Prof. Schmidt–Assmann.

As early as 1968, in its decision in the Fensterglass case, the Supreme Court of the Federal Republic of Germany took the view that the court review of decisions of the cartel authority should be more intensive than that of other administrative decisions. That authoritative ruling then resulted in the handing down of lower court (*Kammergericht*) decisions in which those courts even permitted the examination of circumstances that had not been considered by the Cartel Office (Computer case).

At the same time Schmidt-Assmann's study, which makes so short work of antitrust law, gives the reader a helpful guide by providing a detailed and dogmatically well-grounded exposition of the so-called *general part* (contesting administrative decisions in court).

Within this framework, the analysis of the substance of the law of court review (*Kontrolldichte*) is of particular interest despite the fact that its focus is not on controlling the practicability of administrative decisions, but rather on reviewing their lawfulness. It is nevertheless of fundamental importance, as it amounts to a full-scale review of administrative decisions (*Dogma vollständiger Überprüfung*). In the dogmatics (*juristische Methodenlehre*) evolved

under Art. 19, para. 4, of the FRG Constitution (*Grundgesetz*), this means that:

— the court itself interprets the provisions of law, while correcting eventual misinterpretations by administrative authorities;

— the court itself determines the pertinent facts when contested by the plaintiff or when the court has doubts about the findings of the administrative authority and,

— the court draws its own conclusions and decides the legal norms that govern the facts determined by itself (*subsumtio*).

A different court review, one of a narrower scope than is outlined here, is exceptional (*Dogma ausnahmsweiser Letztentscheidung der Exekutive*), i.e., is resorted to when provided by law. Even so, court review extends to cases in which the administrative authority went beyond its discretionary powers, misused them, or failed to exercise discretion.

Recent years have seen the incursion of the German concept of law into the practice of the European Court and the displacement of the hitherto dominant French concept of administrative law (*Conseil d'Etat*). Accordingly the two authors state in the closing section of their book, what of just for the absolve reason only the expositions on German administrative law, deserves attention.

In conclusion, and independently, as it were, of this book review, the reader needs to be reminded that the study reviewed here represents Volume 155 of the Nomos series edited by Prof. Schwarze (*Europäisches Recht, Politik und Wirtschaft*). This series of publications has already made a significant contribution to the study of theoretical questions relating to EC law. It can be supposed that their contribution will continue growing in importance as well as in readership, owing partly to Maastricht, and partly to the association of the Central and Eastern European countries within the European Community.

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HUNGARIAN LEGAL BIBLIOGRAPHY

1991. 2nd PART

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This bibliography contains legal works of Hungarian authors issued as monographs in Hungary between the 1st of July and the 31st of December 1991, material of periodicals (articles) and studies published in collective works.

The material for the period 1945–1980 is resumed in the following publication: Bibliography of Hungarian legal literature, 1945–1980. Budapest, Akad. K. 1988. 429 pp.

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VÉCSEY Tamás: A magyar magánjog Széchenyi [István] hatása alatt. [Hungarian civil law under István Széchenyi's influence.] JK 1–2/91:12–17.

VEREBÉLYI Imre: Reformszék az állami és az önkormányzati közigazgatásban. [A reform-minded administrative body in state and municipal public administration.] JK 5–6/91:117–122.

XVII. ROMAN LAW

Articles

BALÁZS Tamás: A pandektisztika főbb képviselőinek felelősség-koncepciója. [Concepts of liability of the main representants of pandects law.] = ELTE Acta. 31. köt. 1991. 49–64.

FÖLDI András: A hajósok és a fogadosók a római jog forrásaiban. [Shipmasters and innkeepers in the sources of Roman law.] = ELTE Acta. 31. köt. 1991. 9–30.

PÉTER Orsolya: "Nasciturus pro iam nato habetur". A magzat pozíciója és a magzatelhajtás a római jogban. ["Nasciturus pro iam nato habetur". The position of the foetus and abortion in Roman law.] JK 7–8/91:177–182.

XVIII. MISCELLANEOUS

Book

TRÓCSÁNYI László: Jogászi pályám emlékei. [Remembrances of my juridical life-work.] [Bp.] s.p. 1991. 68 p. Idem. [2nd enl. ed.] 100 p.

Articles

BORGULYA István: Informatika és a jogi oktatás. [Informatics and juridical education.] JK 9–10/91:232–237.

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CONTENTS

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