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STUDIES

Csaba VARGA

Kelsen's Theory of Law-Application*

(Evolution, ambiguities, open questions)

Right from his first theoretical treatises, Kelsen had pretensions to formulate a comprehensive, great theory. His thinking follows its own path; at the same time the set of problems treated in his oeuvre as well as his whole theoretical activity are tinged throughout with constant problems. As a result, his lifework is composed—apart from a great number of volumes—of incredibly manifold essays and critical reflexions as well as of restatements. Still, this monumental theory lacks a proper doctrine of law-application. And the huge literature whether criticising, appreciating or elaborating Kelsen's work, reflects in an apparently correct manner the actual situation, viz. that its pretension to a theory of law-application does not occupy any central issue in it.

Nevertheless, the present paper will attempt to unfold the still existing concept of a law-application theory from 1911 to the 1960s. Such a summary as an aggregate of the Pure Theory of Law and, in general, of his way of legal theoretical thinking, may in itself involve certain lessons. It may, however, be just as interesting from a methodological

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* Abbreviations: *HS—Hauptprobleme der Staatsrechtslehre* (Tübingen: Mohr 1911); *AS—Allgemeine Staatslehre* (Berlin: Springer 1925); *GATS—Az államelmélet alapvonalai [Grundriß einer allgemeinen Theorie des Staates* (Wien, Als Manuskript gedruckt, 1926)] translated by Gyula Moór (Szeged: Városi Nyomda és Könyvkiadó Rt. 1927); *RR—Reine Rechtslehre* Einleitung in die rechtswissenschafliche Problematik (Leipzig und Wien: Deuticke 1943); *GTLS—General Theory of Law and State,* translated by Anders Wedberg (Cambridge, Mass.: Harvard University Press 1946); *RR II—Reine Rechtslehre* zweite, vollständig neu bearbeitete und erweitertete Auflage [1960] (Wien: Deuticke 1983); *PTL—Pure Theory of Law,* translated [from the 2nd ed.] by Max Knight (Berkeley, etc.: University of California Press 1967); *ATN—Allgemeine Theorie der Normen,* ed. Kurt Ringhofer and Robert Walter (Wien: Manzsche 1979).

aspect, namely from the one of the strict discipline and consistency of theory-structuring on the one hand, at the same time—owing to the questions which have remained open—as a choice of the possible intrinsic developments, dilemmas, of disturbing or stimulating ambiguities, in the course of which even controversial conclusions often put a question mark to his own basic concepts and directions. The theory of law-application found in Kelsen's posthumous theory of norms is concerned mostly with a separate set of problems. Therefore a separate study is needed to process this from the perspective of the theory of law-application.

1. Hauptprobleme der Staatsrechtslehre

Kelsen's first venture into the field of legal theory, entitled *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssätze* (1911), forecasts later problems in many of their elements. Characteristically, it enables an eventual further development without major contradictions or breaches. The standpoint taken by him in this period can be ascertained from a conscious self-limitation in the treatment of problems and from what he remains silent about. At the same time, his system is rather taut and closed. His attitude towards the law-application can be deduced both from his ideals concerning the science of law and of his narrow interpretation of the concept of imputation which he considers as the central category of the normative sphere. To wit: legal science is the geometry of the formal presentation; thus the imputation's only factor consists of the norm. Accordingly, the application of law, while being indispensable, is merely an accidental factor, not a constituent part in the legal process.

As a consequence, he has little to say about the "'application' of the norm". The first thing he stresses is a sharp differentiation between whether the norm is used as a basis of reference for mere comparison, or we apply it in a normative context with consequences.[1] Still, whether it is used as an accidental yardstick, or whether the norm leads to a (possibly vital) normative consequence, Kelsen sees no difference, no specific trait deserving further examination.[2] The second tenet is the requirement of the applicability

1 *HS*, pp. 15–17. When we limit ourselves to "merely comparing a concluded action with a norm, and to proving its harmony with the norm in an objective manner", then the "norm will merely serve as the indifferent object of such comparison", and only "as a yardstick of that which has already happened". Obviously, here no "volitive relation" will be present. "When judging whether a mountain is high or low, or a motion is swift or slow, the rules we employ possess no norm-generating meaning." Ibid., p. 15. However, a different situation may also occur. "That judgment which states the correspondence of a given action with a given norm, or the lack of such correspondence, may be linked with the *approval* or *disapproval* of the action by the person who is judging." Ibid., p. 16. That is the field of the normative application of norms.

2 Moreover, as will be clear presently, only the deferentiation is necessary: viz. that the criterion of the existence of the norm should be linked to its normative application, more precisely, through the mediation of the latter, to the Sollen-component present in any elementary norm-unit. "The essence of the norm lies not in its being a rule of adjudication, but in being such a rule which shall be considered by the *adjudicated* as an affirmative or disapproving judgement." *HS*, p. 17. But that will transfer the criterion of the norm from its meaning to circumstances inherent in the use of language. From a structural point this is the same as when

of a proposition of the law to individual cases,[3] and the third is the possibility of institutional applicability by the court, as essential features of the law.[4] Accordingly, merely the factual possibility of judicial application would be needed; neither the actual process of application, nor its way or outcome could add any essential surplus element to law.

Of course, Kelsen could not state anything different in the context of his theory. In fact he considered the imputation as the only determinant of the norm.[5] Incidentally, ha had already stated that the science of law—as "the geometry of the entire phenomenon of law"—treated the law as a formal category;[6] therefore its manifestations should be examined from formal points of view, while the probing of its actual content should be left to other sciences.[7] Looking at it from the aspect of theoretical consistency, Kelsen is undoubtedly right. For if we consider the operation of law from the aspect of its formal manifestation, then the implementation of the law is nothing more than the application of a complete, ready-made law to an individual case. That would not change the proposition of the law in any way; on the contrary, it would merely validate it in a given case, thus reconfirming it. From the formal aspect, the law itself professes this of itself; the entire structure, institutional system and ideology of modern law suggest this.[8] And even approaching the question from the other side: should any shaping of the law be included in these processes, that does not show on the formal side; accordingly, the formal manifestation cannot consider it in any way. As it is, it could be rightfully

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he—later on—proves that validity should be considered as a precondition of the concept of norm: "By the word 'validity' we designate the specific existence of a norm". *PTL*, p. 10. With this, as we know, he has involved himself in contradictions, as well as in the necessity of artificial explanations. The doubts that arise hereby are: Is it a norm which is applied not as a norm? What changes will ensue in a norm upon the acquisition and the loss of its validity? Or else, when its original validity is being replaced by a different validity? Is the law's validity a function of a human will, actually and concretely backing it? As to the juxtaposition of the so-called expressivist concept which finds the criterion of the norm in the human act of prescription, and the so-called hyletic concept accepted by modern norm theories, finding the criterion in its conceptual meaning (i.e. in the operator transforming description into prescription), cf. Eugen Bulygin 'Norms and Logic (Kelsen and Weinberger on the Ontology of Norms)' *Law and Philosophy* 4 (1985) 2.

3 "The precept of a customary law will differ from the *moral law* in that the former is *applied* for an individual case even when it is not *complied with*, just in a case when it is not complied with." *HS*, p. 35.

4 "The court—symbolizing an external organization—is so important for the law that, from among all the norms by which a legal community is governed, and which are followed by that community, only those may be recognized as *legal* norms, which are actually applied by the court (or, in a more complex statehood, by other state bodies as well)." *HS*, p. 236.

5 "... imputation rests solely and exclusively on the *Sollen*, i.e. the norm." *HS*, p. 75.

6 "In view of its formal character, the legal science too may be designated (by a not in every respect fitting analogy) as the geometry of the total legal phenomenon." *HS*, p. 93.

7 "The legal science will only consider the form of such a phenomenon, the substance of which should be dealt with by the sociology and the historical and political disciplines... Owing to its specific cognitive tools, the science of 'law' can only approach one side of this 'legal' phenomenon." *HS*, p. 92.

8 VARGA, Cs.: 'Logic of Law and Judicial Activity: A Gap Between Ideals, Reality and Future Perspectives' in *Legal Development and Comparative Law*, ed. Zoltán Péteri and Vanda Lamm (Budapest: Akadémiai Kiadó 1982), para. 2, pp. 52 et seq.

supposed that any content concealed behind the formal façade is simply indifferent unless it is reflected in the form; just like the definition of a sphere cannot take into account that which is inside.[9]

In this way, the tenet presumed by the law's institutional-ideological structure (and confirmed by its procedure) is that the application of law is nothing more than the restatement of a proposition of the law with reference to (and in the mirror of) individual cases. If such a tenet were necessary for any reason, it was possible to formulate one—ignorant of the actual contents lying behind it. Let us recall, Kelsen himself had pointed at such contact points where social pressure resulted in law, where "being" was converted into "ought". However, in order to maintain the consistency of his system of thought, he had to induce the said transitions from outside, as an external phenomenon, into the system of law while stressing that it could not be grasped within the law, or with the help of its own construction: from inside it was impossible either to define or to explain or to confirm it.[10]

2. *Allgemeine Staatslehre*

One and a half decades later (1925), in the summary of his General Theory of the State, Kelsen had to offer a more detailed treatment. In accordance with the thematic enlargement, administration no longer appears simply as one of the State's duties,[11] but as a strictly legal and juristic activity.[12] Consequently, administrative discretion (i.e. the right of free weighing of pros and cons) in the realm of administrative action, too, appears as a question of law-application. Ultimately, on the overall theoretical plane, law-application will become an operation vested with an autonomous importance and content. At the same time, the formality of explanation was to remain intact. Earlier, Kelsen had conceived the law-application solely as a means of imputation on the basis of norms, and only subject to the given norm. Presently, law-application itself had turned into a kind

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9 "It would be a similar methodological fault to take into consideration the material which the spheric shape, in the given case, conceals." *HS*, p. 93.

10 "How a lastingly unapplied precept of law ceases to be a norm, or how the breach of an obligation lasting several years leads gradually to the loss of its character, i.e. how an Ought becomes destroyed owing to the Being, or vice versa, all this is a situation not to be grasped by a juristic construction, or juristically, it is a mystery." *HS*, p. 334. Or, "There must be a point where the process of social life encroaches in a recurring manner on the body of the State; a transitory area where the amorphous elements of society are crystallized into the solid form of the law and State. That is the area where custom and morals, economic and religious interests, are being turned into legal precepts, into the substance of the State's will, and that area is the legislative act. This is the great *mystery* of the law and State..." *HS*, p. 411.

11 The *Hauptprobleme der Staatslehre*, within an overview of "the legal obligations of the state organs" (Chapter 19), treats the set of problems of public *administration* (and in it, the free weighing)—not touching upon the administration of justice and law application proper.

12 The *Allgemeine Staatslehre* deals, within an overview of the "establishment of the state order", both the part entitled "Administration as law-application" (*AS*, § 35, para C) and the one entitled "Legislation and application of law: two steps in the process of the creation of law" (§ 33c, para. F).

of law-making. In this way, Kelsen did not give up either his formal approach, or the tenet of normative imputation; it is merely that he extends the norm-basis of imputation—formerly conceived as law-making—with the act of law-application.

His new standpoint can be summarized in the following few theses. First, law-application is the medium, in which the general, abstract norm takes on an individual, concrete form.[13] Secondly, law-application in this respect is not just an implementation, but rather the creation of an individual norm on the basis of the general norm.[14] Thirdly, all this is not merely the repeated declaration of the enacted law, but also the constitution of something added to it.[15] Fourthly, the so-called free weighing (viz. the possibility of *discretion*) being admitted in the decision-making process is not a degeneration of the administrative activity (nor is it a characteristic trait thereof), but a property of law-application theoretically present in every case.[16, 17] Fifthly, since law-making cannot be complete, cannot encompass the entire content, but can merely attempt a relative definition, law-application will, of necessity, gain an autonomous significance in the legal process.[18]

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13 "Without the judgement the abstract law would be unable to take on a concrete shape." *AS*, p. 233.

14 "Therefore the judgment... is nothing but an individual legal norm; viz. the individualization or concretization of an abstract or general legal norm." *AS*, p. 233. "Accordingly, the act of law-application is just as much a legal enactment, law-making, establishment of law, as is the legislative act; either of them is just one of the two steps in the process of creating law." *AS*, pp. 233–234.

15 "The judgment of the court is called 'declaration of law', juris*diction*, as if it would merely pronounce that which was already law—in the general norm." *AS*, p. 233.

16 "Just as there must be a substantive difference between the abstract notion and the concrete concept, likewise there must be a necessary difference between the higher and the lower grade of law-concretization, and that difference is the so-called 'free weighing'." *AS*, p. 243.

17 Kelsen would later declare this in an ultimate and unequivocal manner in a resumed (but this time concise) summarization: "If we take into consideration that the *three* traditional functions: legislative, judicial and executive, can be essentially reduced to *two*, since the judicial and the executive one can be equally included in the concept of the execution of laws, then we will realize that the contrast of law-making and law-application which would be expressed by the contrast between the legislation and execution—legis *latio* and legis *executio* —is by no means absolute but a very much *relative* one, expressing—as it does—merely the relation of two consecutive grades of the law-creating process... The tenet, according to which execution, as applied by the public administrative bodies, should *principially* be different from the judicial execution because of the 'free weighing' of the former, is untenable, since more or less *every* act of execution is subject to the free weighing of the executing body, because the general norm can never *fully* determine the legal act called to individualize it; while such a legal act is only possible on the strength of a general norm somehow determining it." *GATS*, pp. 65–66 and 71.

18 "Any law-application, i.e. any concretization of the general norm, any transition from a higher level of law-making to a lower level, is nothing more than a filling-in of a frame, nothing more than an activity within the limits enacted by a higher-level norm. The higher grade can never fully determine the lower one; at the lower grade such substantive elements will always be present which had not been present on the higher level, as in fact, no further steps could come about in the process of the unfolding of the law: every further step would be superfluous." Or, expressed in the context of administration and law: "He who applies the law, will judge according to the law, bound by the law. That process can freely ensue within the limits set by the legal norm; this is free compliance with the State's purposes within given legal limitations." *AS*, p. 243.

In contrast with the former theses characterizing law-application as a one-way, non-autonomous process, lacking a particular operation of its own, this new explanation suggests a multi-chanced, a somewhat dynamic process, showing a certain grade of independence. Still, it does not affect the basic formalism of Kelsen's view on law. According to Kelsen, the normative basis of imputation will still be determined by the legislator. What is merely admitted is that law-application is nothing more than a frame which—from the aspect of the law-maker, but only from the law-maker's aspect—will freely be filled up by those who apply the law. Thus, in the groundwork providing the norm for the imputation, the law-applier will become associated with the law-maker. More precisely, considering the concrete procedural choices of the players who may actually enter the game of imputation, the law-applier will replace the law-maker in a direct manner. It is interesting to note (and considering the theoretical sources and contexts, it is no mere chance) that Kelsen discovers and explains this essential feature of the law-application in connection with the so-called free weighing (i.e., discretion), in the chapter dealing with the executive power, more precisely with the administrative activity.[19] According to Kelsen, law-application does not generate an unlimited or indeterminate autonomy. The autonomy manifests itself only through adhering to the legislative enactments, within the frame of implementing the former. Thus, the autonomy of law-application is only a relative one: it does not affect the primacy of the law. Consequently, it does not change the ideological picture of the operation of modern formal law: the legislator, instead of providing a final specification in determining the legal processes, has to be content with providing a framework which, when it comes to specifications, will inevitably admit alternative solutions.

It is worthwhile noting the openness of this theory, despite its apparently closed character; merely starting from its own tenets, how it could be developed in opposite directions. As it is, the multi-step process of law-making could be interpreted in a restrictive manner, as a specification; on the other hand it can also be interpreted as a set of choices, recurring in time, progressing through its changes—just as it indeed manifests itself in the legal cultures based upon case-law, following precedents in judicial practice. Obviously, Kelsen had attempted to build up his theory of law-application in the former direction, i.e. within a normativistic framework; yet, theoretically speaking, he might have chosen a non-normativist, sociological path, too.

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19 Even more interesting is that at this point he does not say anything more or anything different about discretion than what he had already stated in the *Hauptprobleme der Staatsrechtslehre:* "Neither the terms under which the State acts, nor the character and manner of its action are ever exhaustively determined in the legal precepts... The free weighing by the state bodies is nothing but the inevitable difference between the abstract will of the State and the concrete actions of the State as expressed by the administration." *HS,* pp. 504 and 506. Thus, we are faced not with the application of new theses but with the *linking* of problems that had seemed to be separate, i.e. the recognition of the common essence of law-application and public administration from the aspect of formal legal rationalisation.

3. Reine Rechtslehre

In the period of drafting the Pure Theory of Law, Kelsen incorporates his earlier assessments on the theory of law-application into his new theory as self-evident, obvious elements. These are, at the same time, consolidated as Kelsen widens their theoretical basis.

This applies, first of all, to his *Stufenbautheorie*, or theory of gradation. This construction was conceived back in 1925, when speaking about the steps of creation, Kelsen had referred to the subordinate structure of the state functions, when presenting the role of the Constitution;[20] by now it has become the fundamental principle in the set-up of positive law and of the order established by the latter, and provides its theoretical explanation at the same time.[21] In the light of the theory of gradation, positive law's order shows a hierarchic construction in which, starting with the basic norm, up to the last, individual act of enforcement or legal transaction, each component represents a stepping stone leading from the abstract general towards concretization and individualization. Thus, law-application is essentially a long-lasting, step-by-step process; it can no longer be considered as the actualising counterpole of an abstract norm. In the said hierarchic structure each intermediate step shows a dual face: it implements the superordinated norm as a law-applying concretization/individualization of the former; at the same time, in the process of further concretization/individualization it functions as law-making for the lower level.

In this way the constructive contribution by law-application becomes manifest. Kelsen not only stresses the interdependence and successive intertwining quality of law-making and law-application (as apparently conceptually opposed entities)[22] but he also finds an open parallelism between the judicial law-implementation and the actual legislation, referring to the character, the limitations, and the logical openness of the normative breakdown at each level.[23] In a similar way, the creative possibilities and relatively wide room for manoeuvre of law-application is further confirmed in that public administration is, as far as the legal nature and limitations of norm-application are concerned, treated on the same level with judicial law-implementation. More precisely, while in 1934—owing to the novelty of this appreciation—he emphasizes the essential unity of the two in an

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20 *AS*, Chapter VII. The grades of bringing into existence. § 36. The Constitution. A. The subordination, not coordination of the state functions: The theory of gradation.

21 *RR*, p. V. The legal order and its graded build-up.

22 "The opposition of the creation or making of the law, on the one hand, and the execution or application of the law, on the other, is far from being much absolute, as is attributed to it by the traditional jurisprudence for which the said opposition has a high significance." *RR*, p. 82.

23 "The task of obtaining a correct judgment or correct administrative act from the law, is essentially identical with the task of creating correct laws within the framework of the Constitution... To be sure, there may be a difference between the two but it is a quantitative and not a qualitative one. The difference merely lies in the fact that the legislator's constraint in questions of substance is much less than that of the judge; the legislator enjoys relatively more freedom in law-making than the judge does." *RR*, p. 98.

emphasized manner;[24] by 1946, in the American edition of the *General Theory of Law and State,* he restates the relevant theses from the aspect of the theory of state;[25] by 1960, in the revised and enlarged second edition of the *Pure Theory of Law*, the said statements are treated as simply common knowledge.[26] As can be read from his references, Kelsen treats any kind of implementation of any kind of legal norm as law-application, and after briefly stating this, he has nothing more to say about the unity.[27] As a result of this, the entire problem of discretion—which had been regarded by both the European and the Anglo-American legal literature as the source of the freedom (even arbitrariness) of public administration—has become a most specific issue of law-application.

Finally, the imputation had to be revised in view of this new outlook. It still remains a key concept which, in the peculiar order of "ought"-projections, links a given behaviour with its consequence. However, it is no longer a simple projection of the enacted norm resulting from the application of the norm (as it had been in 1911), nor is it a concretization born in the two-step creation of law (as in 1925), but the completing arch of a multi-step, composite process. One pillar of this arch rests on the—merely hypothetical—source of its validity, it then arches over the generalized-abstract enactments and their step-by-step concretizing-individualizing breakdowns, in order finally to arrive at the actual, normative consequence drawn for the given case. Thus, the concept of imputation will gradually become farther and farther removed from its original application specifically anchored in law; instead it becomes a principle based on causality (but no longer governed by it), i.e. a principle expressing the fundamental connections of the man-made, artificial world of norms.[28]

Theory of gradation

The theory of gradation, projected onto the Kelsenian understanding of law-application, yields two consequences.

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24 "Like jurisdiction, so also the administration manifests itself... in the individualization and concretization of laws... In such a way... the judicial sentence and the administrative act—through which individual norms are being stated—both manifest themselves as the execution of the law." *RR*, pp. 80 and 83.

25 Part Two, II. G.b. The powers or functions of the State: legislation and execution: "By the executive as well as by the judicial power, general legal norms are executed; the difference is merely that, in the one case, it is courts, in the other, so-called 'executive' or administrative organs, to which the execution of general norms is entrusted. The common trichotomy is thus at bottom a dichotomy, the fundamental distinction of *legis latio* and *legis executio.*" *GTLS,* pp. 255–256.

26 E.g. *RR II,* para. 45—changing the wording of *RR*, para. 32 so that it will mean just that.

27 "The administrative authorities... have to apply general legal norms prescribing sanctions and these functions differ from the jurisdiction of courts not in their content, but only in the nature of the functioning organ." *PTL*, p. 263.

28 "The principle... that we apply when describing a normative order of human behaviour, may be called imputation... 'Imputation' means a normative relation." *PTL*, pp. 76 and 90.

The first is the relative unity of the processes of norm-making and norm-application.[29] This means *ab ovo* that the unfolding of the norm is not a logical necessity or an unequivocal process, but rather a creative contribution, i.e. one admitting of several alternatives and lifting these to the normative level; it is merely one grade in a multi-graded process. At the same time it must be seen that when we speak of law-making and law-application in the conventional and historically approved manner (by treating these as different activities of bodies fulfilling different functions) and, subsequently, we explain law-application as law-making, then we will have differing concepts overlapping each other. Namely, analytical concepts will be projected onto descriptive ones.[30] The result of the analysis will merely be restricted to some essential aspect of the given process (an aspect which may be common to another process as well and thus not warranting the differentiation under this aspect); nevertheless that result cannot bring into dispute the demarcation of law-making and law-application as socially institutionalized functions and activities, thus it will not vitiate the grounds of such demarcation.

The other Kelsenian conclusion relates to the hierarchic nature of the gradual construction of law and of the legal order. According to this tenet the entire normative process is displayed between two extreme points; these extreme poles being the foundation of the normative order's validity by means of a hypothetical basic norm (*hypothetische Grundnorm*) and the causal realization of the consequence attached to the given behaviour in the normative order. Within these two extreme points, the normative process is nothing but a gradually narrowing normative breakdown in which an abstract-general enactment becomes gradually and continually concretized until it is reconstrued in the causal event.[31] Accordingly, while the first mentioned conclusion stresses the presence of creation in the process of application, the second conclusion places the implementing (applicative) creation in a broader context, designating its place in the process of the individualizing breakdown of the general legal postulate.

Although Kelsen designates the normative subordination of the "lower norm" as a metaphorical term, yet he declares the legal order built along the mediation of validity

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29 "Application of law is at the same time creation of law. These two concepts are not in absolute opposition to each other... It is not quite correct to distinguish between law-creating and law-applying acts. Because apart from the borderline cases... between which the legal process takes place, every legal act is at the same time the application of a higher norm and the creation of a lower norm." *PTL*, p. 234.

30 Kelsen himself is aware of this. At least in describing the philosophy of the division of powers, he states: "The common trichotomy [of the legislative function and of the executive and the judicial functions] is thus at bottom a dichotomy, the fundamental distinction of *legis latio* and *legis executio*." (Or, in the title: "Legislation and Execution.") *GTLS*, Part Two, para G.b., pp. 255–256. With that, he does not dispute the validity of trichotomy elsewhere, inasmuch as they are "in the course of the shaping of positive law, particularly outstanding or otherwise politically important resting points of the process of law-making." *GATS*, p. 66.

31 "...the process that begins with the establishment of the Constitution... and leads to the execution of the sanction... is a process of increasing individualisation and concretization." *PTL*, p. 237.

to be a hierarchical system.[32] In the said hierarchical system, law-application is nothing more than the creation of an individual norm through the implementation of a general legal norm. Kelsen regards the application of the general legal norm as being of paramount importance—brooking no exception—so much so that he even presumes the existence of a general legal norm behind a decision based on an ambiguous provision of law.[33] He professes the same presumption whenever a case-related judicial decision is used as a precedent,[34] in fact behind any decision using the fiction of "a general, even though not a positive, norm of material law",[35] whenever such a decision declares not a dismissing (negative) sentence but—having the necessary powers thereto—deals with the disputes issue at its discretion, on its merits.[36]

Thus, the theory of gradation outlines on the one hand a pyramid standing on its foot, since the entire legal process is built on a single hypothetical basic norm. On the other hand, it also shows another pyramid placed on its peak, superimposed on the former, since in the course of the final individual acts of execution the general-abstract validity, expressed by the basic norm, receives its concrete shape. At the same time, we should keep in mind that the graded building and its hierarchical structure have a normative character. In other words, the structure is normative not just because it is composed of norms, but also because the very structuring principle rests on normative expectations.

Nevertheless, if we take seriously Kelsen's undertaking[37] to answer the question, "What is law and of what kind is it?"—then we must at once voice our reservations. To wit: it is one question to consider the definite character and direction of structuring as a desirable issue, and another question to follow this tenet in the practice of creating those individual norms. This difference is all the more important since, as it will be revealed later, whatever our opinion is on whether an enactment has been complied with or not, our judgment must rest "on a specific, more precisely normative, interpretation".[38] As to the normative interpretation, in the following we shall see that it

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32 "The relationship between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super- and subordination. The norm which regulates the creation of another norm is the higher, the norm created in conformity with the former is the lower one. The legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms." *PTL*, p. 221.

33 Where "the interpretation implicit in the decision assumes the character of a general norm". *PTL*, p. 250.

34 "The judicial decision of a concrete case gives direction to the decision of similar cases in that the individual norm which the judicial decision represents is generalized. This generalization, that is, the formulation of the general norm, may be done by the court that created the precedent; but it can also be left to other courts bound by the precedential decision." Ibidem.

35 "...a general, even though not a positive, norm of material law". *PTL*, p. 244.

36 "It is usually said that the court is authorized to function as a legislator. This is not quite correct if by 'legislating' is meant the creation of general legal norms. For the court is only authorized to create an individual norm, valid for the single, present case. But the court creates this individual norm by applying a general norm which the court considers 'just' or desirable—a norm which the positive legislator failed to create. The court-created individual norm is justifiable only as application of such a not positive, general norm." Ibidem.

37 *RR*, p. 1.

38 *RR II*, p. 4.

cannot stand alone: it can only exist in a normative context. In other words, only an authority proceeding within its jurisdiction and powers can constitute the result of normative interpretation. Moreover, we must state as a matter of principle that in the graded construction the relation between norms of various levels—i.e. conditioning and conditioned ones—is not necessarily a hierarchical relation. It can also be a relation of interrelated priorities, in which merely the sequence, the origin and the foundation of validity are manifested.[39]

Similarly, one might raise the question, is it warranted or at all necessary to use the gradation theory in a dual way in the Kelsenian oeuvre? Is it necessary that the dialectic interrelation of law-application and law-making should be explained in the official hierarchy of the sources of law going from the top downwards? Is it inevitable that the theory of gradation should become the only possible theoretical model for the foundation of validity? Putting it another way: is the hierarchical mediation and the vertical deduction of validity the only way by which the unity of legal order can be demonstrated? For Kelsen, his own choice of a natural paradigm might have appeared obvious. Nevertheless, it has resulted in the survival of such models of thought which had become worn out even by him. As it is, a chain of validity based on a hypothetical basic norm which would deduce the validity from an external and superior, yet all-embracing, source is, ultimately, a transcendental presumption. It is nothing but "a secularized form of natural-law concepts based on religious, respectively theological considerations", which illustrates the law as the aggregate of hierarchically super- and sub-ordinated determinations—although, in reality, in the case of a state-organized legal system it is rather "a system, without a centre and without a peak".[40]

The constitutive character of law-application

The theory of gradation has little to say about law-application itself; it rather designates its place, its points of attachment within the juridical process. Nevertheless, in an indirect manner, it has staked out the conceivable understanding of law-application.

The most important conclusion that can be drawn from the gradation theory of law can be summarized in that law-application—in contrast to the traditional meaning suggested by the term juris*dictio*—does not declare but constitutes the law. Although Kelsen fails to give a general definition to enable the production of theoretical principle, yet his standpoint is unequivocal: law-application is every bit of a "constitutive character", and the body entrusted with it has a "constitutive function". The contribution of law-application manifests itself in various ways in the different stages of the process.

39 KRAWIETZ, W.: 'Die Lehre vom Stufenbau des Rechts—eine säkularisierte politische Theologie?' in *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen*, ed. Werner Krawietz und Helmut Schelsky (Berlin: Duncker und Humblot 1984), p. 266 [Rechtstheorie, Beiheft 5].

40 KRAWIETZ, para. II and p. 269.

The first step is the identification of the existence of some general norm, as a valid norm of the law.[41] In Kelsen's view this serves a dual purpose: a valid, applicable norm is the natural precondition for law-application; at the same time—on a higher level—that would create the legal relevance, viz. that in the concrete case a legal situation should evolve.[42]

If the identification and choice of the norm have an equally constitutive character, then this also applies to the legal definition of facts that constitute a case. Kelsen explains this, second, grade of constitutivity in a protracted treatment, not devoid of certain contradictions. Accordingly, the question would immediately arise, whether it is an indispensable element of the legal order that, when a fact becomes qualified under a normative aspect, it will (or should) also designate both the agency and its procedure exclusively empowered to qualify the given fact as a fact in law? Despite Kelsen's positive answer[43] it seems that this is in fact a practical question which could freely be regulated in the course of legislation, merely because in the absence of a regulation (or some kind of procedural formalization) a fact could be declared to be a fact in law by anybody, anytime, and so the said person could rank as an official agent applying the law. Incidentally, Kelsen himself had recognized this, although in a different period and different context.[44] Accordingly, some degree of formalization of the procedure seems, in general, necessary, but it will in every case be the legislator who will decide on its terms, degree, and manner under practical considerations. In itself, it seems equally convincing when Kelsen considers the official cognizance of a fact as the only means towards the establishment of a fact in law;[45] so much so that in his reconstruction he states this to be an element of the norm attaching a sanction to the fact.[46]

At the same time we must immediately put a question mark behind the statement that here, essentially, and in every case, we are dealing with the act of a natural fact's being transformed into a normative fact. For if we take into consideration all the circumstances

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41 *RR II*, p. 243.

42 "Only by the ascertainment implied in the judicial decision that a general norm, to be applied by the court, is valid... does the norm become applicable in the concrete case, and thereby a legal situation is created for this case which did not exist before the decision." *PTL*, p. 238.

43 "If a legal order attaches a certain consequence to a certain fact as condition, then this order must also determine the organ who and the procedure by which the existence of the conditioning fact is to be ascertained in a concrete case." *PTL*, p. 239.

44 In his posthumous work he writes: "1. Every man should keep one's promise made to another. 2. Maier has to keep his promise to pay 1000 to Schulz." In connection with these norms, "The validity of norm 2 is based on the validity of norm 1, no matter who had enacted norm 2. For norm 1 does not determine who has the power to enact norm 2. Everybody is empowered to enact norm 2." *ATN*, pp. 214–215.

45 "...even the ascertainment of the facts that a delict had been committed represents an entirely constitutive function of the court... It is only by this ascertainment that the fact reaches the realm of law; only then does a natural fact become a legal fact—is it created as a legal fact." *PTL*, p. 239.

46 "This is so because the legal rule does not say: 'If a certain individual has committed murder, then a punishment ought to be imposed upon him.' The legal rule says: 'If the authorized court in a procedure determined by the legal order has ascertained, with the force of law, that a certain individual has committed a murder, then the court ought to impose a punishment upon that individual." *PTL*, p. 240.

and situations which may bring into dispute the officially established fact being identical with the actual fact, moreover when we recall the finalizing effect of the legal force of a judgement, then it will become immediately apparent: in the formalized proceedings the actual fact is replaced by the allegation of the fact—i.e. the formal and official declaration of its being the case.[47] This, however, both in principle and according to its actual structure, contradicts the claim according to which the official establishment of fact, although it is "not a way of taking cognition of the law, but of creating it", yet it shows a parallel with the cognition of natural facts.[48]

The third domain in which the constitutive character of law-application manifests itself is the creation of the individual norm by filling the framework which the general norm determines, in a discretionary manner. As Kelsen himself has stated with increasing forced since the '30s: the legislatory determination is never an exhaustive one. Accordingly, the recourse to discretion is inevitable with regard to the components, thus, the applicable law is never merely a definition but also involves a framework freely to be filled in.[49] At a later date, Kelsen himself—speaking about legal interpretation—would specifically state: the filling of the framework within the legal limits drawn by the applicable general norm is entirely free. At the same time the said freedom is not identical with free weighing, nor is it a discretionary power permitting preventing an action, nor is it empowered, to permit or deny something; it simply means that within the limits of a basic, existing regulation, the details not affected by the regulation can be concretized in an unbound manner. (Concretization in this case means at the same time a legally valid regulation, i.e. a determination.)

Theoretical question marks

The stress on the constitutive character of law-application is understandable. At the same time, Kelsen's work does not clear up the non-negligible question: What is the theoretical significance of all this? Of course, we must immediately remark: in the arch of Kelsenian thinking it does not appear as a gap. As it is, in his picture of the law, the entire legal process consists of volitive acts, all these acts having a law-making significance—with the exception of the last, concrete-individual act of execution. Whether we agree with this

47 "In juristic thinking the ascertainment of the fact by the competent authority replaces the fact that in nonjuristic thinking is the condition for the coercive act. Only this ascertainment is the conditioning 'fact'..." Ibid.

48 *RR II*, p. 247.

49 "This definition, however, can never be complete. The higher-grade norm cannot bind the act by which it is executed, in every direction. There must always remain a space for free weighing, with a wider or narrower space for manoeuvring, so that the higher-grade norm, in relation to the act executing it... has always the character of a framework to be filled in by the former." *RR*, p. 91, Further: "But even in the case in which the content of the individual legal norm to be created by the court is predetermined by a positive general legal norm, a certain amount of discretion must be reserved for the law-creating function of the court. The positive general norm cannot predetermine all the factors which make up the peculiarities of the concrete case." *PTL*, pp. 244–245.

view or not, we may state that the said explanation is not fitted to prove, from the point of view of underlying constitutivity, the homogeneity of the various components and reflexions of the law-applying process. Nor does it enable it to apply demarcations.

The said constitutivity simply cannot be homogeneous. For instance, as regards the discretionary filling of the normative framework, it has been shown that this is a result of the decision made. It is, therefore, a result to which cognition can merely provide the basis; however, cognition alone does not provide the result. That, however, means that the specific process of law-application is the *only* channel for producing the result (not only because the result is vested with a specific normative quality, but also in view of its entire structure and mechanism). In other words, the constitutive function will directly come about through the shaping of factual content.

On the other hand, we may reflect on the question: Where is the constitutivity when one has to decide about the validity of the applicable law, or when a fact must be established in a legal way? Undoubtedly, in these situations we do not deal merely with a pure cognition, since it is entirely different when, for instance, the doctrinal study of law treats law or the relation between the facts and the law, from the case when the law itself provides distinctions, i.e. when a competent authority—proceeding in its own formal way—not only narrows down the result but excludes from the beginning an open discussion of the result. We might choose the answer by saying that in the last two cases we are faced with the direct inclusion of the result within the law, i.e. fitting it into the law's rules of the game. Looking at it from the external aspect we might say: this is a procedural formalization—in other words, a formal gesture is being completed in, procedurally, a due time and due manner. In other words, it is an act which—regardless of any cognition—can provide a surplus, namely that it starts a motion within the normative order by generating a formal proceeding, thus evoking, in a direct manner, the process of imputation. Thus, its constitutive significance is, primarily, a procedural one.[50]

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50 At times, Kelsen seems to admit (for instance when he describes the judicial establishment of facts as being parallel to their cognition, cf. *RR*, p. 247) that the said procedural constitutivity merely means a cognition possessing the surplus of the legal character of the final result. However, this picture does not take into consideration that this type of the so-called establishment of fact is done in terms of classifications according to models offered by the positive law. It is, thus, inextricably intertwined with qualification which is a normative process with unconditional, absolute ending, primarily carried out under aspects and for purposes different from cognition. Cf. PERELMAN, Ch. 'La distinction du fait et du droit: Le point de vue du logicien' in *Le fait et le droit*, Études de logique juridique (Brussels: Bruylant 1961), p. 271; VARGA, Cs. 'On the Socially Determined Nature of Legal Reasoning' *Logique et Analyse* 1973 Nos. 61–62, pp. 50–54; VARGA, Cs. 'Law-application and Its Theoretical Conception' *Archiv für Rechts- und Sozialphilosophie* LXVII (1981) 4, pp. 465–468. At the same time, it is characteristic of the entire reasoning that in its fundamental definition it uses practical aspects demarcating it from the theoretical one; namely that instead of unfolding the features inherent in the subject, it is directed towards the desired classification (pigeonholing and submission) within the set of concepts defined within the normative system. While logically this endorses the form of subsumption, yet the system which claims the pigeonholing classification is practice-oriented instead of being governed by epistemological considerations. The very process, in the course of which the juristic classification of the subject

The theory of interpretation

Kelsen's theory of interpretation illustrates the character and complexity of the constitutive function of law-application, as well as from fresh aspects.

Primarily, he differentiates between the cognitive (e.g. scholarly, jurisprudential) interpretation and the authentic interpretation carried out by the law-implementing body. The cognitive interpretation of the law identifies the frameworks offered by the applicable law, i.e. the possible meanings and the various options for decision. Normative interpretation will choose one of the former as the individual norm to be used in the concrete case of law-application. Thus, the first is a cognitive act, the latter—as the creation of an individual norm—is an act of volition.

Kelsen stresses that the filling of the framework determined by the general legal norm in the course of law-application is no longer bound by the law,[51] further that any normative influence on the process of filling the frames could only take place through the free use of meta-juristic norm systems.[52] Consequently, anything that ensues in the course of the said frame-filling was no longer a question of legal theory but that of legal policy."[53]

It is questionable, therefore, whether can it be termed as interpretation at all? The answer to this widely debated question is mostly rather sceptic, running against the Kelsenian view.[54] While the contemporary critical answers had all originated from

takes place, is majored by the assessment of the social desirability of the normative consequences to be attached to the result of classification. Thus, any epistemological approach can involve an instrumental significance at the most. Cf. VARGA, Cs. *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1958), Chapter 5, para. 4, pp. 145 et seq. Meanwhile it seems that the correspondence between the natural language and the normative one at some optimal level, as well as the requirement of coherence, consequentiality and social backing in the socio-juristic practice of normative classifications, are by now one of the preconditions of the entire normative process. All this is so deeply anchored in the social existence of the law that it appears to some theoreticians to be the "inner morality" of law. Cf. FULLER L. L. *The Morality of Law* (New Haven and London: Yale University Press 1964), Chapter II and VARGA, Cs. 'Reflections on Law, and on its Inner Morality' *Rivista Internazionale di Filosofia del Diritto* LXVII (1985) 3, p. 444.

51 "From an aspect focussing solely on positive law, there will not ensue any criterion on the basis of which the one possibility available within the frames of the applicable law could be preferred to the other... It would be a futile effort to try to provide the legal basis of the one by excluding the other." *RR*, p. 96.

52 "Inasmuch as—in the course of legislation—beyond the necessary definition of the framework within which the act is to be determined there is space for the cognitive process, then the latter will not relate to the cognition of the positive law but to other norm which may eventually lead to the creation of law. These are the norms of morals, fairness, further: social value judgments, usually labelled as welfare, public interest, progress, and so on. The positive law has nothing to say about their validity and ascertainment. From this aspect, any definition can only be characterized from the negative side: these are, then, definitions not originating from the positive law proper." *RR*, pp. 98–99.

53 *RR*, p. 98.

54 Rodolfo Sacco explained in his *Il concetto di interpretazione nel diritto* (Torino 1947) that "the continued mixing up of interpretation and application" was untenable (p. 131), since Kelsen had merely spoken about "the most convenient choice of the method of law-application" (p. 118, note 6). G. Mario Losano disclosed in his 'Il problema dell'interpretazione in Hans Kelsen" *Rivista internazionale di Filosofia del diritto* XLV (1968) 3–4 that the Kelsenian concept of law-interpretation was a distortion of the concept of interpretation. As it is in the

Kelsen and may have been true within their own logic, they all failed to recognize the essential duality of the legal process, a duality that can be traced all along Kelsen's expositions and never explicitly denied. Namely, that according to the presuppositions providing the foundations of the official ideology of law and of the operation of its institutional set-up, the processes ensuing in law show an analogy to the process of cognition; moreover, apparently, they may not even be distinguished from the latter. In respect of law-application, we have been made to see as such the "judicial establishment" of the validity of the applicable law and the facts of the case. Further, in addition, the cognitive interpretation which, according to Kelsen, first reveals the legal framework of the decision, whereupon it only necessitates a volitive act, viz. the decision resulting in an authentic interpretation. In reality, however, judicial interpretation (owing to its normative environment and practical determination) shows hardly any common feature with the scholarly interpretation. Another argument against the common character is that it is the interpretator himself who will qualify judicial interpretation as such, achieving this with reference to its officially declared function. Meanwhile its actual structure does indeed demarcate it from any kind of interpretation.

Notwithstanding the above, it was just the ideologically declared community of purpose and the apparent similarity of structure that enabled it to be admitted as being analogic to cognitive interpretation. We will qualify it as interpretation because we were made to accept it as the ideal expression of its ideal operation. Moreover, it is qualified as interpretation because revealing and defining meaning is one of its real features. In other words, whatever the outcome of the normative interpretation, revealing and unfolding a meaning must be necessarily included, even with a selective effect. It boasts, therefore, the same status as does the logic in law: the ontological definition of law makes their presence inevitable (a presence that appears for us determinative), whilst the actual incongruencies will, just as inevitably, induce the law's operation of a differing homogeneity.[55]

While the scientific interpretation of the norm starts from the norms themselves, and has the purpose of unfolding its substance, in the normative interpretation all this merely constitutes a passing, intermediary medium, in order that a proper practical answer can be reached by referring to that norm, by invoking its authority. Putting it in another way, the norm is never the purpose or aim but a means to be shaped and providing a form, in the process of normative interpretation.

Procedural outlook of law?

In the textual environment of the *Pure Theory of Law*, there is an apparently inorganic reflexion to be found. Whether this reflexion can be incorporated into the Kelsenian

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case of authentic interpretation, Kelsen replaced the concept of interpretation based on the structure of cognitive interpretation, by a concept relying on a single function of interpretation. Ultimately, Kelsen designated the individual norm-creation as interpretation (pp. 213–215).

55 Cf. VARGA, Cs. *The Place of Law...*, para. 5.3.2 and 5.4.2–3.

doctrine of law-application, may stand the test of the consistency, of the freedom from contradictions of the entire Kelsenian oeuvre. According to the said reflexion, in the course of an authentic interpretation, the choice is not necessarily made from the various alternatives unfolded by the cognitive interpretation. It is also possible that the individual norm thus found should be independent from the former. And if the given decision obtains a legal force,[56] this latter norm will become final in the legal order, too.

The dilemma is obvious. If we accept the basic doctrine of the *Pure Theory of Law* in the theory of gradation (i.e. the concept of individualization and concretization through the breakdown of the general norm), then the authentic interpretation will narrow down—unequivocally—to a category within the cognitive interpretation; the only task of authentic interpretation being the choice among the possible varieties unfolded by cognitive interpretation. If we accept the possibility of choice from beyond these varieties, then this will not narrow the norm but rather extend it; such a choice will employ an external solution instead of the alternatives limited by the cognitive interpretation; it will thus violate the interpretative character of authentic interpretation. It rests, therefore, on a misunderstanding, since it declares that it sets aside the norm which it professes to be applying.[57] On the other hand, if we focus in the theory of gradation on the dialectics of law-making and law-application, viz. when we only perceive the possibility of creation at any point in the normative process and its constitutive significance, then the cognitive interpretation will be reduced to a mere ideal-typical, descriptive category, accompanied by a volitive act, which, as Kelsen himself states,[58] will demarcate the authentic interpretation from any other type of interpretation. Putting it in another way, this means that the volitive contribution within the authentic interpretation shows a specifically constitutive aspect which, in its turn, provides the possibility that, eventually, even the contingency mentioned by Kelsen might ensue—under the guise of norm-application.

It is to be noticed that although in the text of the enlarged, second edition of the *Pure Theory of Law*, the above reflexion may seem merely inconsequential, haphazard and even irrelevant, yet it is not quite alone in the Kelsenian oeuvre, though we suspect that the author did not wish to consider it in a manner consistent to its weight. As it is, in the American edition of the *Pure Theory of Law*, i.e. the *General Theory of Law and State*, after outlining his concept on law-application (included in the set of problems relating to the hierarchy of norms, where he also touched upon the issues of the judicial

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56 "By way of authentic interpretation of a norm by the law-applying organ not only one of the possibilities may be realized that have been shown by the cognitive interpretation of the norm to be applied; but also a norm may be created which lies entirely outside the frame of the norm to be applied... as soon as the validity of this norm cannot be rescinded, as soon as this norm has gained the force of a final judgment." *PTL*, pp. 354–355.

57 Losano writes thus: "is based of an ambiguity", "does not apply" (p. 531). However, he too would force the analogy of cognitive process on normative decision-making. That is why he blamed Kelsen that while cognitive interpretation was also interpretation according to its structure, authentic interpretation was only so according to its function.

58 *RR II*, p. 351.

act, of the applied norm, of the gap of law, and of the judge-made "general" norm), he unfolds his tenet as a "conflict between the norms created at different levels." He cites his classic American source (which is also a citation): "Bishop Hoadly has said: 'Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them'; *a fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver."[59] As it is, Gray, Kelsen's source, had made his conclusions in too simplistic, short-circuited a manner,[60] and that is what evoked Kelsen's condemning criticism and the entire exposition supporting the latter. Meanwhile he fails to notice that he merely restates in a theoretical manner that which Bishop Hoadly had already stated.[61]

Now Kelsen's problem is the following: the foundation of the validity through the superior norm presupposes that it corresponds with the superior norm. However, the establishment of this correspondence (i.e. whether or not it exists) can be effected, with a legal relevance, only with a law-applying decision. All this, therefore, presupposes a determined process of a determined body, i.e. the formalized result of a formal proceeding: its constitutive contribution. Since, however, after the decision has become final by having gained a legal force, it can no longer be disputed whether the constitutive contribution involved by the act of law-application had expressed "real" and "actual" components in a formalized result, there will be no absolute guarantee as to the "reality" and "actuality" of the said correspondence.[62] After the possibilities of appeal or legal remedies have been exhausted, excluding any further legal action in the case, the logic of the postulates of the legal order will irredeemably assert itself and become all exclusive. Thus, the logical reconstruction of the sequence yields the following result: "The law-applying organ has either, authorized by the legal order, created a new substantive law; or it has, according to its own assertion, applied pre-existing substantive law."[63] This logic, as a fundamental feature of the existence and operation of the legal order, is entirely sealed, self-sufficient and self-reproductive. So much so

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59 GRAY, J. Ch. *The Nature and Sources of the Law* 2nd ed. (New York 1927), p. 102.

60 "The courts put life into the dead words of the statute." GRAY, p. 125.

61 "It is difficult to understand why the words of a statute which, according to its meaning, is binding upon the courts should be dead, whereas the words of a judicial decision which, according to its meaning, is binding upon the parties should be living." *GTLS*, p. 154.

62 "The lower norm belongs, together with the higher norm, to the same legal order only insofar as the former corresponds to the latter. But, who shall decide...? Only an organ that has to apply the higher norm can form such a decision. Just as the existence of a fact to which a legal norm attaches certain consequences can be ascertained only by an organ in a certain procedure (both determined by the legal order), the question whether a lower norm corresponds to a higher norm can be decided only by an organ in a certain procedure (both determined by the legal order)." Ibidem.

63 *GTLS*, p. 155. "The decision of a court of last resort cannot be considered to be illegal as long as it has to be considered as a court decision at all. It is a fact that the question whether there exists a general norm which has to be applied by the court and what the content of this norm is can legally be answered only by this court." Ibidem.

that even the harshest facts of life cannot encroach upon it, unless the law itself provides the possibility of legal transformation (i.e. the transformation of the given facts into legal ones and their being contested as such), at least as long as the legal order prevails as such. Incidentally, that is suggested by a Kelsenian example elsewhere. According to the said statement, any legislatory enactment must be considered constitutional until the contrary is proven. Approaching the problem from the other side, this means that inasmuch as the creation or the contents of a legislative act are unconstitutional, but the declaration of its unconstitutionality cannot be legally made, then the constitutional provision responsible for the "conflict" should be regarded as merely being a proposal.[64]

As we have seen, Kelsen had noted these ideas. However, he did not unfold them as a doctrine of law-application; he did not amplify the theoretical possibilities inherent in them, and failed to follow their thread till the end.

In light of these ideas, the foundation of validity no longer seems unambiguous. Though Kelsen's entire work is based on the consistent separation of Being and Ought to Be, his exposition suggests that—progressing downwards in the graded structure of the legal order—it is the application of the superior norm that mediates the validity of the legal order to the lower norm (created by the individualizing-concretizing act in the course of application) and thus lends the norm its legal character. At the same time, the connexion between the said norms is characterized by the apparently ontological relationship of Being between those Ought-enactments. The superior norm will "define", will "lend a framework to", or will offer "alternative interpretations", while the lower norm will "correspond", will provide an "interpretation option" "within the framework". Here, a general philosophical-methodological question could be raised (the answer being a task of legal ontology): Whether these inter-norm relations are existential ones? Whether the relations between the Ought-enactments are "Ought-relations"? In that case, they could not even be interpreted or determined by means of the model of existential relationships between beings? But the question may also be put in a narrower context. And that is the essence of the Kelsenian concept. How can this relationship be unfolded, identified or defined so that it could be relevant for the law? At this point, Kelsen's answer is unambiguous: only by the determined act of the determined organ; and the result of the said process, Kelsen affirms, is not of a declarative but of a constitutive character. Yet constitutivity—as we have seen—shows a dual face, dual aspect. As to its contents it means that the said result could not come about without the given process (e.g. through a simple cognitive process), as a necessary conclusion. From the procedural aspect that means the following: whenever the legal order fails to designate a body which could contest it, or when such a body has already exhausted its legal remedies, then the result will become final within the legal order. It may be that on the

64 "If a statute enacted by the legislative organ is considered to be valid although it has been created in another way or has another content than that prescribed by the Constitution, we must assume that the prescriptions of the Constitution concerning legislation have an alternative character." *GTLS*, p. 156.

social plane sharp debates will develop, revealing its contradictions, or even unmasking its perfidy, yet as long as the legal order prevails, the only answer accepted by and governing for the law will still be *that* result.

At this point, however, the entire line of thought becomes reversed. If all that is true, namely, the normative regulation *may* ascribe definite requirements to definite behaviour; it *may* designate definite organs and procedures to be followed by them, and the normative process *may* show a structural and/or functional correspondence, parallelism or analogy with the cognitive process—nevertheless, even if these are essential, inevitable elements in the legal process, *it is not these* that will appear directly for the law in a relevant manner, but rather those official, formal institutional declarations which report on the faultless "compliance", "fulfilment" or "realization" of the norms. More precisely, the elements of the legal process, whether deriving from the existential sphere of factual reality (i.e., from the "Is") or from the sphere of the normative regulation (i.e., from the "Ought"), they will not appear by themselves *(in se)* in the legal process but only and exclusively as referred to in procedure. That is, when *(1)* the law's regulatory system provides a procedure in which the said elements can be referred to, and *(2)* the reference to them ensues in a procedural way, i.e. in due course, at the time and in the manner determined by the regulation. Now, we know that as soon as this procedurality has ensued, the said elements will be relevant solely as components of the procedure, i.e. their presence in and relevancy for the law will depend exclusively on their being established in procedure. Recalling the above points we might say that the original qualities of the said elements may only be interesting inasmuch as there exists a procedural possibility, in the course of which their procedural conformity can be contested in procedure. However, as soon as this process is closed, i.e. from the moment when the natural fact is transformed into a legal fact with the finality of *res adjudicata*, the formerly mentioned original qualities will become at once for all uninteresting, irrelevant in law. It can be seen that, although the positive law does not usually declare the identity of the legal force and the quality of lawfulness, yet the doctrinal reconstruction of procedural provisions will yield a tacit *presumptio iuris et de iure*, according to which that which is *res judicata* shall also be deemed *lawful*.[65] This is where formalism governs legal processes. As it is, any data or consideration can only obtain a role in the legal process in a formalized way. And once it has obtained that role, it will—to all intents and purposes—become firmly incorporated into the system, in its formalized establishment.

This sequence of deduction will push the entire Kelsenian theory towards a procedural approach. According to its logic, the legal system possesses a specific, ideal motion. For that motion, in determining its direction and in designating its ideal, the legal enactment provides the driving force. That driving force, however, cannot operate unless in a procedural medium, within formal-procedural frameworks, and the degree

65 VARGA, Cs. and SZÁJER, J. "Presumption and Fiction: Means of Legal Technique" *Archiv für Rechts- und Sozialphilosophie* LXXIV (1988) 2.

of formalization is such that this procedural mediation will ultimately become autonomous and—on the plane of the final criteria of the system of fulfilment characteristic of the legal order—it will gain an exclusive significance.

Self-transcendence of the Pure Theory?

Kelsen makes us see that in the legal processes there are no guarantees either in respect of their correspondence with the legal norms, or to their consistency. The legal process merely ensures the sealing and termination of the procedure, where the last possible and/or applied normative qualification is being finalized. That which qualifies as "correspondence", "consequence", or "consistency" according to the estimation relevant in law, need not necessarily receive the same qualification outside the legal order, i.e. either according to a professional (legal-doctrinal, legal-political), or according to a social, lay estimation. Does all this point to the possible arbitrariness or anarchy in the law? Theoretically, it does. Yes, at least until the destruction of the order, when, upon the fading away of its effectiveness, its validity will also become pointless.[66] At the same time, we have pointed out that this was not a doctrine elaborated by Kelsen; it was merely a single sentence from the enlarged second edition of the *Reine Rechtslehre* (1960) and its only precedent could be found in a short excursion from the line of thought of the *General Theory of Law and State* (1960), for the sake of criticizing the Common Law tenet on the exclusivity of judge-made law. This seems to be confirmed by the fact that his thinking, up to the end of the Second World War, had been captured by an implicit trust in the natural meaning of words; so much so that he could not even imagine doubting the lawfulness of legal acts; his sematic premises always show a static standpoint.[67] While he accepts that the choice among the various meanings should be subject to the context, yet he rejects the possibility of the dynamic aspect of the meaning.[68] At the same time it must be pointed out that Kelsen apparently had to reckon consciously with the chances of a theoretical opening, issuing from this productive ambiguity. If no sooner, then by the time he last revised his *Pure Theory of Law*. As it is, when that happened (in

66 "A legal order is regarded as valid, if its norms are by and large effective (that is, actually applied and obeyed)... Effectiveness is a condition for validity..." *PTL*, pp. 212 and 213.

67 Cf. KELSEN, H. 'Value Judgments in the Science of Law' *Journal of Social Philosophy and Jurisprudence* VII (1942), particularly para. VIII, in which the assessment of lawfulness of a court decision was simply regarded as a consequence of the applied norm.

68 In his posthumous effort of resumption-summarization, Kelsen writes: "It stands undisputed that the wording of a norm can be interpreted in several ways. However, it is not opportune to interpret this fact in a way like WRÓBLEWSKI, J. ['The Problem of the Meaning of the Legal Norm' *Österreichische Zeitschrift für öffentliches Recht* XIV (1964) 3–4, p. 265: 'since the contex of the understanding and applying of the legal norm is changing, the norm in question changes its meaning'.] does. The norm does not 'change' its meaning, it merely has several different meanings (or senses)." *ATN*, p. 221, note 1. For a dynamic theory of interpretation, cf. WRÓBLEWSKI, J. *Zagadnienia teorii wykladnii prawa ludowego* [Outlines for a theory of the interpretation fo people's law] (Warszawa: Wydawnictwo Prawnicze 1959), pp. 151 et seq.

1965–66), he did not touch upon the part in question.[69] Yet, if there is a theoretical possibility for arbitrariness, for anarchy, one might justly ask: What prevents the law from a final decadence or, simply, from falling apart? What holds it together at all? Kelsen did not even arrive at putting this question. Accordingly, it cannot be our task, here, to provide a theoretically developed answer. Rather a kind of indication in which by determining the global effectiveness as a condition of the validity of the legal order, Kelsen had already staked out the direction.

So what is the essence of such a theoretical opening? The legislator legislates, the law-maker makes law. The state administration administers on behalf of the state and the judiciary administers justice. How this peculiar world comes about, how it operates—that is, what qualifies as a legal organ, what is the jurisdiction of such an organ, and what procedure it will follow—, all this is determined by positive law, at least in our legal and institutional culture. In a like way, the positive law will determine the frames serving as a model of the decision to be taken in the course of the said organ's proceedings. Whether the act of an organ qualifies as that of a "legal organ's legal act" is identical to the question, whether such an act's formal-procedural features—and also its merits—correspond to the definition of the positive law. That question can be decided—with a legal relevancy—only in the course of the legal operation of a legal organ. This establishment is primarily and directly entrusted to the organ about to proceed. In order to enable the repeated weighing of the decision of the first organ having proceeded in the case—i.e. the repeated weighing whether the first organ's autonomous qualification about its own decision (viz. that the latter did correspond, both formally and in substance, to the provisions of the positive law), the law may create institutional possibilities of appeal, recourse or revision. In the course of this second procedure another legal organ will, through its own legal act, either confirm or reject the correspondence. Meanwhile this second organ will also declare of its own decision that it corresponds to the provisions of the positive law, both formally and in substance.

The legal order may allow the repetition of such a revision and the subsequent confirming (or rejecting) justification through several instances. All this, however, will not change the finality, the closure of the legal process. It will not change the fact that a body, by declaring its own proceeding as lawful, will at the same time declare its decision as being in accordance with the law also on its merits. In the case when the said decision is (*1*) either undebatable (because there is no legal possibility to contest it), or (*2*) undebated (where there is a possibility but those legally empowered to do it failed to avail themselves of this possibility in due time, manner and form)—then the said decision, being a legal decision, will be unassailably embodied in the normative order of the law, with all the consequences thereof, viz. its intrinsic qualifications, and

69 ERNE, R. 'Eine letzte authentische Revision der *Reinen Rechtslehre*' in *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen*, ed. Werner Krawietz and Helmut Schlesky (Berlin: Duncker und Humblot 1984) [Rechtstheorie, Beiheft 5].

the normativity resulting from the latter. Its legal validity will thus become undebatable. The normative enactment will maintain this quality as long as it is not replaced by another normative enactment released by the correct level organ empowered to do it; while the normative qualification will be safeguarded as long as the legal order prevails (that is the case of legal force).

As we have seen, the facts and their interrelations, by themselves, are not components of the law's normative framework. They will become legally relevant and referable (i.e. fit for serving as a basis of normative conclusions) only when a legal organ, in the course of its procedure ending in a legal act, i.e. officially and formally, states their existence. And that applies both to those natural facts, to the judicial establishment of which the positive law attaches a legal sanction, and in the context of correspondence between the applied normative enactment and the normative rule born through the application. It is independent and irrelevant what those extraneous to the legal procedure think of it (independent of the fact whether these persons and bodies, not privy to the procedure, are political or social movements, journalistic media, scholars—including jurisprudents—or even a lawyer acting as a private individual, citizen, or moralist). It is immaterial whether, in connection with the law's self-qualification, there is a consensus, or whether an outcry is raised against it, unmasking it as an abuse.

Who watches the watchmen?

To the classic question of "Quis custodiet ipsos custodes?"[70] the law did not—because it could not—provide an answer. The only possibility available to law is to outline patterns of behaviour, procedure and decision-making, with the help of language. When treated as components of a uniform order, these will enable the creation of the institutional, ideological and doctrinal set-up of the legal order. Linguistic mediation is a mediation with the help of signs, while their meaning is governed by metalinguistic media. As it is a meta-juristic question whether the law is availed of, and complied with, similarly the law has no direct responsibility in how it is being interpreted. The interpretation of the law is the product of the social environment adopting and applying it (measurably by sociological means) just like the pure fact of implementation or non-implementation. The said medium is the "audience" to which reference is made by the modern theories of argumentation, by the logical, semantic and praxeological reconstructions—as a presumed postulate, point of reference, and sociological reality determining the entire process. The life of everyday language—as is well known—is a complex, based on the social practice of communication which reproduces itself through continuous feedback. Well, as far as its normative interrelationships go, we have to conceive law as an autonomous product, yet in actual life it is embedded in general

70 JUVENALIS *Satura*, VI, 347. Cf. RHEINSTEIN, M. 'Who watches the watchmen?' in *Interpretations of Modern Legal Philosophies* Essays in Honor of Roscoe Pound, ed. Paul Sayre (New York: Oxford University Press 1947), pp. 589 et seq.

social practice. Since the linguistic objectivization consists of a mass of signs (which gains its social reality for us thanks to their meaning), so also the law's system of signs will become a social factor owing to its meaning. The meaning, however, is not a self-identical definition, or an encoded phenomenon, but a living and uninterrupted continuity. It is generated through the practice of the society which accepts it as such and by accepting also renders it conventional.

However autonomous the legal meaning has become, its autonomy must be fed from the standard, colloquial everyday language, and can only continually reproduce itself in a constant relation with the latter. Thus, its autonomy, or self-sufficiency, is a relative, even secondary one. Accordingly, the normative components of the legal action stand under the constant control of Mr. "Everyman". By the said components we refer to the self-qualification made by the organ qualifying the facts and the underlying normative enactments, whereby qualification itself is said to follow from the norms and thereby to base a normative appreciation. This is what the everyday man will check on the basis of the cognizance of the norms and interpreting them according to everyday language conventions. Nevertheless, the law's language is not merely a self-sufficient entity, not one simply related and attached to common language. There is a certain logic in its self-sufficiency, where a certain continuity and consistency manifests itself. And what is more important, this logic, its distortions and flaws, will not remain within the closed circle of the law and the legal profession. All these may be observed, controlled from the basis of common language. At least in their major lines or trends, since—in the long run—the political intentions of the state behind the continuity or breach of the law will become manifest. Politics, to which we are referring, may drive the law into inconsistencies, it may force it into artificial deductions and justifications; nevertheless, whether it be guided by any kind of intention or by the inevitable bankruptcy, it cannot wantonly waste away the minimum of social support. It cannot squander the minimum of conventional common language, or the mere possibility of communication. As soon as these minimal thresholds are overstepped, the ruling position expressed in and carried by the law will necessarily fall apart. In the latter case what remains is a chaotic confusion of compulsive actions showing the features of a gradually isolated and reckless anarchy. At this point the legal order will have lost its organizing power (whether this power has been inhuman, even genocidal, so at times in our century), without even showing a certain degree of organization providing the necessary points of attachment.

The procedural character of the legal event means that nothing can become an inherent component of the legal order unless a legally-recognized authority has lifted it, in a determined manner, into the law. From that there follows the admission that the normative breakdown, the concrete shaping of the conclusion and coherence (i.e. the actual formation of the normative interrelations) will be dependent upon the organs acting in the name of law. Of course, only theoretically and within certain boundaries; these boundaries are, however, defined by the social implementation practice of the law and its event—i.e. by the social practice having indirectly accepted them. That is, it is not the law that designates them. Arbitrariness is thus not excluded. However, even if

we have positivated a fixed system of rules, it is up to the conventionalizing practice of society to decide what qualifies as arbitrary in the law's application. The society must decide on how far this remains within the boundaries of law, i.e. within the frames of the "realization" of the law. These questions touch upon normative relationships. Thus their social cognition and valuation may not turn into criteria; at the same time, they provide the general (one might say: the ontological) basis of the entire process.

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An Attempt at Land Value Taxation in Hungary*

I. The Plight of the Hungarian Landless

At the end of the 19th century, Hungary (then a Kingdom united with Austria within the Habsburg Empire) was burdened with an unsolved land problem.[1] The situation was similar to that of Ireland, although stemming from entirely different historical antecedents. In Hungary, serfdom had not been abolished until 1848, and even after that, archaic conditions of land tenure persisted in the country's agricultural sector. More than half of the arable land belonged (incidentally until after World War II, 1945) to huge estates, so-called latifundia.[2] The management of these estates was, in most instances, outdated; technology and administrative procedure were backward; mismanagement often reigned.

1848 was a year of revolution in Europe. In Hungary, the turmoil lasted until 1849. The Magyars rebelled against the Habsburgs but were defeated. The next 18 years were

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* *Translated from the German by Susan N. Faulkner, Ph. D.*

1 On the general situation and on the land question in the Kingdom of Hungary see Gyula SZEKFÜ, HÓMAN-SZEKFÜ, *Magyar történet* ['Hungarian History'], Vol. V. 2nd ed. Budapest, 1936, pp. 537 ff.; Erik MOLNÁR et al., *Magyarország története* ['History of Hungary'], Vol. II. 2nd ed. (Budapest, 1967), pp. 188 ff. Magda M. SOMLYAI (publ.), Földreform 1945 ['Land Reform, 1945'] Budapest, 1965, pp. 7 ff.

2 According to Aladár MÓD, 400 év küzdelem az önálló Magyarországért. [The 400-year battle for an independent Hungary], 7th ed., Budapest, 1954, p. 357. In 1895, 1,945 large estate owners shared 13.7 million "hold" (about one-third of the agricultural land of Hungary), while 1 358 875 smallholders had to be content with 2.5 million (about 6 per cent of the agricultural land).

marked by oppression and hostility. But in 1867, an inter-state agreement, called Compromise, brought about reconciliation between Austria and Hungary. This was followed by a decade of economic prosperity, and the condition of the poor smallholders and of the landless agricultural laborers also became more bearable. Moreover, growing industrialization created new urban jobs and many farm laborers migrated to the cities to escape from rural penury.

Yet soon, during the great European agricultural crisis of the 1880s, want and misery again engulfed the small farmers and the landless agrarian proletariat, and an enormous wave of overseas migration from Hungary developed.[3] But not only the very poor—many owners of medium sized and even of larger farms got into trouble.

The landless poor, including dependents, were estimated to number 6 million, that is, about one third of the total population of the country.[4] As the crisis worsened, there was widespread unrest among these masses.[5] In the 1890s, disquiet often erupted into open uproar. It was in these days that for the first time embryonic land reform aspirations surfaced in the Kingdom: a politically articulate tiny minority among Hungary's poor peasant millions was desparately looking for a way out, for some goal that could be communicated to the untutored masses. The first pioneers found what they needed in the program of the Hungarian Social-Democratic Party.[6]

In actual fact, the Hungarian Social-Democrats did not have an elaborate plan for a land reform; but in firm adherence to Marx's teachings and unlike the 1875 Gotha program of the German Social-Democracy,[7] their program included the thesis that "landed property and all means of production should be placed under public ownership".[8] The first known spokesman for the aroused propertyless rural population, the agricultural laborer János Szántó-Kovács, adopted this item on the program as his slogan. He was arrested in 1895 and sentenced to 5 years in jail for incitement.[9] He declared himself to be a Social-Democrat and to be striving for the nationalization of the large estates. But he emphatically (and truthfully) denied having agitated for the carving up to the latifundia among those without land.

It might appear incomprehensible, if only at first glance, that the rural proletariat in contrast, for instance, to the majority of dissatisfied tenant farmers in Ireland[10] did not seek farm ownership, but instead wanted to be employed at government-owned estates.

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3 Between 1899 and 1911, more than one million Hungarian residents emigrated overseas A. MÓD: op. cit., p. 369: cf. also HORVÁTH, Z.: *Die Jahrhundertwende in Ungarn*, Neuwied. Budapest, 1966, p. 345.

4 MOLNÁR: op. cit., p. 189.

5 MOLNÁR: op. cit., pp. 130 ff.

6 Op. cit., p. 136 fn.

7 MÓD: op. cit., p. 376 fn.

8 Op. cit.; also see MOLNÁR, op. cit., p. 124.

9 On Szántó–Kovács cf. Ágnes KENYERES (ed.), *Magyar Életrajzi Lexikon* ['Hungarian biographical lexicon'], Vol. II. Budapest, 1969, p. 705 fn.; SZEKFŰ: op. cit., p. 542; MOLNÁR: op. cit., p. 141; SOMLYAI: op. cit., p. 13, and SÜLE: *Sozialdemokratie in Ungarn*, Cologne, 1967, p. 33.

10 Cf. PALMER, N. D.: *The First Land League Crisis*, New Haven, 1940, passim.

But these people, like their fathers before them, had never had land of their own. They had rather always sought to find work at large estates. Moreover, the situation of the small landowners did not arouse their envy, for these small farmers did not have it much easier. They carried the additional burden of worries about over-mortgaging their property, and with it the terrible fear (one shown by statistics, not to be unjustified[11]) of losing it. The unpropertied farmhands of Szántó-Kovács' kind had to perform their labors for starvation wages, but were glad even to find a job. Thus it is understandable that when they dreamed, it was not of owning their "own soil", but of getting fair wages and secure employment, a dream which the program of nationalization of the large estates promised to fulfil.[12]

At first, when the dissatisfaction of the small and medium-sized farmers began to take concrete form, the desire for breaking up large estates into small parcels became a political demand—as in the program written by the farmer András Áchim,[13] who founded the first substantial Hungarian farmers'party.[14] According to Áchim's program the tremendous estate entails, the vast church lands, and all other estates above 10,000 "hold" [1 "hold" = 0.57 hectares = 1.4 acres] were to be nationalized and then parcelled out into small rentable plots; later on, Áchim reduced the upper limit of the properties to be left untouched to 1,000 "hold".[15]

Actually, since the end of the eighties, some owners of latifundia and medium sized estates had been giving consideration to the elimination of the manifold social ills. Yet even while their proposals were later to be represented as, *inter alia*, a first step toward a land reform movement,[16] more likely these were proposals which, with few exceptions, could never be realized. They were proposals which were designed to improve the existing order through a far-reaching lease system[17] or through dividing up state and community property into parcels,[18] and thereby to secure the existing order against crises. Another intention, at times stated explicitly, was to arrest the "racial loss" which Hungary had sustained by the already mentioned emigrations, by establishing Magyar settlements in the territories of the national minorities.[19]

Within the conservative, Hungarian Christian-Socialist movement, the so-called progressive wing might be said to have represented most closely those ideas which could be described as land reform-styled. The most important spokesman of this wing

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11 See MÓD: op. cit., pp. 360 ff.

12 SOMLYAI: op. cit., p. 11.

13 On Achim see REINERT-TÁRNOKY, I.: "Áchim L(iker) András", *Biographisches Lexikon zur Geschichte Südosteuropas*, Munich, 1972, p. 10 f.

14 Op. cit.

15 Loc. cit.

16 Thus IVÁN, J.: *Földbirtokreform és társadalmunk 1890–1914* ['Landownership reform and our society 1890–1914'] Budapest, 1935, pp. 4 ff., 34 ff., 55 ff., 80 ff.

17 Op. cit., p. 67.

18 Op. cit., p. 105.

19 Op. cit., p. 41 fn, 43 fn, 53.

was Ottokár Prohászka,[20] after 1905 the Bishop of Székesfehérvár (Stuhlweissenburg). Prohászka, a celebrated ecclesiastical figure of his time, emphasized that the unpropertied agrarians should be helped to obtain land, but that this goal was opposed, not only by economic liberalism and what he called Jewish plutocracy, but also by the latifundia system.[21] As early as 1898, he declared—a statement revolutionary not only for his time, but for Hungary as a whole until 1945—that sooner or later there would inevitably come a secularization of church lands.[22]

In 1916, the Bishop made the acquaintance of Adolf Damaschke, then visiting Budapest, and as a result became an active follower of the program of the union of German Land Reformers.[23] At that time, he himself publicized a land reform proposal which suggested the creation of war veterans' homesteads.[24] However, his antisemitic and antiliberal position forbade a joining of forces with the Leftist land reformers, of whom we shall speak shortly, and his conservative side rejected land reform ideas, even those of Damaschke's brand.[25] As a result, the Bishop's proposals were not implemented.

Those who espoused land reform in Hungary until 1914, whether in the direction of socialization or of parcelling large estates, were Socialist politicians. Two notable groups among them were members of the Social Science Society and of the club of the reform-happy young students, the Galilei Circle. These two organizations were the spiritual pioneers of the "bourgeois" revolution in Hungary of October 1918.[26] But these efforts did not, prior to World War I, achieve any political significance, much less any movement toward land reform.

It is, therefore, not surprising that, in 1913, the largest Hungarian encyclopedia of the 20th century did not mention, under the heading "Földbirtokreform" (landownership reform), any Hungarian movement, not even any Magyar authors. Rather it cited, first, the earlier English precursors and, second, it spoke of Henry George[27] as "initiator of landownership reform in the narrower sense". It then went on to describe in detail the German land reform movement and the relevant socialist, especially Marxist efforts. Only the last sentence of the encyclopedia article dealt with Hungary. It says: The Hungarian Social-Democratic Party "still could not agree on an appropriate agrarian

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20 *Magyar Életrajzi Lexikon*, II. p. 444; on Prohászka see also HORVÁTH: op. cit., p. 249.

21 IVÁN: op. cit., p. 70.

22 Loc. cit.

23 DAMASCHKE: *Geschichte der Nationalökonomie*, Jena, 1922, II. p. 336; DAMASCHKE: *Zeitenwende*, Leipzig, 1925, p. 294.

24 PROHÁSZKA, O.: "Ein Antrag zur Durchführung der Kriegerheimstätten in Ungarn, *Jahrbuch der Bodenreform* XII. 1912, pp. 129–133.

25 DAMASCHKE: *Geschichte der Nationalökonomie*, II. p. 337.

26 HORVÁTH: op. cit., p. 120 ff., 240 ff.: about the Galilei Circle: op. cit., p. 351 ff. and IGNOTUS, P.: *Hungary*, London, 1972, p. 141.

27 On Henry George and his teachings cf. SILAGI, *American Journal of Economics and Sociology*, 1986, pp. 201–213, 373–384.

program [i.e. one which also took the needs for protection of the small farmers into consideration]".[28] To be sure, behind this sentence is hidden the fact that the agrarian problem was the subject of controversial discussions within the party, notwithstanding the lack of definitive conclusions.[29]

The land reform scene came to life at last in June of 1914, when the avantgarde of the Leftist intelligentsia, active partly in the Masonic lodges, and partly in the Sociological Society, founded a radical agrarian party which was to become the spearhead of the republican October revolution in 1918.[30] In its platform, radical land reform stood in foremost place.[31] Among its principles (as well of the Independence Party, founded in 1916 by the "Hungarian Kerensky", Count Michael Károlyi,[32] head of the short-lived bourgeois revolution of 1918/19) was the demand for "democratic land reform."[33]

Furthermore, the promise of "far-reaching" land reform[34] was in the foreground of the republican government's program, but now enhanced by a significant fiscal-political element. In a History of Hungary, published in 1967 under the aegis of the Hungarian Academy of Sciences in a second, revised edition, we read the following in connection with the land reform endeavours of the revolutionary government of 1918: "The majority of the bourgeois radicals sought to introduce, consistent with the teachings of an American economist, Henry George, a land value tax in order to solve the land problems, and wanted to use the revenues of this tax (this land value tax would have been equal to the annual land rent) for social purposes. Their ideas included the confiscation of part of the large landed estates... Some of the Socialists leaned toward this conception, while other [Socialists] championed the cause of private property based on small farm holdings."[35]

II. Julius J. Pikler, Effective Publicist of Georgism

How did it happen that Georgism, which had played no role whatsoever in Hungary until 1914, moved so strongly into the foreground in 1918, if only—as we shall see—for a short time and without lasting effects? This was due to appearance of a single individual, a physician and statistician, Julius J. Pikler[36] (1864–1952).[37]

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28 *Révai Nagy Lexikona* [Révai's Great Encyclopedia]. Vol. VII. Budapest, 1913, p. 757 fn.

29 SÜLE, op. cit., p. 140 ff.

30 Op. cit., p. 166.

31 MOLNÁR: op. cit., p. 255.

32 On Count Károlyi, cf., *Magyar Életrajzi Lexikon*, I. Budapest, 1967. p. 870.

33 DAMASCHKE: *Geschichte der Nationalökonomie*, II. p. 336.

34 Op. cit., 337.

35 MOLNÁR: op. cit., p. 297.

36 The Hungarian form of his first name is Gyula. In his German and English publications he himself used the international form "Julius". (The translation of Hungarian first names was customary in Hungary before 1945 in interchange with foreign countries.)

No writings exist about Pikler except for short articles in encyclopedias and a footnote in a work about the intellectual history of Hungary.[38] One of his surviving students,[39] however, portrays him rather effusively as "a personality of manifold knowledge, of superior intellectual force, and of utterly irresistible powers of persuasion."[40]

The Georgist doctrine had actually reached Hungary earlier: the Pester Lloyd, the German-language daily of the Hungarian intelligentsia, reported in 1886—the only significant periodical to do so—in two lead articles the efforts of the Land League just founded in Berlin.[41] But Pikler did not learn about the doctrine until shortly before the first World War. The intermediary was the sociologist Robert Braun (1879–1937),[42] who maintained a close relationship with the American world of learning. Braun, prior to World War I, had met with the American adherents of the Single Tax theory.[43] Braun started the publication of George's work in Hungarian translation. In 1909, he began by issuing a Magyar version of *Protection or Free Trade (Vámvédelem vagy szabadkeresedelem),* followed in 1912 by the rendering of a Georgist novel written in English in 1894,[44] and in 1914 he brought out *Progress and Poverty,* for the first time in Hungarian (*Haladás és szegénység).*[45] A review of this work may be counted as Pikler's own first Georgist publication.

Pikler had studied medicine in Vienna and, after receiving his accreditation, settled in Kőröshegy as circuit doctor. Then he worked for some time in Budapest as a panel doctor. After having made a name for himself with publications in the areas of medicine and statistics, particularly mortality statistics, he entered, in 1897, the service of the

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37 *Magyar Életrajzi Lexikon,* II. p. 416; Julius J. Pikler should not be confused with his cousin, legal scholar and psychologist Julius Pikler 1864–1937 (ibid.).

38 IGNOTUS, P.: "Die intellektuelle Linke im Ungarn der 'Horthy-Zeit'", *Südost-Forschungen* XXVII. Munich, 1968, pp. 148–241 (239). In the footnote, Pikler's place of work of many years is given as the National Statistics Bureau instead of, correctly, the Budapest Public Statistics Office.

39 Insofar as in the following comments no other sources are indicated, the portrayal of the person and of the influence of Pikler's is based on data supplied by his closest collaborator in the area of Georgism, the architect and urban planner, Aladár Sós as well as oral information of a student of Pikler, economist and historian Robert Major. On Sós, cf. Révai XXI, 1935, p. 752. See also SILAGI, "Aladár Sós", Land & Liberty, London, LXXXII. 1975. p. 73.

40 Ignotus speaks of Pikler's "numerous enthusiastic students, who were fascinated by his incorruptible, razor-sharp logic" ("Die intellektuelle Linke...", p. 239).

41 WEHBERG, H.: *A. Theodor Stamm und die Anfänge der deutschen Bodenreformbewegung*, Bonn, 1911, p. 25.

42 *Magyar Életrajzi Lexikon*, I. p. 263.

43 The editor of the Single Tax Year Book, Joseph Dana MILLER, wrote in 1917 in his contribution "Historical Addenda", p. 194: "his visit to America a few years ago is pleasantly remembered by many Single Taxers in New York and other cities".

44 *Kormányzóságom története.* The English original was entitled *The Story of my Dictatorship* and appeared initially anonymously in 1894 in England. It describes how a politician, called to be dictator of England, translates George's program into action for the welfare of all.

45 In 1921, Braun published a translation of Henry George's *Social Problems* ('Társadalmi problémák').

Statistics Office in the capital, where, in 1906, he was named Deputy Director. Both as country doctor in the backward province and as panel doctor in Budapest—then synonymous with doctor for the poor—he obtained an insight into the misery of the masses, an insight to which he gave expression as an author.

Pikler's interests were multi-faceted; whenever he encountered problems, he tried to solve them by strictly logical and rational means. In the realm of the rational he was at one with George, but the emotional warmth of the American was alien to him. (By the way, the same reproach often leveled at George, that he operated with eternally valid natural laws and lacked a historical sense, was also directed at Pikler.)

There is no complete bibliography of Pikler's publications, but even the extant data about his works demonstrate a decided versatility. He published not only medical and statistical works;[46] in 1910, he subjected the ballyhoo about the "calculating horses of Elberfeld"[47] to a devastating critique. In 1927, he offered in *Schmoller's Year Book* (a German economic journal), a proposal for solving the problems of monetary stability.[48] Finally, in 1940, he began writing a study in which he as a Jew was also interested existentially. It was initially meant to concern itself with discovering the sources of the social phenomenon of the hostility toward Jews. But this work eventually expanded to become a far-reaching analysis and inventory not only of antisemitism, but—as Pikler put it—of "antiism" in general.[49]

As Deputy Director of the Public Statistics Office in Budapest, Pikler attended, together with Robert Braun, the International Congress of Georgists held in Oxford in 1923.[50] At that time he reported in a speech that, in 1913, he had occupied himself

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46 An incomplete list of Pikler's medical and statistical writings: Magyar Életrajzi Lexikon, II. 416. According to this article, Pikler edited "for some time" the German-language periodical *Pester Medizinisch Chirurgische Presse* and contributed to it "numerous medicial and social-hygiene articles".

47 See KRALL, K.: *Denkende Tiere*, 4th ed. Leipzig, 1912, *passim.*

48 PIKLER, J. J.: "Zur Frage der Dynamik und Systematologie des Geldes", Schmollers Jahrbuch, LI Munich, 1927, pp. 723–760 (reprint of an address given by the author before the Oesterreichische Politische Gesellschaft in Vienna).

49 According to Sós the voluminous manuscript of the unifinished work is lost. Pikler also wrote a whole series of combative and controversial essays, such as for the *Wiener Medizinische Wochenschrift, inter alia* about genetics, on the definition of life, and about the psychology of lying.

50 This and the following paragraph are based on Julius J. Pikler, *A magyar városi telekértékadó elméleti és gyakorlati tanulságai* ['The theoretical and practical lessons from the Hungarian city land value tax'], ms. Budapest, 1924, p. 46. The subtitle of the 65-page brochure reads as follows: "Expansion of the speech given at the International Conference in Oxford, August 13–20, 1923". Meant is the international conference of Georgists, which takes place at several years' intervals in diverse places throughout the world. This brochure was the "Bible" of the Hungarian Georgists between the two world wars, and was labeled the "speech of Oxford" by them. The text appears to be a transcription rich in the rhetorical elements of a speech, but in view of its size only part of it could have been read to the audience. It is impossible to determine at this point what was actually spoken and what was expansion or subsequent addition. An excerpt of the Oxford speech is recorded in the Conference report: "Land Value Policy in Hungary. Theoretical and Practical Lessons", *International Conference on the Taxation of Land Values, Oxford, 1923,* Official report of proceedings London, 1923, pp. 45–50. This excerpt was reprinted in 1960 as "A Land Values Classic" in Land & Liberty, LXVII.

with housing statistics and with the housing shortage.[51] He steeped himself in the problem and, in the process, turned to the literature of the German land reform movement. From it he learned a great deal, but he rejected "its practices which were false and which complicated things (value increase tax, land tax, estate entail—styled restitution of family—owned farms, purchase and sale of land through the community etc.)"

His own thinking and the study of Henry George's works led him to the conviction that the solution of the land question—nay, of the entire social question—could be found in the idea of the "pure, simple, and concession-less land value tax". "Thereupon I determined to institute the urban land value tax in Hungary, in the hopes of expanding it in time into a tax which would embrace all real estate in the whole country", Pikler writes.

He deliberately decided upon doing this by himself, without founding any movement, any organization, any party—for this purpose, or even without tying himself to any particular political group. He believed that he could reach his goal simply through logical argumentation, if he could just get the ear of the men in authority.

His first publication about Henry George's doctrine, as already stated, was devoted to the Hungarian edition of *Progress and Poverty.* The review article appeared in the influential scholarly journal *Huszadik Század* [Twentieth Century],[52] the organ of the Social Science Society. According to its program, this Society had originally been supra-partisan, apolitical, but was now dominated by the pioneers of the bourgeois revolution of 1918.[53]

The Freemason Pikler held his first speech about a land value tax in his lodge "Demokrácia". His remarks evoked a strong echo among the Hungarian Masons, although the group as a whole did not identify itself with Georgist theses.[54]

As the respected Deputy Director of a high city administration office, Pikler found many doors open to him. In addition, with the help of his Masonic brethren, he obtained entrance even there where perhaps as statistician, however much esteemed, he might not have been able to find a hearing.

As lobbyist, then, for the idea of the land value tax, he conducted what might be called a one-man campaign. To gain support, he wrote for the great liberal daily founded by the Masons, *Világ* (the word means "world" as well as "light")[55] and for the official periodical of the capital, *Városi Szemle* [Urban Review]. He also held

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pp. 165–168; 185 fn, and a separate reprint of the article in the journal was distributed as a pamphlet by the British Georgists. (In my text the Hungarian brochure is cited as "Oxford speech".)

51 On the housing scarcity cf. KISS, Gy.: *A budapesti várospolitika* ['The communal policy of Budapest'], 2nd ed. Budapest, 1958, p. 95 ff.

52 On *Huszadik század* see Ignotus, Hungary, p. 112 fn and HORVÁTH: op. cit., p. 121, 129 fn.

53 HORVÁTH: op. cit., p. 121, 240 fn.

54 Information by letter from A. SÓS.

55 SZABÓ, A.: *Az Eötvös-Páholy hetvenéves története* ['The 70-year history of the Lodge Eötvös'], Budapest, 1947, p. 17 ff.

speeches at the Social Science Society, in the Galilei Circle, and before any union or group whose interest he could arouse. In fact, he went so far as to use personal conversations to win over resistant city politicians.[56]

Pikler did not, however, propagandize overtly for Georgism or for the single Tax. He merely pointed out again and again that he was proposing a new kind of taxation. This was the argument which had the strongest effect on the councillors of the City of Budapest, battling a constant deficit[57]—for it promised revenues while increasing production of homes and thus served to ameliorate the shortage housing. Yet it was eminently fair, required little administrative cost, and could not be fraudulently evaded. it was only later that Pikler indicated that, of course, other taxes, those which were anti-social, production-inhibiting, and corruption-inciting, could (and must) be eliminated at the same rate that revenues from the new taxes, land value taxes based on generally accepted valuation, were flowing in.[58]

After the town of Arad (today Romania) had accepted the land value tax in May of 1917,[59] Pikler achieved a breakthrough in Budapest in November. Here, in 1917, he won over the Mayor, István Bárczy,[60] his deputy, Ferenc Harrer, and the head of a large center-party, Vilmos Vázsonyi,[61] who, during the last years of the war, was at times also Minister of Justice.

In November of 1917, the Budapest City Council also adopted, with a large majority, an "Ordinance for the city land value tax in Budapest",[62] which was proclaimed on December 17th of the same year with the approval of the Ministers of Finance and of Interior.

According to this ordinance, a land tax was to be instituted, based on generally accepted valuation and strictly in accord with orthodox Georgist principles.[63] There was no mention—yet—of any taking away by taxation of the whole land rent, and the annual tax rate amounted to only 0.5 percent of the assessed land value (Par. 14 of the Ordinance); at the same time, a special city tax, the so-called "rent-dime", was reduced by 50 percent (Par. 20). The tax basis was the generally accepted land value, defined as follows: "As per the paragraph below, the city land value tax is determined according to the market value of the parcel of land. The value of the improvements existing in and above the land (construction above and below ground, trees, plants, etc.) are not to be taken into consideration in the computation of the tax basis". (Par. 4) The market value

56 Information by letter from A. SÓS.

57 KISS: op. cit., II. p. 977.

58 PIKLER: *Oxford Speech*, p. 46 fn.

59 DAMASCHKE: *Geschichte der Nationalökonomie*, II. p. 337.

60 *Magyar Életrajzi Lexikon*, I. p. 115.

61 Op. cit., II. p. 977.

62 The German translation of the regulation is reprinted in the Jahrbuch der Bodenreform, XVIII. 1918, pp. 174–179; the most important sections, together with a commentary by Pikler, are contained in the excerpt from the Hungarian'speech published by the English Georgists (see Note 48).

63 PIKLER: *Oxford Speech*, p. 43.

was to be determined every three years (Par. 5). A special city office was created for the evaluation of the land value (Par. 6); Julius J. Pikler was appointed Director of the Budapest Land Valuation Office.

Pikler had no doubt that the favourable experiences with the land value tax would inevitably lead to a gradual increase by the city administrations of the 0.5 percent tax rate, along with an equal decrease of other taxes, until the rate corresponded to the entire land rent, in other words, to about 5 percent. The image he had before him as goal was something similar to the tax system of Germany's protectorate in China, Kiautschou (1894–1914), the province he characterized as late as 1948 as the "model state".[64]

After his success in Budapest, Pikler travelled in 1917 and 1918 throughout Hungary and proceeded everywhere in the same way as in Budapest, except that in his attempts to persuade the provinces he could now point to the ordinances passed in the capital. Within twelve months, seven other cities had decided to institute the land value tax: Szeged, Debrecen, Kaposvár, Ujpest (today part of Budapest), Győr, Marosvásárhely (today Tîrgu Mureş, in Romania), and Sopron.[65]

In the cases of Szeged and Debrecen, Pikler's success was especially remarkable, since these towns at that time (1918) could not be called towns in West European terms, but were rather enormous agrarian settlements around an urban core, a tiny one in proportion to the expanse of the total area. So, for example, the entire precinct of Debrecen, the city which in Hungary was called the "Calvinist Rome", had a diameter of 70 kilometers—with around 80,000 inhabitants.[66] Pikler's land value tax, in accord with Georgist doctrine, placed a levy on each site without exception, on each piece of real estate, whether urban or rural, at the same percentage of the generally accepted value. Thus, in Debrecen the Georgist program was accepted (though, it is true, formally through city ordinances) in a large agricultural area; and Pikler reports that he was surprised at having been able to convince the leader of the small farmers in Debrecen more quickly of the justice and usefulness of the new tax than the upper class.[67]

During 1918, an appraisal was made in all applicable cities of the value of all real estate property—without consideration for their use, possible construction, or improvements; the imposition of the tax was to begin in Budapest on January 1, 1919 (Par. 1 of the Ordinance).

Shortly before, however, on October 31, 1918, the revolution broke out in the capital. The comment cited above in the *Hungarian History* of the Budapest Academy illustrates how strongly even the historical writings of Marxists who clearly rejected Henry George's teachings have assessed the Georgist influences at that time. But in

64 PIKLER, J. J.: "Der Weg zum Musterstaat", *Neue Welt und Judenstaat*, II. 14 Vienna, 1949, p. 8. On the tax system of Kiautschou cf. SILAGI, *American Journal of Economics and Sociology*, 1984, pp. 167–177.

65 PIKLER: *Oxford Speech*, p. 48 fn.

66 Op. cit., p. 49.

67 Loc. cit.

actuality this impact was due, in Pikler's own opinion, rather to his personal propagandistic efforts and to the example of the land value tax introduced in nine cities.

These two factors lent the Georgist program a sort of nationalistic flavour, so much so that the republican regime of Count Michael Károlyi, eager to stabilize its popularity, included in its agenda among other items the introduction of a land value tax throughout the country. This was alongside other demands which were deemed to be effective propaganda weapons, but which were incompatible with Georgism.[68] I fact, however, it did not comê to a realization of this statement of intentions.

On March 21, 1919, the regime of Count Károlyi was replaced by the Hungarian Soviet Republic which in turn broke down on August 1. And on August 3, Romanian troops marched into Budapest and occupied the capital until the middle of November. On November 16, 1919, Admiral Miklós Horthy with his national army seized power in Hungary; as a result, groups of conservative right-wingers attained control of the government.[69] The change also meant the end of the relatively liberal self-government bodies in the cities.[70]

The Budapest Ordinance concerning the land value tax was not actually rescinded by any of these changing administrations, but to the political disorders was added the rapid decline in value of the Hungarian currency. An inflation now set in which was similar in magnitude to the Austrian one, so that by 1919 the revenues from the tax, which had been based on the land value assessments of the previous year, were reduced to insignificance.

The rightist parties, which were supported by the tenement house owners' lobby and which ruled in Budapest at the time, now organized a campaign against Pikler.[71] Their principal objection (at the time a very effective one) against the land value tax was simply that this was an invention of the (then banned) Masons and of the Jews. Pikler, though still head of the capital's Land Valuation Office, had no contact with the new city delegates; but he writes that these men still could not bring themselves to abolish without a proper substitute the Ordinance of December 1917. During the decisive City Council debate, the speakers took turns countering each other's arguments directed against this Ordinance.[72] Finally, in 1921, it was decided that, while at that time the law was not to be rescinded, the collection of the tax was to be suspended for the time being. The legal department of the city was instructed to formulate a new, more "Christian" and more truly nationalistic land value tax ordinance.[73]

Things remained at that stage. The city agencies have not returned to the matter since then.

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68 Op. cit., p. 50.

69 IGNOTUS: *Hungary*; p. 141 ff.

70 IGNOTUS: "Die intellektuelle Linke ...", p. 156.

71 PIKLER: *Oxford Speech*, p. 50.

72 Op. cit., p. 51.

73 Op. cit., p. 52.

III. Pikler's Influence Abroad

The news of Julius J. Pikler's initial successes in Hungary reached Vienna during the first World War.[74] The Viennese Socio-Pedagogical Society, founded by the Austrian Freemasons,[75] invited him to give an address in Vienna. Pikler's arguments were persuasive in Vienna as well: the Cristian Socialists mayor, Dr. Richard Weiskirchner, and his deputy, von Goldemund, received Pikler and became converted by him to the idea of the land value tax.[76] Thus, already before the dissolution of the monarchy, the preparations began here too for the passing of appropriate legislation, which were not even undercut, whether by the revolutionary upheaval, by the reform of the franchise, by Weiskirchner's defeat at the polls on May 4, 1919, or by the entry of a two-thirds Socialist majority into the City Council.[77]

The contact with Pikler had been interrupted since the beginning of 1919, but on December 18, 1919, the "law concerning a tax on the current land value (land value tax) in the metropolitan area of the City of Vienna" was passed.[78] It followed in several ways the Budapest model, and the tax rate of 0.5 percent of the market price was taken over as well. But one major difference, a fact which later drove Pikler to bitter protest, lay in the provision that the amount was to be based on the landowners' self-appraisal.[79] Pikler saw in this a direct violation of the spirit of Georgism which required the creation of a tax measure through which no one could gain an advantage by cheating the community; and for the same reason, no one should be exposed to the temptation of making false statements. In a system truly governed by natural law, there would be no tax declarations, and the evaluation of a piece of land should, as had been done in Hungary, be done through an independent assessment office. This office, if required, would have to justify its assessment in writing to the concerned taxpayer, and would have to make all values available for public inspection in order to facilitate comparisons (in Budapest, par. 8 of the City Ordinance provided that the values be issued as a city publication); and its decisions could be appealed in court.[80]

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74 Op. cit., p. 53.

75 As King of Hungary the monarch permitted legal, open activities of the Freemasons; as Emperor of Austria, however, he upheld to the last the ban on the Lodges issued there at the end of the 18th century. This was the case through 1918, the end of the dual monarchy. As a result, when the Austrian Freemasons desired to take part in Lodge activities, they travelled to Hungary; at home they functioned under camouflage, through humanitarian and reform associations such as the "Social-Pedagogical Society". [Gustav] Kuèss, [Bernhard] Scheichelbauer, 200 *Jahre Freimaurerei in Österreich* Vienna, 1959, p. 117 fn. 161 fn.)

76 PIKLER: *Oxford Speech*, p. 53.

77 TILL, R.: *Geschichte von Wien in Daten* Vienna, 1948, p. 151; Karl ZIAK, ed., *Unvergängliches Wien* Vienna, 1964, p. 404.

78 Entwurf für ein "Wirtschaftsbefreiungsgesetz", 6th document of the Bund Österreichischer Bodenreformer, 2nd ed. Vienna, 1933, p. 3.

79 Op. cit., p. 4.

80 PIKLER: *Oxford Speech*, p. 20 ff.

Whether the self-appraisal actually would have had a negative effect of this sort could not be determined empirically in Vienna. The valuations were carried out in 1920, and the tax collections began in 1921; but the revenues which, with a relatively stable currency, would have been quite substantial, appeared in the whirl of the galloping inflation from a fiscal standpoint to be hardly worth the trouble.[81] The Socialist majority in the City Council showed from the outset little enthusiasm for this tax. On one hand, the little man, whose grandparents had built a meagre cottage at the far-away city limits, and who still lived modestly in this tiny home while the city had grown beyond his piece of land, the value of which had grown a thousand-fold—this little man was now to be burdened with a high tax. On the other hand, the wealthy tenement house owner on the parcel next to him would not have to pay more land value tax than the modest neighbour and, as far as his rental edifice was concerned, would be as tax-exempt as the little man's cottage. This did not sit well with a Marxist Socialist.[82] The Georgist thinking was that this wealthy man was useful to the community as a residence provider by using his land for rental apartments, while the poor neighbour was withholding a costly site from the community. Therefore, objectively speaking, the latter was a land speculator, even though the ultimate, unearned super-gain might not fall to him but to his heirs. However, such a viewpoint was incomprehensible to the Viennese Socialists.

In Budapest as in Vienna, it was doubtless the inflation and the thereby diminished revenues from the land value tax which helped its enemies to achieve to witness the wrecking, not only of his project, based on Henry George's teachings, but also of the law of his conception. In Vienna, it was the Socialists whose ideology drove them to tax, not the land but the members of the propertied class, their enemies. They officially abolished the Viennese land value tax at the end of 1923.[83] In contrast, in Budapest it was the real estate owners who, supported by the majority in the City Council, prevented for understandable reasons of self-interest the taxation of their private land monopolies.

The news of Pikler's seemingly thoroughgoing success in Budapest reached, long after the demand for a land value tax had vanished in Hungary, into far-off foreign countries. In consequence of an article in the British Georgist journal, *Land & Liberty*,in which Dr. Pikler reported about his activities,[84] he was invited at the beginning of the 1920s by land reformers in northern Germany and Denmark to make a lecturing tour. Pikler was able, through financial support of the United Committee for the Taxation of

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81 KNAB, P.: *Bodenwertbesteuerung in Österreich*, London, 1959, p. 2.

82 SCHWARZL, J.: *Franz, Camillo und Siegfried Sitte*, Vienna, 1949, p. 4.

83 TILL: op. cit., p. 153. A home building tax was substituted for the previous realty tax to finance the municipal housing projects which later became world famous. But the new tax, however much it may have served a useful purpose, was by Georgist standards inhibiting to production and therefore inimical to the economy.

84 PIKLER, J. J.: "The Valuation and Taxation of Land Value in Budapest", *Land & Liberty*, XXVII. 1920, p. 549 fn, and Pikler, "Hungary", op. cit., XXIX. 1922, p. 276.

Land Values in London to make this trip, which ordinarily would have been impossible for a Hungarian, in straitened circumstances as a result of the war. In addition to Copenhagen, he visited the Hanseatic cities of Lübeck, Hamburg, and Bremen, where he spent, respectively, two, four and eight days.[85]

True, the periodical *Land Reform* of the Union of German Land Reformers, published by Adolf Damaschke, did not take any notice of the Hungarian's trip through northern Germany. But how Pikler was received there is indicated by a letter about the visit of the chairman of Bremen's Land Reformers, Otto Erich Günther, to the editor of *Land & Liberty*. In this letter, characterized by the editor as "enthusiastic", we read:

"Dr. Pikler's presence and activity in Bremen was entirely in keeping with our method of conducting our campaign, which aims at the introduction of as clean a form of Taxation of Land Values as possible. This has been our aim during all the years we have been working for the cause, and we have always put stress on this in our negotiations with friend and foe, in public and privately. It was our former chairman, Mr. Elwert, who, being a subscriber to *Land & Liberty*, had his attention drawn to Dr. Pikler by an article in that journal describing his work in Budapest... . In looking back upon Dr. Pikler's visit I can but say that the high expectations we had placed in it have been far surpassed. Quite apart from his being a charming man to know, he put an enormous amount of energy and self-sacrifice into his work, that we cannot but cherish the memory of his visit and personality among the pleasantest experiences we have had for a long time."[86]

Pikler also left a deep impression with his audience by the lecture, cited previously in this chapter, before the participants at the International Georgist Congress in Oxford in 1923. The correspondent of the British Georgist periodical wrote about this event:

"Dr. Percy McDougall presided, and said he was introducing one of their friends whom they were all waiting to hear because of his eminent services as chief of the Land Valuation Department of Budapest. Dr. Pikler had already taken some part in their deliberations, and in these contributions had given them an insight into the great talents he possessed. Dr. Julius J. Pikler had chosen as the title of his address, 'Theoretical and Tactical Lessons to be learned from the Land-Value Policy in Hungary'... . Dr. Pikler's address, which occupied more than an hour's time, marshalled in masterly fashion a whole dossier of facts and arguments. It made a profound impression on his audience, and speakers in the discussion were glad to express their hearty appreciation of his informing treatment of the subject, especially complimenting on the way in which he had dealt with questions of controversy."[87]

In the years of Admiral Horthy's regency, Pikler's influence was shattered, and his potential for effectiveness was extinguished. He did, it is true, continue to enjoy much respect in the circles of the liberal intelligentsia. But the strict and uncompromising

85 PIKLER: *Oxford Speech*, p. 53; "Notes and News", *Land & Liberty*, XXX. 1923, p. 59.
86 "Notes and News", *Land & Liberty*, XXX. 1923, p. 175.
87 "Land Value Policy in Hungary," *Land & Liberty*, XXX. 1923, p. 175.

logicality of his theories and the extreme sharpness of his polemics had the result that, in Hungary after 1920, he could assemble only a small group of compatriots who, under a conservative regime, had become as ineffective as he. He lectured and took part in panel discussions. On those occasions he was assured, as reports his closest collaborator Aladár Sós, of complete success owing both to his arguments and to his sarcastic comments, but his sarcasm did little to gain friends among the other participants in the debates. From 1934 to 1937 he published (together with Sós) a scholarly journal *Állam és polgár* [State and Citizen], in which he sought to deepen the theoretical basis of Henry George's system and to solve, along his own lines of thinking, some problems not touched upon by George.

Pikler held fast to the Georgist tenets, as well as to the differentiation between two kinds of property, "the land (site) and men (respectively, labour power and its products)."[88] He believed that he could divide every social system according to the ways in which it dealt with these two kinds of property, of which the first (land) belonged by right to the community and the other (labour power and its products) definitely to the individual.[89]

Pikler was asked in 1948, four years before his death, at the end of an interview granted a German-language, Viennese, Jewish periodical, "Do you have hopes for the actualization of your teachings?". He gave an answer which was typical for his thinking, so opposed to any political compromise or compromise of any sort, and so strictly rationalistic, but indicative at the same time of his presentiment that his efforts were going to fail: "We are against collectivism, against a planned economy, in fact against any unnecessary ties or any avoidable coercion. Yet, we are also just as unrelenting in our hostility toward the misusers of monopolies as are the Communists. In other words, we are thoroughly out of step with the times. But I believe I know one thing: Our propositions are equal in rank of logic to the arithmetic equations of the multiplication table. Even if today someone were to forbid, in the name of some ideals, the use of the multiplication table, and were to turn the masses against it through the appropriate educational-propagandistic measures-the equation 2 x 2 = 4 would still win through in the end. That I shall hardly live to see this happen is my private grief and sorrow."[90]

88 SABBATAI, D.: "Ein humanistischer Sozialismus. Gespräch mit dem Sozialphilosophen Dr. Julius J. Pikler," *Neuse Welt und Judenstaat*, I. 2. 1948, p. 8.

89 See also "A helyes társadalmi rendszer problémája" ['The problem of the correct social order'], *Állam és polgár*, 1934, No. 1. pp. 2–12 (10 ff.)

90 SABBATAI: loc. cit.

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Lenke FEHÉR

Alternative Penal Sanctions*

It is a world-wide phenomenon and recognition, that the development of criminal law as a possible answer for the criminality, has became overdimensioned in many respects. The traditional role of the criminal law is more and more enlargened, sometimes loosing its "last resort" character. Some of this enrichment can be regarded, as the natural consequence of the social development, so their rationality are unquestionable. Some are however, only an artificial shifting over the problems to the field of criminal law. This lattest has a lion's shares, that some are speaking about the inflation of the criminal law. In special field of the social life we can speak about over–regulation, while in other respects it is nearly untouched by criminal law. But not only the criminalisation has such dimensions. The criminal justice itself, trying to solve the problem: the courts are facing too much cases, in consequence of it is more and more difficult to keep the balance, to finish the procedure during rational period, to focus to the rights and interests of the victim and reach the goals of the criminal policy.[1]

All of this has concluded, that in the field of criminalisation as well as criminal procedure there is a tendency to decrease the competence of the criminal law.

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* Paper for the XIVth International Congress of Comparative Law (31 July–6 August 1994 Athens).

1 LÉVAI, M.: Társadalmi, politikai változások és a bűnözés. Válogatás a 11. Nemzetközi Kriminológiai Kongresszus előadásaiból (Budapest, 1993. aug. 22–27) MKT. (Social, political changes and criminality. Selected papers of 11th International Congress on Criminology. Budapest, 22–27 of August, Hungarian Association of Criminology.) p. 123.

Minimising the intervention means more responsibility, control and social participation in the criminalisation process.[2]

Concerning the sanction system, there is a tendency of humanisation. This means the humanisation of the content of prison sentence as well as the existence come into the limelight and use of the catalogue of alternative punishments. All of this arise the question of retributive or restorative justice.

In a broader sense—as restitution, restoration of the legal order, which had been violated by the crime—every criminal justice system has restorative purposes, tendencies. Inflicting a punishment, however, means always a malum, a negative experience for the offender, a retribution, for the crime committed.

Restorative efforts from time to time appeared in the history of criminal law. The restoration has sometimes symbolic, sometimes more instrumental character.

The vast majority of crimes are defined, as dangerous to the society, even if the victim is a natural person. The prevailing criminal justice system—in the name of the society—prosecute the criminal offender, bringing accusation and proceeding against him at trial. This method has more garantees and efficiency than the individual victim's action.

In a great number of the crimes of public prosecution, the crime is strictly directed against the citizens personality and/or property. According to this fact, the expectation would be a similar rate of victim's initiation to start a criminal procedure. In reality this occures only in two-third part of the cases. The difference can be explained by the fact, that according to the cost-benefit balancing, sometimes more favourable for the victim to disregard a smaller loss of damage, than a long, time-consuming and unpleasant procedure.

According to our law, the necessary condition to qualify a person as a victim: to be hurted in rights or legal interests. This forms a basis to appear at the authority in the role of the victim, who has to be informed of all the important decisions already in the pre-trial phasis.

As the accused is represented by the prosecutor in the case of public accusation, the victim's procedural role changes radically. The victim, who initiated the procedure, who is the starting point of this process, paradox manner will not arrive to the centre of the procedure, on the opposite: step by step displaced to a marginal position.

The criminal procedure has its strict rules and participants are acting in certain roles. In this way, the will, wishes and claims of the victim have a limited possibility to be fulfiled. *The accusation-monopoly of the state has a special consequence: the response to the crime given by criminal law is more repressive, than reparative or restitutive.* For this very reason we have to pay more attention to secure the rights and legitim interests of the victim. In such manner we can avoid or reduce the risk of the so-called "secondary victimisation".

Whenever a crime is committed against person or property, the citizen suffers physical and/or psychical harms, damages. This is the primarily, actual process of

2 KIRÁLY, T.: A büntetőeljárás reformja elé. (Towards the Reform of Criminal Procedure.) In: Magyar Jog. (Hungarian Law Review.) 1993/5. pp. 257–261.

victimisation. If the criminal proceeding is directed only for the official, organisational interests, the victim still remain in a handicapped situation and the result is the "secondary victimisation", for which no more the offender is to be blamed, but the organs and persons, participating in the criminal procedure. In this case however, the criminal procedure is serving the *system*, but not the *justice*.

The criminal procedure, which is neglecting the interests of the victim, compounds a future risk of the victim's reluctancy to initiate and help the criminal procedure, proving the evidence. In further consequence this will increase the hidden criminality; this could positively effect the bravery to commit new crimes, etc. If the criminal procedure neglects the victim's interests in such degree, that the organisational interests of proving evidence are considerably dominant, the victim can be violated in his human rights.

In the case of crimes against person, the victims is primarily motivated by claim of moral compensation. Therefore the process can cause a new trauma, a similar harm, as itself the crime. We cannot avoid this unpleasant consequence by overruled procedure, but such a practice, which takes into consideration not only the official, organisational, but the individual interests, too. When people are selected—who should act in criminal justice—we have to pay attention not only to their professional knowledge, but also to their human qualities and suitabilities.

It is said, that the criminal law has developed a phase of so-called *autonomous* and *repressive* character, while the post-modern law needs a *responsive* direction.[3] I am convinced, that in the present criminal law all the three features have to be represented in a harmony. The criminal law always has been more or less *repressive*, because it has punitive sanctions. This character cannot be denied even by the most treatment-oriented criminal law. But to a certain degree, extent, the criminal law has to be *autonomous*, to avoid to serve only the dominant political streams and interests. It is also an acceptable wish to strenghten the *responsive* character of the criminal law in the special meaning, to be able to follow the social interests. It cannot be so much autonomous, as for instance to sanctionalise a great number of acts which are not against public moral, because this would be a dictatorical overemphasising of the autonomy. At the same time it will be unreasonable also, because the massive law-breaking—which would arise among such circumstances—would reduce and not increase the respect of law. However, I have to remark, that the massive rule—breaking not necessarily represents the innaccuracy of norms, but by this way the problems of other fields of social life also can be demonstrated. In this case the correction is not the task of criminal law alone.

Returning again to our original subject, all of this (namely my remarks on the repressive, autonomous and responsive character of criminal law) means, that *in strengthening of the victim's position, the responsive character can be a basis.* This is emphasised at the institution of mediation, which helps to reach an agreement between the offender and victim. Of course, this way is effective only in milder cases.

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3 HALLIDAY, T. C.: Civic Professionalism: Melding the Sociology of Law and Lawyers in Historical and Comparative Research Onati Proceedings 1. Legal Culture and Everyday Life, 1989. p. 104.

I should like to emphasize: the transformation of individual harm to social one, cannot neglect the victims' interests, neither in a general not in a concrete level. The criminal punishment is a special kind of social reaction to the crime, that is anyway *responsive*. The *repressive* character, the inclination of stabilisation of law and social order also cannot be denied. From the victims' view, to punish the offender, serves also a moral judgement. Most of the cases however, the victims' aim is connected with material compensation.

It is not accidental, that at the end of our decade the victimology reached its high time, after the failure of the expectations, concerning the offender-oriented treatment ideology. Instead of the "offender and his crime" has been emphasized for now the relationship of the "crime and the victim". In such manner, the system which has been enclosed to itself, starts opening to the direction of the society. The former types of sanctions, emphasizing the retribution, the punitive need of the society, were replaced by the new variations, directed to the victims' demand of compensation and conciliation. This can be regarded as the crisis of the former criminal policy, as well as the revolutionaly change to a new one. The extremes dominantly outline again: it is possible to look for solutions outside, or inside the criminal law. To convert the criminal law however, into civil law or social conflict-management, is not a real alternative. The appearence of the former mentioned idea—in the abolitionist or moderate abolitionist tendencies—is almost necessary, but any way natural fact. A model, a piece of life is picked out and applied as a schema in the criminal procedure or instead of. It is only one step further, to neglect and replace the criminal law itself. This attempt however, is obviously overdimensioned. The former and recently emphasized elements of the model, factually arising the question of retributive and/or restorative justice. How far can we go in retribution and restoration? Which are the limits of the restorative efforts? Explanation and discussion of this problem however, would lead too far, for this reason here and now I do not intend more detailed to deal with.

Compensation of the harm, damage suffered by the victim in the consequence of the crime can be reached partly or wholly by the way of

a) restitution, given by the offender
b) state compensation
c) victim-support services (as for instance White Ring)
d) insurance.

The notion on restitution given by the offender (Schadengutmachung) and mediation are in close connection. The former, includes on the one hand the material equilising accomplishment, respectively the restitution of the harm on the legal object, on the other hand, the settlement of the interaction-malfunction, between the offender and victim, as well as the emotional reconciliation.[4]

4 NAGY, F.: Jóvátétel, mint a konfliktusfeloldó büntető igazságszolgáltatás egyik formája. (Restitution as one form of the conglict management in criminal justice.) Separatum, 1993. p. 10.

The mediation means reconciliation between the offender and the victim. It is a form, a possible model of dispute settlement. The reconciliation, as a procedure is taken place out of the criminal procedure, as well as in its initiative, pre-trial phase. The buds of the other compensation models can be found in the substantial criminal law, in the criminal procedure, as well as in the law enforcement. I would refer only to their list. In the substantial criminal law, the restitution can be a) excluding cause of punishability b) sanction-variant, c) sanction-surrogate d) mitigating circumstance of inflicting the punishment e) other. In the criminal procedure, the claim to compensation, results in adhesive procedure, while the fulfilment of restitution can result in stopping the procedure, or putting aside of accusation. At the same time, in the law enforcement, the compensation can be a prerequisite, a prescription of the conditional release, but its other relations can have relevance, too.

The persons, involved in mediation are acting in the next roles: the *offender,* the *victim* and the *mediator.* The lattest is a person with special training and special abilities; he can be psychologist, pedagogue, social worker etc. Extremely important starting point of the mediation is the *voluntariness* of the parties (offender, victim) acting in the procedure, as well as the *confession* of the offender that he is guilty in committing the crime. The advantage of mediation, is recognised in its *informality,* avoidability of the cast of the criminal procedure, as well as the dramatic reproducement of the events and the professional jargon. In such manner, the disadvantages of courtroom communication can be easily eliminated.

The communication in the mediation process is directed by the mediator, concentrating to create such conditions and forms of compensation which are acceptable for both parties. At the same time it includes of course, the detailed discussion of the crime, releasing from the emotional tensions, helping the interpretation of the events and negotiate of the conflict. The correct behaviour of the offender in the process, even if is not guaranteed, but supported by the fact, that unsuccessful mediation is followed by the re-starting criminal procedure, with its morally stigmatising and other disadvantages. State intervention is preconditioned by the deficit of the private conflict resolution, as an author has formulated.[5]

The aim is the reconciliation and to reach an appropriate form of compensation. This means, that the victim, sooner can get the compensation for the material kinds of losses and damages. Beside this, he can put questions, to understand the motivations of the offender. The mediator is responsible for keeping the negotiations to proceed favourably, to help the concentration for the most important questions. This role is *active,* directed to a target-oriented conflict-management and conflict-resolution.

Theoretically, the mediator's role can also be performed by a respectable layman, who acts as a non-payed social-worker. I am still concerned about the activity of a

5 WALTER, M.: Alternativen zum Strafrecht. Separatum, 1989. Cited by: BARABÁS A. T.: Egyezség a büntetőeljárásban? (Reconciliation in the criminal justice?) In: Magyar Jog. (Hungarian Law Review.) 1992/7. p. 467.

professional, who is specially trained for this task. It is more suitable, effective and there is good reason, that both parties are more willing to accept the intervention of such mediator.

The criminal prosecution authority has competence, to initiate mediation procedure, as it declares the circle of the so-called "crimes of less severity". In such cases, there is possibility to avoid the state intervention, to apply diversion from the criminal procedure. In the criminal procedural systems, following the principle of "discretion" the public prosecutor's office is authorized to exercise discretion within the framework of applicable law, in deciding whether or not the interest of criminal justice would be served by pursuing a specific offence through the court. Consequently, in such systems mediation is used on a large-scale. In the countries, where the legality is the guiding principle, this is a more complicated question.[6]

In Hungary the present legal system does not make possible the mediation procedure. Traits of mediation as nearly everywhere, can be found in our *substantial* and *procedural criminal law,* too. According to § 318 of the Criminal Procedure Law, in the cases of private complaint there is a personal hearing, ordered by the court trying to reconcile between the parties. Formally, this constitutes a part of the criminal procedure. Actually, it is different from the mediation in two respects:

1) it is obligatory to attend,

2) it is directed not only to the conflict settlement, but to the exact statement of facts, concerning the crime (consequently, the legal representatives also can attend it).[7]

Other element of mediation can be discovered also in the substantial criminal law. § 332 of the Criminal Code is regulating the *active repentance* as follows:

Punishment may be unrestrictedly mitigated—in a case deserving special consideration, it may even be waived—where the perpetrator of theft, embezzlement, fraud, malversation, wilful damaging, receiving goods unlawfully acquired, unlawful appropriation or arbitrary taking away of a vehicle, reports the act, before it is discovered, to the authority or to the injured person, and compensates for the damage, or does his best that can be expected from him (her) in order to repair the prejudice.

All of these are only the nucleus of the idea of mediation, which can constitute the ideological bases suitable to develop.

In the Hungarian criminal procedure (§ 55 of the Criminal Procedural Law) the victim—his successor, or the prosecutor—can assert civil claim to receive compensation for the losses concerning the crime, committed against him. This is happening among the framework of the so-called adhesive procedure.

The idea of mediation started in the years of 60-s in the USA and developed a great variety of projects, it is equally successful in Great Britain, too.

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6 PUSZTAI, L.: Elterelés a büntető útról. (Diversion in the criminal procedure.) In: Kriminológiai és Kriminalisztikai tanulmányok. (Studies on Criminology and Criminalitics.) BM Kiadó, 1991. p. 35.

7 MORVAI, K.: Meditáció a mediációról. (Meditation in Mediation.) In: Magyar Jog. (Hungarian Law Review) 1989/2. p. 153.

There are different European models on mediation, like the Austrian or the German models. (the Braunschweig project,[8] in Reutlingen the "Handschlag",[9] in Cologne (Köln) the "Waage",[10] or in Mönchengladbach the Stop program). In Austria the conflict settlements has two forms. *On the one hand,* the law, related to the young offenders, provides the possibility of mediation for the initiation of prosecutor and with the help of probation officer as mediator. *On the other hand,* limited to the average criminality, the judge has the competence to decide on the special form of conflict resolution, combined with certain obligations of the offender (community work, attendance at traffic course, etc.). Both forms has very positive results. It is worth mentioning, that the second model does not arise constitutional concerns. The success of mediation, applied in the case of youth criminality, supported the idea of adapting it also for adults, when the crime is punishable max. up to 3 years imprisonment (StGb § 42).

It is necessary to stress, that the mediation in the case of adult offenders is not an equal alternative of the traditional fine or imprisonment. The momentums of personal involvement in the wrongful act and the consideration of prevention, sometimes serves as an obstacle of mediation, as conflict-settlement.

It is unavoidable to emphasize the *formal,* as well as the *substantial* difference of the mediation and other sanctions, which are preconditioning its careful application. Beside this the object of reconciliation is not possible to define (which is unusual in the criminal law) therefore the framework of application is necessary to precise.[11]

"There is a paragraph within the existing Austrian Juvenile Justice Law stating that the prosecutor can renounce or—more figurative—step back from the prosecution (Absehen von der Strafverfolgung), whenever he expects or presumes, that in case of an indictment the defendent would be sentenced to no more than a small fine or a short-term confinement and notwithstanding considerations of special deterrence.

Thus on tiptoes the principle of discretion seems at last to have entered the Austrian Criminal Procedural Law, and most interesting in a way, that is apt to strengthen the authority of the state prosecutor's office. The use of his right to drop an indictment is interpreted as "negative sentencing" or "negative justice": the prosecutor is still the "master of the criminal procedure"! Within the Austrian model of conflict resolution it is the state prosecutor, who exercises discretion as to whether a case that has come to his

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8 HILSE, J.—SCHALK, K.: Hintergrund und Konzeption eines Modellprojekts zur Arbeit der Jugendgerichtshilfe. In: KERNER, H. J.—KURY, H.—SESSAR, K. (Ed.): Deutsche Forschungen zur Kriminalitätsentsehung und Kriminalitätskontrolle II. pp. 896–1022.

9 RÖSSNER, J.: Jugendstrafe als Jugendkonflikthilfe. In: MÜLLER, D.—OTTO, J. (Ed.): Damit Erziehung nicht zur Strafe wird. Bielefeld, 1987. pp. 231–261. KUHN, A. and RÖSSNER, D. (1987): Konstruktive Tatverarbeitung im Jugendstrafrecht: Handschlag statt Urteil. Zeitschrift für Rechtspolitik N. 20. pp. 267–270. et al.

10 SCHROLL, H. V.: Konfliktusrendezés a felnőttkoruakkal kapcsolatban. Juristische Blätter, 1992/2.—translated by György Berkes. Magyar Jog (Hungarian Law Review), 1992/7. pp. 444–448.

11 KERNER, H. J.—MARKS, E.—RÖSSNER, E.—SCHRECKLING, J.: Täter—Opfer Ausgleich im Jugendstrafrecht DVJJ—Rundbrief, 1990/131.

notice is to be handed back to the people, out of whose conflicts it has arisen or whether an indictment is drawn up. It is up to him to renounce further state intervention, according to the penal code, whenever he regards the result of an informal agreement brought about by the intervention and help of the social worker "sufficient". This paradox of enlarging the disretionary powers of the state agency cannot be denied, but it can be explained out of the history and out of the existing structures of this institution. Very shortly the conflict resolution scheme has offered state prosecutors a veritable chance to rebuild or redefine their role, taking a stance toward looking and concentrating on people, instead working on files."[12]

The mediation techniques has several variations, consequently it is situation–adequat and flexible. From the catalogue of the numerous arguments favouring the mediation I should like to bring into the limelight the followings:

– it forms a new, very much humanized kind of sanction (which can be regarded as an alternative of short-time imprisonment);

– in processual meaning it is a form of diversion;

– keeping and solving the conflict, where it was originated;

– maintaining the social peace;

– eliminating the disadvantages of courtroom communication (by an informal atmosphere, actively involving the parties, keeping the flexibility of roles and rules);

– helping the offender to face his crime and to understand the standpoint of the victim;

– meeting the victims' demand for compensation and emotional satisfaction;

– hopefuly developing a higher level of conflict–management in the society.

The mediation can be such station of the procedure, which can solve the problem, but in the case of failure, the machinery of the criminal justice re-starts again. Consequently, it is necessary to form such a structure, which is possible to integrate into the present system, as mediation and reintegrate, as unsuccessful mediation.

At any case, it has primarily importance, to clarify our expectations, concerning this form of diversion, its price and balancing between costs and benefits. The fundamental question still remains open, how to integrate the mediation to our legal system in accordance with the Constitution of Hungary[13] and according to the "legality principle" of the criminal procedure. Acting in this direction, we cannot avoid of thinking and re-thinking the whole criminal policy and the criminal justice system.

12 PELIKAN, Chr.: Conflict Resolution between Victims and Offenders in Austria and in the Federal Republic of Germany (FRG) Separatum, Austria 1991. pp. 16–20.

13 According to the Constitution: In the Republic of Hungary the criminal justice is exercised by the Supreme Court, the City Court, the district courts and the local courts. Consequently, other organs than court cannot practice such activity.

Conclusions

The existence of the catalogue of alternative sanctions means at the same time that the criminal punishment has a new conception. The imprisonment express in a very direct way, that the response given to the crime by the criminal law is more repressive, than reparative or restitutive. This punishment is strengthening the norm, the legal order and isolates the offender from the society. The alternative punishment has not so directly repressive character. It is primarily *responsive, restorative* by the way of payment, compensation, restitution of the harm suffered by the victim. The punishment has more individual character, the offender is called for doing something to eliminate, compensate, restitute the harm, caused by him. The offender is not isolated from the community, the society, his rights are not so drastically limited as in the case of imprisonment. When the offender is not willing to collaborate, the alternative sanction has to be changed into an other form. This flexibility of alternative punishments is very important and modern characteristic of the sanction system.

In the international meetings we are frequently witnessed of arising the discussion concerning the dangers when applying fine as an alternative punishment. Some are emphasizing that—simply speaking—the poor people has the greater risk to get in prison, as they are not able to pay the sum of money imposed on them as a punishment. For this reason there is a great importance of such institutions, like suspended fine, the payment in instalments which is helping to equalize the situation. But the community work is also a possible alternative, instead of imprisonment, in the case, when the financial situation of the offender is unfavourable.

The fine is not an appropriate punishment in the case of "criminality of poor people", when the cause of committing crime is basically to be found in the financially handicapped situation, the missing costs of living. It is an other question, that in this case the crime prevention is primarily does not constitute the task of the criminal law, which has not competence in solving social problems.

The real danger of the alternative punishment is more dominant in that respect, that its content and conditions are not so precisely detailed and regulated, its practice is not quite clear and established. This has to be developed in the future.

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The Rights of Women and International Law in the Muslim World

The religious nature of Islamic Law (Shari'a), makes it difficult for Muslims to appear critical of that law. They tend to regard the specific jurisprudential interpretations and formulations of Shari'a as divine and heavenly as the sources of Islam itself, namely the *Qur'an* and *Sunna*.[1] Whether in relation to the rights of women, or any other aspect of Shari'a, a Muslim cannot be comfortable in his or her criticism of the establishment formulations of Shari'a and, more importantly, expect other Muslims to accept and act upon such criticism, depends on whether, he or she can base the criticism on some provisions of the *Qur'an* and *Sunna*.

For Muslims, the debate and controversy over the interpretation and implications of texts of *Qur'an* and *Sunna* are acceptable, if not expected, although the intolerance of

1 The *Qur'an* is the Arabic text of what Muslims believe to be the literal and final word of God as revealed to the Prophet Muhammad between 610 and 632 A.D.

Sunna are the records of what the prophet is believed to have said and done in the interpretation and application of Islam.

The *Qur'an* was recorded shortly after the Prophet's death and its Arabic text is accepted by all Muslimas authentic and beyond dispute. *Sunna*, however, was not collected and recorded until the second and third centuries of Islam, eight and ninth centuries A.D. Certain records of *Sunna*, such as those of Bukhari (died 869 A.D.) and Muslim (died 874 A.D.) are accepted by Muslims in general as containing authentic *(sahih) Sunna*. Nevertheless, controversy continues among the Muslims as to the authenticity of some *Sunna* reports and the relationship between the *Qur'an* and *Sunna*. It is not settled, for example, to what extent *Sunna* may restrict or otherwise affect the interpretation of some of the verses of the *Qur'an*. These jurisprudential and methodological questions can be relevant to the reform of Shari'a in relation to the rights of women suggested in this article.

some Muslims may cause those holding unorthodox views to suffer for their opinions.[2] Complete secularism, however, is unacceptable to the majority of Muslims. Muslims believe that they have a very clear and definite obligation to conduct every aspect of their public, as well as private, life in accordance with principles of the *Qur'an* and *Sunna.*[3] While subscribing to this sense of religious obligation as a matter of principle, and appreciating the political fact that this sense of obligation is shared by the vast majority of Muslims throughout the world, one may nevertheless question the appropriateness of the modern application of certain historical formulations of Shari'a. The obligation to maintain the religious law, I submit, does not necessarily mean the application of Shari'a in its historical formulations.[4]

This article discusses some aspects of the relationship between Shari'a and current international standards on the rights of women. The article starts with a statement of the main relevant principles of Shari'a on the rights of women not only because of the historical role of Shari'a but also in view of the likely re-establishment of Shari'a in the public domain. This trend, however, is unlikely to have free field because of the impact of secularization in recent Muslim history. Following a brief assessment of the interaction between secularization and re-Islamization in the sense of the application of Shari'a, the article proceeds to consider the role of international law on the rights of women in the Muslim world. In conclusion, the article proposes an approach to the rights of Muslim women, combining traditional and modern forces in order to promote the rights of women in a coherent and realistic fashion.

Although reference will be made to the need for reform of Shari'a on the rights of women, and to a specific proposal to achieve such reform, this subject will not be considered in detail for two reasons. *First,* this is an internal debate for the Muslims to conduct and settle among themselves. *Second,* such reform involves consideration of alternative approaches and technical matters which may not be of interest to the readers of this article. The need for such reform, and the existence of proposals to realize it in practice, must nevertheless be noted here.

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2 Although the Prophet is reported to have said that the differences of opinion among the Muslims is a blessing from God, and despite the existence of a wide range of schools of Islamic jurisprudence, often with differences of the opinion within the same school, proponents of unorthodox interpretations of the sources are sometimes charged with apostasy (heresy) punishable with death. For a discussion of the recent trial and execution of a Muslim scholar because of his unorthodox views, including a call for the reform of Shari'a in relation to the rights of women, *see* AN-NA'IM, A.: *The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan,* 16 *Religion* 197 (1986).

3 The *Qur'an* 5:44–47. 24:51 and many other verses require the Muslims to conduct all their public and private affairs in accordance with what was revealed by God and decreed by the Prophet.

4 The religious obligations is to the sources, the *Qur'an* and *Sunna,* and not to their historical interpretation by Muslim jurists. The technique for reinterpretation of the *Qur'an* and *Sunna* in order reconcile Islamic law with the full range of human rights, including the rights of women.

The Theory of the Rights of Women in Shari'a

The Muslim world is a vast geographical area, extending from west and north Africa, through the Middle East and the southern of the former Soviet Union to Indonesia. According to generally accepted estimates, there are approximately 837 million Muslims in the world today.[5] As can be expected, the vast spread of Muslim lands and the tremendous diversity of their cultural and ethic composition have affected the interpretation and application of Islam.[6]

Since its initial phenomenal expansion within the first few decades of its existence, Islam has tended to incorporate and assimilate the social customs and institutions of the various regions and communities which converted to Islam.[7] As Shari'a was gradually developed as a comprehensive system of law and a way of life over the first three centuries of Islam, around the eighth to the ninth centuries A.D.,[8] it was supposed to be used as the criterion for screening and admitting, or rejecting, local custom and social institutions.[9] Although a purist may conceive of this process in terms of a preexisting and fully integrated body of Shari'a influencing and validating local customs and institutions, I would agree with the more realistic view which perceives the process as a dynamic process of interaction between Islamic principles and endogenous norms and practices. Local customs, attitudes and institutions have naturally influenced the interpretation and application of Shari'a as law in the particular region, as well as being themselves influenced by Islam and its Shari'a law.

Disentangling and distinguishing the "pure" Shari'a from local custom may be a fascinating subject for some, while others may declare this to be an impossible task. Fortunately, we need not undertake this difficult, if not impossible, task for our present

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5 Muslim Peoples, A World Ethnographic Survey, xxi (R. Weeks, Ed. 1984) [hereinafter cited as Weeks, Muslim Peoples]. See also GEERTZ, C.: Islam Observed: Religious Development in Morocco and Indonesia (1968).

6 For current manifestations of the different cultural perspectives on the interpretation and application of Islam, see the articles on various Muslim peoples in Weeks, Muslim Peoples.

7 On the expansion of Islam and assimilation and Islamization of various cultures, see generally BROCKELMAN, C.: History of the Islamic Peoples (J. Carmichael and M. Perlmann trans. 1960) and LEVY, R.: The Social Structure of Islam (1969).

8 COULSON, N. J.: On the history and Development of Shari'a see generally. A History of Islamic Law (1964). The major jurists, and the schools of thought (Madhahb) they established, tended to be concentrated in the main urban centers of Arabia, southern Iraq, Syria and Egypt before spreading throughout the Muslim world in subsequent centuries.

9 Coulson: in A History of Islamic Law, *id.* at 38, describes the process of Islamization as follows:

"The starting point was the review of local practice, legal and popular, in the light of their principles of conduct enshrined in the *Qur'an*. Institutions and activities were individually considered, then approved or rejected according to whether they measured up or fell short of these criteria."

purposes.[10] What needs to be emphasized here is that there is a body of general principles and detailed rules which the Muslims as a whole accept as the authoritative statement of Shari'a.[11] (In particular, the prevailing conceptions of Shari'a are either the law of the land or at least very influential in the formulation and maintenance of certain attitudes and policies with regard to the rights of women.) It is for this reason that we have to take Shari'a into account as a very important consideration in assessing the current position and future prospects of the rights of women in the Muslim world.

Although it is difficult to generalize, in view of the wide cultural diversity of the Muslim peoples and the extensive scope of Shari'a[12] one can confidently assert that Shari'a has had, and for a very long time, a positive impact on the rights of women.[13] From its very beginning in the seventh century, Shari'a guaranteed all Muslim women an independent legal personality, including the capacity to hold and dispose of property in their own right, a specific share in inheritance, access to education (provided it is conducted in facilities separate from men) and some participation in public life.[14] At the family law level, for example, Shari'a restricted polygamy and guaranteed a wife's right to maintenance and decent treatment.[15] It also provides for the right to judicial divorce, on certain specific grounds.[16] This level of achievement may not appear impressive by

10 The difficulty or impossibility of this task is due to two problems. First, there is the problem of the lack of verifiable information on the pre-Islamic customs of the Islamized peoples. Second, since Shari'a took two to three centuries to evolve as a comprehensive system of law, it would be extremely difficult, if not impossible, to determine the precise point in time when Islamization took place. A people and their customs may have been influenced by Islamic norms for generations prior to the formulation of Shari'a as legal rules and principles or prior to its formal application in the particular region.

11 Subject to some differences between the established schools of Islamic jurisprudence adhered to in the various regions of the Muslim world, Shari'a signifies an identifiable and generally agreed upon main principle of law and ethics accepted by all Muslims.

12 Shari'a provides for codes of ethics, social interaction and a positive legal system. It regulates the full range of human activities, from religious rituals, social manners and political institutions and relationships, to positive legal rules in civil, commercial, criminal and family law matters. Generalizations on such a comprehensive scale for the extremely wide diversity of Muslim cultural traditions is obviously difficult. Reference to principles and rules relevant to the rights of women will therefore be confined to the most fundamental principles which are accepted as binding by the vast majority of Muslims.

13 It is not suggested here that the position of women in pre-Islamic Arabia was uniform or necessarily bad in every respect. There is clear evidence of some recognition and relatively good status for some women prior to the coming of Islam. See, generally, SABAGH, L.: Al-Mar'a Fi Al-Tarikh Al-'Arabi (Women in Arab History—in Arabic) (1975). What is suggested, however, is that women in pre-Islamic Arabia generally had a status inferior to that of men. In particular, women suffered from a number of legal and social institutions which Islam sought to redress. See, for example, RAHMAN, F.: "Status of Women in the *Qur'an*" in Women and Revolution in Iran 37 (G. Nashat ed., 1983). The improvements introduced by Shari'a should therefore be seen in relation to the general status of women, and with reference to the specific problems addressed by Shari'a in that context.

14 See generally, ALI, A.: The Spirit of Islam, 222–57 (1922).

15 ESPOSITO, J.: Women in Muslim Family Law, chapter 3 (1982.)

16 EL AROUSI, M. El.: *Judicial Dissolution of Marriage, 7 Journal of Islamic and Comparative Law* 13, (1977).

some modern standards, but it has meant very significant improvements in women's rights when viewed in historical perspective.[17] Shari'a on the rights of women, I would suggest, compares very favourably with any other legal system until the nineteenth century.

A historical perspective, however, is a poor excuse for the current inferior status of women under Shari'a when compared to other contemporary legal systems or when judged by the emerging international standards. Although the Muslim women's legal personality is complete in theory,[18] their access to opportunities for making that personality meaningful are rather restricted. (Gender) segregation and requirements of the veil and confinement to the home, as a general rule, tend to diminish the practical value of Muslim women's theoretical entitlement to certain rights and limit their abilities to realize economic independence and educational and other public achievements.[19] Although women are not prohibited by Shari'a from expressing their opinions in public affairs, and may vote on those competing for public office, the above noted restrictions tended to inhibit their ability to exercise these rights in practice. They are also denied competence to hold general high-ranking public office themselves.[20]

Although Shari'a guarantees members of the family of the deceased specific shares in his or her estate, a woman's guaranteed share in inheritance is generally half the share of a man of the same degree of relationship to the deceased.[21] Restrictions on polygamy generally mean that it is lawful for a man to take up to four wives.[22] In

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17 LEVY, The Social Structure of Islam, *supra* note 7 at 91–96; SMITH, R.: Kinship and Marriage in Early Arabia, 92–94 (1939).

18 While all the major schools os Islamic jurisprudence accept the right of women to hold and dispose of property in their own right, the Maliki school, currently prevailing in West Africa, denies unmarried women capacity to conclude contracts and restricts the right of married women to dispose of their own property. See COULSON, N. J.: Commercial Law in the Gulf States, The Islamic Legal Tradition, 36–37 (1984).

19 The complex and amorphous subject of the veil and gender segregation with clear cultural variations, does not permit a brief summary. See, generally, Separate Worlds: Studies of Purdah in Southeast Asia (H. Papanek and G. Minault Eds., 1982); Women and Revolution in Iran, *supra* note 13, chapter 7; M.U.H. Kah, Purdah and Polygamy (1983); and MERNISSI, F.: Beyond the Veil: Male-Female Dynamics In Modern Muslim Society (rev. ed. 1987). It is important to note, however, that the relevant principles and practices do have the very clear and definite sanction of the *Qur'an* as in 33:33 and 53.

20 The disqualification of women to hold high-ranking public office is partly based on what is believed to be Qur'anic requirements of the veil and gender segregation noted above which restrict women's ability to seek and exercise the responsibilities of public office. The more important soures of disqualification, however, are Qur'anic, as in 2:282 and 4:34 and *Sunna* statements which have been given this interpretation by the agreement of all schools of jurisprudence. Cf. RAHMAN, F. *supra* note 13.

21 *Qur'an* 4:11 and 176.

22 *Qur'an* 4:3 authorizes a man to take up to four wives provided that he maintain justice among them. This requirement, when read with verse 129 of the same chapter which rules that justice among co-wives is impossible to achieve, can be used to restrict polygamy. Although this interpretation has been adopted to justify such restrictions in some Muslim countries, the traditional view, which leaves compliance with the requirement

contrast to a woman's right to seek a judicial divorce (before a male judge and for specific grounds) man can divorce his wife at will by unilateral repudiation without having to explain his reasons to anyone.[23] A woman's right to decent treatment is subject to the guardianship which a father, brother, husband, uncle or even a son may have on his women wards.[24]

It must be emphasized here that this is Shari'a as accepted by the vast majority of Muslims. Space does not permit statement of slight variations among the various schools of Islamic jurisprudence. In any case, none of these established schools challenges the basic principles of these limitations on women. Moreover, the concern here is not with the justifications of these restrictions on the rights of women because such inquiry will not affect the content of the rules. In a religious legal system such as Shari'a, policy arguments are insufficient bases for challenging the rules and replacing them with an alternative set of rules unless one can also rely on scriptural authority. Although a few Muslims are prepared to challenge Shari'a on the rights of women today,[25] they are a tiny minority while the vast majority of Muslims continue to subscribe to the validity of Shari'a restrictions on the rights of women.

It is true, in my view, that the provisions of the *Qur'an* and *Sunna* on women's rights can be interpreted differently. In fact, I am suggesting that we should now rely on this alternative interpretation of the *Qur'an* and *Sunna* in the reformation of Shari'a on the rights of women. The possibility of an alternative interpretation, however, should not be confused with the current authoritative view of Shari'a as accepted by the vast majority of Muslims. We must state Shari'a for what it is, and deal with it in relation to the rights of women, until we are able to replace it with the proposed alternative interpretation.

In general, Shari'a was concerned with guaranteeing certain minimum rights for women and not with achieving complete legal equality between men and women. It is obviously true that complete legal equality was never achieved anywhere in the world until very recently. Some would contend that it is yet to be achieved by even the most advanced and enlightened human societies. I do not believe however, that complete legal equality between men and women is achievable and must be our objective in the Muslim world today. Although much needs to be done under even the most progressive legal and social systems, the ideal of substantive equality between men and women has found sufficient expression and concrete realization elsewhere to have had a profound impact on many Muslim women, and on some Muslim men.

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of justice to the discretion and subjective responsibility of the husband, continues to prevail among the vast majority of Muslims. For an example of progressive reform of Muslim family law see ANDERSON, N.: *The Tunisian Law of Personal Status, 7 International and Comparative Law Quarterly* 262 (1958).

23 See generally TALAK in Shorter Encyclopedia of Islam, 564–7 (H. A. R. Gibb and J. H. Kramers Eds. 1953).

24 *Id.* 633 *et seq.* under *Wilaya*, male guardianship over women. According to *Qur'an* 4:34, the main verse on male guardianship over women, a husband may discipline his wife in a number of ways, to the extent of beating her "lightly" in exercise of his guardianship.

25 Such as *Ustadh* Mahmoud Mohamed Taha. See his book "The second message of Islam" 1987.

Since the nineteenth century, the Muslim peoples have experienced the massive influence of external forces of increasing secularization and westernization.[26] The main centers of Muslim civilization (in Turkey, Egypt, Persia and India) have experienced western cultural influences far greater and more profound than the experiences of military defeat and political subjugation. In due course, especially after the end of the First World War, nationalism and secular constitutions replaced pan-Islamism and the ideal of Shari'a as the sole legitimate system.[27]

During what may be called the liberal age, Muslims borrowed extensively from western ideas of equality and emancipation of women. Even in those Muslim countries which professed an Islamic ideology, many practices and policies incompatible with Shari'a were allowed, or maybe forced themselves into the consciousness and lifestyle of many Muslims. To a varying degree, Muslim women became increasingly successful in claiming equality in education, employment and access to public life.[28] This process, I submit, cannot be expected to completely transform the rights of Muslim women for two reasons.

First, secular movements towards equality and emancipation tend to be largely confined to the urban centers. The rights and actual living conditions of rural and nomadic women, who are the vast majority of Muslim women, are likely to remain substantially unaffected by western ideas and institutions.[29] For the most part, the status and rights of the majority of Muslim women continue to be almost exclusively defined by traditional norms, including Shari'a. Shari'a principles, moreover, are easily used to resist the demands even of urban Muslim women. In particular, the strict application of

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26 LIEBESNY, H. J.: The Law of the Near & Middle East, Readings, Cases & Material, chapter 3 (1975).

27 *Id.* Chapter 4; and LAYISH, A.: *The Contribution of the Modernists to the Secularization of Islamic Law,* 14 *Middle East Studies* 263 (1978).

28 See, for example, N. Al-Razaz, Musharakat Al-Mar'a a Fi Al-Hayah Al-'Ama Fi Suriya (Participation of Women in Public Life in Syria, in Arabic, 1975); INGRAMS, D.: The Awakened: Women in Iraq (1983); Women in Iran: The Conflict With Fundamentalism in Iran, 179 F. Azari, Ed. 1983); and SULLIVAN, E.: Women in Egyptian Public Life (1986).

29 BAUER, J.: "Poor Women and Social Consciousness in Revolutionary Iran", in Women and Revolution in Iran, *supra* note 13; and MAHDI, A.: Women, Religion and the State: Legal Developments in Twentith Century Iran 7 (Michigan State University Working Paper #38, 1983). It is not suggested here that secularization and western cultural influences had no impact whatsoever on rural and nomadic women. Under some trickle-down theory, one can see some benefits reaching rural and nomadic women from the social and legal reforms manifested primarily at the urban centers. What is suggested is that these benefits are so little and are so much successfully resisted and neutralized through traditional adjustment mechanisms in favour of maintaining the *status quo* for these "reforms" that they cannot have a significant and lasting effect on the rights of women in the countryside. This assertion is subject, however, to variations in the degree of penetration of reforms as affected by the clarity and determination of governmental policies targeting rural and nomadic populations and the socio-economic factors facilitating or obstructing such penetration.

For an example of the interplay of reform and tradition in a Muslim context, see HIGGINS, P. J.: *Women in the Islamic Republic of Iran: Legal, Social and Ideological Changes,* 20 *Signs: Journal of Women in Culture and Society* 477 (1985).

Shari'a law of personal status in marriage, divorce, custody and inheritance mean that women's rights in these crucial areas are not affected by thy secularization and westernization of the legal system as a whole.[30] As a result, a fundamental tension exists between women's civil and political rights under the constitution and the general legal system on the one hand, and their private rights as determined by the Shari'a law of personal status on the other hand.

The second related limitation is the resurgence of the so-called Islamic fundamentalism which challenges the basic premise of secularization of public life. The declared aim of these re-Islamization movements, known by various names in the different regions of the Muslim world, is to re-establish Shari'a as the sole source of all aspects of the law, both public and private.[31] To some extent, these movements can be seen as a reaction to western secularization, which is blamed by many Muslims for the political frustration, economic deprivation and social disorganization of Muslim communities.[32] A more fundamental cause of Islamic resurgence, in my view, is the inherent power of Islam as intellectual and spiritual forces. The forces of Islamization were merely suppressed and never neutralized or assimilated in the secularization processes of the liberal age. The forces are now coming to power in Iran, Pakistan and the Sudan, seeking to reverse changes introduced through secularization. In almost all other Muslim countries, the forces of re-Islamization are undermining recent reforms and resisting further changes that may be introduced through the secularization of constitutions and legal systems and progress in the realization of the rights of women, even in terms of civil and political action of the forces of re-Islamization.[33]

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30 MAHDI: *id* at 5. Even in the most secularized Muslim countries, family law and inheritance continue to be governed by Shari'a. SCHACHT, J.: Introduction to Islamic Law 76 (1964).

31 See generally, Voices of Resurgent Islam (J. L. Esposito, Ed. 1983), and Islamic Resurgence in the Arab World (A.E.H. Dessouki, Ed. 1982).

32 For an analysis of the causes underlying re-Islamization, or Islamic resurgence, *see* AHMAD, K.: "The Nature of the Islamic Resurgence" in Voices of Resurgent Islam, *id.* at 218.

33 In relation to Iran, for example, the Khomeini regime has repealed legislation and reversed policies of the previous regime granting women rights in family and public life. See HIGGINS: *Women in the Islamic Republic of Iran: Legal, Social and Ideological Changes, supra* note 29 at 483; *supra* note 29 at 11; Women In Iran, *supra* note 28 at 217–21.

According to sections 5 and 46 of the Retribution Act of 1981, *diyah*, compensation for unlawful homicide, for killing a woman is fixed as half that for killing a man. Section 33A of the same Act provides that the testimony of women in homicide cases is completely unacceptable. See IRFANI, S.: Iran's Islamic Revolution: Popular Liberation or Religious Dictatorship, 211 (1983).

As reported by Omar Asghar Kan, *Political and Economic Aspects of Islamization in* Islam, Politics and State: The Pakistan Experience 147 (M. A. Khan, Ed. 1985), when Pakistani women protested in February 1983 against legislation aimed at making the evidence of two women equal to that of one man, they were brutally beaten. The author also reported that a section of the 'ulama' religious scholars, demanded the death penalty for these women whom they regarded as quilt of apostasy heresy for demonstrating against Qur'anic injunctions.

It should be noted that the *Qur'an* 2:282 specifically requires two male witnesses or one male and two female witnesses for commercial transactions. To apply Shari'a is therefore to disqualify women as witnesses in homicide cases and hold a woman to be half a witness in commercial matters.

Such reversal and regression, however,[34] are unlikely to be complete because the liberal age has already succeeded in changing the awareness of both women and men. Woman's movements, and liberal political forces in general, have taken root and are expected to struggle to maintain their achievements and resist regression under re-Islamization.[35] The best way for doing this, I suggest, is through what may be described as alternative Islamization through the reformation of Shari'a.[36] Islam is too powerful a political and cultural force to abandon to the fundamentalists. As already demonstrated by their challenge to changes achieved through secularization, Islamic movements can easily mobilize mass support for their agenda by appealing to the religious sentiments and allegiance of the vast majority of Muslims. As evidenced by the vocal presence of educated, intelligent and well-organized fundamentalist women, Islam can motivate women themselves to challenge the achievements of the rights of women when conceived as alien western notions.[37] The best way to challenge this, it would seem, is to show that the rights of women are Islamic and not alien western notions, albeit they may find expression in other cultural and religious traditions, both western and non-western.

By alternative Islamization I therefore mean the assumption of an Islamic platform in advocating fundamental reform of Shari'a on the rights of women and the provision of Islamic foundations for these rights. This must be done internally through the adoption of imaginative reform techniques for the evolution and reformulation of Shari'a rules relative to women's rights. The two essential characteristics of an appropriate reform technique are, in my view, the ability to provide Islamic legitimacy and effectiveness in achieving the necessary degree of reform. Without legitimacy, on the one hand, the technique may be defeated as secularist and alien. On the other hand, the rights of women would not be served by an approach which does not change substantially the status and rights of women under Shari'a. The choice of an appropriate reform technique is an internal debate for the Muslim advocates of the rights of women to conduct with other Muslims in the light of the suggested dual criteria of legitimacy and efficacy. It can

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34 A recent good example of organized women's action in support of their rights is the International Conference on the Challenges Facing Arab Women in the Coming Decades—held on September 1–3, 1986 at the Arab League Building, Cairo, Egypt, by the Organization of Arab Women Solidarity. For other evidence of action by women in support of their rights *see* sources cited in *supra* note 28; and In the Shadow of Islam: The Women's Movement in Iran (A. Tabari and N. Yeganeh, Eds. 1982).

35 Added to balance with second 34 in text.

36 The call for reform has so far been confined to efforts to seek favourable formulations of the rules of Shari'a applicable to women from within traditional jurisprudence. This process of selection from the various schools of jurisprudence and the opinions of individual jurists will not, I submit, achieve the necessary degree of reform. Fundamental reform of the basic principles of Shari'a in relation to the rights of women is unavoidable if Muslim women are to achieve complete legal equality with men.

37 "Muslim Feminists in Discord", N. Y. Times, July 25, 1985, 15–16. It should not be assumed, however, that women speaking from an Islamic platform express uniform views or accept all the restrictions imposed by the prevailing interpretation of Shari'a. For samples of differences in opinion among Muslim spokeswomen see In the Shadow of Islam, *supra* note 34 at 171–200.

neither be settled, nor should it be addressed, by the present paper.[38] What is relevant and must be addressed here is the role of international law in the advocacy of women's rights in the Muslim world.

As in the case of other aspects of human rights, customary international law has very little to say on the rights of women. Since individuals were traditionally regarded as objects rather than direct subjects of international law, custom did not address their rights as such.[39] Therefore, the most significant developments in the rights of women have been achieved through treaties and conventions. This was accomplished by both the general human rights instruments and those specialized in the rights of women. Before offering a brief survey of the provisions of these binding treaties, it may be appropriate to refer to the relevance and force of the Universal Declaration of Human Rights (UDHR) as a non-treaty document of special significance.[40]

The provisions of the UDHR include the fundamental principles of equality and freedom from discrimination on grounds such as sex, in relation to any of the rights set forth in the Declaration.[41] Are any of the provisions of the UDHR, and especially the equality and non-discrimination principles, binding on States as a matter of international law? The UDHR was the first major and most widely supported United Nations document giving an authoritative interpretation to the human rights provisions of the

38 The position of *Ustadh* Mahmoud Mohamed Taha, *supra* note 4, is an example of a modern Islamic approach to achieving respect for the rights of women from within Islam. As indicated earlier, however, this is a minority position. It is up to the Muslim women themselves, with the support of some sympathetic Muslim men, to advance their cause within their own religious and cultural traditions through the work of the late *Ustadh* Mahmoud or a similar approach.

39 The abolition of slavery in the nineteenth century may be taken as an example of customary international law protection of a human right. It is hard to think of another example of a human right based on custom. Section 702 of the *Restatement (Revised) of the Foreign Relations, Law of the United States* does not include gender discrimination, even as a matter of state policy, in its list of customary international law human rights. Nevertheless, International Law, Cases and Materials (L. Henkin, R.C. Pugh, O. Schachter and H. Smit, Eds., 2nd ed. 1987) (hereinafter cited as Henkin *et al.*) at 998 assert that "while gender-based discrimination is still practised in many states in varying degrees, freedom from gender discrimination as state policy, in many matters, may already have become a principle of customary international law."

40 G.A. Res. 217A (III), U.N. Doc. a/810, at 71 (1948). This document and all the instruments discussed or cited below may be found in International Human Rights Instruments (R. Lillich, Ed. 1985) [hereinafter cited as Lillich 1985]. For the Universal Declaration of Human Rights see *id.* 440. 1.

41 Articles 1 and 2 of UDHR. These rights include the right to life, liberty and security of the person (Art. 3); freedom from slavery and servitude (Art. 4); guarantee against torture and cruel, inhuman or degrading treatment or punishment (Art 5); equality before the law (Art. 7); freedom of movement and residence (Art. 13). Obviously, any of these and the other rights set forth in the UDHR are, however, of special significance to women in the sense explained below, namely that women have traditionally been, and continue to be, the most frequent victims of gross and consistent violations of these rights. These especially significant rights under the UDHR include the right to marry and found a family upon free and full consent and with equality at all stages of marriage (Art. 16), the right to participate in government and have equal access to public service (Art. 21), and rights in relation to work (Art. 23).

United Nations Charter which is a binding treaty.[42] As such, the UDHR may have more persuasive authority than other resolutions of the General Assembly. Some would even argue that, when taken together with the United Nations Charter and other developments, the UDHR has achieved the status of binding custom.[43] Whether any of its principles, and if so which ones, have become international custom remains to be seen. In any case, the provisions of the UDHR enjoy special moral and political weight and can be used anywhere in the world to support claims to at least the underlying principles of its main provisions.[44]

In the following brief survey of human rights instruments, the focus will be on rights and principles which are of special significance to women. This should not be taken as implying that women are not concerned with the full ranges of human rights. It simply means that besides being equally affected by and concerned with all the social, economic, cultural, civil and political human rights, women have traditionally been victims of certain types of oppression and discrimination which make certain rights specifically applicable to them. In view of space limitations and the subject of this essay, the following brief survey will focus on this second category of rights.

The general human rights instruments, namely the International Covenant on Social, Economic and Cultural Rights (ICSECR) and the International Covenant on Civil and Political Rights (ICCPR), generally give more precise treaty formulation for the principles of the UDHR, thereby making them legally binding on the States Parties.[45] Both

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42 Article 55 of the United Nations Charter provides that the U.N. shall promote, *inter alia*, "c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". The Preamble to the U.N. Charter and Articles 1(3), 13(1)(b), 62(2), 68 and 76(c) also refer to human rights in a variety of contexts. Nevertheless, the Charter neither defines nor enumerates human rights.

Another difficulty with using the U.N. Charter as a treaty source of the rights of women is due to the fact that the Charter is unlikely to be treated as a self-executing treaty directly creating enforceable rights. See Henkin *et al.* at 984–85.

43 As early as 1968, the Montreal Statement for the Assembly for Human Rights described the UDHR as "an authoritative interpretation of the (United Nations) Charter of the highest order, and has over the years become a part of customary international law". See *9 Journal of the International Commission of Jurists*, 94 at 95 (June 1968). In M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order, 274 (1980), the UDHR is also described as "now hailed as an authoritative interpretation of the human rights provision of the United Nations Charter and as established customary law, having the attributes of *jus cogens* and constituting the heart of a global bill of rights." See also LAUTERPACHT, H.: International Law and Human Rights, 145–60 (1950, 1973), and SCHWELB, E.: The International Court of Justice and the Human Rights Clause of the Charter, 66 A.J.I.L. 337 (1972).

44 STARKE, J. G.: *Human Rights and International Law* in Human Rights, 113 at 122 (E. Kamenka & A.E.S. Tay, Eds. 1978).

45 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc. A/6136 at 490 (1966); entered into force on January 3, (1976). International Covenant on Civil and Political Rights, R.A. Res. 2200 (XXI) 21 U.N. GAOR, Supp. (No.16) 52, U.N. Doc. A/6316 at 52 (1966); entered into force on March 23 (1976). For the texts of both Covenants see Lillich 1985 at 170 and 160, respectively.

Covenants embody the fundamental principle of non-discrimination on grounds such as sex, in relation to any of the rights enunciated, or recognized, in each Covenant.[46] Moreover, Article 3 of both Covenants specifically provides for the obligation undertaken by the States Parties to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights, or civil and political rights, set forth in the respective Covenant.

The rights enunciated in the ICSECR which appear to be of special significance to women include the right to freely choose or accept work under just and favourable conditions, especially in relation to equal enumeration for work of equal value and equal opportunity to be promoted on no consideration other than seniority and competence.[47] Also especially significant to women is the recognition of the widest possible protection and assistance to the family. Marriage must be entered into with the free consent of the intending spouses.[48] Moreover, the Covenant provides for special protection to mothers during a reasonable period before and after childbirth when working mothers should be accorded paid leave or leave with adequate social security benefits.[49]

Because of the special problems of implementing the full range of social, economic and cultural rights within the limited resources of many countries, Article 2(1) of ICSECR generally requires of each State Party steps with a view *to achieving progressively the full realization* of the rights recognized in this Covenant.[50] Compliance by the State Parties with their undertakings under the Covenant, in light of this consideration, is supposed to be monitored through State reports to the Secretary-General of the United Nations, with copies for the consideration of the Economic and Social Council.[51] The Secretary-General must also transmit copies of the reports to the specialized agencies in so far as these reports relate to any matter which falls within the responsibilities of the particular agency.[52] The Covenant also provides for arrangements between the Economic and Social Council and the specialized agencies with respect to progress made in achieving observance of the provisions of the Covenant as well as the study of States' reports and general recommendations by the Commission on Human

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46 Articles 2(2) of the ICSECR and 2(1) of ICCPR. The use of the terms "enunciated" in the ICSECR and "recognized" in the ICCPR may be due to the nature of the rights covered by the particular covenant. This has no bearing, however, on the principle of non-discrimination on the grounds of sex being emphasized in the present context.

47 Articles 6 and 7 of the ICSECR. The obligation under Article 7(c) to ensure equal opportunity to employment promotion "subject to no considerations other than those of seniority and competence" may create difficulties for adopting policies of affirmative action in favour of women, for example, to compensate for previous discrimination. This, however, is a premature concern for Muslim women who are struggling to establish basic legal equality.

48 *Id.* Article 10(1).

49 *Id.* Article 10(2).

50 Emphasis supplied.

51 *Id.* Article 16(2)(a).

52 *Id.* Article 16(2)(b).

Rights with opportunities for States and specialized agencies to comment on the general recommendations of the Commission on Human Rights.[53] The Economic and Social Council may also submit occasional reports to the General Assembly reports with general recommendations on information received from the States Parties and specialized agencies on the measures taken and progress made in achieving general observance of the rights recognized in the Covenant.[54] On the whole, it is clear that compliance with the obligations under the ICSECR is dependent on the voluntary cooperation of the States, prompted by any political pressure and persuasion through the Social and Economic Council, specialized agencies and the General Assembly of the United Nations.

The ICCPR recognizes as legally binding treaty obligations several rights which may be especially significant to women, such as guarantees against torture, cruel, inhuman or degrading treatment or punishment,[55] freedom from slavery and servitude,[56] and equality before the law.[57] Of particular significance to Muslim women, however, are the provisions relating to marriage and participation in public affairs. Not only the right to marry freely and with full consent, but also a requirement on the States Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.[58] Every citizen (of a State Party), has the right and the opportunity, without any distinctions on grounds such as sex, to take part in the conduct of public affairs; this includes the right to vote and to be elected and to have access, on general terms of equality, to public service in his (or her) country.[59]

It seems that general agreement among the States Parties on the feasibility of immediate implementation of the full range of the civil and political rights covered by the ICCPR, unlike those of the ICSECR, permits relatively stronger enforcement mechanisms. Thus, the ICCPR provides for the establishment of a Human Rights Committee which considers reports from the States Parties on the measures they have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of these rights.[60] Furthermore, Article 41 of ICCPR provides for an optional feature whereby a State Party may lodge complaints that another State Party is not fulfilling its obligations under this Covenant, provided that the two States have both made declarations accepting this complaint procedure. The Article sets out a three-stage process of direct settlement between the two states, mediation by the Human Rights

53 *Id.* Articles 18 to 20.

54 *Id.* Article 21.

55 ICCPR Article 7.

56 *Id.* Article 8.

57 *Id.* Articles 14 and 26.

58 *Id.* Article 23.

59 *Id.* Article 25.

60 Articles 28 to 39 of the ICCPR are devoted to the composition and regulation of the Human Rights Committee. Article 40 provides for the obligation of States Parties to submit reports, and the process of consideration of these reports and communications with other organizations and specialized agencies of the U.N.

Committee (with a view towards a friendly solution) or through an ad hoc Conciliation Commission with the prior consent of the States Parties concerned.

It is obvious from the great emphasis placed in this State complaint procedure on the consent of the States Parties, and the need for a friendly or amicable solution, that States are unwilling to surrender their national sovereignty over questions of human rights to independent international adjudication. Nevertheless, this optional procedure is a positive move towards greater international jurisdiction over human rights.

A more positive move, however, is to be found in the Optional Protocol to the ICCPR which provides for a procedure whereby an individual may petition the Human Rights Committee when a violation of the rights set forth in ICCPR occurs by a state to whose jurisdiction the individual is subject.[61] Such individual petition can be received only against states which recognize the competence of the committee in this regard,[62] and subject to several procedural requirements.[63] The Optional Protocol provides for a timetable for communications, comments and consideration by the Committee in closed meetings, leading up to the formulation by the Committee of its views, which must then be forwarded to the State Party concerned and the individual.[64] Further, the Committee must include a summary of its activities under the Optional Protocol in its annual report.[65] Although ultimately dependent on the voluntary acceptance of its procedure by the States, and on the moral weight of the Committee and possibilities of political pressure on the States Parties to avoid negative publicity, the Protocol is significant in its provision of a treaty framework for individual petition.[66]

Most of the rights of women covered by these general instruments are also provided for in specialized instruments of the International Labor Organization (ILO) and other international conventions. Besides the ILO, there are the 1951 Convention Concerning

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61 Optional Protocol to the International Covenant on Civil and Political Rights. G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.26), U.N. Doc. A/6316 at 59 (1966); entered into force on March 23, 1976.

It should be noted, however, that as of January 1, 1986, this Optional Protocol was ratified by only 34 states while the ICCPR was ratified by 82 states. Henkin *et al.* 990.

62 Article 1 of the Optional Protocol.

63 Such as the requirement of exhaustion of local remedies under *id.* Article 2. Article 3 prescribes that communications or petitions which are anonymous or which the Human Rights Committee consider to be an abuse of the right of submission of such communication or to be incompatible with the provision of the Covenant are all inadmissible.

While space does not permit a discussion of the merits of these procedural requirements, it may be noted that they are likely to inhibit or discourage individual communications, at least from certain countries.

64 *Id.* Article 5.

65 *Id.* Article 6.

66 For a brief discussion of procedure for the consideration of private (individual) communications on human rights violations in the U.N. system, *see* Human Rights in International Law: Legal and Policy Issues, 384–92 (T. Meron, Ed. 1984).

Individual communications are the general rule in the Inter-American system for the protection of human rights while they are only optional under the European convention for the Protection of Human Rights and Fundamental Freedoms. *See id.* chapters 12 and 13, respectively.

Equal Renumeration for Men and Women Workers for Work of Equal Value,[67] and the 1958 Convention Concerning Discrimination in Respect of Employment and Occupation.[68] Other specialized international conventions include the 1953 Convention on the Political Rights of Women,[69] the 1958 Convention on the Nationality of Married Women,[70] the 1960 UNESCO Convention Against Discrimination in Education,[71] and the 1962 Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.[72]

The most comprehensive and important specialized instrument is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.[73] This Convention defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[74] Other provisions of the Convention impose very specific obligations to eliminate all forms and types of discrimination against women. Besides general condemnation of inequality and requirement of specified types of action to achieve equality and to eliminate discrimination; whether official or private, collective or individual,[75] the Convention follows up with more specific and precise provisions in the fields of political and public life, education, employment, health care, and other areas.[76]

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67 ILO No.100. 165 U.N.T.S.32. For the text of this Convention see Lillich 1985 at 270.

68 ILO No.111. 362 U.N.T.S.32. For the text see Lillich 1985 at 320.

69 193 U.N.T.S. 135. For the text see Lillich 1985 at 60.

70 309 U.N.T.S.65. For the text see Lillich 1985 at 310.

71 429 U.N.T.S. 93. For the text see Lillich 1985 at 330.

72 521 U.N.T.S. 231. For the text see Lillich 1985 at 150.

73 G.A. Res. 34/180, U.N. Doc. A/Res/34/180 (1980); 19 I.L.M. 33 (1980); entered into force on September 3, 1981. For the text of this Convention see Lillich 1985 at 220.

74 *Id.* Article 1.

75 *Id.* Article 2. The requirements of this Article include the embodiment of the principle of equality of men and women in national constitutional and other appropriate legislation, ensuring through the law and other appropriate means the practical realization of this principle, and adopting legislative and other measures to prohibit all discrimination against women.Most significantly, this Article also requires States to take appropriate measures to eliminate discrimination against women by any person, organization or enterprise.

76 *Id.* Articles 3 to 16. It is interesting to note that Article 5 requires States Parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, customs and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women. This goes to the heart of the matter because no legal or other official and formal measures can possibly achieve the objectives of equality and human dignity for women without the necessary education and elimination of attitudes and social norms and practices which are antithetical to the rights of women.

Moreover, this Convention makes a serious attempt at monitoring progress made in the implementation of its provisions through the work of the Committee on the Elimination of Discrimination Against Women.[77] The Committee is required to receive reports from States Parties on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Convention, and on the progress made in this respect.[78] The report may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention.[79] The Committee must also report annually to the General Assembly of the United Nations through the Economic and Social Council, with copies transmitted to the Commission on the Status of Women for its information.[80]

In conclusion of this brief survey it may be observed that the relevant international instruments create an impressive body of international standards on the rights of women. Unfortunately, like other aspects of human rights, international law on the rights of women suffers from the inadequacy of enforcement or compliance mechanisms even in relation to the States Parties to the conventions. The reason for this deficiency is presumably the unwillingness of States to submit to international jurisdiction regarding their human rights practices. Since States are likely to continue to be the primary subjects of international law for the foreseeable future, the enforcement of international human rights standards will have to be pursued from within each State. Governments cannot be expected to submit voluntarily to independent international scrutiny without substantial and continuous pressure from their own population. It is with a view to assessing the existence and efficacy of a human rights constituency in the Muslim world, especially in relation to the rights of women, that consideration be given to the record of ratification of the relevant instruments by Muslim countries. It is also extremely important to reflect on possible inconsistencies between Shari'a and the international standards of the rights of women. This is true not only because of the current legal force of certain relevant aspects of Shari'a,[81] but also because of its continuing strong influence on Muslim public opinion, even where it is not binding as law at the present time.

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77 *Id.* Article 17.

78 *Id.* Article 18(1).

79 *Id.* Article 18(2). According to Article 22 of this Convention, specialized agencies are not only entitled to be represented at the consideration of the implementation of such provisions of the Convention as fall within the scope of their activities, but also to be invited by the Committee to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

80 *Id.* Article 21. This annual report may include the Committee's suggestions and general recommendations based on the examination of the State reports and other information received from the States Parties.

81 As noted earlier, note 30, and accompanying text, Shari'a constitutes family law and inheritance for Muslims throughout the Muslim world. The rights of women is these areas, therefore, directly submit to the limitations of Shari'a. Moreover, efforts to implement Shari'a in other spheres have already achieved some success in Iran, Pakistan and the Sudan. In these and other "traditional" muslim countries such as Saudi Arabia and the Gulf States, Shari'a impact on the rights of women affect a wide range of social, civil and political rights such as access to public office and participation in public life.

Conventions on women

The Convention on the Elimination of All Forms of Discrimination Against Women has been ratified or acceded to by the Islamic states of Bangladesh, Egypt, Iran, Tunisia, and the People's Democratic Republic of Yemen. Jordan has signed but not yet ratified the Convention. More Islamic states ratified the earlier Convention on the Political Rights of Women, the Convention on the Nationality of Married Women, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

As early as 1984, Saudi delegates to the United Nations opposed provisions on women's rights, arguing that marriage, an area in which "Islamic law was explicit on the smallest details", ought not to be burdened by international requirements that wives be of full age and have equal rights. These concepts were said to reflect Western biases and to ignore the internal safeguards of Islam, which guarantee women property, inheritance, and compensation following divorce. Even the Pakistani delegate, prior to the passage of her country's Muslim Family Law Ordinance, argued that strict equality would put women at a disadvantage because of their "natural need for protection". As recently as 1975, Saudi Ambassador al-Barudi acknowledged that he was "not denying that some of the demands of women's movements in the Western world were understandable and legitimate, but those movements were overzealous in their action and wrongly assumed that their values were suited to the entire world".

More revealing are the substantive reservations interposed by Islamic states which have accommodated themselves to the international human rights movement and ratified the Convention on the Elimination of All Forms of Discrimination Against Women. With the exception of the People's Democratic Republic of Yemen, each of the Islamic states that have signed, ratified, or acceded to the Convention have entered substantive reservations.

Article 2 states the general policy of the Convention and includes a general condemnation of discrimination against women and seven specific measures to be undertaken. Egypt's reservations stated that it was "willing to comply with the content of (Article 2), provided that such compliance does not run counter to the Islamic Shariah". Bangladesh declared even more definitively that it did not consider Article 2 and other articles binding, "as they conflict with Shari'a law based on Holy Quaran and Sunna". Iraq exempted itself from being bound to paragraphs (f) and (g) of Article 2, which state the commitments "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women," and "to repeal all national penal provisions which constitute discrimination against women".

Article 9 of the Convention pertains to women's equal rights with men to acquire, change, or retain their own nationality and the nationality of their children. Egypt entered a reservation allowing for acquisition of the father's nationality in order to "prevent the child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future".

Egypt claimed that it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality. It is unclear whether, by this statement, Egypt is acknowledging repeal of the traditional Islamic rule that only Muslim men, not Muslim women, can marry non-Muslims. Iraq, Jordan, and Tunisia also entered general reservations to Article 9.

Under Article 15(4), "States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile". Without explanation, Jordan entered a reservation to this paragraph, as did Tunisia, which later asserted that the paragraph "must not be interpreted in a manner which conflicts with the provisions of the (Tunisian) Personal Status Code on this subject".

The most strenuous reservations have been entered by Egypt and Iran to Article 16, which provides for equality of men and women in eight specific categories relating to marriage and family relations. Iraq's reservation "shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them". Egypt entered the same statement, adding:

> "This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called into question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses."

Bangladesh, Jordan, and Tunisia also entered substantive reservations to several paragraphs of Article 16.

The wording of these reservations evidences a defensiveness about traditional values and customs by some of the very countries that have undergone modernization. Reservation that reflect, for instance, a refusal to repeal discriminatory national laws, throw into question these countries' commitment to reform and suggest that ratification was only intended as an exercise in rhetoric and image-making. Moreover, Article 28(2) of the Convention prohibits reservations incompatible with the object and purpose of the Convention. Article 19 of the Vienna Convention on the Law of Treaties, of which Egypt, Kuwait, Morocco, Syria, and Tunisia are parties, contains a similar restriction. Mexico, Sweden, and the Federal Republic of Germany have objected to the reservations of Bangladesh, Egypt, Iraq, and Tunisia, as well as those of some non-Islamic states, as being incompatible with the Convention. The statement of Sweden is directly on point:

> "In this context the Government of Sweden wishes to take this opportunity to make the observation that the reason why reservations incompatible with the object and purpose of treaty are not acceptable is precisely that otherwise they would render a basic international obligation of a contractual nature meaningless. Incompatible reservations, made in respect of the Convention on the Elimination on all Forms of Discrimination Against Women, do not only cast doubts on the commitments of the reserving States to the objects and purposes of this Convention, but moreover,

contribute to undermine (sic) the basis of international contractual law. It is in the common interest of states that treaties to which they have chosen to become parties also are respected, as to object and purpose, by other parties."

In partial response to this reservation problem, the Committee on the Elimination of Discrimination Against Women (CEDAW) asked the United Nations in 1987 "to promote or undertake studies on the status of women under Islamic laws and customs and in particular on the status and equality of women in the family on issues such as marriage, divorce, custody and property rights and their participation in public life of the society". This decision angered Islamic representatives in the General Assembly and in the Economic and Social Council, leading to attacks on CEDAW as ignorant of and hostile to islam. No action was taken on the request.

Muslim reaction to international standards on the rights of women

Ratification of international instruments by any government, whether of a Muslim or a non-Muslim country, is obviously not conclusive evidence of the actual practice of that country in terms of a given set of rights. What motivates governments to ratify, or fail to ratify, can be a complex phenomenon and may not be necessarily related to the real policies and concrete conditions of life in their countries.

For one thing, a government may have failed to ratify these instruments simply because the issue was not raised at the appropriate levels of decision-making. Alternatively, the issue may have been raised at a politically inopportune moment or the case for ratification may have been made poorly and impersuasively. The mere fact of failure to ratify cannot, therefore, be taken as conclusive evidence of a conscious and deliberate policy rejecting a commitment to the content of the particular international instrument.

Ratification, on the other hand, may have been decided by an individual ruler or official, without sufficient political support from the country as a whole. The official or regime which effected the ratification, may change or be overthrown, with possible significant consequences to the country's commitment to the policy underlying ratification.[82] Alternatively, the decision to ratify may be taken for ulterior motives other than a genuine commitment to the contents of the particular international instruments. On the one hand, ratification may have been effected, for example, to satisfy certain temporary political ends at home or abroad. On the other hand, the decision to ratify or not, may be motivated by some ideological or political considerations unrelated to the specific issue. It therefore may not be valid to assume, for example, that a Muslim

82 In Iran, for example, secular reforms and ratification of international human rights documents by the Shah were effectively reversed after the Islamic revolution of 1979. See AMIN, S. H.: Middle East Legal Systems, chapter 3 (1985). It is assumed here that the Shah's motives in ratifying human rights conventions were genuine. The point being made here is that his policies, whatever their motives and effects may have been, were reversed after his overthrow.

country refused to ratify a convention on the rights of women specifically because of Shari'a considerations. Finally, ratification may be subject to reservations that substantially diminish its political value.[83]

Thus, neither ratification nor failure to ratify can be taken as conclusive evidence of deliberate and effectively pursued policies. Nevertheless, the ratification or its absence may provide some evidence of policy. So long as one is aware of the complexity of motivation and the possible impact of the nature of the political process in the particular country at a given point in time, the ratification or non-ratification of an international instrument may be taken as a relevant consideration. It is in this light that the record of ratification by Muslim countries of the three main instruments relevant to the rights of women will be considered.[84]

The ICSECR, has been ratified by twelve Muslim countries and the ICCPR, by eleven.[85] Special care must be taken with regard to the significance of the ratification of these general human rights documents. Objection to ratification, to the extent that it was a conscious and deliberate decision, may be due to apprehension over some provisions or general implications of rights, other than those especially significant to women. In such cases, women would be affected with the policies which are negative to those other human rights, but there may still be some support in the country for the special rights of women in other areas. The Convention on the Elimination of All Forms of Discrimination Against Women has so far received only five ratifications by Muslim countries.[86]

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83 The example of Egypt's reservation on the Convention on the Elimination of All Forms of Discrimination Against Women is discussed below.

84 The criteria for identifying Muslim countries can be problematic and may depend on the purpose of such identification. For the purposes of this article, all countries where the Muslims constitute over 70% of the total population are taken to be Muslim countries. According to the statistics quoted in Weeks, Muslim Peoples at 882–911, the following 32 countries may be regarded as Muslim countries: Afghanistan 99%, Algeria 90%, Bahrain 99,3%, Bangladesh 82,9%, Comoros 99,5%, Djibouti 90%, Egypt 91,1% The Gambia 87%, Indonesia 80%, Iran 98%, Iraq 96%, Jordan 93%, Kuwait 96%, Libya 98%, Maldive Islands 100%, Mali 80%, Mauritania 99%, Morocco 99%, Niger 87,4% Oman 99%, Pakistan 97%, Qatar 95%, Saudia Arabia 99%, Senegal 91%, Somalia 99%, Sudan 72%, Syria 87%, Tunisia 99,4%, Turkey 99,2% United Arab Emirates 90%, Arab Republic of Yemen 99%, Peoples Republic of Yemen 99%.

The vast majority of these countries are not constituted as Islamic states in accordance with Shari'a. Nevertheless, in all of them family law and inheritance for Muslims are governed by Shari'a. Moreover, the fact that Muslims constitute over 70% of the total population indicates, to the present author, that Shari'a considerations are likely to affect the rights of women in these countries.

Since the rights of women provided for in the earlier specialized conventions are now covered by the three main instruments noted below, there is no need to consider Muslim ratification of the earlier specialized conventions.

85 Basic Documents Supplement to International law: Cases and Materials, 403 and 38 8, respectively (L. Henkin, R. C. Pugh, O. Schachter, H. Smit, Eds., 2nd ed. 1987).

86 *Id.* 425. Part of the reason for the low ratification of this Convention may be due to its recent adoption, since it was adopted in 1979 and came into force in 1981.

What are the implications of the fact that the obligations undertaken by Muslim countries under these three main conventions cannot be reconciled with Shari'a rules on the rights of women? As noted above, Shari'a sought to guarantee certain minimum rights for women rather than strive for the complete equality with men. This may have been justified as the only realistic objective in the past, and I believe that it can be so justified, but the result remains that current efforts to achieve complete equality and remove all discrimination are bound to be viewed as contrary to Shari'a.

Nevertheless, several Muslim countries have in fact ratified all the three main instruments. Egypt, Senegal and Turkey, for example, have ratified the extensive and advanced Convention on the Elimination of All Forms of Discrimination Against Women. Since these countries have undertaken international obligations inconsistent with the established Shari'a, as accepted by all Muslims, their position can only be explained in one of three ways: either they do not feel bound by Shari'a; they do not take their international obligations seriously; or they have taken a view of the relevant principles of Shari'a which is consistent with these international obligations. The last mentioned explanation is the one favored by the present author, for reasons explained in the last section of this article.[87] The facts, unfortunately, do not seem to support this as the true explanation of the position of, for example, Egypt.

Egypt has entered reservations with regard to only three Articles of the Convention on Discrimination Against Women, namely Articles 9, 16 and 29.[88] The reservation with regard to Article 9, granting women equal rights to those of men, with regard to the nationality of their children, may raise serious objection as a matter of principle. The reasons for Egypt's position on this issue may well be due to national policy independent of Shari'a. Again, the reservation on Article 29, regarding submission to arbitration, does not seem to be based on Shari'a. It is Egypt's reservation on Article 16, concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, which is clearly based on established Shari'a, as accepted by Muslims in general. In the text of this reservation, Egypt justifies its position by saying that its obligations "must be without prejudice to the Islamic Shari'a provisions... This is out of respect for the sanctity deriving from firm religious beliefs which govern marital relations in Egypt and which may not be called in question..."[89] The reservation cites principles of Shari'a whereby the husband is required to pay bridal money to the wife, maintain her fully out of his own funds and also to make a payment to her upon divorce. The wife retains full rights over her property and is not obliged to spend anything on her keep. The reservations concludes by saying: "The Shari'a therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband."[90]

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87 *See* text accompanying note 92 *infra.*

88 For the full texts of these reservations see Lillich 1985 at 11.

89 *Id.*

90 *Id.*

In light of the clear language of the reservation, it can neither be said that Egypt does not feel bound by Shari'a nor that it has developed an alternative view of Shari'a. Paradoxically, Egypt has undertaken other international obligations under the same Convention which are clearly inconsistent with Shari'a.[91] Does this mean that Egypt does not take its international obligations seriously? I think not. Egypt would not have bothered to enter a reservation on Article 16 if it had no intention of attempting to comply. The explanation for this apparent inconsistency in Egypt's position seems to be due to the fact that while Shari'a is the law of personal status for Muslims in Egypt, which would make the country's obligation under Article 16 inconsistent with an unalterable aspect of its current law, other aspects of Egyptian law are not currently based on Shari'a. Therefore, the question is how would the adoption of Shari'a as the sole, or even the main, source of legislation affect the rights of women in Egypt or elsewhere in the Muslim world? If Shari'a is to be strictly applied, no law, policy or practice will be allowed to stand if it is perceived to be in violation of Shari'a.[92] Such is the probable impact of Shari'a on the international standards as applied to the Muslim world, unless a fundamental reformulation of the relevant rules of Shari'a is undertaken.

An approach to the rights of women in islam

When viewed in the Muslim context, the rights of women are the function of the interplay of two powerful forces. On the one hand, Muslims have a strong and enduring commitment to Shari'a, with its negative implications for the rights of women. On the other hand, secularization and external cultural influence have already transformed the consciousness of Muslim women and men and created an expectation of complete equality and full respect for the rights of women. More recently, emerging international standards on the rights of women have also provided strong support for equality and non-discrimination for all women, including the Muslim women. The question now is how to sustain the emerging Muslim awareness of, and commitment to, the rights of women in the face of likely and powerful opposition by the proponents of Shari'a?

In view of the dominant role of Islam in this part of the world, I believe that the advocacy of the rights of women must come from within the Islamic tradition itself. As

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91 The Conventions's general prohibition of all discrimination against women, as defined in Article 1, and the specific obligations to eliminate discrimination against women in the field of employment, as defined in Article 11, are impossible to reconcile, for example, with Shari'a rules disqualifying women from holding general judicial office.

92 This is not an unlikely possibility, even in a country like Egypt. Article 2 of the Egyptian Constitution of 1971 used to provide that "Islamic jurisprudence is a principle source of legislation." An amendment to the Constitution in 1980 changed that last part of the clause to make Shari'a "the" principle source of legislation. 1985 Facts on File, Inc., August 2, 1985, at 578E1. See volume IV of Constitutions of the Countries of the World—Egypt (A. P. Blaustein, Ed. 1986). Even if the whole legal system was not transformed over time through this constitutional mandate, it is not unlikely that the rights of women may suffer some regression to bring Egyptian law and practice intro greater conformity with Shari'a, international obligations notwithstanding.

indicated at the end of the introduction of this article,[93] to maintain Islamic religious law does not necessarily mean the application of Shari'a in its historical formulations. Reference has also been made to the possibility of an alternative interpretation of Islamic sources. It is true that what has been described in this article as alternative Islamization, is an internal struggle for the adoption of imaginative reform techniques for the evolution and reformulation of Shari'a. The dual essential characteristics of this alternative Islamization are Islamic legitimacy and efficacy in achieving the necessary degree of reform to realize the full rights of equality and freedom from any shade or form of discrimination against women. This article can neither discuss in detail nor hope to win this internal struggle for the Muslim women. However, it may be helpful to reflect on the possible contribution of international advocates of the rights of women. In what ways can they be constructive or destructive in their efforts to promote the rights of Muslim women? How can international standards be most relevant and helpful to Muslim women?

International standards are meaningless to Muslim women unless they are reflected in the concrete realities of the Muslim environment. Like members of other cultural traditions, Muslims tend to be suspicious and unreceptive towards what they perceive to be an attempt to impose alien standards. To obtain their cooperation in implementing international standards on the rights of women, we need to show the Muslims in general that these standards are not alien at all. They are, in fact, quite compatible with the fundamental values of Islam. In other words, we need to provide Islamic legitimacy for the international standards on the rights of women.

The balance of universality and cultural relativity of human rights, especially the rights of women, is extremely difficult to achieve and maintain in practice. It requires giving each cultural tradition an opportunity to contribute in the standard formulation process without allowing any tradition to dictate to the others. The balance also requires recognition of the ethical standards and substantive norms of the cultural tradition while rejecting or disallowing archaic and oppressive norms. To avoid even the appearance of dictation by outsiders, which is likely only to be counterproductive, the classification of certain cultural (legal or religious) norms, as archaic and oppressive, must be done by the members of the cultural or religious group themselves. Yet, they cannot be left to themselves completely to do whatever they, or their elites, deem fit and appropriate.

There must be room for external influence which is considerate and sensitive to cultural concerns, while committed to enlightened ideals which can be shown to be the common wisdom of mankind. Sensitive and reflective regard to the totality of the human experience, not only to the dominate cultures or that of the rich and developed societies, can provide us with a core of fundamental rights which are either accepted or can be acceptable to all the cultural traditions of the world. We can then act immediately on these core fundamental rights while working progressively towards developing consensus on, and agreed formulations of, more rights.

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93 See note 4 *supra* and accompanying text.

Both principle and pragmatism, I believe, would recommend this approach to the rights of women. Our commitment should not be to the rights of women in the abstract, or as contained in high-sounding international instruments signed by official delegations. It should be a commitment to the rights of women in practice; the rights of rural and nomadic African and Asian women to live in very "traditional" or tribal communities and practice Islam, or other religious beliefs, out of genuine conviction. These women cannot and should not be invited to subscribe to a supposedly "international" feminist vision without enabling them, at the same time, to live in harmony with their immediate environment. It is irresponsible and inhumane to encourage these women to move too fast, too soon and to repudiate many of the established norms of their culture or religious law, without due regard to the full implications of such action. It must be remembered that it is these women who will have to remain there to endure the full consequences of their actions.

In conclusion, the wholeness of women as human beings must be emphasized. Efforts to promote the full range of human rights, social, economic and cultural, as well as civil and political, are as conducive to maintaining respect for the rights of women, as efforts to promote rights especially significant to women. What does equality with men and freedom from discrimination mean if both men and women are equally poor and hungry? Can women enjoy any rights when their children are starving, their countries ravaged by civil war or external aggression, or their communities denied their collective right to self-determination? In the final analysis, the rights of women are an integral part of the individual and collective human rights of their men and children.

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The Historical Justice Debate: International Law and its Impact on Rights in Hungary

I. Introduction

The tortured path of how to deal with "retroactive justice" in Hungary—punishing those acts committed during the 1956 uprising—ostensibly ended with the recent decision of the Hungarian Constitutional Court (hereinafter "Case II").[1] The Court in Case II established that those crimes whose statutes of limitations have expired may still be prosecuted should they 1) "qualify as a war crime or crime against humanity under international law" or 2) where Hungary is required by its international obligations proceed to prosecute those acts.

This case follows a previous decision by the Court on retroactive justice. In the earlier case, a member of the Parliament drafted a bill that attempted to retrigger statutes of limitations for crimes committed under the Communist regime, which have since lapsed, "provided that the state's failure to prosecute the said offenses was due to political reasons" (hereinafter "Case I").[2] While couched in general terms, the bill clearly was designed to provide for the prosecutions of those crimes committed during and after the 1956 uprising in Hungary. The Court found the bill, by retroactively changing domestic law, unconstitutional. The Court based the decision on various grounds—including that the act was unconstitutionally vague and that it violated principles of the rule of law, particularly the guarantee of *nullum crimen sine lege*, the prohibition against retroactive criminal prosecution.

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1 Case 53/1993 (X. 13.).
2 Case 11/1992 (III. 5.).

While scholars generally praised the Court's decision in Case I, the Court became the target of vicious attacks, particularly by members of the then centrist-right government, led by the Hungarian Democratic Forum party. These strong criticisms partially reflected the perception that this institution of ten men prevented a democratically-elected Parliament from carrying out their mandate. In Case I, the legitimacy of the Court itself and "the rule of law and judicial review of majoritarian decision-making" were compromised—at least in the government's view.[3]

The Court's decision in Case I thus prompted the second draft, which was reviewed in Case II. The second draft relied on international law as the basis upon which to prosecute crimes whose statutes of limitations have lapsed. The draft law provided that those acts that qualify as war crimes or crimes against humanity under international treaties to which Hungary is a party would be subject to prosecution under domestic law, even retroactively. Those international treaties involved included the Geneva Conventions Relatively to the Treatment of Civilians in the Time of War and Relative to the Treatment of Prisoners of war of 1949 and the 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The 1968 New York Convention declares that "no statutory limitation shall apply to several categories of war crimes and crimes against humanity irrespective of the date of their commission". The Court upheld a majority of the provisions in the draft law.[4]

The decision of the Court in Case II invoked the general reaction that the Court finally was doing its job properly; public discussions of the Court were positive.[5] The Court clearly faced substantial pressure, particularly public opinion, that something needed to be done with those egregious acts committed during 1956. Unfortunately, discussions about the Court's reasoning in Case II and its implications have been virtually nonexistent, due to both the relief that the retroactive issue has been banished from the political arena (into the prosecutor's office) and by the satisfaction that something will finally be done to punish those who committed grave crimes in 1956. The responses were focused mainly on the result itself, and not on how the Court reached its decision.

I will not discuss the substantive issues behind the retroactive justice issue; it has been done elsewhere. What I will explore is how the Court further extended its already broad powers and, as a result, changed the constitutional and political landscape. What the Court

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3 MORVAI, K.: *Retroactive Justice Based on International Law*, East European Constitutional Review, 32, 33 (Vol. 2, No. 4, Vol. 3, No. 1 1993–94).

4 The Court found unconstitutional a clause in the draft law which listed a set of crimes which were not based on international law, particularly those based on a domestic law of 1945 which imposed criminal liability on those acts that might jeopardize the peace or the cooperation between peoples after the war or had the potential of causing international conflict. Prosecution under this law would impose criminal sanctions on those who requested the entry of the Russian troops into Hungary during 1956. I will not address this part of the draft bill in any detail in this paper.

5 Professor Morvai, for example, praised the Court for resisting activism by upholding a political decision and the legislature's will, thus proving its political "neutrality". She adds that the Court's decision provides a "clearer understanding of the notions of the rule of law and of judicial review as valuable safeguards in a democratic society." MORVAI, K.: *op. cit.*

did in Case II was extraordinary and has broad implications—far beyond the retroactive justice problem—for Hungary's constitutional framework, raising serious issues about separation of powers and the hierarchy of legal norms. I argue further that the Court's jurisprudence in Case II has created broad opportunities for the development of substantive rights in Hungary, as well as enlarged individual access to invoke those rights.

While this paper focuses on the Hungarian case, the discussion has obvious implications for all countries in East-Central Europe and in the former Soviet Union, particularly those who have newly-adopted constitutions and constitutional courts. In the early stages of state-building in this region, particularly in the constitutional drafting process, not much thought appears to have been given to how to structure the relationship between international law and domestic law. It simply was not a "sexy" issue. Moreover, as with Germany and Italy after World War II, the strong desire among East-Central European countries to integrate into the international community is reflected in almost boiler-plate provisions that the respective country adheres to "generally recognized rules of international law" or something similar. As this discussion will show, there are complex issues, legal and political, underlying the interface between international and domestic law, issues that countries in this region will have to face sooner or later.

II. Constitutional Structure: International Law and Domestic Institutions and Processes

A. A Mere Jurisdictional Issue?

The first hint of the Court's extension of its already broad powers came early in the opinion. The Court was confronted with the question of whether it is empowered to decide whether a *draft law* conforms with Hungary's treaty obligations.[6] Under the Act on the Constitutional Court (ACC), there is no text which provides that the Court has the jurisdiction to scrutinize whether a draft law or other non-promulgated legal acts are consistent with a ratified international treaty. The ACC explicitly grants the Court the power to review only for a *promulgated* law's consistency with international agreements to which Hungary is a party.[7] By implication, the Court does not have jurisdiction to review whether a bill or non-promulgated legal act is consistent with Hungary's treaty obligations. Indeed, the Court's power to exercise preliminary norm control appears to be

6 The international treaties involved are Article 7(1) of the European Convention of Human Rights and Article 8(1) of the International Covenant for Civil and Political Rights.

7 "If the Constitutional Court establishes that a legislative provision, equal in hierarchy or subordinate to the enactment promulgating the international agreement, or another act of State organs is in conflict with the international agreement in question, it shall annul, wholly or in part, the legislative provision or other acts of State organs contrary to the international agreement." Act on the Constitutional Court, Act XXXII of 1989, Article 44(1).

A law or legal act takes effect, or is promulgated, when it is published in the official Gazette, the *Magyar Közlöny*.

limited to the review of a draft bill for its consistency only with *constitutional* provisions.[8] I call this *direct* constitutional review.

Despite the text of the ACC, the Court asserted its jurisdiction in Case II by adopting a seemingly straightforward interpretation of a crucial constitutional provision. The Court argued that, by virtue of Article 7 (1) of the Hungarian Constitution, it is compelled to review even a non-promulgated law for consistency with international treaties. Article 7 (1) of the Hungarian Constitution states:

> "The legal system of the Republic of Hungary adopts the universally accepted rules of international law, and shall continue to ensure the accord between Hungary's international legal obligations and her domestic laws."

Court established that, through the second clause of Article 7 (1), the harmony between Hungarian domestic law and international commitments is a part of the "constitutionality of the norms". Therefore, any petition to review a legal act—promulgated or non-promulgated—for its consistency with international treaties *necessarily implicates* the Constitution and, thus, the Court's jurisdiction. The scope of the Court's reasoning becomes clearer later in the case; the Court concluded that the "commitment undertaken" in the second clause of Article 7 (1) includes not only ratified treaties, but also customary international law.[9]

The Court's reasoning is straightforward, yet unsupportable under the present legislative scheme. As noted above, the Court's interpretation finds no support in the text of the ACC. The Court's understanding of Article 7 (1), for example, is not consistent with the distinction made under the ACC between promulgated and non-promulgated laws. Moreover, Articles 44–47 of the ACC deal specifically with cases of conflict with international agreements. Nowhere in those articles does it provide or imply that the Court may review a non-promulgated legal act for its consistency with an international treaty. In its haste to establish jurisdiction, the Court apparently failed to heed the ACC's clear guidelines.

B. The Relationship and Hierarchy of International Law to Domestic Law

The Court's interpretation of Article 7 (1) raises additional questions and concerns. Immediately following the discussion on its jurisdiction, the Court went beyond treaties and examined the whole relationship between domestic and traditional international law—customary international law and, presumably, *jus cogens* laws.[10] In doing so, the Court established some far-reaching principles which will have major implications for

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8 *See* ACC, *supra* n. 7, Article 1 (a), Article 33 (1).

9 "Consequently, without any separate transformation or adaptation, the [generally recognized rules of international law] count among 'the undertaken international-law obligations,' the harmony of which with the national law is provided for in the second phrase of [Article 7 (1)]."

10 Incidentally, at a conference in 1992, one of the justices stated that it was not appropriate for the Court to interpret Article 7 before the political branches have had a chance to legislate on it.

1) separation of powers, 2) the development of Hungarian domestic law, and, more specifically 3) the development of rights in Hungary.

1. Incorporation in Hungary: Separation of Powers Concerns

The Court first stated, without offering any reasoning, that under Article 7 (1), "generally recognized rules of international law" are "integral parts of Hungarian law without any further transformation." The Constitution, the Court asserted, itself transformed international law into domestic law.[11]

Does the language of Article 7 (1) compel a conclusion as that of the Court's? Not necessarily. The German Basic Law is much more precise about the status of international law. "The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory."[12] The Greek Constitution is similarly precise.[13] The Italian Constitution, on the other hand, is more similar to that of Hungary's. It states: "Italy's legal system conforms with the generally recognized principles of international law."[14] The Italian Constitutional Court has ruled that international law is incorporated automatically into the international legal system and is supreme over conflicting domestic legislation. However, the Italian Court noted that no rules of customary international law may violate the highest and most basic constitutional principles and the Court, as the protector of the Constitution, has the authority (1) to determine what these principles are and (2) to determine when they conflict, and thus prevail, over international law.

In Case II, the Hungarian Constitutional Court, similar to the Italian Court, established what the German and Greek Constitutions provide with *explicit* constitutional text—that "generally recognized rules of international law" is automatically transformed into the domestic legal system. On that basis, the legitimacy of the Hungarian Constitutional Court's decision stands on less than unequivocal ground.

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11 The monist/dualist dichotomy is not helpful here. It is well known that, whether you espouse one or the other ideology in the long-standing debate between monism or dualism, international law will not be operative on the domestic level unless it is so provided for by the national constitution or a basic rule of domestic law. Both a dualist and a monist may adhere to the principle of immediate application and supremacy of international law in the domestic sphere. The dualist, in this case, would maintain that the domestic law is independent of and is in no way subordinate to international law; instead, it is the will of domestic law itself that may elect, in some or in all cases, that international law is supreme and directly applicable on the domestic level.

12 Basic Law of the Federal Republic of Germany, Article 25.

13 "The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditioned therein, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law." Constitution of Greece, Article 28 (1).

14 Constitution of Italy, Article 10.

Concededly, the Court is vested with the power to interpret the Constitution, including Article 7 (1). However, many constitutions contain similar provisions to Article 7 (1), but often merely to manifest its general intention to be part of the community of nations. The Court's interpretation of Article 7 (1), on the other hand, fundamentally changed Hungary's constitutional boundaries. Indeed, what the Hungarian Constitutional Court has done, as with the Italian Constitutional Court, is *to replace the legislature and/or the government with the constitution as the mediator between international and domestic law*. Should treaties not have constitutional status, as the ACC strongly implies, then they may be modified by subsequent legislative or executive action. This, of course, would place Hungary in violation of its international obligations on the international level. Under the Court's reasoning in Case II, however, such legislative action by virtue of Article 7 (1) may be challenged and found unconstitutional. The Court effectively has taken away the power of the political branches to decide, under some rare circumstances, to raise an objection to international practice or to violate international law.

This certainly has appeal as a substantive matter as international norms, which presumably provide greater protections of human rights than domestic norms, automatically becomes a part of domestic law. Nonetheless, as an institutional matter, it is disturbing to see this Court single-handedly relinquishing a part of Hungary's *sovereignty*, particularly when the constitutional text is not so compelling. By displacing the legislature with the Constitution as the gatekeeper between international and domestic law, the Court has placed severe, if not absolute, limitations on parliamentary or government initiatives to not give effect to certain sections of a treaty on the national level. While this type of problem in practice tends to be resolved by negotiations between States or by payment of compensation, the inability of a state to break its international treaty commitments *on the domestic level* deprives such state of a significant bargaining tool with other nations, particularly when there is a good faith disagreement about the respective State parties' obligations under the treaty. While few would challenge the Court's general power to interpret the Constitution, it has stretched that interpretive power perhaps too far by establishing principles that impose broad restraints on domestic political actors on the international level without input from the other branches of power.

2. Rules of Interpretation and the Status of International Law

Interpretive principles often serve to structure the legal relationship between international law and domestic law. The Court in Case II sets out a broad rule of statutory *and* constitutional interpretation. Despite declaring first that "the generally recognized rules of international law are not parts of the Constitution, but are 'obligations undertaken,'" the Court proceeds to do the opposite, and with strong language. In the next paragraphs, it argues that Article 7 (1) requires that "the constitution and domestic law ... be interpreted in such a way that generally accepted rules of international *shall be effective*". *At the very least*, the Court establishes

Hungary's version—on a broader scale—of the United States *In re Schooner Betsy* rule, which states that federal statutes should be construed, "where fairly possible", in a manner consistent with international law.[15]

The Court in Case II goes further than in the *Betsy* case, however, and requires that not only Hungarian laws, but constitutional provisions, be interpreted consistently with international law. The obligatory language suggests that the Court has established the supremacy of international law over the Constitution by insisting that constitutional provisions be consistent with the dictates of international law. This was confirmed later at another crucial juncture in the case. The Court was considering the effects of a conflict between a constitutional provision and international law—a topic I will address below. The Court stated that the language of Article 7 (1) articulates a "condition of being a member of the commonwealth of nations", and that the "norms of another legal system, international law, are prevailing ... [In fact] a rejection of the international law would be unconstitutional, contrary to Article 7 (1) of the Constitution."

This unequivocal language takes the Hungarian Court further than that of the Italian Constitutional Court, which has provided that while international law principles shall prevail as a general rule, they may not violate the most basic principles underlying the Italian Constitution. It is unclear whether the Hungarian Court will accept such a limiting principle on the effect of international law should it face the same issue in a different case. In this case, at least, the Hungarian Court painted the same theme with broader strokes by suggesting that *all* constitutional provisions are invalid if they contradict international law.

3. "Generally Recognized Rules of International Law": Meanings & Institutions

Most would agree that this phrase means something more than just those norms that are included in treaties endorsed by a majority of states and accepted as being of general application. Many would include customary rules of international law in the phrase—those that have the elements of (1) general practice and (2) its acceptance as law *(opinio juris).* Of course, much has been written on the difficulties of determining what constitutes adequate state practice and what are the manifestations of the moral obligation to obey a norm that would render it a customary law. Nonetheless, most scholars would place customary international law under the category of "generally recognized rules of international law." Should this be the case, hardly any scholars would object to the inclusion of *jus cogens* or peremptory norms—those to which derogation is not permitted—to the category itself. In any case, this phrase is interpreted to mean those rules as recognized by the country in question.

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15 Murray, v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); see also Restatement (Third) of the Foreign Relations Law of the United States, § 114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

The Hungarian Constitutional Court seems to have made similar distinction about its treaty obligations, and those obligations derive from custom and general practice. At various places in the cases, in exploring the scope of Article 7 (1), the Court discussed how similar or different international treaties are to "generally recognized rules of international law". Nonetheless, the case was not particularly helpful in providing guidelines as to what the Court will consider as a "generally recognized rule". If international law is to play a more useful role, more precise guidelines would aid parliamentarians develop legislation that would fit more closely with international standards.

Let me briefly raise a related, institutional question. Tasks such as interpreting or expounding the meaning of international law norms or reviewing for consistency between conflicting norms would seem appropriate to entrust to a judicial or quasi-judicial body, such as a constitutional court. Some of these tasks would include reviewing evidence as to questions of how much state practice is required, how much consistency is required, what evidence is required to establish *opinio juris*, or may treaties be invoked as evidence of customary law.[16] Nonetheless, unless provided specifically, the interpretation of international law arguably may be carried out by other branches of government. One conceivably can envision the Hungarian Ministry of Foreign Affairs using different standards than those of the Court in determining which norm has achieved the status of a "generally recognized rule" of international law. Indeed, the Polish Constitutional Tribunal, for example, "does not consider itself competent to verify the computability of Polish domestic law with international law".[17] In Poland then, the legislature maintains its role as a mediator in the interface between international and national law.

To provide a more legitimate basis on which to entrust the review and interpretation of international law to a constitutional court, one alternative would be to adopt a constitutional provision similar to that of the German Basic Law. "If, in the course of litigation, doubts arise as to whether a rule of public international law is an integral part of federal law and whether such a rule directly creates rights and duties for the individual, the court shall obtain a decision from the Federal Constitutional Court."[18]

Such a provision would not only address the issue of jurisdiction over issues of incorporation or transformation of international law into domestic law, but also issues of whether international norms, once incorporated, provide individuals a claim upon which to invoke.[19] Moreover, such a provision would minimize the possibilities of

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16 For additional examples of relevant questions, see HENKIN, et al., *International Law* 37–40 (2nd ed. 1987).

17 *The Relationship between International and Domestic Law*, Proceedings, p. 35 (Coun. of Eur. Press 1993).

18 Bundesverfassungsgericht, Article 100, Clause 2. Although a fascinating jurisprudential problem, I will not discuss the epistemological problems of norms which remain valid and enforceable until declared otherwise. For an enjoyable bit of philosophical "freewheeling" on these issues, see NINO, C. A.: *Philosophical Reconstruction of Judicial Review*, 14 Cardozo Law Review, 799 (1993).

19 The principles of "direct applicability" and "invocability" are distinct and separate, despite scholarly treatment which collapses the two into one. Invocability is somewhat related to the U.S. concept of "standing". Thus, the determination of whether a treaty is directly applicable on the domestic level does not necessarily

embarrassment should two or more branches of power disagree publicly about the status of a particular international norm on the national level.

C. The Constitutionalization of International Law

The Court, prior to Case II, was authorized by the ACC to review for the consistency of promulgated laws with international treaties. In order to justify its exercise of jurisdiction in Case II, the Court had to consider fully the relationship between international law—treaty and customary—and domestic law. In Case II, the Court established that it is required, under Article 7 (1) of the Constitution, to consider questions of international law when ruling on the constitutionality of a law. Its broad interpretation of Article 7 (1) ostensibly gave it power not only to judge whether a draft law is inconsistent with an international treaty, but that the law is *unconstitutional because it is inconsistent* with either international treaties or customary international law. I call this *indirect* constitutional review, as the standards of constitutionality are not based directly on constitutional text. In expanding the limits of its constitutional review power, the Court effectively assigned constitutional status or rank to at least incorporated international law and, arguably to international treaties.

1. Amendment of International Law on the National Level

The constitutionalization of international law has other implications for Hungary's constitutional structure. Should customary international law be given constitutional status, as the Hungarian Court established, it automatically becomes valid on the domestic level without any legislative or executive action. By virtue of its constitutional rank, however, any amendment of such law would require going through the process of constitutional amendment, rather than that of amending a simple statute.

Some have argued that this would be extremely undemocratic by requiring a much more difficult process to dictate how international law is to be applied on the national level.[20] The argument concededly may have great force under a legal structure such as that of the United States where it is extremely difficult to amend the constitution. This is not the case in Hungary where the Constitution can be amended by a mere two-thirds vote in Parliament.[21] While the requirement of two-thirds is more difficult than that of

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establish, in a particular dispute, that certain parties may invoke treaty norms to resolve that dispute. See JACKSON, J.: *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 American Journal of International Law, 310, 317 (1992).

20 See, e.g., TRIMBLE, A.: *Revisionist View of Customary International Law*, 33 University of California Law Review, 665 (1986); OLIVER, C. T.: *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in U.S. Courts*, 4 Houston Journal of International Law, 59 (1981).

21 Hungarian Constitution, Chap. 2, § 24 (3). Should Parliament feel that a particular rule of international law is undesirable, it need not amend the text of article 7 itself. Parliament can amend the application of a

a majority vote, it is not such a high hurdle so as to deprive Hungarians of democratic expression. Instead, a two-thirds requirement is a sufficiently low threshold to permit democratic manifestations while acting as a check on the governing party or coalition from renouncing too quickly Hungary's commitments under customary international law. This not only should come as a comfort to those who believe that international law acts as a positive influence on the establishment of the rule of law in Hungary, but also to Hungary's neighbors who may see Hungary as increasingly threatening due to the presence of substantial Hungarian minorities in these countries, such as in Romania and Slovakia.[22]

2. Increasing Monopolization of the Power of Constitutional Review

The Hungarian Constitutional Court in Case II further expands the scope of its constitutional review power. As Hungary follows the model of centralized constitutional review, as a general rule, only the Constitutional Court may resolve a "constitutional" issue. For those legal disputes that implicate constitutional issues then, the Constitutional Court is the only court that has jurisdiction.

By asserting its jurisdiction to review for indirect unconstitutionality—whether a law (either a draft law or a promulgated act) conflicts with an international law—the Court effectively assigned constitutional status or rank to customary international law. This jurisprudential move solidifies the allocation of the review power to the Court over legislation when international law is implicated. As international law is now a constitutional issue, and because the Constitutional Court is the only institution vested with the power of constitution review, the Court arguably has the sole power to determine both the existence of a "general rule of international law" and the content of such rule. To date, I know of no Hungarian law nor any legal act establishing such a principle. Under the Court's reasoning, however, the Court has virtually erected a monopoly over the power to not only declare the existence of certain customary international norms, but also to define the contours and scope of such norms.

"generally recognized rule of international law" by passing an Act or statute that has "constitutional force", which requires a two-thirds vote in Parliament. By passing such legislation, the Parliament may alter an undesirable rule of international law from the domestic point of view, while preserving Hungary's commitment to remain a peaceful member of the international community through its obligation to ensure "the accord between the obligations assumed under international law and domestic law." Article 7 (1).

22 "The Republic of Hungary recognizes its responsibilities towards the fate of Hungarians living outside the borders of the country and shall assist them in cultivating their relations with Hungary." Article 6 (3). The fact that Hungary's relationship with and responsibility for its minorities has been raised to constitutional status has not been a comfort to its neighbors.

The former Hungarian Minister of the Interior and later Prime Minister Peter Boross, stated that Hungary "can improve our security and the peace of the Hungarians outside the borders with a show and organization of force". HOOKER, J.: *From Caterer to Nation's Leader*, Budapest Week, p. 3 (Sept. 30–Oct. 6, 1993).

III. International Law, the Hungarian Constitutional Court, and the Development of Rights in Hungary

A. Individual Access to the Constitutional Court

On a more practical basis, the constitutionalization of treaties arguably provides a mechanism for individuals to directly petition the Constitutional Court to vindicate their *treaty-based* rights, one that previously did not exist under Hungary's legal scheme. To understand how, I will briefly describe the structure prior to the decision in Case II.

1. The Act on the Constitutional Court Scheme

The ACC permits anyone, including individuals, to submit petitions for alleged violations of constitutional rights[23] or to challenge the constitutionality of an existing legal rule.[24] However, when the claim is that a legal rule contradicts a treaty to which Hungary's a party, the list of those who are permitted under the ACC to petition the Court includes only of high government officials.[25] Thus, while the ACC allows individuals to petition the Court to review for the constitutionality of a law that currently is in force, individuals are precluded from invoking the Court's jurisdiction when governmental action is challenged for violating an "international treaty" to which Hungary is a party.

Such exclusion is not necessarily arbitrary nor irrational. There may be several reasons for excluding individuals from invoking treaties to challenge governmental statutes, and thus policy, in front of the Constitutional Court. Much has been commented on the desirability of unnecessarily hampering the Government's ability to conduct foreign policy. In U.S. jurisprudence, for example, judges have noted that the executive should not be embarrassed by judicial intervention in "political" questions.[26] Other prudential doctrines, such as the various elements of justiciability, are designed to provide the executive, and sometimes the legislature, the freedom and leverage necessary to conduct U.S. foreign relations effectively. In Hungary, in comparison, the structure of the ACC explicitly insulates the government's sphere of competence over foreign affairs by preventing individuals from challenging the government's actions, at least where it involves Hungary's treaty obligations.

Similarly, a legislative act that implicates an international treaty is a sovereign act by the legislative body. Analogical arguments thus apply; namely, that individual citizens

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23 ACC, *supra* note 7, Chap. I, Article 1(d); Chap. III, Article 21 (4); Article 48 (1).

24 *Id.*, Chap. I, Article 1 (b); Chap. III, Article 21 (2).

25 The Parliament, any of its standing committees, or any MP; the President of the Republic; the Council of Ministers or any of its members; the President of the State Audit Office; the President of the Supreme Court; and the Chief Prosecutor. ACC, Article 21 (3). See also ACC, Article 1 (c).

26 The political question doctrine has been subject to much criticism. See, e.g., HENKIN, L.: *Is There a "Political Question" Doctrine,* 85 Yale Law Journal, 597 (1976).

should not be allowed to hamper the ability of the Parliament to conduct foreign relations allowed under its sphere of competence. Under the present text of the ACC, this is particularly true to the extent that it allows Parliament to take legislative decisions or acts that may place Hungary in violation of its treaty obligations. While these actions may subject Hungary to liability on the international plane, such legislative acts are perfectly legitimate and valid on the domestic level.

2. The Development of Rights Under the Scheme

However, by precluding individuals from challenging statutes by claiming that the statutes violate international treaties, the ACC does not offer a strong, structural framework for the protection of human rights in the Hungarian legal system. Where governmental actions, taken by either the Parliament or the Government, arguably infringe upon international human rights because they conflict with Hungarian treaty obligations, individuals cannot invoke the Court's jurisdiction to challenge such actions. Such rights would include those in the International Covenant on Civil and Political Rights, and the International Covenant on Social, Economic and Cultural Rights.

Hungary's failure to provide an effective tribunal arguably violates both the Hungarian Constitution's mandate as well as that of the Covenant for Civil and Political Rights, which Hungary has ratified and promulgated.[27] First, Article 57 (5) of the Hungarian Constitution requires that "everyone shall have the right to legal recourse against a decision of a court, state administration, or other authority, which infringed his *rights or lawful interests*."[28] Thus, the lack of any mechanism under which individuals may claim protection of "rights or lawful interests" that, while not derived from the Hungarian Constitution, but can be gleaned from international treaties to which Hungary is a party, may entitle a person to challenge this structural infirmity as a constitutional violation. The Constitutional Court in Case II gives full meaning to the language of Article 7 (1), that the Constitution not only requires that the Republic of Hungary "respect the universally accepted rules of international law," Hungary must also "ensure the accord between the obligations assumed under international law and domestic law." Thus, if the application of the domestic rule violates Hungary's international obligations, treaty or otherwise, then the failure of Hungary to provide mechanisms to ensure the consistency between domestic laws and international law arguably violates of Article 57 (5) of the Hungarian Constitution. Thus, if individuals are excluded from petitioning the Court on the basis that a government action violates a treaty, and the eligible parties[29] do not petition on behalf of these individuals, these persons effectively are left without a remedy. This arguably places the Hungarian government in violation of the Constitution's dictates.

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27 The CCPR has been properly transformed into a domestic statute. Law-decree 8 of 1976.

28 Hungarian Constitution, Chap. XII, Article 57 (5).

29 See footnote 25 *supra*.

Second, the International Covenant for Civil and Political Rights obliges parties to provide an effective domestic mechanism for individuals to invoke protection of rights, where applicable, under the Covenant. While it is generally agreed that it is up to the signatories to establish what kind of mechanism, judicial or otherwise, to fulfill their obligations under the Covenant, the failure to provide for an independent body to evaluate claims or for a remedy would arguably place the state in violation of its obligations under the CCPR.

3. Case II and A New Mechanism of Access on Treaty-Based Rights

How is this structure changed by the Court in Case II? I argue that the Court unwittingly has created an avenue through which individuals may petition the Court directly to vindicate their rights contained in treaties such as the International Covenants for Civil and Political Rights and Social Economic and Cultural Rights, and the European Convention for Human Rights. I've noted earlier that the ACC does not explicitly confer such a right to petition the Court.[30] The Court's interpretation of the second clause of Article 7 (1) in Case II provides a convenient loophole.

The argument an individual would make would be as follows: The Constitutional Court has jurisdiction over constitutional issues; the court has interpreted Article 7 (1) of the Constitution and concluded that properly transformed international agreements to which Hungary is a party is part of the Hungarian constitutional norms; the consistency between a domestic rule of law with an international treaty is a constitutional issue; individuals may petition the Court alledging that a provision of law is "unconstitutional";[31] therefore, individuals may invoke the jurisdiction of the Court by claiming that the domestic rule of law is inconsistent with the international treaty.

The ACC itself provides independent support for this conclusion. Article 48 of the ACC provides that anyone, through the application of an unconstitutional legal rule, and "who has exhausted all other legal remedies *or has no other remedy available*, may submit a constitutional complaint to the Constitutional Court because of the violation of his/her constitutional rights".[32] Under the broad reading of Article 7 articulated by the Court in Case II, the failure to assure the consistency between domestic law and Hungary's international obligations is a constitutional violation. Article 48 of the ACC is thus implicated and individuals arguably may then invoke the jurisdiction of the Court.

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30 The analogous term in U.S. jurisprudence would be "standing."

31 "The Constitutional Court shall be competent to decide constitutional complaints lodged in cases of violations of constitutional rights." ACC, *supra* n. 7, Article 1 (d). "Any person may lodge a constitutional complaint with the Constitutional Court alledging that he/she has been injured by the application of an unconstitutional provision of law in respect of his/her rights and that no other remedy is available or the remedy has been exhausted. ACC, Article 48 (1). *See also id.*, Articles 1 (b) & 21 (2).

32 ACC, supra note 7, Article 48 (emphasis added).

4. Vindication of Customary International Law-Based Rights

What are the implications for the development of rights by the Court constitutionalizing customary international norms? As noted above, the ACC ostensibly precludes individuals from invoking the Court's jurisdiction to vindicate their treaty-based rights. The ACC, however, does not mention whether individuals have the right to petition the Court when their "rights or lawful interests" derived from *other* sources of international law—customary international law, general rules of international law, and peremptory norms. For example, there may be some rights in the Universal Declaration of Human Rights which, while not affirmed in binding treaties, may take on characteristics of customary international law.

Individuals then can make the cogent argument that, through the constitutionalization of customary international law, and which is not excluded by the ACC, they should be allowed to petition the Court directly to protect their rights under customary international law. In other words, as international law has constitutional status, and as the Court has asserted the power to exercise indirect constitutionality review, and the Court is required to hear individual complaints of unconstitutionality, individuals arguably may rely upon customary international law to petition the Court.

B. The Indirect Method of Incorporation: Interstitial Development of Fundamental Rights

Case II also could have indirect, but extraordinary, impact on the Court's jurisprudence in the area of fundamental rights. Constitutional courts in this region are vested with the general power of abstract norm control, which involves construing "open-ended" provisions of a constitution, those from which fundamental rights may be based or derived.[33] Courts often have not only the opportunity to declare the existence, but also establish the scope of those rights. Some of the established constitutional courts often refer to a country's customs, history, or certain documents to assist them to interpret these broad provisions. The Conseil Constitutionelle, for example, has used the 1789 Declaration on the rights of Man (also mentioned in its preamble) to help it shape the development of rights in France. Given the broad language of the Court in Case II concerning Hungary's obligation to insure the accord of domestic law and international, one can easily make the argument that, *in reviewing the constitutionality of a law, the*

33 Professor Ely defines "open-ended" provisions as those phrases in the Constitution "that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision making process considerations that will not be found in the language of the amendment or the debates that led up to it". ELY, J.: Democracy and Distrust: A Theory of Judicial Review 14 (1980). Prominent examples of such provisions are in the first, fifth, ninth and fourteenth amendments of the U.S. Constitution. Of course, the import of considerations outside the explicit text does not necessarily render the decision making process illegitimate.

Court should refer to, or incorporate by reference, the norms in international treaties or customary rules.

This "indirect" or "weak" method of incorporation of international law involves the domestic tribunal using such norms to guide its jurisprudence, particularly in grappling with the concept of deriving unenumerated rights from "open-ended" provisions.[34] This method considers the international norms as only one facet in the task of constitutional interpretation. One possible use of international law under this proposed method is to fashion a remedy not explicitly granted under the Constitution from a violation of international law. In *Fernandez v. Wilkinson*,[35] for example, the U.S. District Court granted relief to aliens from arbitrary detention under international human rights norms.[36] Aside from using international norms to fill in the cracks or gaps of constitutional *protection*, such norms may also be used to assist in the *interpretation* of constitutional text, particularly the inherently ambiguous "open-ended" provisions. In the subsequent appeal of *Fernandez*, for example, the 10th Circuit did not adopt the District Court's approach of using international law to create a remedy. Instead, the Circuit Court relied on identical positive sources of customary international law to interpret and expand the notion of due process to extend the same protection to aliens from arbitrary detention.

What is significant about the two cases is that neither the District Court nor the Circuit Court relied upon "natural law" to provide protection to the aliens. Rather, both courts used positive sources (evidence of state practice, conventions and covenants) of international law, either to fill in the gaps among, or help inform the interpretation of constitutional "open-ended" provisions. Under these approaches, international law does not provide an *independent* or binding source of law or rule of decision; rather, international law supplements and enriches the context to define the contours of rights rooted in the constitutional text itself.[37]

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34 The problem of unenumerated rights has been formulated as follows: "Short of a natural law theory of how 'to find' and give protection to those unenumerated rights, however, we are left with only textually enumerated rights as positive limits on power." CHRISTENSON, G.: *Using Human Rights Law to Inform Due Process and Equal Protection Analysis*, 52 Cincinnati Law Review, 3, 7–8 (1983). In the case of the United States, the latter approach, of course, contradicts the plain meaning of the ninth amendment of the U.S. Constitution.

35 505 F. Supp. at 790.

36 "Even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law." *Id.* at 790.

37 The civil rights movement in the United States also relied upon international law in its efforts to eliminate discrimination in various spheres, including education, housing, property ownership and employment. See generally TOLLEY, H.: *Interest Group Litigation to Enforce Human Rights: Confronting Judicial Restraint*, in World Justice? U.S. Courts and International Human Rights (M. Gibney, Ed. 1991); LOCKWOOD, B. B.: *The United Nations Charter and United States Civil Rights Litigation: 1946–1955*, 69 Iowa Law Review, 901 (1984).

For some recent developments in the region, the International Human Rights Law Group has submitted an amicus brief to the Romanian Constitutional Court, urging the application of international human rights standards to review the constitutionality of legislation criminalizing homosexual acts.

This method has several advantages. First, by allowing domestic tribunals to infuse the Constitution with standards adopted by the international community, the approach may enhance domestic protection of human rights as international norms generally provide broader protection of human rights than national law. This line of argument has special significance in this region. Historically and culturally, the protection of rights in East-Central Europe cannot be framed merely behind the philosophy of limited state power to intrude on individual liberty. Instead, expectations of entitlements from the state may well be as important, if not more, in the perception of rights. Human rights can no longer be defined by negative restraints on state power; one must also consider the "entitlements of human need that are ultimately guaranteed by the state" in order for individuals to be "judicially autonomous" entities.[38] As international norms contain much more "positive rights" than in the United States Constitution, for example, their relevance and effect on the constitutional development of rights in the countries of this region are significant.

Second, the proposed method of "indirect" incorporation of international law allows us to step out of the theoretical debate between monism and dualism which, fundamentally, attempts to resolve the question of when and where does international law provide the rule of decision in domestic courts. Some argue that the use of international norms is illegitimate. Customary international norms, for example is established by a subjective determination of *opinio juris*,[39] rather than representative politics.[40] With regard to treaties, while the participation of governments subjects them to weaker claims of illegitimacy, a court's very act of interpretation "gives rise to law, a quasi-legislative function..."[41] Others, however, argue that the level of participation of the elected, political branches are sufficient for both treaty and customary international law to counter countermajoritarian charges.

The proposed method of using international law by domestic tribunals—the "weak" theory of incorporation—offers a judicial tool that sidesteps perhaps unresolvable theoretical conflicts. This approach does not address the issue of using international law as the rule of decision or to "define respective spheres for the dominant operation of international and domestic law".[42] Instead, using international norms as guidelines provides an accommodating interpretative tool by which ambiguous or "open-ended"

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38 CHRISTENSON, *supra* note 34, at 10.

39 Two elements constitute customary international law: opinio juris sive necessitatis—a "sense of obligation"—and reasonably consistent state practice. North Sea Continental Shelf Cases, 1969 I.C.J. 4. See also Restatement (Third) of the Foreign Relations Law of the United States § 102 (2) (1986).

40 See, e.g., TRIMBLE, W.R.: *A Revisionist View of Customary International Law*, 33 University of Calofornia Law Review, 665 (1986); OLIVER, C. T.: *Problems of Cognition and Interpretation in Applying Norms of Customary international Law of Human Rights in U.S. Courts*, 4 Houston Journal of International Law, 59 (1981).

41 STEINHARDT, R.: *The Role of Domestic Law As a Canon of Domestic Statutory Construction*, 43 Vanderbilt Law Review, 1103, 1108 (1990).

42 STEINHARDT, *id.*, at 1109. Indeed, "useful as that debate may be, it is a pathology". *Id.*

constitutional text is infused with norms and aspirations arising from transnational consensus.[43] Thus, unlike the direct incorporation method of international norms,[44] the recommended indirect incorporation approach is one that is rooted in the constitutional text, but gains additional depth through a context that is universally recognized.

The "weak" or "indirect" method of incorporation, which has taken on more force following the decision in Case II, also augments the Hungarian Constitutional Court's position in the Hungarian constitutional scheme. A constitutional court does not employ force to enforce its decisions. Its power depends on the goodwill of the other political branches, which in turn is dependent upon the perception of whether the court is exercising its tasks legitimately. An often-noted example is that of the Russian Constitutional Court in the last civil conflict.

Using different sources from which customary law is derived—such as concrete state practices, treaties and conventions, judicial opinions and work of jurists[45]—to assist constitutional courts in interpreting the national constitution provides an additional

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43 The U.S. jurisprudence has developed similarly. United States courts to date have not hesitated to refer and rely upon informal sources or standards that do not qualify as the "law of nations," which would transform such norms into federal common law analogues. Much of this use of external sources have occurred in cases dealing with human rights issues. See, e.g., Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged arbitrary detention); Filartiga v. Pena-Irala, 630 F.2d 876, 883–85 (2d. Cir. 1980) (referring to the American Convention on Human Rights and the International Covenant on Civil and Political Rights, among others, to determine the customary prohibition on torture); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1542 (N.D. Cal 1987) (noting the Universal Declaration, American Convention, and the Civil and Political Covenant as evidence of a customary norm against summary execution), *right granted in part and denied in part*, 694 F. supp. 707 (N.D. Cal. 1988).

U.S. courts have thus relied on principles in treaties the U.S. has never ratified to determine the content of international law.

44 Such an approach has been advocated for international human rights law in the United States domestic legal system. 1 The Law Group Docket [published by the International Human Rights Law Group (Spring 1981)].

45 Filartiga v. Pena-Irala, 630 F. 2d at 884. Sources of customary law may also include general expectations created by democratic states, domestic laws common to all civilized nations, decisions of both domestic and international tribunals, states' foreign relations practices, the writings of distinguished jurists, and the practices of international organizations.

The fact that judges use extra-constitutional sources, especially universal norms, to guide their decision process is not necessarily illegitimate. Even Hans Kelsen, a strong proponent of positivism, conceded that judges should have the power and discretion to apply universal principles as one element in their decision when gaps are present in positive law. KELSEN, H.: *Principles of International Law* 553–54 (W. Tucker, Ed. 1966). See also KELSEN, H.: *General Theory of Law and State* 145–49 (A. Wedberg trans. 1961).

Moreover, an overemphasis on positivism, warns Bodenheimer, may lead to "interpretive nihilism." Because the positive system as established today by the state is "inescapably incomplete, fragmentary, and full of ambiguities ... [t]he defects must be overcome by resorting to ideas, principles, and standards which are presumably not as well articulated as a formalized sources of the law, but which nevertheless give some degree or normative discretion to the findings of the courts. In the absence of a theory of non-formal source, nothing remains outside the boundaries of fixed, positive precepts but the arbitrariness of the individual judge." BODENHEIMER, E.: *Jurisprudence* 295 (1962).

layer of legitimacy to the courts' work-product. The approach grounds the judge's exercise of constitutional review to specific sources while minimizing the tendency to rely on the individual judge's subjectivity, thus countering some countermajoritarian objections.

While the "indirect" method of incorporation is essentially non-interpretive and is not explicitly grounded in the constitutional text, it is more objective and offers more judicial accountability than "evolving standards", the Hungarian Constitutional Court's concept of the "invisible Constitution",[46] or the jump into the often muddled realm of "natural law".[47] Under this approach, judges rely on objective sources rather than individual values to guide the conflict resolution process, especially when dealing with unenumerated rights.[48] This jurisprudential technique also provides constitutional courts with a mechanism to be sensitive to separation of powers concerns; it offers a palatable middle ground between the two polar choices of applying, or completely disregarding, international norms.

By being more transparent, the approach thus reduces the possibility of public or political backlash from the perception of judicial "activism". The reference to norms formed in a universally recognized context to shape the substantive content of open-ended provisions in the Hungarian Constitution allows the Court to preserve its legitimacy, while strengthening its role in resolving constitutional disputes, either in separation of powers or fundamental rights cases. This method of "interstitial growth in constitutional interpretation"[49] through international norms thus fosters greater protection of human rights by safeguarding the Court's legitimacy as the Court, case by case, continues to define the contours of those rights that arguably belong in the Hungarian constitutional scheme, but are not enumerated explicitly.

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46 In his concurrence in the Death Penalty Case, 89/b/1990/7, Chief Justice Sólyom, one of the most influential judges on the Hungarian Constitutional Court, urged the Court to give content to constitutional provisions according to a "a reliable standard of constitutionalism—an 'invisible Constitution'—beyond the written Constitution, which often is amended presently by current political interests; and, because this 'invisible Constitution' will not conflict with the new Constitutional to be established or sith future Constitution". The Court indeed has particularly been aggressive in deriving unenumerated rights, particularly from the clause "human dignity." The right to "human dignity" "is a 'maternal right'—i.e., the source of still unnamed fundamental freedoms." *Id.* at 15 (Chief Justice Sólyom, concurring).

47 Notions of natural law in international law, as embodied in the the principle of *opinio juris*, differs from natural law exercised by judges. The former signifies the establishment, *through international consensus*, of "principles about the morally proper conduct of human affairs which are either self-evident or discoverable by the exercise of practical reason. HARTMAN, G.: *"Unusual " Punishment: The Domestic Effects of International Norms restricting the Application of the Death Penalty*, 52 CINCINNATI LAW REVIEW, 655, 674 (1983). The latter, however, merely are *disassociated or isolated* instances of "natural reason"—rather than evolving, mutual moral consciousness—exercised by one or a group of judges.

48 See supra n. 35.

49 CHRISTENSON, G.: *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 Houston Journal of International Law, 39, 55 (1981).

IV. Conflicts Between International Norms and Rights

A. Conflict of Customary International Norms and Constitutional Rights

In Case II, the Court faced for the first the issue of how to resolve the inconsistency between a rule of customary international law and a specific constitutional right. The Court faced a clear conflict: Article 57 (4) of the Hungarian Constitution contained an absolute prohibition against retroactive punishment. "No one may be pronounced guilty of, or sentenced for, any act that was not considered a criminal offense under Hungarian law at the time it was committed." On the other hand, it was clear, *at least in the Court's mind,* that the international criminal principles on war crimes and crimes against humanity imposed the obligation on nation states to punish, even retroactively, these crimes. As these customary norms are among the undertaken "international law obligations" under the second clause of Article 7 (1), there is direct conflict with Article 57 (4) on the *domestic* legal level.

The Court argued in unequivocal language that the strength of Article 7 (1) compels the conclusion that international law, while belonging to another legal system, should prevail generally. Indeed, the Court stated that domestic law must be implemented and harmonized with international law as that is a "condition of being a member of the commonwealth of nations." Despite this initial broad statement, the Court hesitated momentarily before going over the brink. It noted that if a country fails to bring its domestic law in line with international law, it would be subject to liability on the international level. This is the classic dualist formulation, where a country may consciously decide to violate its international obligations by passing a valid, domestic law or by failing to harmonize domestic law with its international treaty obligations. The Court, however, immediately thereafter took the fateful step and declared that any such "rejection of the international law would be unconstitutional, contrary to Article 7 (1) of the Constitution". Thus even a decision by the legislature to violate international law would be found unconstitutional. Moreover, a country's failure to harmonize the norms in both legal systems could arguably be challenged as unconstitutional. It appears then that, at least with respect to customary international law, the Court has characterized Hungary as a variant of a monist model where international law is automatically superior even to constitutional values; in this case, the protection from retroactive criminal punishment.

Until WWII, this theoretical problem had few practical effects in other jurisdictions as international law rarely conflicted with constitutional principles. Also, customary international law inconsistent with constitutional value was unlikely to relate to a national law, particularly one that related to rights of individuals.[50] The rapid development in the field

50 In comparison, the U.S. Supreme Court has yet to consider the question of whether the Constitution is supreme over the law of nations or principles of customary law. Although there is no case on point on this issue, there is dictum suggesting that the U.S. Constitution would prevail domestically over law of nations. See

of international human rights over the last few decades, however, has increased the importance of the debate. The human rights "revolution" after WWII has rendered the individual a subject of international law. The explosion of statutory law in all areas of life, even in a common law country like the United States, has increased the possibilities of conflicts between domestic legislation, the constitution and international law. This trend only will increase as countries in East-Central Europe and the former Soviet Union are passing a large amount of statutory law.

There is one slight possibility where the Court can bring the country back in some variant form of a dualist model. The approach mentioned above is the one adopted by the Italian Constitutional Court, which established that basic constitutional values underlying the Italian Constitution scheme, which may or may not be enumerated in the Constitution, should prevail over those of international law. The Hungarian Constitutional Court may well adopt that strategy should it be faced with the same issue in a different case. It may, for example, distinguish Case II by noting that the norms embodied in Article 57 (4) does not constitute a basic constitutional value of the Hungarian Constitution. This appears unlikely, however, as the prohibition against retroactive criminal punishment would seem to be as basic as any other values in preserving a democratic state where citizens are not arbitrarily punished. If this norm is not assigned the status of a basic constitutional right, it would be difficult to imagine what would be.

B. Conflict Between Treaty-based Norms and the Constitutional Rights

The Court in Case II creates a legal incoherence between the status of treaties in Hungary, the ACC, and the Constitution. Hungary maintains strict adherence to the dualist model for treaties by requiring that a treaty be transformed into the domestic legal system, either through a statute or some other legal act, before it acquires legal force. These "transformation" statutes render norms in treaties into norms of a domestic legal act, either a parliamentary statute or an executive order. The "transformation" statute can be applied as other statutes. The ACC provides that treaties generally would prevail over inconsistent domestic laws, unless the legal act that promulgated the treaty is lower in the hierarchy than that of the inconsistent domestic law.[51] Although not expressly provided,

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In re Dillon, 7 F. Cas. 710, 712 (C.C.N.D. Cal. 1854) (No. 3,914) (involving the domestic invalidity of treaty granting immunity from subpoena in the face of U.S. Constitution's sixth amendment).

51 "The Constitutional Court shall, ..., decide whether a legislative provision or other act of State organs is in conflict with an international agreement. If the Constitution Court establishes that a legislative provision, equal in hierarchy or subordinate to the enactment promulgating the international agreement, or another act of State organs is in conflict with the international agreement in question, it shall annul, wholly or in part, the legislative provision or other acts of State organs to the international agreement. ACC, Article 45 (1).

Many countries, such as Italy, adopt the principle that treaties are of the same rank as ordinary national laws. As such, an incorporated treaty prevails over inconsistent prior law while treaties are subject to subsequently enacted legislative acts. There are some special treaties which prevail over all domestic law, such as

given the possibility that a legal act may be higher in rank than a treaty, it would be reasonable to deduce that constitutional rights and norms would prevail over inconsistent treaty norms.

Case II appears to vitiate this scheme, at least partially, by effectively constitutionalizing treaties, thus suggesting that treaties are superior to all legal acts, even where the challenged act is higher in rank than the statute promulgating the treaty. As such, Court's treatment of international treaties is seemingly irreconcilable with that of the Act on Constitutional Court.

The Court in Case II thus provides the first glimpse at how it would reconcile a conflict between a treaty-based norm and a constitutional provision. The Court considered the effects of the international documents relating to war crime and crimes against humanity, including the 1968 New York Convention[52] and the European Convention of 1974 on the non-application of the statutory limitation on such crimes. The Court noted that these international covenants "cannot be deemed as integral parts of the international customary law or as the generally recognized rules of international law."[53] The Court thus had to deal with the conflict between Article 57 (4)'s strict prohibition against retroactive criminal liability and the obligation under the two treaties to prosecute war crimes and crimes against humanity, retroactively if necessary; in other words, the Court had to consider whether to treat the conflict between the Constitution and international treaties in the same manner as it resolved the conflict between the general rules of international law and the Constitution.

The Court held that the obligations of the two relevant international conventions override the absolute protection afforded under Article 57 (4) of the Hungarian Constitution. It noted that the two conventions bind the parties to prosecute war crimes or crimes against humanity regardless of their statutes of limitations and that this obligation reflects a "clar trend" in the development of customary international law. Whereas international law does not have a clear rule on statutes of limitations on war crimes or crimes against humanity, the norms in the two treaties, including those on statutes of limitations, reflect and supplement the customary international law that states have the obligation to prosecute such crimes.

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the Italian Lateran Pacts and the European Communities. The United States's "last-in-time" rule also allows federal laws to modify treaties, although the federal system assures that treaties, like federal laws, are supreme over state laws. Whitney v. Robertson, 124 U.S. 190 (1988).

There are other countries that provide for the supremacy of treaties over even subsequently promulgated laws. These countries include Spain (Spanish Const., Article 96), France (French Const. of 1958, Article 55) and Greece (Greek Const., Article 28).

52 The New York Convention, for example, stated that the war crimes and crimes against humanity listed in the Convention "shall not be subject to statutory limitation, regardless of the date of their commission".

53 I will not address in this paper the Court's approach in determining which norms have reached the status of customary international law or "generally recognized rules". I will say, however, that the Court has not been particular thorough in delineating the elements that it considers relevant and persuasive in determining whether a rule has reached this status.

The Court's here piggybacked on its broad interpretation of Article 7 (1) of the Hungarian Constitution to trump the domestic, absolute guarantee *of nullum crimen sine lege*. Nonetheless, The Court's language suggests that it would not find in every case that a treaty norm would prevail over a Constitutional provision. The Court here bootstrapped its reasoning on the strength it assigned to a particular international norm—the obligation to prosecute war crimes or crimes against humanity. This is unlikely to happen in every conflict between a treaty provision and a constitutional right, particularly when many treaties protect and supplement, rather than conflict with, domestic fundamental rights.

Nonetheless, the Court's approach potentially affects a broader scheme for the development of rights in Hungary. If treaty norms prevail over constitutional norms under some circumstances, one could envision the Court declaring that the national government has violated Article 7 (1) of the Hungarian Constitution because some constitutional provisions do not conform, for example, to what often are the more expansive rights in the Covenant on Social, Economic and Cultural Rights.

One other related point. The Court's decision failed to give effect to other sources of international law, including the International Covenant of Civil and Political Rights [Article 15 (1)], the European Convention for the Protection of Human Rights [Article 7 (1)]. As with the Hungarian Constitution, these also provide for the unconditional prohibition of retroactive criminal punishment. Most scholars of international law would also claim that the guarantee *of nullum crimen sine lege* also has reached the status of customary international law. Indeed, in Case I concerning retroactive justice, the Court reviewed the practice of many countries and the Court itself suggested forcefully that such a rule is internationally recognized as fundamental to a state whose basis is the rule of law.[54] In this respect, the Court did not provide an explanation why, in this case, one norm of customary international law (obligation to prosecute war crimes/crimes against humanity) should prevail over another (no retroactive criminal liability).

V. Conclusion

A full understanding of how international norms operate or affect the national legal systems requires the examination of those institutions where "the claims of the international and national legal orders frequently converge"[55]—generally, domestic tribunals, particularly the newly-created constitutional courts in East-Central Europe. In an international order where transnational relations and effects are more fluid, like that of today, transnational norms have increasingly greater relevance for domestic courts. Yet, there is inherent tension in courts examining international issues, as courts may act as "unofficial agents of the international legal order," but concurrently are subject to the national legal order from which these courts receive their jurisdictional competence. This

54 Case 11/1992 (III. 5.)

55 LILLICH, R.: *The Proper Role of Domestic Courts in the International Legal Order*, 11 Vanderbilt Journal of International Law, 9, 12 (1970).

tension is enhanced as the "history of international law in the twentieth century" has seen an "incremental exclusion of issues and behaviors from the protective ambit of exclusive domestic jurisdiction ... "[56]

Domestic tribunals often function as crucial intermediaries in the relationship between the international and domestic legal systems, particularly in the decades following WWII. With the rapid development of international human rights law after WWII, the state sovereignty paradigm of international relations established by the Peace of Westphalia[57] ineluctably changed. International law no longer was perceived only as a horizontal system of norms between sovereign states. Instead, international law increasingly was created and enforced vertically, with the individual occupying a more prominent role, including that of a rightsholder.[58] With the ebb in the legal and political importance of the Westphalian notion of sovereignty, there has been not only more consensus about desired practices, but also more codification of these norms. The change in paradigms—from one of strong state sovereignty to one where fundamental rights place limits on such sovereignty—has pressured domestic courts to change the scope of their traditional roles, to become more active even where international elements are involved. This is no different with the new constitutional courts in the region. Thus, at least in the context of human rights, the lack of "appropriate centralized international judicial tribunals, domestic courts, ..., may bridge the waning Westphalian model and the evolving human rights paradigm."[59]

The Hungarian Constitutional Court and its decision in Case II provides a clear example of the significant issues *and* dangers involved in the clarification (or non-clarification) of the exact relationship between international and domestic law. These dangers are magnified as these issues often were not given much thought or attention in the recent and numerous attempts at constitutional drafting in the region, either by the countries themselves or by the foreign lawyers providing "expert" advice. Beyond its immediate effect of sanctioning the prosecution of a few egregious acts in 1956 in Hungary, the second retroactive justice decision handed down by the Hungarian Constitutional Court has both optimistic and troubling implications. As discussed above, the case has and may have enormous impact on 1) the allocation of powers between the Court, the Parliament and the Government and 2) the development of substantive rights in Hungary and individual access to vindicate those rights.

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56 STEINHARDT, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vanderbilt Law Review, 1103, 1177 (1990).

57 See generally GROSS, L.: *The Peace of Westphalia, 1648, 1948*, 32 American Journal of International Law, 20 (1948).

58 See generally JANIS, M.: An Introduction to International Law (1988); SOHN, L. B.: *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 American University Law Review, 1 (1982); HIGGINS, R.: *Conceptual Thinking about the Individual in International Law*, 24 New York University Law Review, 11 (1978).

59 RANDALL, K. C.: *Federal Questions and the Human Rights Paradigm*, 73 Minnesota Law Review, 349, 421–22 (1988).

The Court, in delineating its vision of the relationship between international and domestic law, imposed broad rules and constraints on the other branches of government. These constraints, I argued, are not necessarily compelled by the constitutional or other legal texts, or even necessarily desirable. The Court in this case single-handedly changed some constitutional boundaries and opened gaps in others. It remains to be seen, however, whether these constraints will be implicated and, if so, what the reactions will be from the other political branches.

Aside from the perhaps esoteric theoretical debate between monism and dualism the case provokes, the case also has practical impacts on the development of rights in Hungary. The Court, I argued, established a mechanism for individuals to petition the Court directly to vindicate their treaty-based rights. Even if international law is determined not to be applicable, the court has opened up the door to individuals to participate in the interplay between international and domestic law. Even if Hungarian citizens do not prevail on their claims, they thus have opportunities to "provoke ... [the] articulation of a *norm* of transnational law, with an eye toward using that declaration to promote a political settlement in which both governmental and non-governmental entities will participate."[60]

The ability to force a pronouncement that a transnational[61] norm has been violated has at least two implications for the countries in East-Central Europe. First, transnational law could offer citizens a source of law or standard from which they may challenge or review state action in a particular case. Transnational law thus is an additional, and potentially powerful, tool with which citizens can assure that the rights granted in newly-written or revised constitutions will be more than merely aspirational.

Second, how the relationship between international and domestic law is structured affects both the nature and shape of political debates and the development of the polity. A successful transition requires not only the creation and maintenance of appropriate structures and institutions, but also the development of a polity that is willing to engage in formalized processes to resolve disputes. This task is particularly difficult in East-Central Europe where a lack of civil society spheres and formal barriers to political participation erected by the Communist Party over the last few decades have fostered a mentality of helplessness towards a republican style of dispute settlement. Should international law provide an *additional* mechanism that allows citizens to engage formal institutions in these debates, perhaps in a forum such as a constitutional court, the polity will slowly be socialized into patterns of behavior towards republican debate—behavior that will legitimize the newly created democratic institutions over time.

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60 KOH, H.: *Transnational Public Litigation*, 100 Yale Law Journal. 2347, 2349 (1991).

61 "Transnational law" conceptually is broader than "international law". Judge Jessup defined transnational law as "all law which regulates actions or events that transcend national frontiers" and includes "both public and private international law ... [plus] other rules which do not wholly fit into such standard categories". JESSUP, P.: Transnational Law 2 (1956).

Finally, in adopting a broad and straight-forward interpretation of Article 7 (1), the Court opened the door for further use of international law to fill the gaps of the Constitution. Case II arguably imposes a strong suggestion, if not obligation, on the Court to refer to international norms to assure that domestic norms are consistent with those of the international legal system. I argue further that this not only would have a positive effect for the development and protection of rights in Hungary, it would also aid the assertive and fiercely independent Hungarian Constitutional Court to maintain and augment its legitimacy in the Hungarian constitutional scheme.

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KALEIDOSCOPE

Some Issues of the Compensation and Restitution for Crime Victims

Introduction

The different models of reparation for crime victims have become to the centre of interest recently. Most initiatives concern either compensation by the State or restitution by the offender. The spreading of the idea of restitution can be approached from different aspects of criminal policy like the efforts of victimology which keep the victims interests in view, reservations about imprisonment and the consideration of punishments which do not involve imprisonment or tendencies towards alternative sanctions, or the question of efficiency of criminal justice and reconciliation between the offender and the victim or the idea of diversion from criminal law.[1]

Although restitution is a key-factor in reconciliation or mediation within this article we shall concentrate on the conception of compensation in criminal law as we have no experience concerning mediation in Hungary. In the first part we are going to pay attention to the different aspects of compensation and restitution and the contradictory and ambiguous usage of the terms. In the second part we are going to write about restitution in criminal substantive law, paying attention to the Hungarian regulations and the characteristics of

1 WEIGEND, Th.: "Restitution" in den USA. In: Albin Eser, Günther Kaiser and Kurt Madlener (Eds.): Neue Wege der Wiedergutmachung im Strafrecht, Freiburg i.Br. 1990, p. 111; MÜLLER-DIETZ, H.: Compensation as a Criminal Penalty? in: G. Kaiser–H. Kury–H. J. Albrecht (Eds.) with the assistance of H. Arnold: Victim and Criminal Justice Criminological Research Report by the Max Planck Institute for Foreign and International Penal Law, Volume 51, pp. 197–198; NAGY, F.: Intézkedések a büntetőjog szankciórendszerében (Measures in the Sanction System of Penal Law), Közgazdasági és Jogi Könyvkiadó, Budapest, 1986, pp. 85–88; NAGY, F.–TOKAJI, G.: A magyar büntetőjog általános része (The General Part of the Hungarian Criminal Law), JATE Kiadó, Szeged, 1990, Volume II, p. 7; VIGH, J.: Vita az igazságszolgáltatás jövőjéről az Európa Tanácsban (Debate on the Future of Criminal Justice in the Council of Europe), Magyar Jog No. 3, 1991, p. 173.

adhesive process of civil law claim in the criminal procedure. In the end we shall refer to the connection between restitution by the offender and criminal substantive law.

1. The professional literature pays special attention to the compensation of victims. To label compensation there are, however, several legal terms or the same terms are used with different meanings. It makes the clarification even more difficult that we can speak of rules and ideas of compensation in criminal law which fall on the offender and, on the other hand, compensation by the State or from public funds. The present article concentrates on the first part of the above statement.

In England compensation as a term of criminal law is used to denote the material compensation paid by the offender to the victim to compensate the material loss or personal injuries caused by a crime (compensation order). Restitution as a means of other legal consequence of criminal law assuring natural reparation is understood in a narrower sense and, in integrum restitutio, the restitution of material goods to the person from whom they have been taken away illegally.[2]

Many have, however, a different opinion. According to most considerations in the professional literature restitution denotes the responsibility that falls on the offender towards the victim and compensation is the duty of government offices or third parties (insurance companies). Restitution and compensation are alternative methods of repaying losses.[3] The definition which says that compensation is the repaying of losses to the victims of crimes by the state organizations and restitution is that of by the offender seems more clear-cut.[4] *S. Schafer* also says that "restitution in criminal-victim relationships concerns the reparation of the victims loss or, letter, restoration of his position and rights that were damaged or destroyed by and during the criminal attack... Compensation, in criminal-victim relationships, concerns the counterbalancing of the victims loss that results from the criminal attack... It is an indication of the responsibility of the society; it is a claim for compensating action by the society".[5]

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2 JOUTSEN, M.: The Role of the Victims of Crime in European Criminal Justice Systems. A Crossnational Study of the Role of the Victim. HEUNI Publication Series No. 11, Helsinki 1987, 221 pp.; JOUTSEN, M.: Research on Victims and Criminal Policy in Europe. In: Crime and Criminal Policy in Europe. Proceedings of a European Colloquium. Ed.: Roger Hood, Centre for Criminological Research, University of Oxford, 1988, p. 67; WALSH, D.–POOLE, A.: A Dictionary of Criminology. London, 1983, pp. 40 and 199; LÉVAI, M.: A büntetőjogi jogkövetkezmények rendszere Angliában és Walesben; kriminálpolitikai tanulságok. "Az alternatív büntetési formák és a pártfogó felügyelet Angliában és Walesben" c. kötet (Criminal Sanction System in England and Wales; Lessons of Crime Policy. In: The Forms of Alternative Sanctions and Probation Service in England and Wales) Ed.: Gönczöl, Katalin. Kriminológiai Közlemények No. 42, Magyar Kriminológiai Társaság 1991, pp. 47–48, 55; KÖVÉR, Á.: A börtönnépesség csökkentésére irányuló angol büntetőpolitika eszközei és beavatkozási szintjei (Instruments and Levels of the Intervention of English Crime Policy for Reduction in the Prison Population), Magyar Jog, No. 11, 1991, p. 681.

3 KARMEN, A.: Crime Victims. An Introduction to Victimology, Wadsworth 1984, 176 pp.

4 EREZ, E.: Victim Participation in Sentencing: Rhetoric adn Reality. Journal of Criminal Justice Vol. 18, pp. 19–31 (1990), p. 20; GALAWAY, B.: Use of Restitution as a Penal Measure in the United States. The Howard Journal, Volume XXII. 1983, p. 9.

5 SCHAFER, S.: The Victim and his Criminal. A study in functional responsibility, Random House, New York, 1968., pp. 112–113.

Similarly the *United Nations*[6] makes such a difference between restitution and compensation that the former is provided by the offenders or third parties e.g. the offenders employer or the person who, with his carelessness opened the door to crime, and the latter is taken care of by the state or other fund founded for this special purpose. Comparing the meaning of compensation and restitution as it is understood in the terminology of the UN and their meaning understood by the English we find that the terminology of the UN uses restitution to denote both partial reparation by the offender and return of material goods. The "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" adopted by the General Assembly on 29 November 1985, describes what we understand by restitution and compensation. According to point 8 "offenders or third parties responsible for the behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and restoration of rights".

According to point 12 "when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to

a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization."

In documents of the Council of Europe we can read about restitution or compensation (or both) by the offender on the one hand and about compensation by the State. In connection with the above the Council of Europe stated that the compensation paid by the offender to the victim includes everything that is meant by restitution in the American terminology. The recommendation, which was accepted by the Committee of Ministers of Member States of the Council of Europe on 28 June 1985, on the position of the victim in the framework of criminal law and procedure contains some instructions which are worth following. Resolution No. 77 (27) was formed to provide compensation to victims of crimes, mainly intentional assault, and the dependants of persons who have died as a result of victimization and altering and supplementing the European Convention on the Compensation of Victims of Violent Crimes was brought in 1983. Both comprise regulations on compensation by the State. The twofold character of the difference in meaning of the terms above is significant. On the one hand who is the obligant—the offender, a third party, or the State—and who is the recipient of the compensation or restitution and, on the other hand, what is the sphere of authority of the legal title? The contradictory usage of the terminology in other countries has not resulted in a unified Hungarian translation. Further on we wish to stick to the terminology used by the UN, see above.

6 A Titkárság A/CONF. 121/6. sz. munkaokmánya — Az Egyesült Nemzetek hetedik bűnmegelőzési kongresszusa, Milánó, 1985. (Report of the United Nations Secretary No. A/CONF. 121/6—the Seventh Congress, Milan 1985) Ed.: Szük, László, Igazságügyi Minisztérium 18. sz. tanulmánykötete, 1986, p. 125.

2. There are different methods for restitution of the losses caused by an offender of a crime in different countries. Concerning the enforcement of the victims rights for civil law claim in the criminal procedure two terms are frequently used: "partie civile" and the adhesive procedure. The former one is significant in France and countries under French influence. The latter one is known in Germany and in countries under German influence, i.e. in Hungary.[7]

2.1. Before drawing up the general characteristics of the adhesive procedure in criminal procedural law in Hungary we wish to mention that there are different possibilities for restitution of the losses caused by an offender in *criminal substantive law*:

— The returns of losses can be a mitigating factor in judicial practice when imposing punishment for committing crime against property. The returns of the major part of the losses can also be a mitigating factor.

— Active repentance is also a familiar term concerning crime against property. It means that the punishment may be unrestrictedly mitigated, in a case deserving special consideration it may even be waived, where the perpetrator of theft, embezzlement, fraud, malversation, wilful damaging, receiving goods unlawfully acquired, unlawful appropriation or arbitrary taking away of a vehicle, reports the act before it is discovered to the authority or to the injured person and compensates for the damage or does his best that can be expected from him in order to repair the prejudice (Criminal Code 332 §).

— In case of rape and indecent assault where the perpetrator and the injured person contract marriage prior to the passing of the sentence of first instance, the punishment may be mitigated without restriction (Criminal Code 197 § and 198 §).

— In the case of exoneration by court decision special attention is paid to the offenders meritoriousness which means that it is taken into consideration if the convicted has, in accordance with his means, repaired the prejudice (Criminal Code 103 §).

2.2. In Hungary *the criminal procedural law* includes the rules of enforcement of civil law claims in criminal procedure (the rules of adhesive procedure). In connection with this we wish to write about the person entitled to and the obligee of the civil law claims first and the idea of civil law claim second. We wish to emphasize in connection with *the person entitled to civil law claim* that in the criminal procedure in Hungary the injured party can be the plaintiff, the private prosecutor, the private party in a criminal procedure and can be examined as a witness as well. The private party shall be the injured party who wants to enforce a civil law claim in criminal procedure [Criminal Procedural Code 55 § (1)]. Besides the enforcement right of civil law claim the private party can, of course, exercise the rights which are due to the injured. Although a private party is always an injured party as well the circle of private parties is narrower than that of the injured so not every injured is a private party. The injured

7 KILLIAS, M.: Victim-Related Alternatives to the Criminal Justice System: Compensation Restitution, and Mediation. In: Günther Kaiser and Hans-Jörg Albrecht: Crime and Criminal Policy in Europe. Proceedings of the II. European Colloquium, pp. 249–251.

is a natural person or legal entity whose rights or lawful interests have been violated or jeopardized by the criminal offence [Criminal Procedural Code 53 § (1)].

Without such violation of rights or lawful interests no enforcement of civil law claim can be spoken of. This does not, however, mean that any possibility of violation can be repaired by a case of civil law claim. It is only possible to enforce a civil law claim "which has arisen owing to the criminal offence or the petty offence adjudged by the court" [Criminal Procedural Code 55 § (2)]. In the event of the decease of the injured party, his heir may appear as private party [Criminal Procedural Code 55 § (5)]. According to the criminal procedural law the procurator has the right, independently from the injured, to enforce the civil law claim of the injured [Criminal Procedural Code 55 § (4)].

In relation to *the persons obliged to pay civil law claim*, in the criminal procedure civil law claim can be enforced only against the offender [Criminal Procedural Code 55 § (2)]. The fact that civil law claim is being enforced against the offender in the criminal procedure may not restrict the offenders legal rights.

The offender when there is a civil law claim enforced against him in the criminal procedure is in the situation of the defendant in a civil procedure but he has less rights than the defendant in a civil case.

In criminal procedures civil law claims are usually enforced against the offender of crimes causing damage (the offender, a party to the crime, the instigator or the accomplice) but the enforcement of civil law claims is not impossible against the offender of incidental crime concerning the basic crime causing damage like abetment or receiving unlawfully acquired goods. In case of more than one offenders if they caused the damage together the rules of responsibility of civil law must be administered, i.e. their responsibility towards the injured is corporate and it is proportional to the attributability of their behaviour among them [Civil Code 344 § (1)].

What refers to the *notion of civil law claim* "the private party may enforce the civil law claim against the accused which has arisen owing to the criminal offence or the petty offence adjudged by the court" [Criminal Procedural Code 55 § (2)].

This legal conception raises several questions. First the question of connexion and this claim should be enforced by law. Civil law claims may not be restricted to civil law only as they may issue from other legal area. (E.g. labour law claim for repairing the prejudice caused by crime concerning employment.) Civil law claims are generally contract-law claims namely claims for indemnification (compensation) as crimes usually involve damages (injuries). In legal practice adhesive cases are cases in the course of which claims for indemnification (compensation) are enforced.

As in the adhesive procedure both criminal law claims and civil law claims are decided by the court in the same procedure. The administration of the two different rules of law proves difficult because criminal substantive law and civil material law differ from each other basically:

— criminal responsibility is based on culpability while in civil law the guiltless responsibility for damage is also known,

— criminal law is dominated by culpability and civil law is dominated by guiltiness, and

— it also makes the decision difficult that the sum of the indemnification (compensation) received in the enforcement of civil law claim in the adhesive procedure is often not equivalent to the value of the goods (theft, embezzlement) to the damage caused (fraud, wilful damaging) or the criminal concept of the pecuniary loss caused by the crime (malversation).

This latter problem is based on the fact that the meaning of damage in criminal law is narrower than that of in civil law because it only includes the loss of value of property produced by the offence and not the lucrum cessans. Furthermore value and prejudice are also terms known in criminal law.

It makes the judgement of adhesive claims even more complicated that not only two different rules of material law but two different rules of procedural law compete with each other so it is quite natural that the elements of criminal and civil law, material and procedural law mix.

There is no denying that adhesive procedures have their advantages in aspects of economicality and practicability of cases and also the interest of law that the injuries caused by crime be repaired as soon as possible. In the practice in Hungary this legal institution however, is not administered efficiently enough. Furthermore in case of a civil law claim the criminal court will pass a decision only if it has been applied for, a civil law claim cannot be judged automatically and the injured is never automatically asked to make a statement about a civil law claim.

The provision of the Hungarian criminal law below may well illustrate the situation: if the determination of the civil law claim "would considerably delay the termination of the procedure the court shall in its decision determining the case, refer the enforcement of the civil law claim to settlement by other legal procedure" [Criminal Procedural Code 215 § (1)].

3. The claim for the enforcement of compensation in the course of the criminal procedure remains a possibility in theory only for most of the victims of crime in Hungary. While the demand for compensation for damages caused by crime is increasing.[8] This

8 KAISER, G.: Kriminologie. Heidelberg 1988, 10. Kapitel: Verbrechensopfer. pp. 465–495; EXNER, Franz. Für den Verletzen. Festschrift für Karl Stoos. Schweizerische Zeitschrift für Strafrecht 1929, pages 19–36; cited by KIRCHHOFF, G. F.: A viktimológia, emberi jogok és a büntető eljárás. In: Az emberi jogok és a büntető igazságszolgáltatás. XLIII. Nemzetközi Kriminológiai Konferencia, Miskolc 1991. augusztus 21–25; Miskolc 1991 (Victimology, Human Rights and Criminal Procedure. In: XLIII. International Criminological Course on Human Rights and Criminal Justice, Miskolc, 21–25 August 1991; Miskolc 1991), p. 254; ARNOLD, H.—KORINEK, L.: Victimization, Attitudes towards Crime and Related Issues: Comparative Research Results from Hungary, in: Victims and Criminal Justice, edited by G. Kaiser, H. Kury, H.-J. Albrecht with the assistance of H. Arnold, Volume 51, Max Planck Institute for Foreign and International Penal Law, Freiburg 1991, p. 114; KRATOCHWILL, F.: A bűncselekmények áldozatainak kártalanítása (Compensation for Crime Victims), Kriminológiai Közlemények, No. 38–39, p. 65; IRK, F.: A ma kriminológiájának aktuális kérdései (Current Questions of Criminology), Magyar Jog, No. 5, 1992, p. 262; RASKÓ, G.: A III. nemzetközi viktimológiai szimpozion (The III. International Victimological Symposium), Belügyi Szemle No. 2, 1980, p. 45; VÁG, A.: Rendőri–sértetti interakciók az átmeneti korszakban. (Police–Victim Interactions in the Interim Period), Kriminológiai Közlemények, No. 38–39, pp. 98–119.

deserves special attention during the criminal justice because significant changes can be experienced in the field of criminal policy (see above in the introduction). In many countries the transformation of the system of penal sanction is a frequent question on the agenda. The system based on fine and imprisonment could be improved by restitution enforcing the interests of victims.[9]

Point 9 of the UN Declaration referred to above urges that "Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases in addition to other criminal sanctions".

According to the Council of Europe "Legislation should provide that compensation may either be a penal sanction or a substitute for a penal sanction or be awarded in addition to a penal sanction".

It may be worth mentioning here that criminal law of XIXth century in Hungary had a similar legal institution (V. of 1878.) as in cases of murder or homicide compensation for the dependants of the victim was automatically adjudged either in form of a capital or annuity. In cases of bodily assault it was possible, in accordance with the wish of the injured, to get reasonable compensation. The name of this was "Fine due to the injured".[10]

In many countries the precondition of suspension of criminal procedure, probation and suspended sentence is the restitution for the injuries caused by the offender to the victim. Restitution by the offender is considered at the infliction of punishment, waiving of punishment, exoneration or when exercising the right of granting pardon. Its administration as a supplementary or rather as an independent sanction raises several questions concerning restitution and criminal law and system of criminal sanctions, and their connection with theories of punishment which seem to be the most important questions of international criminal policy today.

Ilona Görgényi

9 ESER, A.: A német büntetőjog százesztendős reformtörténete. Visszapillantás és a jövő útjai. A Legfelsőbb Bíróságon 1990. április 10–én tartott előadás. (The Hundred Year Reform History in the German Criminal Law. Review and the Way of Future. Paper presented in the Hungarian Supreme Court on 10. April 1990), Translated by Györgyi, K. Magyar Jog No. 9, 1990, p. 788.

10 ANGYAL, P.: Az ember élete elleni bűncselekmények és a párviadal. A magyar büntetőjog kézikönyve (Crimes Against Human Life. Handbook of Hungarian Criminal Law), Volume II, Budapest 1928, pp. 30–31, 46; KAUTZ, G.: A magyar büntetőjog tankönyve (Text-book of the Hungarian Criminal Law) Budapest 1881. p. 336.

István Werbőczy and his Work

István Werbőczy was one of the outstanding jurists and key figurers of the political life in Hungary during the 16th century. His work and activity were presented at the Conference organised by the Hungarian Academy of Sciences, Eötvös Loránd University and the Hungarian Jurists Association held in the Aula Magna of the University on the 26th of April 1993.

The main aim the symposium was to illustrate the divergent Werbőczy image through the interpretations of prominent scholars. The Tripartitum, a draft bill by Werbőczy was the embodiment of the Hungarian Holy Crown doctrine and this work was one of the best-sellers of the Hungarian intellectuals between the 17th and the 19th centuries.

The first lecturer at the conference was *Professor András Kubinyi,* who depicted Werbőczy's political career. Lacking the sources, it is very difficult to show and judge the historic facts—that is why scholars studying Werbőczy's political life-work before 1526 have to face many obstacles.

István Werbőczy studied at the University of Cracow in 1492, and in this year he became a clerk of the King's Court, then he was Prothonotary and Chief Justice, representing the King in the Highest Court. Werbőczy was adopted by Mihály Szobi, the political leader of the lesser nobility who helped his adoptive son. Werbőczy, who was pushed into the political background, achieved a fairly good reputation, for while he was doing his official duty the Hungarian nobility from all over the country got to know him. After Mihály Szobi's retirement Werbőczy became one of the leaders of the nobility in 1526. Unfortunately after his election as Palatine he could not cope with this position and it meant his defeat.

The next lecturer was Chief Archivist Géza Érszegi, who spoke about the operation of the Office of the Chief Justice. The nobility demanded qualified persons for the position of Personalis. Although this status was often fulfilled by bishops, the nobility appointed secular jurists to carry out the task of representing the king in the Highest Court.

István Werbőczy was *personalis praesentiae locum tenens* between 1516 and 1525. Two prothonotaries and several clerks assisted him in this office. The prothonotaries dealt with the easy everyday issues, therefore Werbőczy had the time and the opportunity to take part in political and international diplomatic life. Werbőczy's important political work did not leave him much time to carry out his official duty as Chief Justice.

Professor *Gábor Barta* gave a lecture on Werbőczy's activity after 1526. He spoke about the political situation in Hungary after the defeat at Mohács and we could follow

the career of a member of the lower nobility from its beginning to its fall. Werbőczy could get hold of his illustrious positions through his important supporters; he became a Personalis with Szobi's help and János Szapolyai, Transylvanian voivode, helped him to become a Palatine. He became a Chancellor after Szapolyai had been elected King.

Werbőczy coped very well with the problems deriving from his position, in fact, using his diplomatic fits he served his country well. Unfortunately as a politician he did not always manage to make the best decisions. This led to his failure when the Turks occupied Buda in 1541.

Professor *Gábor Hamza* analysed the Tripartitum as a source of law. He evaluated and analysed Werbőczy's *oeuvre* from a legal aspect. We may say that the Tripartitum cannot be called lex, as it was not sanctioned due to political fights, nor was it promulgated. On the other hand it was of extreme significance. Several Hungarian jurists, like *Imre Kelemen, Sándor Kövy, Pál Szlemenics* regarded it as law. Professor Gábor Hamza emphasised that the Tripartitum was considered as a source of law according to Act. XLI of 1518. It can be placed on the field of unwritten law and as *consuetudo* it was obligatory for the judicial practice. Beyond doubt the Tripartitum was not a formal act, still its significance stood on the same level with acts in the hierarchy of sources of law.

György Székely, Member of the Hungarian Academy of Sciences, dealt with the legal position of the town Buda. In this presentation he mentioned the antagonism deriving from the composition of the population such as the legal evaluation of strifes arising between noble men and citizens on the one hand and Christians and Jews on the other. Professor Székely expounded that citizens were judged as noble people from many aspects such as their *homage*, but the equal treatment did not spread over all fields of life.

Ferenc Szakály, head of the department of the Historical Institute of the Hungarian Academy of Sciences dealt with the position of Hungarian lawmaking after the defeat at Mohács. As the country had fallen into three parts, the integrity of Hungarian law seemed to fall into pieces because of political conditions, but this was averted as the Tripartitum was a general source of law accepted in each part of the country.

Until the end of the 17th century the Diet, both in Hungary and in Transylvania made efforts to restrict the Turks' freedom in lawmaking. The purpose of the Diet was to let Turks make legal rules only in cases that could not be averted or were irrelevant to Hungarians.

Professor Szakály pointed out that among the tasks regulated by the Transylvanian and Hungarian Diet, the regulation of the territories under enemy rule was not special because the legal norms made by legislators could be effective.

Professor *Péter Erdő*, canonist, studied the extend wording of the diocese synods, thus defining the genre of the synodial book. In his lecture he expounded that the resolutions of the diocesan council of Esztergom in 1382 corresponded to the new resolutions of *liber synodalis* worked out by Spanish researchers. Talking about the *liber synodalis* of Esztergom he mentioned that a synodial book of southern France served as its primary source. The fact that the author of the book of Esztergom used indirect sources as a base for writing could explain it. On the other hand Professor Erdő emphasized that the original French wording can be found in mediaeval Spanish synodial books.

The next lecturer, Professor *Wilhelm Brauneder* of the University of Vienna, dealt with the effects of Werbőczy's activity in Austria.

It is well known that the Tripartitum was published in Austria and that the Habsburg rulers were interested in Hungary. This is why studying Hungarian law was of great importance in Austria. At that time the Tripartitum was the most important part of the Hungarian law. The Tripartitum is based on Roman law—that is why it is an important step in the development of European law, and explains the interest of Austrian legal scholars. Brauneder emphasised that the research of the Tripartitum did not serve then current political interests since the Habsburg rulers did not want to expand the Austrian legal system to Hungary.

Assistant Professor *Andrea Lengyel* studied the influence of Roman law on the Tripartitum, especially on procedure and property law. In her lecture she described parts that were received word for word or by their contents. She pointed out that the *Institutes of Justinian* were used as a basis for the source of the compilation of Tripartitum, which is proved by the verbal and abstract transcription. The literal quotations can be found mostly in the *Prologus* where Werbőczy summarised the significant sources and interpreted them in his own composition by the model of glossators.

The divergent features of the legal practice restricted the effects of Roman law in the Tripartitum, therefore, where they were inconsistent, Werbőczy complied the Tripartitum in compliance with the interests of the nobility.

Associate Professor *András Földi* gave a lecture on the impact of Roman law on the Tripartitum in the fields of personal and family law. He emphasised that one of the main reasons for reception of some Roman law elements was to fill the gaps of the customary Hungarian law.

The lecturer showed a number of notions and institutions of Roman law which can be found in the Tripartitum, referring to the modifications and transformations as well.

We find in the Tripartitum, for example the notions of *persona sui juris* and that of agnatio, but Werbőczy's conceptions are not entirely in accordance with Roman law.

Speaking about the women's position, András Földi stated that the rules of the Tripartitum were more disadvantageous than those of ancient Roman Law and even the moral aspect was more unfavourable at that time in Hungary.

Furthermore he compared the regulation of *patria potestas* and adoption stating that there are many similarities in this respect with the Roman law.

Assistant Professor *Ádám Tóth* in connection with *tutela* studied the tutelage of minors in a comparative way. The lecturer established that Werbőczy preferred the regulation of Roman law to European regulation of the Middle Ages that can be noticed in connection with the matter of official guardianship. Using the rules of the *lex Plaetoria* in connection with the persons deceiving minors in the Tripartitum shows even more similarities.

Ádám Tóth concluded his lecture by emphasing the powerful effects of Roman law on the Tripartitum that was utilized by intermediate sources such as *Summa Legum Raymundi.*

Professor *János Zlinszky* expounded István Werbőczy's thesis about sources of law. The law in force, *ius commune,* derived from sources enforced by the ordinary courts of

Hungary. The *consuetudo* consisted of three elements: royal permissions sanctioned by the feudal assembly; general royal privileges; and judicial custom. Consequently, judicial custom was one of the most important determinative factors of the law in force because it had to be in conformity with the acts and orders, but tacitly it could set aside in certain decrees so that judicial custom was not consistently used. Regarding the privileges we may talk about a particular law that was effective only in some certain places. Only the Diet was empowered to repeal privileges based upon local law.

Professor Zlinszky emphasised that Werbőczy took only the laws in force in Hungary into consideration during the compilation of his work, and therefore Werbőczy left the *ius commune* adopted by courts out of consideration.

The Tripartitum was primarily a bill that came to the jurists in an informal way and became the only general work on domestic law that defended the interests of the nobility against the influence of *ius commune.*

Professor *Pál Horváth* dealt with Werbőczy's work from the viewpoint of historiography. It is an unfortunate fact that the first scientific study about Werbőczy was written by *Kadlec* because of the political influence on national science.

By the influence of the liberal political tendency Werbőczy became a negative propagandist of the medieval law and the value of his work was examined from this aspect.

But *Ferenc Eckhart* studied the Tripartitum in an objective way and emphasised its scientific and educational significance. He found it important that this work was a guide not only for the national jurists but that it had a significant role in the unity of Hungarian law as well. Werbőczy's Tripartitum was a founder of the Holy Crown doctrine and therefore it had influence not only on the field of legal history but on the field of politics as well, which predestined the evaluation of Werbőczy's work.

The conference raised many new questions about the understanding of Werbőczy's image from an objective aspect. The questions expounded by the lecturers of the symposium gave new perspectives to the interdisciplinary research of Werbőczy's life and works.

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BOOK REVIEW

Julie DAHLITZ: **Avoidance and Settlement of Arms Control Disputes. United Nations**, New York, 1994.

From the end of the eighties profound and comprehensive changes took place in the fields of arms control and disarmament. In the course of the last years virtually more significant changes happened than since the Second World War, in the last three decades. In 1987 the two super powers agreed on the dismantling of short and middle-range missiles in Europe, then agreed on the reduction of conventional weapons in Europe (1990), there is an agreement about the comprehensive ban of chemical weapons altogether (1993).

Despite all these achievements the disarmament until today did not produce a real breakthrough. Nowadays the super powers possess thousands of lethal nuclear arms, although these weapons are not directed against each other any more. However, the nuclear arsenal of China grows rapidly, the expansive politics of the fundamentalist Islamic states becomes more and more threatening, in their "arsenal" appears more and more the black mail with different weapons. The workout of international law norms aiming the control of mass destruction weapons happen in a rather slow pace indeed despite all those promising signs, which mean the prevalence of peaceful debates, discussions in the international politics against the violence and the aggression promoted by the arguments of arms. This volume contains the essays of outstanding international law experts in three main parts, namely the part dealing with the mode of control and competence, the part containing the settlement of disputes and the settlement of arms control disputes, moreover the part dealing with the subjects of arms' control debates.

Already the Introduction emphasizes that the international law is one of the most interactive and universal intellectual achievements, which can create the conditions for the further evolution in this field. Considering all these facts it is understandable that the last decade of this century is declared to be the Decade of International Disarmament, in the same time the Decade of International Law

too. Furthermore it can be understood that the UN which was condemned to failure in this aspect too for decades, although its Charter referred to this duty already before 50 years, now finally became suitable for the peaceful settlement of international disputes, promoting the agreements.

The first essay presents the diverse aspects of the application of control on the spot. It mentions that the two super powers already agreed on the technical means and apparatus of the arms control in 1972 and promised not to hinder in any way the continuation of this supervision, the change of data concerning the numbers, localities and technical characteristics. The comprehensive and detailed analysis of these data requires the contribution of an extensive expert staff in this control activity. The paper shortly deals with the early forms of on-the-spot control and the contemporary models of control, mentioning those possibilities too, which can be available in the future for the international on-the-spot control. It especially deals with the ad hoc agreements, which in line with the norms of international law frequently led to the significant betterment of international relations. First of all it mentions the ad hoc visits of the American and Soviet parties to each others' installations in order to clear out such situations, which can be misunderstood. For example they have visited radar stations, submarine bases at the end of the eighties on the soil of each other. Although the on-the-spot control cannot be taken as a universal panacea for all troubles, it proved to be an effective tool of controlling the adherence to the complex agreements during the last years. The next paper deals with the diverse aspects of weapon export within the countries of the European Community. It stresses that due to the technical progress in the chemical and electronic field it is very difficult to make distinction between the usage of military and civil application of technologies, which makes the supervision almost impossible. Today it could be achieved, however, in the framework of Europen political cooperation the "necessity of the more close cooperation of the parties" is recognized. In December 1990 the representatives of the EU member states declared that the role of the European Union should be extended to the different fields of common security, namely regarding those questions, which are disputed in the international fori, as the arms control, the economic and technical cooperation in the field of arms industry. Considering the basic principles hardly any counterargument appeared, but in the achievement and practical implementation of the aims the cooperation is much more difficult. The essay mentions that the first consequence of the fully harmonized Community arms export policy would be the constant highest level control of every member state. As the concerned concrete solutions will wait until the distant future as the European system of any export control for the dual use goods and military equipment requires the strengthening and harmonisation of the domestic implementation of supervision. The European integration process is clearly not yet reached this phase. Such European legal regulation is not accepted yet, which would harmonize the domestic law concerning the sanctions. Recently the gravity and nature of sanctions is very different in the European Community states. The workout and acceptance of a universal sanction system would transform the illegal export uneconomic and fruitless altogether. The essay presents the judgements of the European Court regarding the export of dual use goods and weapons. The paper closes with the final pessimistic conclusion that due to the lack

of the necessary legislative steps the pressure of the market is too strong for anything to block the export of arms.

An outstanding Japanese scholar wrote the following essay on the role of transparency in the arms control disputes. He examines the results of several post-war disarmament talks. He quotes from the American-Soviet nuclear test ban agreement of 1963:

"Each Party shall in exercising its national sovereignty have the right to withdrawal from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country."

The term "extraordinary events" in the clause in question can include the breach of treaty obligations by other parties as well as actions of non-parties which are contrary to the provisions of the treaty. In those cases the withdrawal from the treaty is regarded as a countermeasure.

Almost three decades later Boutros-Boutros Gali, the recent Secretary General of the UN presented his report under the title "An Agenda for Peace", which contains the action program of the peaceful era closing the times of world-wide confrontation. It is a series of such actions, which aim the presentation and promotion of structures which strengthen and solidify the peace and avoid the relapse into conflicts. The report by the Secretary General emphasizes: "Preventive diplomacy seeks to resolve disputes before violence breaks out; peacemaking and peacekeeping are required to halt conflicts and preserve peace once it is attained." The disarmament initiatives, the development of international law obviously contributed to lay the foundations of a peaceful world. Considering the armaments the UN makes efforts to receive objective informations on military matters as they are prerequisites of avoiding disputes on military control or the solution of such disputes. The essay emphasizes the importance of openness, transparency, despite the fact that some countries are doing their utmost to reach the opposite goal. The so-called Helsinki process, which made significant steps for the confidence-building measures, including the change of relevant informations on military matters/military allocations, the placement of main weapon systems, naval manoeuvres, budgets. Eventually due to the tragic experiences in Bosnia the world organisation stresses more than ever the control of traffic of conventional weapons. The author of the paper emphasizes that several arms control agreement lacks the effective enforcement measures and tools, therefore applying the traditional means the agreement cannot be enforced and imposed at all.

The next paper is also very interesting, it deals with the comparative analysis of arms reduction disputes. According to Raymond Aron, the outstanding scholar and analyst the armed intervention is a characteristic feature of international relations even today. It is no doubt about that the objective matter of facts shows exactly this point. However, in the last decades several countries have renounced the armed intervention as a tool of imposing its own intentions. The general definition of the International Court on the dispute can be accepted: "A dispute is a disagreement on the point of law or fact a conflict of legal views or interests between two persons."

The paper analyses the recent state of acceptance and implementation of obligations viewing several important international agreements on disarmament and arms control. It presents some agreements, which, however, for a limited geographic area implements the ban of certain weapons: e.g. the agreement

on placement of weapons in outer space, the demilitarisation of sea-bed treaty, the Antarctica Treaty, etc. There is an agreement on the procedure of disarmament disputes, which eventually facilitates the substantial progress in the debate. In the same time it does not miss to mention that several, newly established states—due to their lack of political stability and reliability—may create such a situation, where the respect of disarmament agreements could be pushed aside. By all means the solution of disputes should be tried by both diplomatic and legal means.

The paper dealing with the control mechanisms and the solution of disputes is worth of attention by all means. It presents in details the problem of verification of arms limitation and arms control agreements, the possibilities and results of international supervision. It points out that until the pre-war years the question of control of the implementation did not raise too much attention. By the intensification of international relations in the diverse spheres of political, economic, technological, social and cultural life this control became a substantial element during the past decades. Among such circumstances the control function became such a specific task that it could be hardly combined with the general diplomatic activities. Meanwhile in these days the regulation of arms limitation became very dynamic matter too. It is not possible to place the international arms control themes to a legal system without the extensive and practical interpretation of the doctrine of international control, the plans for construction and development of control mechanisms. The essay surveys the modes of control related to several concrete arms limitation agreement. It mentions the notion that eventually the economic models can give an example to follow in the field of arms control too.

The paper of Felix C. Calderon is about avoiding the applications of arms in the international conflicts. It points out that the collapse of communism and the latest changes of the European political theatre created special conditions for the further reduction of armament, the reliable arms control. By the elimination of ideological confrontation and rivalry the super powers also see a chance to eliminate significant part of their "overkill" capacity, in order to accomplish security at the possible lowest level of armament.

The last essay of the volume is written by two Japanese experts about the problems of nuclear arms at the countries which were established on the soil of the former Soviet Union. They mention that recently the number one danger source of the world is the lack of control of those nuclear weapons which are spread around the land area of the vast spaces of the former empire. The atomic arsenal of the Soviet armed forces can be found mainly in the area of three countries: Russia, Ukraine and Kazakhstan. In these countries the danger of "instant proliferation" exists, namely hundreds of these lethal weapons capable to destroy millions can fall in the hands of politically irresponsible elements. Actually these new states do not even belong to the competence of the world-wide international agreements blocking the proliferation of nuclear weapons, it depends entirely on them whether they accept the regulations of these agreements or they transform these weapons to be the tools of their armed expansion somewhere. It is obvious that the disintegration of the Soviet Union increased the number of de facto nuclear powers and indirectly encourage such countries which not yet possess nuclear arms to produce such weapons as soon as possible (eventually this is the case in Iran too, which intends to build nuclear plant

with the help of Russian technology). However, after the collapse of the empire talks started among the successor states to keep these mass destruction weapons under one command and control. Ukraine obliged herself to destroy the nuclear weapons in her possession, but the other successor states did not take at the beginning such obligation. Finally even these countries agreed that in the framework of the START Treaty they renounce their nuclear weapons, although they did not mention explicitly when this will take place. Due to the encouragement of the Western powers at the end of 1992 the European Community, the United States and Russian Federation, and Japan accepted such an agreement, which aims to establish an international scientific and technological centre, which will coordinate the nuclear research programmes of the former Soviet empire.

This interesting and significant volume is supplemented by the short curriculum vitae of the authors. Every such researcher can use well this volume, who deals with international public law matters, particularly the problems of arms control and arms reduction problems.

Miklós UDVAROS

Kriminológiai és Kriminalisztikai Évkönyv 1994

The National Institute for Criminology and Criminalistics publishes an annual volume of studies which contains reports on completed research projects or the results of researches in progress. The 31st volume of these annuals was published in 1994 (Kriminológiai és Kriminalisztikai Évkönyv, 1994.—Yearbook of Criminology and Criminalistics, 1994—Ikva, Budapest, 1994. 256 pages). Corresponding with the Institute's field of research it contains studies in the field of criminal justice, criminal procedure, criminology and criminalistics. Short summaries of the studies:

Géza Gosztonyi—Dr. Klára Kerezsi: Crime Preventive Role of the Family Assistance Centres and the Probation Services. The study describes the activity of the Family Assistance Centres and the Probation Services within the theoretical framework of primary, secondary and tertiary prevention system. It analyses the helping process and the adequacy of these two types of services. The authors clarify the competency barrier between "multiplied care" and "inter agency co-operation". The survey is based on a questionnaire filled in at 21 Family Assistance Centres. The findings show that these two types of services are not prepared to cope with criminal behaviour in a non-authoritarian way. According to the authors' view the co-operation between these two types of services would become more intensive, if the special tasks became the responsibility of the probation officers and the generic tasks became the responsibility of the generic social workers at the Family Assistance Centres. The study analyses the recent and a possible share of roles represented by these services with the help of the following three dimensions: Time, Resource, Keyworker. According to the statement of the study the nonauthoritarian serving and helping type of activity is present only the very least degree in the present practice of dealing with the problems concerning delinquency.

Dr. Mária Herczog: Correctional School and the Family. Based on a research, the author describes the structural and professional contradictions which endanger the effectiveness of the institutionalised care for young offenders. She investigated in two special institution for young offenders the lack of information and connection of the family background and environment.

Dr. Ilona Lévai: Criminal Procedure and the Prosecution—The "French Model" from the Hungarian point of view. Describing the new French Code of Criminal Procedure passed in 1992 this article reviews the role of the Prosecution in the criminal procedure as well as the position of the Prosecution in the system of the government organs. Writing about the rights and liabilities in the procedure the author compares the French Code with the prevailing Hungarian law, analyses the advantages and disadvantages of the different regulations and describes their theoretical and historical background, too.

Dr. Anna Kiss: Reflections on the Role and Future of the Preliminary Procedure (In the mirror of the reformative proposals in Hungary, Germany and Austria). This article deals with the theoretical problems which determine the probable development of the first stage of the criminal procedure (the investigation as preliminary procedure). The author describes the role of the investigation and the reaction of the two stages of the procedure to each other.

Dr. László Tibor Nagy: Contributions to the Legal History of the Crimes Against Property in Hungary. This article gives a review on the legal history of the crimes against property which is the most significant category in numbers. It describes from the age of the early feudalism the characteristic ways of regulation of the royal edicts, the role of the unwritten law, the influence of István Werbőczy's Tripartitum, and the attempts of codification during the age of enlightenment. It gives an analysis of the system of the Code Csemegi, the first Hungarian penal code, and also of the socialist legislation with special respect to its most typical manifestation, the preference of the collective property. Writing about the prevailing law at the end it describes the role of the Constitutional Court after the political changes.

József Kó—Dr. Iván Münnich: Analysis of the Effect of Violence Transmitted by Television, Tested in Two Criminologically Differently Infected Districts. The research tested the reactions of the inhabitants of Budapest's two criminologically differently endangered (infected) districts living in the same microsocial environment, after watching a TV film containing violent scenes. Those living in the criminologically more infected part were not that sensitive to the shown violence, some of them identified themselves with one of the negative figures. It might be a warning signal that those living in this district are more likely to adopt the behaviour patterns of the films and use it in their everyday life.

Dr. György Virág: Sex, Reality, Media (Sexual Violence in the Mass Media at the End of 1993). The paper describes the presentation of sexual violence in the media on the base of a three month survey including all publications of the period about the subject. Its aim is to show how does the mass media reflect the problem at the end of 1993 in Hungary—what kind of images and beliefs it cultivates on it. After the analysis of the different indicators (resources of the new, information about the perpetrator and the victim, the relation between the two, the effects of the crime, the titles, etc.)

the article summarizes the characteristics and consequences of the two typical way of presentation: the "sensationalism" and the "bagatellisation".

Dr. Ágnes Kövér: Work in the Prison System. Historical Experiences and their International Comparison in the Mirror of the Present Hungarian Reformatory Efforts. The first part of the paper reviews some important stages of the history of work in the prison in Hungary. The second part deals with the relating international rules and the practice of Austria, Germany, Switzerland, the Netherlands, England and Wales, the United States, and Canada, respectively. At the end the author considers the historical and international experiences from the point of view of the reform of work in prison in Hungary.

László Kriston—Klára Kriston: Contributions to the System of Soil Examination in the Police Science. II. The authors deal with the microscopic methods in this second part of the study. The paper discusses the examination of soil components and their characteristics by stereomicroscopic and polarisation-microscopic methods and the special forensic questions of examination and evaluation.

László PUSZTAI

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Budapest

HUNGARIAN LEGAL BIBLIOGRAPHY

1992. 2nd 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 1992, 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 p.

The material published from the 1st of January, 1981 is currently processed half-yearly in the *Acta Juridica*, beginning with Tomus 23, 1981. Nos 3–4.

Abbreviations of periodicals and other abbrevations see in the *Acta Juridica* Nos 1–2 of 1989.

Periodicals processed in this bibliography:

Acta Humana 6–9. sz. 1991. [1992.]; ÁJ 1–4. sz. 1991. [1992.]; AJurid. 1–2. sz. 1991. [1992.]; JK 7–12/1992.; MJ 7–12/1992.; MKözigazg. 7–12/1992.; MTud. 7–12/1992.; TSZ 7–12/1992.; Valóság 7–12/992.

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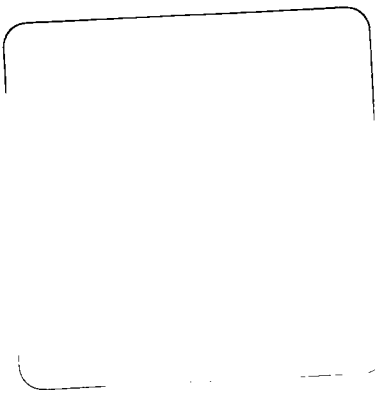

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STUDIES

Zoltán PÉTERI

Constitution-Making in Hungary

I

1. Constitution-making is an exceptional event in the history of a nation. It is usually resorted to whenever a sudden historical change occurs or, as has been aptly termed in Hungary, at rare "moments of grace". It is therefore fully understandable that the adoption of a new constitution should attract high interest both within and beyond the national boundaries. In the case of Hungary such a spill-over of interest appears to be absolutely justified. As an after-effect not least of the revolution of 1956, Hungary succeeded, as early as the last years of the Kádár regime, in advancing considerably along the path of social and economic reforms, and in carrying out some reforms affecting the organization and functioning of the state. By the end of the 1980s, those gradual reforms had opened up real possibilities for a comprehensive and radical transformation of the entire political system as well. Both the ascendancy of the reformist wing within the Hungarian Socialist Workers' Party and the activity of dissident forces partly within legal frameworks, contributed substantially to the success of this process. As far as foreign politics is concerned by opening its western frontiers and then initiating the abolition of the Warsaw pact, Hungary also made a significant contribution to the erosion and the final crumbling of the communist bloc in East-Central Europe.

Continuing on its course of reform, Hungary virtually effected, within the frameworks of a bloodless revolution, a really revolutionary change, by thoroughly revising its constitutional order, instituting political pluralism and parliamentary democracy, and creating the frameworks of a law-governed state (Rechtsstaat). Among the plans of the

reformers the adoption of a new constitution played an important role from the very beginning of the new developments. In this respect, however, Hungary, like Poland, opted for slower progress. Although the first plans for enacting a new constitution had been devised already in the last years of the Kádár regime, and even the first text had been drafted, the course of events prevented the carrying out of these initiatives. This is why Hungary's preexisting constitution from the year 1949 is, at least formally, still in effect, albeit with essential amendments, whereas in the great majority of the neighbouring countries the fundamental political and social changes were rapidly followed by the adoption of new constitutions.

Now it seems that constitution-making in Hungary has quickened its pace. The political forces that won the elections of 1994 and the new coalition government formed by them gave considerable weight in their programmes to adoption of a new constitution, and have taken concrete measures for its preparation. The Government has adopted a timetable for constitution-making, has taken steps for setting up the necessary institutional frameworks, and has requested the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences to take care of the professional coordination of the efforts to lay the scientific foundation for a new constitution. According to preliminary plans, the adoption of the Constitution by the Parliament and its approval by a people's referendum may take place a not too distant future and possibly in 1966.

II

2. As is known, Hungary had no written constitution before the decisive changes in 1945, although the core of such a constitution, the endeavour to pose definite limitations on the exercise of power, was a centuries-old tradition in Hungarian public law. As a modern manifestation of related demands, Hungarian literature on public law gave expression already in the early decades of the 17th century, almost at the same time that the idea of the written constitution appeared in Western Europe, to the conviction that the king's power should be limited by *basic laws*. In the form of "essential rights, liberties and immunities", this same idea reappeared during the reign of Empress Maria Theresa of Hapsburg (1740–80) as a guarantee for national independence *vis-à-vis* the foreign monarch, and as a justification for the feudal privileges of the nobility (primarily the exemption from payment of taxes).

The first appearance in Hungary of the modern concept of the constitution is usually dated from statutes passed by the Diet of 1790–91. Declaring Hungary as an independent country existing as a separate state inside the empire of the Hapsburgs with a constitution of its own, these statutes made cautious attempts to achieve fulfilment of the requirements connected with a constitutional State. In regulating the relationship between the legislative and the executive power (*de legislativae et executivae potestatis exercitio*), they reflected the traditional Hungarian convictions on the right of legislation. Consequently, this right was assigned jointly to the king crowned in accordance with the law of the country *as well as* in the feudal Diet, whereas the executive power should only

be exercised under the terms of the laws, and its decrees should concern only "matters covered by the law". The guarantees for the independence of judges were also provided for by the Diet of 1790–91.

Under the concept of feudal constitutionalism thus evolved and enacted, Hungary was a monarchy which, limited by the rights of the Estates, rested on a whole series of so-called basic laws. The Hungarian literature of public law kept in mind among them

— the mythic *Compact Sealed with Blood,* allegedly made at the time of the Hungarian conquest (A.D. 896), vesting supreme power in Prince Álmos and his descendants, as a forerunner of the pact of union (*pactum unionis)* and the pact of subjection (*pactum subiectionis*);

— the *Golden Bull* of King Andreas II (1222), like the English *Magna Carta* of barely 7 years before, essentially summarizing the privileges of nobility;

— István Werbőczy's enormous work *Tripartitum* (*Tripartitum Opus Iuris Consuetudinarii Inclyti Regni Hungariae*), a compilation of Hungary's medieval customary law (1517) laying principal emphasis on the "essential" rights and privileges of the nobility, conceived as a whole (*una eademque nobilitas*);

— the *Peace Treaties* of Vienna (1606) and Linz (1645) recognizing the freedom of religion for Protestants;

— the statute relinquishing the freedom to elect a king and recognizing the right of the Hapsburg dynasty to succeed to the throne (1682),

— the *Pragmatica Sanctio* (1723) extending succession to the female line of the Hapsburgs in Hungary;

— the *diplomas* issued by the kings of Hungary at their coronation and recognizing the privileges of the Estates.

Associated with the basic laws as the framework of the country's constitutional order was the *Doctrine of the Holy Crown.* As a specific tradition of Hungarian public law originating in the Middle Ages, a force independent of the person of the monarch and mythical in many respects, was attributed to the crown of St. Stephen (1000–1038), the first king of the country. Accordingly the Holy Crown is not only a coronation jewel or a more symbol of royal power, but also an expression of the fullness of national sovereignty. It establishes an organic unity (*Corpus Sacrae Regni Coronae*) between the duly crowned monarch and the privileged Estates, and as such constitutes the source of all laws of the land.

3. The revolution of March 1848 destroyed the organization of the feudal state and started a series of constitutional reforms in Hungary that clearly pointed to a bourgeois democratic transformation. The resulting *Statutes of March* declared above all the freedom of religion and the press, as well as the equality of citizens before the law, which was underpinned by the abolition of serfdom and by the introduction of general and equal sharing in taxation. A National Assembly based on the principle of people's representation was elected with a new, Hungarian government responsible to it and independent of the imperial government in Vienna. Moreover, the National Assembly's decision of 4 April 1848, with the dethroning of the Hapsburg dynasty and with the

election of Lajos Kossuth as governing President of the country, anticipated the introduction of a republican form of government. However, with the fall of the revolution and the struggle for independence (1849), these ideas as well as the initiatives for the preparation of a new, written constitution, came to be stricken from the agenda.

The most important achievements of bourgeois transformation materialized within the framework of the Austro-Hungarian Monarchy established by the *Act of Compromise* of 1867. Although the Compromise was based on the revolutionary enactments of 1848, its imperfections and gaps left room for the survival of numerous feudal institutions under the changed conditions. That was manifest in the emergence, around the turn of the century, of the concept of the *Thousand Years' Constitution* which served as a point of reference mainly for those who wanted to slow down the country's bourgeois democratic transformation by maintaining the institutions of feudal origin. Their complete abolition was announced practically at once by the bourgeois democratic revolution in the fall of 1918 and the "people's republic" emerging in its wake. Subsequently the Hungarian Councils' Republic, established on the Soviet model in March 1919, wanted to place Hungary's constitutional development on an entirely new basis. In the first days of its existence the Councils's Republic initiated the establishment of a new state organization of the Soviet type and the adoption of a written constitution. Those initiatives were the result of an official decision of the General Meeting of the Councils passed on 23 June 1919, adopting for the first time in national history a written constitution or charter. The defeat of the Councils' Republic shortly afterwards prevented the new constitution from becoming a reality of state life, and the subsequent counter-revolutionary government repealed all enactments of the Councils' Republic, including the constitution.

The new National Assembly, deciding "on the restoration of constitutionality and on the provisional regulation of the exercise of supreme state power", pronounced itself in favour of legal continuity. The Assembly proceeded on the assumption that in his declaration of Eckartsau (13 November 1918), Charles IV, the last Hapsburg monarch, did not relinquish the throne, but merely retired from dealing with state affairs. As a consequence, the Assembly elected Admiral Miklós Horthy, one-time *aide-de-camp* of Emperor and King Franz Joseph, to be Regent of Hungary on a provisional basis, thereby leaving the door open to the return of the king. That fact was not altered by the National Assembly's decision repealing the earlier enactments on the succession to the throne of the Hapsburg dynasty. This decision spelled out the reversion to the nation of the right to elect a king, thus maintaining constitutional monarchy as a form of government ("kingdom without king"). That "provisional" regulation ultimately survived for nearly a quarter of a century, until the collapse of the Horthy regime shortly before the close of World War II.

4. The provisional devices of the postwar period were replaced by the Act on the Republic (Act I of 1946), which was adopted by the new National Assembly and, proceeding from the fact that "the exercise of royal power had discontinued in Hungary as of 13 November 1918" and that "the nation has regained its right to self-determination", also legislatively terminated the provisional constitutional arrangement prevailing between the two world wars. On the analogy of the institution of presidency

as known to parliamentary republics, the Act emulated the legal status of the President of the Republic of Hungary, while clearly concentrating the totality of power in the National Assembly.

In the elections of 1947, which were of questionable purity, the majority of votes was obtained by the National Independence Front led by the Hungarian Communist Party. The process of revamping the political system on the Soviet model, began at that time and the left-wing majority of Parliament allowed the programme of the Communist Party to be implemented by legislative means. Efforts were successfully undertaken to bring about the fusion of the two workers' parties, the Communist Party and the Social Democratic Party, under the name of the Hungarian Working People's Party on the basis of the Marxist-Leninist ideology (1948) as well as to oust from power and to destroy the opposition parties. Standing for national election in May 1949 were only candidates of the reorganized National Independence Front under the name of Patriotic Popular Front, who obtained the support of 91% of voters. On 5 August 1949 the Government published the draft of a new constitution, which was considered and unanimously adopted by the National Assembly at its session of 17–18 August. The new Constitution was promulgated as Act XX of 1949 in the official journal on 20 August of that year, i.e. on the day of St. Stephen, the first king of Hungary.

Contrary to the practice of other countries in East-Central Europe, this constitution remained Hungary's basic law for decades. The reason for that was, according to contemporary Hungarian literature on constitutional law, that "whereas in the European people's democracies the fact on laying down foundations of socialism in a particular country was generally documented by the adoption of a new constitution, in Hungary there was no need for such enactment precisely because our Constitution of 1949 had been consciously adopted as a socialist one and therefore it was sufficient to insert general amendments in it in order to adjust certain of its provisions to the needs of development in socialist construction". There were several such "adjustments", of which the amendment by Act I of 1972 affected the entire text of the Constitution, while other amendments modified but a few provisions. Considering the fact that an entirely new constitution was envisaged already prior to the turn-over in 1989, they may be regarded as representing, in a certain sense, a "preliminary constitutional regulation" on some questions. In 1989 the Government, more responsive to the need for constitutional reforms, published a comprehensive text entitled "Regulatory Principles of Hungary's Constitution", which was later confirmed by the National Assembly. It was on that basis that the draft of a new written constitution was prepared, but its consideration and adoption by Parliament was caused by the quickening pace of events to lose relevancy. The rounds of negotiations which had started between the Government and its Opposition in June 1989 ("National Round Table") came to a successful conclusion in September of that year. On the basis of the agreement reached, the National Assembly adopted by a large majority of votes the amendment to the Constitution as envisaged.

Act XXXI of 1989, which entered into force on 23 October 1989, the anniversary day of the defeated revolution of 1956, is formally not more than an *enactment amending the Constitution* because it follows the structure of the Constitution of 1949.

Nevertheless, in terms of substance it may be seen as a virtually new constitution declaring as it does, by introducing a system of western democratic institutions, a state governed by the rule of law and a parliamentary form of government. In like manner, the basic laws regarding the Constitutional Court, political parties and elections were passed by Parliament on the basis of the agreement reached during the National Round Table-negotiations.

All this was achieved within the framework of the current legal regulations relating to amendment both of the Constitution and of the so-called "two-thirds laws", enactments subject to adoption by a qualified majority of votes, in observance of the procedural guarantees as laid down in the Constitution and other laws. So, there appears to be a ground for stating that in 1989 Hungary consummated a "constitutional revolution", i.e. the transformations which may be deemed to be revolutionary in substantive terms took place within the frameworks of the law in force. Like other "velvet revolutions" in East-Central Europe, that revolution could be held my many observers as a "*contradictio in adiecto*". Practically speaking, the revolutionary road usually rules out legality, as is evidenced by the fact that the overwhelming majority of revolutions known in history have attained their goals by rejecting the existing legality and counterposing a revolutionary legality to it.

III

5. The need for stability as a requirement placed upon comprehensive legislations, which has been accepted by democratic countries since the Napoleonic codification, applies to a greater extent to the constitution as a basic law. To cite Rousseau's conviction, a constitution "is carved, not in marble or ore, but in the hearts of citizens. This means the genuine constitution of a state and gains new strength from day to day. When laws become obsolete or outdated, they are revived or replaced by this general feeling upholding the spirit of constitutionalism in the people and imperceptibly putting the force of habit in the place of public power". For this very reason, a statement of this order is always a highly responsible enterprise usually undertaken in times of great turns in the history of a nation.

As started above, the development of Hungarian constitutionalism can likewise be associated with such turning points in our history. The valid Constitution of the country which came into being after the decisive political turn of 1947–48, is no exception to this general rule. This Constitution, as was clearly stated in contemporary literature, followed the example of the Soviet Union's Constitution of 1936 connected with the name of Stalin. Accordingly, "it is virtually the first document of the new Hungarian public law, which diverges even formally from the "historical" constitution and introduces into the Hungarian legal system the idea and practice of a charter, i.e. a written basic law. In addition, it creates, in terms of substance, an entirely new system of constitutionalism. By breaking with the previous concepts and practices of the public law and rejecting bourgeois constitutionalism based on the separation of powers, it

creates new constitutional frameworks for the people's democratic state, i.e. the dictatorship of the proletariat. The new Constitution of the Hungarian People's Republic... has a bearing not only on public law, but also on our entire legal system, on our entire legal life. The constitutions of the people's democratic countries, including Hungary,... determine the basic principles of our economic and social systems as well as their basic institutions. Consequently,... the different branches of our legal system will be governed by the basic principles as determined by the Constitution... Thus the Constitution will become a real basic law in the material sense of the term as well".

Consequently, Hungary's constitution of 1949 made a radical break with the past in both substantive and formal aspects: on the one hand, it destroyed the earlier organization of the state burdened with feudal elements and, on the other, it dismissed finally the idea of "historical constitution". By comparison, the turn of 1989 produced radical changes only in substance: it effected constitutional reforms providing for the return to the path of Western European development, but it remained faithful to the idea and practice of a written constitution (charter), refusing the return to the ancient historical constitution of the country. In all fairness, however, one may assume that such an endeavour could not have counted on the support of the population either. The idea of a written constitution had struck deep roots in Hungarian public opinion over the past period of nearly 50 years and, for that matter, taking into account Hungary's present aspirations to become a member of a unified Europe, there is no *raison d'être* for emphasizing our national peculiarities as distinct from the constitutional model of Western Europe.

6. Still, in setting about the task of drafting a new constitution one could hear repeatedly also the slogans of traditionalism in Hungary. Suggestions of this kind were made in support of a conservative-minded attitude as a *sine qua non* for a broad consensus, indispensable for constitution-making and for the legitimacy of a new constitution. This requirement, as an organic development of the constitutional regulation currently in force, may doubtless count on wide support. The postulate of "progress with reflection" has been a national tradition in Hungary since the time of Count István Széchenyi, a prominent reformer of the last century, known as the "greatest Hungarian". The new institutions representing a break with the previous political establishment have, for the most part, evolved gradually so that the new initiatives set in motion over the recent years for the sake of constitution-making could consistently be followed and strengthened after the turnover of 1989. In this sense it is really justified to speak of continuous evolution or of an organic development of the existing Constitution, to insist on continuity as the only reasonable path, and even to demand some sort of conservatism in this effort. The role and significance of traditions and continuity could be denied only by those who look upon our recent history as a symptom of discontinuity resulting from the tragic destiny of most East-Central European countries. They have been inclined to reject wholly or in majority of cases the issues of past history and, consequently, the very mention of continuity could be held by them as conceptual absurdity (*contradictio in adiecto*).

At any rate, it would be difficult to question the continuity of evolution unfolding in recent years; moreover, one can speak of continuity of Hungarian traditions of public law

on a much broader horizon. In this meaning continuity can be dated from the years long before the turnover of 1989. In point of fact, the path taken in 1989 only re-affirmed the demand for *following the Western way of development* opted for already in the years of the Hungarian State foundation but forcibly interrupted at later times. To this extent, the traditions of the country's public law framed on the Western model had their roots in a past of many centuries. In the words of István Bibó, Hungarian political scientist of this century, these traditions, even if "in a simpler texture and with a rustic character", followed the mainstream of Western European development, forming an integral part thereof, and this link was severed by unfortunate turns in our history, only transitorily.

European democratic traditions can consistently be traced to the world of ideas governing Hungary's social progress, going on under often adverse circumstances. Following the Western development model and catching up with the West has been a leading idea recurring in Hungarian political and legal thought since the 1820s (the so-called reform era), so much so that, as was stated, "it is no longer possible to take any course, to give it credit and to hold it without meeting European criteria". Considering the road Hungary is taking today to joining a unified Europe, these "European criteria" mean not only adopting certain time-honoured institutions in Western democracies, but also accepting a comprehensive set of values and a new attitude of mind as pre-requisites for a successful transplant of any institution adopted from foreign countries in order to function in a new environment. It has been a general experience that the political and legal institutions transplanted from one country to another do not live up to expectations without taking into consideration their appropriate social and ideological background. It can be stated, therefore, without any exaggeration that the new developments in our constitutional system, following the Western model, call for a comprehensive reform of our entire political and legal culture.

7. The set of values and the institutions characteristic of advanced democracies in the West are clearly associated today with the concept of *"State of law"* (Rechtsstaat). This is the "Archimedean point" from which the political and legal realities of our day and the new developments can be evaluated. The Hungarian Constitution as amended has explicitly undertaken to meet the Western requirements by defining the Republic of Hungary as an independent, democratic "State of law" (Rechtsstaat). Nevertheless, as is evidenced by history, the meaning of this concept can in no way be regarded as being "objectively" established or *a priori* valid; on the contrary, it was and from time to time is in need of further interpretation. The concept of the "Rechtsstaat" falsely identified with order or an orderly state in general would, as has been pointed out by one of its ingenious critics, ultimately conjure up the order and repose of the cemetery insuring to the fullest the security of order, or, at the most, would mean a blank sheet of paper which may be used by anyone in pursuance of any goal. Behind the general acceptance, at least in words, of a law-governed state as a great achievement in the development of a democratic society, one can find sometimes rather different and even diametrically opposed interpretations of it, moreover, the notion of the Rechtsstaat can serve as a cover for rather dubious political theories and practices (e.g. the concept of the "socialist Rechtsstaat"). Therefore, the clearing up the present-day meaning of the word

"Rechtsstaat" seems to be one of the pre-requisites for the success of the constitution-making process under way in Hungary.

Of course, such clarification serving to promote consensus concerning basic concepts cannot imply full coverage, in all their aspects, of scientific and practical approaches and also occasional abuses connected with the word "Rechtsstaat". The investigations in this field may be aiming at the elaboration, in Max Weber's footsteps, of a concept of an "ideal type" which, as an "ideal picture" of social phenomena and processes, can integrate "certain aspects and processes of historical life into a cosmos of conceived contexts that is free from contradictions in itself". This "ideal type", which is based on a multitude of individual phenomena and implies a generalization thereof, is not to be encountered empirically in its notional purity anywhere in real life and, to this extent, is nothing more than a utopia. Nevertheless, it may be of help to constitution-makers in taking a clearer view and making a more realistic assessment of the present and future tasks presented by the development of Hungarian society and state.

IV

8. Almost from the moment of its commencement in recent years, constitution-making in Hungary was faced with a number of problems to be solved. Some of these issues were of a political nature and required broad political consensus indispensable for framing a constitution. Other questions focused attention on apparently procedural and technical aspects related to legal arrangements for the adoption of a constitution. At the same time it was equally obvious that, in the last analysis, the answers to the latter questions were themselves dependent on political decisions, with particular emphasis on the fact that the government coalition has an assured majority of 72% in the National Assembly. This enables the coalition to bring decisive influence to bear not only on the substance of a new constitution, but also on the constitution-making process and the procedural rules governing it. On the other hand, it is a responsibility of the coalition parties, as is also reflected in pronouncements published in both the professional and the daily press, to bring about mutual trust among the participants in political life and, thereby achieving consensus between them on the major issues, to remove the very semblance of an eventually "imposed" constitution.

The first question still in dispute has arisen in connection with the necessity of "*hic et nunc*" in constitution-making. There is more or less full agreement to the effect that a new constitution would complete the process started in recent years and would serve to stabilize the new political system. That is why the case for adoption of a new constitution was pressed, already in the period immediately following the turnover in 1989, particularly by some political groups in and outside Hungary. These groups, afraid of a Communist re-establishment argued in favour of the enactment of an entirely new Constitution. This would definitely silence the voices of dissent against the old Constitution which, despite the amendments made in recent years, has had its origin in the "Stalinist" period.

Another argument in favour of constitution-making is based on the fact that the fulfilment of the conditions specified in the recently modified preamble to the Constitution in force—namely the transition to a Rechtsstaat characterized by a multi-party system, parliamentary democracy and a social market economy—has laid the foundation for further progress, toward adopting a new, stable constitution. Consequently, it is high time to pass a new, comprehensive regulation which could reconcile the provisions of the current Constitution adopted at different periods of time, integrating them into a coherent system. This is all the more necessary since the practice of the past decades as manifested in repeated amendments of the Constitution has produced ambiguous or inconsistent results: on the one hand, the text of the basic law was adjusted to the new requirements raised by historical changes, but, on the other, the amendments cut across the logical system of the constitution and sometimes resulted in controversies. Some of the new regulations need further interpretation or lack consistency with the full text of the Constitution; occasionally, by annulling former rules, they result in substantial gaps and consequently, destabilization. There is no doubt that these considerations justify the broad political expectations for the early adoption of a new constitution.

If, on the other hand, we proceed from the fact that the adoption of a new constitution calls for a broad consensus, precisely in the interest of ensuring stability, there is a strong case against jumping into conclusions concerning a new constitution. It was rightly argued that the substantial changes in the country's political regime have been duly expressed in the amended text of the current Constitution, containing stipulations relating the democratic institutions known in the West, thus laying the constitutional foundations for the development of a Rechtsstaat meeting European standards. Moreover, it was argued that the new substance of a constitution is not dependent on formal factors, since a qualitative change—both regarding its basic concept and the institutional arrangements radically breaking with the earlier ones—can also be introduced by amendments to the existing constitution.

A further argument against an early constitution-making is that there is no doubt about the legitimacy, viewed either normatively or, under Max Weber's approach sociologically, of the present constitutional order as established by previous enactments. The country has had the peaceful character of the transition, there is no constitutional crisis or emergency, nor any threat thereof, calling for immediate intervention, so there is no urgent pressure that could only be removed by speedy constitution-making. Therefore, should the question of constitution-making still be taken up, there is no, nor can there be any, obstacle of appropriate preparatory work within the framework of a politically and professionally well-considered and planned process. This has to take past experience into account in order to establish a proper balance between historical traditions and the country's present and future possibilities. This is naturally a time-consuming task, which could hardly be tackled to satisfaction within the time-frame set in the course of preliminary planning. It follows, therefore, that, once the need for a new constitution is generally accepted, it will be advisable for the constitution to be adopted as the result of a longer process of "maturing".

9. Reaching the consensus required for the adoption of a new constitution is, in point of fact, a crucial question of constitution-making, one on which there is no difference of opinion either. The new constitution should be drafted on the basis of a broad publicity and citizens' involvement, thus securing its legitimacy and, for the future, its stability. Such a consensus should ultimately be arrived at by the decision-makers, whether they be the National Assembly as the supreme organ of people's representation or a constituent assembly convened only for this purpose or the citizens themselves consulted by way of referendum. Of course, there may be and, indeed, there are differences in views concerning the chances of arriving at such a consensus. It is obvious to both inside and outside observers that a search for a full consensus on all questions of detail belongs to the realm of illusions rather than of political realities. Yet it is far from being a matter of indifference to the stability and future fate of the constitution in the making whether it is possible at all—and if it is, on how wide a social basis—to arrive at a "minimum" of consensus as a common denominator on at least the fundamental principles and value-preferences of the socio-political system.

As far as this "minimum" is concerned, some conceive of such consensus as one of the "whole people" placed on the widest footing. Others deem it necessary to obtain the agreement of all *political forces* playing a determinant role in national life. Still others insist on the need for the agreement of the *political parties* represented in Parliament. There is also the view that a solid basis for a well-functioning constitutional order can only be laid by a consensus reached in the *professional* circles of a country, and that therefore the disputed issues concerning the constitution, inclusive of the conceptions about its fundamental principles and the different institutions should be agreed upon beforehand with competent jurists, political scientists and other experts in professional debates. Taking such a position may be supported by the argument that only representatives of a relatively narrow professional circle are able to grasp and appraise a constitutional model in its entirety, so that the assumption that large masses of citizens can make a well-considered, independent decision on this issue must be held as a dangerous illusion, kept alive by mass media. Under such circumstances one can hardly believe that a political decision manifested in the adoption of a constitution will be truly reflective of the majority will.

On the other hand, however, it is highly questionable whether an agreement obtained in professional circles would be really a decisive component of the consensus required for adoption of the constitution. Even if we disregard the numerical factor, namely the fact that representatives of the "profession" are themselves but a narrow group of the voters entitled to make a decision, the chances of their reaching a full consensus of opinion can at least be called into question. As history provides for conclusive evidence on a diversity of approaches and views existing in professional circles, full consensus—in the form of accepted scientific paradigms—cannot be imagined except with respect to certain points of departure or scientific terms at best. So what remains for experts to do is to offer options, which does not, of course, rule out the possibility of their active participation in elaborating both a preliminary and then a final concept of regulation reflecting a majority view on the constitution.

A broad social consensus about a new constitution is likely to be reached mainly with respect to such fundamental principles of the political system, as democracy, pluralism, *Rechtsstaat, basic rights*, etc., although there may arise several kinds of diversities even in their interpretation. The differences in views are still greater on institutional arrangements designed to ensure the implementation of these principles. To bridge them is made difficult, furthermore, by the need for the constitution-maker to devise the functioning of public-law institutions within the framework of a comprehensive social, economic and political system. The mechanical adoption of arrangements that have proved their worth in other countries does not always produce the result expected and intended. So there is much doubt about the extent to which constitutional institutions imported from abroad (e.g. ombudsman) will become elements of a Hungarian constitution in action. At any rate, a comprehensive approach, a broader view and a comparative analysis are prerequisites for the success of the work to frame a constitution.

10. In seeking consensus, the question of validity of decisions previously handed down by the Hungarian Constitutional Court prompted sharp debates. The reason for this can be found in understanding that the adoption of a new constitution will give rise in Hungary to a special situation, not frequently found in history, in which the existence and functioning of the Constitutional Court has preceded the adoption of the constitution which would form the basis of its activity. If on this score we start from the assumption that, as has also been covered by the press, the activity of the Constitutional Court was based on a constitution framed originally in the communist past, the question arises whether or not the survival of these decisions would be inconsistent with the new constitution. One can easily draw the conclusion that by enacting a new constitution not only the previous basic law but also all the earlier decisions of the Constitutional Court will become obsolete as only records of legal history. The logic of this reasoning would also imply the termination, by the adoption of the new constitution, of the mandate of the constitutional judges in office.

Another argument against retaining the former decisions of the Constitutional Court in force is concerned with the characteristic "continental" Romano-Germanic attitude towards judge-made law.

There is undoubtedly some basis for this line of reasoning, taking into account the fact that the current text of the Hungarian Constitution contains a good number of obscure provisions that are in need of interpretation, and even gaps in the law, as a logical consequence of the numerous amendments during the intervening period. To eliminate such imperfections became the responsibility of the Constitutional Court, which, likewise established by an amendment of the Constitution in 1989, acted freely on the mandate conferred on it by a subsequent statute (Act XXXII of 1989) regulating its status, organization and functions. The Constitutional Court took on the task in a great many cases to interpret the current text of the Constitution and even to develop it further under the sign of the idea of an "invisible constitution". Such decisions now make up several volumes and include judgments, binding on all, about several components of Hungary's constitutional order and legal system. The keeping of previous decisions in

effect would amount to open admission of the fact that the Constitutional Court had taken over a part of the legislative, moreover constitution-making power.

To these arguments containing an implicit criticism of the functioning of the Constitutional Court was apposed that the invalidity of Constitutional Court decisions does not automatically follow from the formal recognition of the maxim of *lex posterior derogat priori,* but also other substantive criteria (contradiction, impossibility of interpretation, superfluity, etc.) are needed for that to happen. In the case of inconsistency between the old and the new constitution, it is up to the constitution-maker to decide whether the Constitutional Court decisions based on the old constitution should lose effect or not. It is highly improbable, however, that this conflict may arise in practice as Hungary has already undergone a decisive constitutional change. The new constitution will in all certainty bring no radical changes, but further progress on the road upon which this country has embarked. Under such circumstances there is little likelihood that the earlier decisions of the Constitutional Court will be in conflict with the constitution-maker's intention as expressed in the new constitution. Thus, unless a decision to the contrary would be adopted in the course of the constitution-making process, there will be no bar to regarding the earlier Constitutional Court decisions as continuing in force. This is all the more justified or else the laws and regulations which have been abrogated by the Constitutional Court should, in lack of new statutory regulation be considered as operative again, which would naturally give rise to additional complicated problems.

V

11. According to the constitutional provisions in force, adoption by the National Assembly of a new constitution must be subject to a qualified (two-thirds) majority of votes. Under the relevant Act (Act XVII of 1989), a new constitution must be approved by referendum, and in case of non-approval a new referendum must be held within a year. The proof of the pudding being in its eating; only the future will tell us to what extent the new constitution thus adopted and approved will stand against time.

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Projects to Adopt a New Polish Constitution (1991–1994)

Substituting the Constitution of the Polish People's Republic of 22 VII 1952 r. with a new one was one of the most significant demands of the Civic Committee of "Solidarity" in 1989. Nevertheless, the interim constitution based on the Constitutional Act of 17th October, 1992 on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government, widely known as the "Small Constitution", is still in force. One of the most crucial tasks of the parliament elected on September 19, 1993 should be to adopt the Constitution of the Third Republic of Poland.

1. Shortly after preparatory work on the new constitution had started, establishing the procedure of its adoption began. Various legal and political debates were evoked by the legislative work (started in 1991) connected with the matter. Drafts specifying the procedure of preparing and adopting the new constitution had already existed before. The drafts of June 6, 1991 (the Sejm Bulletin No. 16) and December 21, 1991 (the Sejm Bulletin No. 42) were a starting point for work on the procedure of adopting the new constitution for the first term Sejm (1991–1993). Both drafts elaborated by parliamentary bodies (parliamentary drafts) were to be considered by the Legislative Committee, which aimed at presenting a compromise regulation concerning the procedure of adopting the new constitution. The debate concentrated on which body is entitled to adopt a constitution: the National Assembly (NA) or the Nation in a referendum? The text of the constitutional act presented by the Legislative Committee (LC) on February 15 (the Sejm Bulletin No. 180) said that the Constitutional Committee (CC) is the only body to have the right to introduce legislation in presenting drafts of the new constitution. The President's letter (February 20, 1992) to the Speaker of the

Sejm revealed his reservations and soon the President submitted his own draft of the constitutional act (March 9, 1992), which suggested including not only deputies and senators in the CC but also representatives from outside the parliament. After reconsidering all the texts the LC worked out (March 31, 1992) a compromise draft of the constitutional act (the Sejm Bulletin No. 198). After an animated debate during the 13th sitting, the Sejm passed (April 23, 1992) the Constitutional Act on the procedure of preparing and adopting the Constitution of the Republic of Poland. It soon became the subject of a heated political debate.

After the President had signed it, the constitutional act of April 23 was promulgated on September 1, 1992 (Law Gazette of 1992, No. 67, para. 336). The act came into effect on November 29, 1992 and thus formal obstacles in preparatory work on adopting the new constitution were removed. According to the act of April 23 "The Constitution of the Republic of Poland, adopted by the Sejm and the Senate joined in the National Assembly, is approved of by the Nation in a constitutional referendum" (Art. 2, para. 1). The act decided that the President (and not the NA) orders a referendum (Art. 9), in which all citizens holding a full electoral franchise are entitled to participate. According to the constitutional act of April 23, 1992: "In a referendum the Citizens by means of voting, ..., accept or reject the constitution, subject to referendum" (Art. 10, para. 2). The President is obliged to sign the constitution adopted in a referendum.

The CC, a group of 56 members of the NA and the President are entitled to submit a draft of the new constitution to the NA (government-forming initiative). Government is not entitled to do so. It was decided that drafts should be submitted within 6 months after the CC is set up, that is by April 30, 1993. The drafts constitute the basis on which the CC is entitled to work out its own draft of the new constitution. 46 deputies and 10 senators make up the CC. Its sessions are supervised by the chairman and the vice-chairman, of which one is a deputy and the other a senator. Representatives of the President, the Council of Ministers and the Constitutional Court have the right to attend the CC sessions. The course of the CC's work is regulated by the rules adopted by it on January 13, 1993.

2. After the deputies (October 17, 1992) and the senators (October 29, 1992) had been elected, the first CC plenary session was held (October 30, 1992). Walerian Piotrowski (from the National and Christian Union) was elected Chairman and Jerzy Ciemniewski (the Democratic Union) vice-Chairman. After the CC had been constituted (consisting of 56 MPs), its procedure was established. It was not finished until mid-January 1993. The CC regulations established permanent subcommittees: (1) the editorial subcommittee of general rules and regulations introducing a constitution; (2) the subcommittee on the basis of the political, social and economic system; (3) the subcommittee of issues related to the system of the sources of law; (4) the subcommittee of the organs of legislative and executive power and local government; (5) the subcommittee of the institutions of law protection and organs of Jurisdiction; (6) the subcommittee of rights and obligations of citizens (Art. 4). It is significant that the act of January 13, 1993 did not establish a permanent subcommittee for the CC to work out its own draft of the new constitution. Many party leaders and chairmen of parliamentary clubs entered the CC and thus it became one of

the most politically representative parliamentary assemblies. Not until the 7th CC plenary session (March 24, 1993), five months after the Committee had been established, the permanent subcommittees' chairmen were chosen. The CC's lack of concrete activity provoked severe criticism. More and more often it was perceived as a lack of political will to adopt the new constitution quickly.

Within a few months (January–March 1993) the activity of the CC was closely examined. Most of its members opted for starting with a review of the existing 11 drafts of the constitution (including two parliamentary drafts). They were published in 1992 by "Wydawnictwo Sejmowe": "Drafts of the constitution 1989–1991" (prepared by M. Kallas). The CC members decided that a review of the drafts would be an introduction to a debate in the Sejm on selected constitutional issues. After an animated discussion it was decided that the next few CC sessions would be devoted to a presentation (legal comparison) of the structure of government in the drafts. This plan was not executed because the time of submitting drafts was due soon afterwards.

3. Working out the procedure of dealing with the drafts dominated two months (April and May 1993) of the CC's activity. It was decided that the drafts meeting the requirements specified in the act of April 23, 1992 would be presented on plenary sessions of the CC by the projectors' representatives.

Seven drafts meeting the requirements specified in the act of April 23, 1992 were submitted to the Secretariat of the CC by April 30, 1993. A draft was accepted (as a separate protocol) provided it was signed by at least 56 deputies and senators. A different procedure was applied to the President's draft. Between April 24 and April 26 the following drafts of a constitution were submitted: (1) the draft adopted by the CC of the first term Senate signed mainly by National and Christian Union MPs; (2) the draft signed by members of the Parliamentary Club of the Democratic Left Alliance; (3) the draft signed by members of the parliamentary Club of the Democratic Union; (4) the draft signed by Polish Peasant Party MPs and, among others, members of the Parliamentary Club of the Union of Labour and the Parliamentary Group of the German Minority; (5) the draft signed by the President of the Republic of Poland; (6) the draft signed by the Confederation for an Independent Poland MPs; (7) the draft signed mainly by members of the Parliamentary Club of the "Centrum" Civic Alliance. The texts of these drafts were published in a special issue of the Bulletin edited by the CC of the National Assembly.

Five more drafts (not meeting the requirements specified in the act of April 23, 1992) were submitted to the Secretariat of the CC (between April 29 and May 12, 1993): (1) the draft of the General Headquarters of the National Democratic Party; (2) the draft of the Democratic Party; (3) the draft of the Wielkopolans' Union Group in Warsaw; (4) the draft by Sławomir Sitkiewicz from Rumia; (5) the draft of the Union of Real Politics. The texts were published in several issues of the CC Bulletin.

The last plenary session (9) of the CC was held on May 19, 1993. The CC was in the process of working out theses of government to submit them to the Speaker of the Sejm, on June 25, 1993. It was connected with the debate in the Sejm planned for July 10, 1993. The debate was to concentrate on basic issues of government suggested by the

CC. The President's executive order from May 29, 1993 ("Monitor Polski" form 1993, No. 27, para. 285) dissolving the Sejm (and thus the Senate) caused a few months' interval in the work on the new constitution.

4. The parliamentary election of September 19, 1993 resulted in a new political configuration with a dominant, strong coalition of the Democratic Left Alliance (DLA) and the Polish Peasant Party (PPP). At the same time the parliament became less representative as a constituent assembly. The party representatives present in the Sejm and the Senate declared, however, that adopting the new constitution would be one of the chief aims of the parliament.

The resolutions of the Sejm (October 21) and the Senate (October 22, 1993) formed a new CC with the deputy Aleksander Kwaśnirewski (from the Parliamentary Club of the DLA) as chairman and the senator Stefan Pastuszka (from the Parliamentary Club of the PPP) as vice-chairman. Soon the procedure of the CC was established. The issue of limiting the time to submit drafts provoked the CC to consider amending the act of April 23. The matter of whether the CC should work with the drafts already submitted (in April 1993) or whether the procedure of submitting drafts should start anew ("zero" option) evoked a very animated debate. During the CC session (December 12, 1993) deputy Jerzy Jaskiernia (DLA) stressed that: "The new political configuration means new constitutional content". Work to introduce new regulations of the CC started. Some people voiced the opinion that the parliament is not enough of a representative body to adopt the new constitution of the Republic of Poland. The importance of a preliminary constitutional referendum was indicated (and it was to be ordered together with the local government election in June 1994). The views voiced in the second CC session (December 8, 1993) soon changed significantly.

The discussion on the draft of the CC rules dominated the next two sessions. The appropriate resolution was passed in the 4th CC session (January 18, 1994). The CC rules were published in "Monitor Polski" from 1994, No. 6, para. 62. The postulate (by Ryszard Buga from the Parliamentary Club of the Union of Labour) that representatives of both various political organisations and non-parliamentary institutions should take part in CC work provoked an extremely animated debate. The postulate received support from 12 CC members while 11 were against (7 abstained). Unlike in the parliament of the previous term, the CC established the 6 standing subcommittees and elected its chairmen in the session on January 18, 1994. The agenda for the monthly CC sessions in the first half of 1994 was also drawn up on the same day. In the event only some of the planned sessions were held. Establishing the lawful procedure of the CC work took 3 months and only then did concrete work start. The main issue was naturally working out a draft of the constitution, but the CC has not managed to do it so far. However, the pace of work visibly slowed down (until May 1994) and only few subcommittees engaged in some activity (especially the subcommittees of the organs of legislative and executive power and of local government).

5. As early as December, 1993 the deputies' drafts suggesting amendments to the constitutional act of April 23, 1992 appeared. According to the draft of the Confederation for an Independent Poland of December 16, 1993 (the Sejm Bulletin No. 221) the drafts

of the constitution already submitted (in April 1993) would be considered by the NA. According to the draft of the Union of Labour (of December 17, 1993): "The referendum will be held on the basic issues of government since the constitution is supposed to be based on them". The results would be binding for the parliament if over 50% of those holding a full electoral franchise participated in the referendum.

At the turn of 1993 and 1994 several constitutional committees outside of the parliament were established. In January 1994 an opening session of the Constitutional Committee of the coalition of right-wing parties, coordinated by Walerian Piotrowski, was held. It was agreed that the coalition's draft would be an alternative to the draft worked out by the CC of the NA. The next Constitutional Committee was set up by the Headquarters of the Independent Self-Governing Trades Union "Solidarity" (situated at the Senate Faction of "Solidarity"). Marian Krzaklewski was the formal coordinator of its work and a civic draft of the new constitution was to be the result of its activity. The two committees did not unite in the National Constitutional Council, however, this being the initiative of the "Centrum" Civic Alliance.

The 10th session of the Sejm (January 20–21, 1994) revealed many reservations as to the type of referendum suggested by the Union of Labour. Nevertheless both the submitted drafts were referred to the Special Committee. Soon the President manifested legislative initiative (January 31, 1994). The President's draft (the Sejm Bulletin No. 252) granted a group of 100,000 citizens the right to submit a draft of the constitution to the NA. This issue was further developed in the draft of the resolution on the procedure of submitting a civic draft of the Constitution of the RP (the Sejm Bulletin No. 253). To everybody's surprise, the Sejm rejected the President's draft after the first reading during its 12th session (February 17–18, 1994). To a large degree it was a reaction to the statement: "In case of the Constitution being rejected in a constitutional referendum, the Sejm and the Senate will be dissolved by law".

One of the results of the consequent political conflict was the withdrawal of the President's constitutional draft and of his representative from the CC. A motion to stop the CC work was defeated in the session held on February 23, 1994 and then the procedure of work of the standing subcommittees were established. The next sessions of the CC, to be held in March and April, were cancelled.

At the same time the Special Committee worked intensively to consider the drafts suggesting amendments to the constitutional act of April 23, 1992. In the session of this Committee (March 8, 1994) the deputy Jaskiernia (DLA) unexpectedly made a motion to grant 500,000 citizens the right to submit a draft of the new constitution. The Committee rejected the "zero" option in the next session. Its rejection was finally accepted in the report (March 17, 1994) of the Special Committee. At the second reading of the draft (16th session of the Sejm, March 25, 1994) the Sejm passed an amendment to the constitutional act of April 23, 1992. After considering the Senate's amendments to the text, the Sejm (18th session, April 22, 1994) passed changes in the constitutional act of April 23, 1994 ("The Journal of Laws" of 1994, No. 61, para. 251). The resolution came into force on May 5, 1994. Within three months (that is by September 5, 1994) the possibility of submitting drafts of the constitution by at least 500,000 citizens was accepted.

The resolution of April 22, 1994 (apart from the people's constitutional initiative) allows for an optional partial referendum.

On May 18, 1994 the CC announced that the already submitted drafts would be reviewed during the next session (June 21–23, 1994). Three out of seven drafts were submitted once again (with some changes introduced): the drafts of the Club of the Union of Freedom, the Club of the DLA and that of the President. Soon the Civic "Centrum" Alliance withdrew its draft of the constitution (submitted to the parliament of the previous term) and thus six drafts were reviewed by the CC on June 21–22, 1994.

6. After a few months of drafting work the Headquarters of "Solidarity" accepted (June 22, 1994) the final civic draft of "Solidarity": the Constitution of the Republic of Poland. Meeting the formal requirements, the draft was submitted by the President of "Solidarity" to the Speaker of the Sejm, Józef Oleksy (September 5, 1994). On August 22, 1993 the coalition of right-wing parties announced that their draft would not be submitted to the CC of the NA. The draft of an ecological constitution did not get the support of the required number of citizens. The preparatory work of the CC became animated after the presentation of the civic draft of the constitution. It was announced that seven drafts would be presented to the NA on September 22–23, 1994.

It is expected that the review will be a comparative analysis of the drafts submitted to the CC. The starting point will most probably be a report of a group of experts (February 1994) on the seven drafts of 1993 ordered by the President of the Polish Academy of Science. The text of the experts' report entitled: "Which Constitution?" was published by "Wydawnictwo Sejmowe" in 1994.

Soon after presenting the civic draft, the next session of the CC was held (September 8, 1994). It was agreed that the civic draft of "Solidarity" would be treated as other drafts meeting the requirements of the constitutional act of April 23, 1992 on the procedure of adopting the new constitution.

The first session of the NA of this term was held on September 21–23, 1994, as had been announced before. The first reading of the already presented drafts was preceded by adopting the order of debates (September 22). After the debate in the NA, all the drafts (7) were sent to the CC so that it could work out one draft of the future constitution. The next session (October 11, 1994) of the CC resulted in the resolution that three constitutional issues would be the subject of the Sejm debate. The first is related to the problem of the political system (including the matters connected with the division and balance of power and the question of whether parliament should consist of one or two chambers). The second issue is related to the specification of the position and character of rules concerning social laws. The third issue comprises the matters concerned with the sources of law.

The CC has announced the intensification of drafting work. It has been agreed that on October 21, 1994 the Sejm debate on basic issues of government will be held. It is planned that a draft of the Constitution of the Republic of Poland will be adopted by the end of November.

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The Judicial Process

A Contribution to its Philosophical Understanding

Presuppositions

In the legal cultures based on the institutional-ideological set-up of modern formal law, the institutional framework and the tools of the judicial establishment of facts—including the overall concept of the process—are built on definite presuppositions.

According to these: (1) Judicial decision-making is a two-tier process. The two components—although built upon one another—can be clearly demarcated. The demarcation is not only a practical possibility but also an inevitable necessity, since within the decision-making two processes of different natures are to be found: the fact has to be established, while the law has to be applied. Consequently, the judicial decision-making process is nothing else than (2) the application of a normative value-standard to the reality, as it has been reconstructed on the basis of cognition. That is, in fact, a complex process, in which a normative pattern is being applied in practice to the outcome of theoretical cognition. Accordingly, the process is composed of cognitive and volitive acts, relying on each other. It follows from this that (3) the theoretical moment will major the entire process. As it is, the fact—in itself—is objectively given. Thus, the fact has to be taken cognisance of; and the outcome of the cognition will determine the entire process. In fact, it is the cognition of the fact that starts the process, and the quality of the fact will determine the character of the procedure as well as the decision to be made in the procedure. Thus that which happens with the facts during the judicial process, will replace their cognition in any other way. Accordingly, the outcome of the judicial cognition is characterised by the latter's objective truth—that being the criterion. As usual in the domain of cognition, the outcome will be expressed in a precept which is necessarily capable of being verified or falsified.

All the more so because (4) the judicial cognition, essentially, cannot be limited. Its regulation—if any—has an auxiliary character only: it merely assists in fulfilling its role. Namely, it may support keeping the cognition within the desired channel, further it helps to conclude the cognition within a reasonable time.

Consequently, judicial cognition is, by itself, non-specific. Its particularity consists of its being non-recurrent, its being oriented on a single past event (which shows an affinity with historical cognition), and of its eventual dramatic effect.

These presuppositions do not stand alone; nor did they develop by chance. They derive from the ideological environment which regards the judicial decision as a syllogism, consisting of a rule and of a statement of fact subsumed under the said rule, and of the logical consequence derived from their premises.

In continental Europe, the recognition of customary law was linked with the judicial acceptance of socially-approved practice even at an early stage of development, while subsequently it limited and reduced the law to so-called positive law, elaborated through definite processes and enacted in formal, written texts. In the cultures of Common Law, the judge, availing himself of the art of distinguishing and the possibility of overruling, may insert certain intermediate steps into the decision-making process, nevertheless, he will always refer to some kind of a general rule, and confirm, by his decision, a custom of the realm existing from time immemorial.

Well, whichever the system, in western legal cultures the syllogistic form (whether conceived as the logical reconstruction of the operation or only as its brief, indicative form) will suggest such situations and conditions, in which there is a pre-existent norm, serving as *praemissa maior*, as well as the statement of facts (fully accidental from the aspect of the norm), serving as *praemissa minor*; the application of the former on the latter will yield the judicial decision as a logical necessity.

Thus, the syllogistic formula projects for us a situation (with an enhanced imagery and suggesting the inevitability of the process) which expresses the rule of the general. It should be known that he who possesses the general also possesses the inherent particular. For the general becomes realised as individual in that which is a case of the former. Here the general is everything, the only palpable, tangible factor. It is all that is capable of action, that is active, that is capable of moving things.

As against this, the individual will solely and exclusively exist as a case of the general, a mere example, which would be—otherwise—purely accidental. Still, however dependent the individual may be, yet—when it exists—it will be perceived. When that happens it becomes liable to apply on itself, to realise on itself, the general. In other words, the individual provides an opportunity for the general to manifest itself in it.

All this will generate, inevitably, the idea of safety, of inevitability, of an almost automatic mechanism. In fact, we learn about the general that it becomes realised. And of the individual, we learn how its realisation has come about by its subsuming under the general.

At the same time, the above presuppositions will trigger further ones. Every presupposition needs a certain environment. So also the syllogistic form (whether conceived as a means of reconstruction or just as a genuine medium) can only be

imagined in a definite intellectual atmosphere. Ultimately, we have to make a choice: the logical formula is either the true mental reproduction of some process, or just a game played with the help of symbols.

Well, the said formula cannot provide the essential characteristics of the process in question, unless (1) it is backed by a language in which the meaning is encoded, and so the relation of the signs and the concepts represented by them is unequivocal, and their linkage is fixed; further if (2) the nature and structure of the cognition is such as can ensure the linguistic expression of the subject of cognition by way of concepts and as the combination of concepts, in a sufficiently exact manner.

These presuppositions have been self-evident throughout the centuries and did not have to be proven. That fact is shown by the circumstance that, for a long time, the problem of presuppositions, or the specific problem of the judicial process, did not even arise. Simply, scholars did not perceive any specific treat in it which would differ from any other domain of human perception.

In exceptional cases which were—seemingly—contrary to the above trend, i.e. when the problem of law-application was treated in an epistemological context, it will become apparent that that was due to the special nature of the approach (e.g. a conception defined by the Leninist theory of reflection). Accordingly, in such cases the doctrine did not intend either to support or to criticise the presuppositions (whether admitted as self-evident or merely laid down as ideological tenets).[1]

I should add that even the classic fundamental works of this century, having engaged in a sweeping criticism and having helped to destroy the existing myths and founding a more realistic juristic world-concept, even they have left these notional traditions and ideological *Weltanschauung* essentially intact—despite their seemingly all-embracing and annihilating criticism.

Notably in the American movement formed at the end of the 19th century that had argued the obsolete clichés of the juristic outlook, considered the law as a social engagement and putting the judge's action into focus instead of the rigid textbooks—Jerome Frank played an outstanding role. Frank saw our human claim for legal certainty merely as an archetype, a subconscious extension of man's yearning after a paternal authority. In his eyes, legal certainty was nothing but wishful thinking—unsupported by theory and therefore indefensible.

In his view the judicial event (individual, irreproducible and unforeseeable) was the moment where and in which the law became defined and identified as law. He was the pioneer, maybe the greatest and unsurpassed one, among those scholars that developed their deep scepticism into a theory. He was also among those who doubted that the facts

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1 E.g., by PESCHKA, V.: "Az esetnorma, avagy a jogszabály és a jogeset kapcsolatának problémája" [The case-norm, or the problem of the relationship between the legal rule and a legal case] *Állam- és Jogtudomány*, 28 (1985), pp. 217 et seq., as grounded by his *Jogforrás és jogalkotás* [Source and making of the law] (Budapest 1965), ch. III, par. 2, and *Die Theorie der Rechtsnormen* (Budapest 1979), ch. I, par. IV and ch. II, par. 1, all representing the adaptation of the theory of reflection on the problems of law-application.

and the norms constituted some kind of concrete and determining factors of our environment, and that each played a decisive role in legal proceedings.[2] Himself a practising lawyer, judge of the Federal Appeals Court, he nourished a particularly devastating opinion on the judicial system and especially on the jury system, as well as on the judge's role in establishing the facts of the case. He found that the said process depended on essential points on the judge's subjective judgement and was therefore both uncontrolled and uncontrollable.[3] His standpoint was both sharp and clear: "For court purposes, what the court thinks about the facts is all that matters. For actual events [...] happened in the past. They do not walk into the court."[4] As it is, "the 'facts' [...] are not objective. They are what the judge thinks they are".[5]

And yet: from his work, from its emphases and context, it becomes apparent that, through all this, Frank did not want to deny the facts themselves, nor their being approachable through cognitive means and, eventually, their actual cognition. Just the opposite. As a practising judge, he considered that the stake of the entire judicial process lay in the facts, in the fight centring around the allegation and proof of the facts; in the dramatic fight of the two opposing parties in the closure of the fight by obtaining the court's conviction. (Let us not forget: his everyday experience in the appellate courts of the US must have borne this out.) Accordingly, his critique relies exactly on those presuppositions we have outlined above. It seems as if his entire work, his bitter recriminations, had been aimed at the full and undisturbed realisation of these presuppositions. Thus, the said presuppositions not only provide the framework of his line of thought but they also fill it with content. The myth-destroyer, praised all over the world, himself nurtures a myth. The ideal he expresses, and by which he would measure the uncertainty, the accidental nature, and essential subjectivism of judicial fact-finding, is not excluded in principle. Nevertheless, he did not realise the difference in category by which the judicial establishment of facts deviates from the everyday or scientific cognition. Instead, he sought the reasons by which the "finding" of the "true facts" could be replaced by the "fight" waged for them, in the institutional set-up of the procedure, more precisely, in the role assigned to the judges of fact. And finally, this is what prompted him to criticise, with an unprecedented sharpness, the "unpredictability" of the judicial system. While he does not say so expressly, what he means is that the system, in a different, corrected set-up, i.e. under a changed principle of operation, could function in another way.[6]

Parallel with American realism, on the European continent another trend was developing: one that perhaps led to less spectacular but tighter theoretical results. I am referring

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2 Such were the impacts (on the basis of psycho-analysis) by, e.g., SZABÓ, J.: *A jogászi gondolkodás bölcselete* [The philosophy of juristic thought] (Szeged 1941) and (in the wake of the treatment of 'situation' in the existentialist philosophy) by Cohn, G.: *Existentialismus und Rechtswissenschaft* (Basel 1955).

3 FRANK, J.: "Say it with Music" *Harvard Law Review*, 61 (1948), pp. 924–925.

4 FRANK, J.: *Courts on Trial* (Princeton 1949), p. 15.

5 FRANK, J.: *Law and the Modern* Mind [1930] (Garden City 1963), p. xviii.

6 Cf. RUMBLE, W. E.: *American Legal Realism* (Ithaca 1968), pp. 116–136.

to the neo-Kantian approach anchored in the German classic philosophical traditions. The scholars of this line made an effort at a methodological consistency and purity. In other words, they tried to avoid the short-circuiting of the realms of *Sein* and *Sollen*, i.e. the blending of these two aspects. While the realism forged a theory from the individual and accidental components of judicial activity, neo-Kantianism (starting from its own philosophical and methodological assumptions) erected an impressive theoretical edifice on the pattern of the law, its functioning and principles. Frank had identified as law that which according to him was the only reality while being, in his view, merely accidental in the process; more closely: the outcome of merely accidental elements. As opposed to this, Kelsen would start just from that point, i.e. from the formal enactment of law.

Now, while it is true that the enactment defines the ideal operation of the law, yet it does so in a way that in the absence of any other possibility (*viz.* any possible limitation), any actual function could become ideal. In fact, any kind of actual operation may lead to final judgement and force of law. (As it is, by a purely accidental practical factor, namely by the mere fact that the given judicial process remained unassailed or was unassailable.) On the other hand, according to the said formal enactment, force of law is nothing but the declaration of the legal finality. Exactly, the declaration that the result in question is situated 'within' the valid precepts of the law, since it 'corresponds' with the said precepts.[7]

This amounts to the assertion that each step in the decision-making process has a normative character and significance. Each step, therefore, is a constitutive contribution to the decision to be taken as an element which is the product of the very process. Thus, not a single element or moment of the process is, in itself or by itself, given.[8]

Kelsen stresses that this constitutive construction is a creative and not a cognitive process.[9] Nevertheless, this creation is not quite alien to cognition. The legal facts that constitute a case are derived from the "natural" set of facts. Consequently, the said process shows "a certain parallelism" with the cognition.[10]

Well, while in Frank's oeuvre it becomes apparent that behind the criticism of the apparently non-cognitive outcome of the judicial process there hides the possibility—even outright postulate—of cognition, in the case of Kelsen the philosophical-textual context suggests that, for him, the non-cognitive feature and the parallelism with cognition are not important individually, but only in their joint statement.

In Kelsen's opinion, both the "self-existent" and the "procedurally created" facts[11] are essential in their heterogeneity and concomitantly in their parallelism. It seems that that was the only possible way for him to transfer the non-law into the law. In other words, that enabled him to create the possibility of transition from the domain of *Sein* into that of *Sollen*, without infringing methodological purity. For this purpose, to conserve

7 KELSEN, H.: *General Theory of Law and State* (Cambridge, Mass. 1946), pp. 154–156.
8 KELSEN, H.: *Reine Rechtslehre* (Wien 1960), ch. 35, par. g/a.
9 *Ibid.*, p. 240.
10 *Ibid.*, pp. 245 and 247.
11 *Ibid.*, p. 246.

all that had been given in the *Sein* by transcending (i.e. negating by retaining) them in the *Sollen* to the necessary extent and manner. This is what he meant by sublation.

Fact and Value

Attempting to describe what is distinctively human through the analysis of mind, philosophy has concluded that it cannot be characterised as a "machine" with a "ghost" built into it. It has no part whatever which, when the whole machinery is set to motion, is to start working according to own laws and regularities.[12] In its existence, the human being is a whole having its imprint on each and every segment and moment of its existence. This is what Marx meant too when stating that both social nature and historical character were inherent in human kind.

This is also established in psychology: pure perception is nothing else but mere theoretical abstraction. What will come to mind as perception is already evaluated at some level, i.e. processed through the psychological structure individually characteristic of our personality. *Gestalt*-psychology discovered several decades ago that fields of perception showed qualities that could not be determined by single sensory stimuli, but expressed attributes of more or less extended areas (of space or time).[13] Upon this recognition, a totality concept was methodologically defined, proposing not only that parts were at any given instance determined by the whole and that, accordingly, investigation had at any time to depart from this whole, but also that parts could not even in themselves be neutral static components, either, as it was just their configuration in one structured organisation that at any time made up the whole.[14] In consequence, no intellectual construction reduced to elements can be turned into something meaningful. For even in an elementary situation (with elementary conditions in an elementary isolation, etc.), human response always embodies a relative unity.

Human attachment to events and matters is necessarily discrete: we appropriate what we encounter as mediated by our psychological reactions from the start, and not directly in their own materiality. Of course, this builds into our perception processes an abstractive-transformative filter from the very beginning, which makes fact and value seen as a unity. "Even, however, when the 'facts' in question are not infused with empirically intractable value-elements, they still represent patterns more or less severely abstracted from any concrete events."[15] Strictly speaking, patterns referred to are by far not pure facts any longer; they are fact-value complexes. They are the only factors that really exist in our human world.[16]

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12 Cf. RYLE, G.: *The Concept of Mind* (London 1949).

13 Cf., e.g., WERTHEIMER, M.: *Productive Thinking* (New York 1959).

14 Cf. STROMBACH, W.: "Wholeness, Gestalt, System" *International Journal of General Systems*, 9 (1983), p. 68.

15 STONE, J.: *Social Dimensions of Law and Justice* (London 1966), p. 738.

16 Cf. STONE, J.: *Legal System and Lawyers' Reasonings* (London 1964), ch. 7.

The fact-value complex in itself is, however, not a subject of communication. Once we name or communicate on an event by asserting it as a 'fact', it will also be filtered through linguistic mediation. And as known, language preconditions and expresses, while creating and reproducing, a given form of life.[17] This is so because of the ontological fact of social embeddedness (that is, at the same time being conditioned and conditioning),[18] and also by virtue of the particular features and instrumental definition of the given medium. Language is able to communicate by making ideas "speakable" as "'projected' into discursive form".[19] Its semantics and syntax are equally built on "a linear, discrete, successive order" structure.[20] In other words, both the elements of linguistic expression and its complex structures are built on an endless series of operations establishing relations (analogies and distinctions), which are from the start to wedge an evaluative moment into the fact-value complex in respect to the particularity of the linguistic medium too. It has two aspects. As already seen, any transformation into linguistic expression is in itself a kind of institutionalisation which assumes evaluation. At the same time, the understanding of what has been linguistically communicated also preconditions transformation, i.e., further evaluation. Since communication is only conceivable through generalising classification,[21] it is justifiable to say that "every word is to some extent a word of degree",[22] made and interpreted via non-equivalent transformation. And what is not equivalent is constitutive.

All this is to say that the road from individual perception through generalising linguistic expression to a concretising interpretation as reflected in a given situation displays the same dialectic of the individual and the general that has been used to describe law-making as projecting the general and judicial application of the law conceived of as its individuation.[23]

The statement according to which "even indisputable facts need interpretation"[24] seems to be corroborated. "It is commonly known that the facts of a case are not 'brute' facts, but interpreted facts."[25] What are called facts are at the same time product of evaluation as well. Or, the social nature of facts is also mediated by evaluation inherent in the fact-value complex. As one of the classics of American legal realism said, "to one brought up in [a given culture], varying emphasis, tacit assumptions, unwritten practices,

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17 E.g. WITTGENSTEIN, L.: *Philosophische Untersuchungen / Philosophical Investigations* [1945] (Oxford 1953).

18 LUKÁCS, Gy.: *A társadalmi lét ontológiájáról* [Zur Ontologie des gesellschaftlichen Seins, 1971], II (Budapest 1976), cf. VARGA, Cs.: *The Place of Law in Lukács' World Concept* (Budapest 1985).

19 LANGER, S. K.: Philosophy in a New Key [1942] (Cambridge, Mass. 1960), p. 93.

20 *Ibid.*, p. 80.

21 LUKÁCS: p. 195.

22 WILLIAMS, G.: "Law and Fact" *The Criminal Law Review*, 1976, p. 535.

23 E.g. PESCHKA (1965): ch. 3. For a theoretical criticism, see Cs. VARGA: "Law-application and Its Theoretical Conception" *Archiv für Rechts- und Sozialphilosophie*, 67 (1981), and "Logic of Law and Judicial Activity" in Z. Péteri, V. Lamm (eds.): *Legal Development and Comparative Law* (Budapest 1981).

24 AARNIO, A.: *On Legal Reasoning* (Turku 1977), p. 70.

25 KLAMI, H.T.: *Anti-legalism* (Vammala 1980), pp. 69 and 73.

a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books".[26]

Fact and value are, in consequence, co-related to one another. They themselves are analytical concepts; they can only be stated in unity. Their complex stands for the understanding that fact is only conceivable as evaluated and, evaluation, as being attached to fact. As parts of a totality,[27] they gain meaning from the whole. Both their existence and their meaning can only evolve in the process of a ceaseless interaction between these two components. In consequence, (1) the whole construction breaks down if any of its components is extracted therefrom; (2) the whole construction becomes re-posited if any of its components is re-posited; (3) the whole construction gets modified if any of its components is modified.

Fact and Law

In point of principle, reality is one and undivided. It is a totality at any given time of the motions actually taking place in it. Reality as a subject of human praxis, notwithstanding, cannot be separated from the communicative practice of human kind and from human evaluations and normative expectations. As seen in another context, the establishment of facts is an intellectual appropriation with human evaluative involvement in it.[28] In the social construction of reality, neither facts nor factual operations can meaningfully be considered as abstracted from social praxis.

If normative expectations appear repeatedly in a way pointing to the desirability of a legal solution and to the attempt at having an inquiry into its conceivability, in human perception and evaluation a search for relevancy is to gain ground as a prime factor of selection and ordering, a search which, if initially reconfirmed, will turn out to be almost exclusive in order to lead to a genuine act of law-application.

To be sure, the law is far from being a panacea with universal application omnipresent and omnipotent. Nevertheless, if there is any point in having a mediation through the law, law turns out to be co-related to something else (in the course and for the sake of this mediation). Certainly, no exclusivity in this attempt is needed. Human perception and evaluation of facts can at the same time have several conceptual webs, operational functions, attempts at being reflected in more than one direction.

"The organisation of facts that allows the application of a rule is supported by a prior interpretation, without which these facts have no sense whatever. This prior interpretation is supplied by the legal rule itself, and is in no way an objective datum, a pure reflection

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26 HOLMES: in *Diaz v. Gonzales*, 261 U.S. 102 (1923), 67 L. Ed. 550, 552, as quoted by KENDAL, G.H.: *Facts* (Toronto 1980), p. 61.

27 Cf. NERHOT, P.: "The Fact of Law" in G. Teubner (ed.): *Autopoietic Law* (Berlin and New York 1988), p. 20.

28 VARGA, Cs.: "Fact and Its Approach in Philosophy and in Law" in R. Kevelson (ed.): *Law and Semiotics*, 3 (New York and London), pp. 357 et seq.

of reality." For "the law is in no way attached to the 'materiality' of the facts, acts, and various events that it considers, but to the meaning they have within the legal system itself. This meaning is in no way bound up with the elementary events, taken in isolation, that constitute them; it results from the whole of them as a construct under the rules."[29] This is why "the factual situation brought before the court is already a 'legally filtered' situation defining at least in outlines also the applicable rules".[30]

For facts themselves have no meaning at all; they have no names, either. "Fact situations do not await us neatly labelled, creased, and folded; nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand, with all the practical consequences involved in this decision."[31] And giving a name is at the same time qualifying what has been named. "Qualification [...] establishes a relation between a concept and an element which is told to fall or not to fall within the extension of the concept."[32] For qualifying, we are also expected to interpret in order that the extension of the concept to be qualified can be defined. That is, the meaning of the word involved in naming is to be established. "Or, the question is not to have a search for any true meaning of the words as Socrates believed, as if there were any external world or world of ideas offering one single solution that can be exclusively conform to reality; it is rather a practical job to find and work out the meaning which may fit the most to a concrete solution proposed by some consideration."[33] Consequently, 'having a meaning' and 'giving a meaning' become differentiated in argumentation, albeit their notional extension may be the same in ontological reconstruction.[34]

In other words, they are synonyms indeed, with the former dysanthropomorphizing what is, both apparently and as to its actual functioning, only anthropomorphous. Even logical schools of thought reducing legal processes to merely cognitive ones consider the act of giving a name a complex operation of searching for, while establishing, meaning, in which "problems [...] are fundamentally semantic, since the main difficulty lies in identifying the property referred to by the expressions found in legal discourse".[35] Are problems semantic? It means that even apparently elementary operations we are inclined to regard as purely factual are already embedded in the social context of formulating

29 NERHOT: pp. 321 and 322.

30 LAGNEAU-DEVILLE, A.: "Questions sociologiques à propos de l'interprétation du droit" in M. van de Kerchove (ed.): *L'interprétation en droit* (Bruxelles 1978), p. 528.

31 HART, H. L. A.: "Positivism and the Separation of Law and Morals" [1958] in his *Essays in Jurisprudence and Philosophy* (Oxford 1983), pp. 63–64.

32 PERELMAN, Ch.: "La distinction du fait et du droit" in Ch. Perelman (ed.): *Le fait et le droit* (Bruxelles 1961), p. 275.

33 PERELMAN, Ch.: *Logique juridique* (Paris 1976), p. 121.

34 Cf., first of all, PERELMAN, Ch.: "Avoir un sens et donner un sens" *Logique et Analyse* (1962), No. 5.

35 ALCHOURRÓN C. E. and BULYGIN, E.: *Normative Systems* (Wien and New York 1971), p. 147, quotation at 153.

them as a question, embedded from the very start in the evaluations that are inherent in both perceiving facts and making use of legal relevancy to serve as a criterion in their selection and ordering. This is why the statement, even if simplistic, can be justified, according to which "the qualification of facts is implied by their conceptualisation".[36]

It is a classical paradox of philosophy of law that legal consequence can only be construed as related to the judicial establishment of facts that constitute a case and, *vice versa*, the question whether facts constituting a case are judicially establishable is only answered alongside the realisation whether exacting legal consequences is desirable or not.[37] Abstractly speaking, no operation can withstand becoming normative in a normative context.

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(Questio facti et questio juris) The debate about the separation of 'questions of fact' and 'questions of law' is expressive of the basic structural and paradigmatic features of the arrangement and ideology of modern formal law, even if positive stipulations may temporarily put it aside.[38] A fundamental procedural institution in both Common Law and Civil Law cultures,[39] a deeply traditionalised division of the ideals and directions of juristic thinking, it has already fully permeated Roman law as a kind of false ideology.

As a conceptual distinction, it has already been accepted by contrasting *factum* to *jus* as achieved in the series of *res facti* and *res juris*, as well as *actio in factum* and *actio in jus*. As it may be seen in classical texts clearly,[40] 'law' is what exists in terms of *jus commune*, that is, what is being considered valid, or what one concludes therefrom as valid (or, as we could say now, what is present for a deductive breaking down), in opposition to 'fact', what exists exclusively to the extent and with a degree of validity that it has been proven or sanctioned (or, as we could express now, what can be added inductively and posteriorly to what is already present). That is to say that, both in the classical age and in the Roman law *redivivus* of the Middle Ages, 'law' conceived of as fundamental, primary, and unchangedly standing, will be contrasted to legal projections as 'fact', which is subordinated, secondary, unknown, not inferable therefrom, or which, even if regarded as valid, is unable to invalidate the former. In other words, the conceptual distinction is a means of internal structuration; at the same time, it shapes legal thinking as well.

(As opposed to the intuition of everyday thinking, owing, on the basis of the everyday routine and scientific experience, priority, and also cognitive significance, to the

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36 HÉBRAUD, P.: "Rapport introductif" in *La logique judiciaire* (Paris 1969), p. 31.

37 E.g. RADBRUCH, G.: *Grundzüge der Rechtsphilosohie* (Leipzig 1914), p. 199.

38 For an attempt at overcoming it, see, e.g., NAGY, L.: *Ítélet a büntetőperben* [Judgment in criminal process] (Budapest 1974), pp. 266–267.

39 Surveyed by ROTONDI, M.: "Considérations en 'fait' et en 'droit'" *Revue trimestrielle de Droit civil* [Extrait] 1977/1, p. 12, note 18.

40 *Ibid.*, pp. 7–8.

operations with facts, it is worth noting that both the differentiation of fact and law and the understanding of fact as reality are, in Latin and in the languages derived therefrom as well, stemmed not from everyday routine and scientific experience, but precisely from law, precisely from this distinction, and spread over to many other fields.[41] Or, in Latin and German, the primitive and first meaning of 'true' is '[procedurally] right', which in its turn transforms into 'reality' as opposed to the merely assumed or presumed,[42] differing from the English, where the original meaning of 'true' is 'plighted faith'.[43] (Accordingly, the concept of both the fact and the true is basically procedurally conceived, as opposed to, e.g., the Greek, in which *talethes* [true] is that which is revealed[44] without tradition continued.)

In procedural systems having developed from modern times, the differentiation between 'question of fact' and 'question of law' is of fundamental importance. By the very fact of having a strict distinction (e.g. of the competencies of non-professional jury and professional judge in complementing one another; of the procedural phases of a given procedure; of subjects that can be appealed against), it suggests diverging approaches, paths of thought, terminologies, and references for decision. Moreover, it puts its stamp on the limitations of the preparatory stages of a trial process, of drafting documents, of evidencing, witnessing and expertising as well, in order that they cannot be prejudiced in questions of law; what is even more, it can even define how the judge is expected to understand a norm, notably by separating the normative message of a norm to be accepted by the judge as a fact from the one to be interpreted as a law.

The significance attributed to this distinction[45] is based upon the definability of the conceptual sphere of the questions of fact, to be separated from what is law. Accordingly, definitions are mostly simplistic, knowing no reservation. "A question of fact [...] is one which has not been thus [in accordance with established principles] predetermined."[46] "The questions of fact [...] are those questions which may be determined without reference to any rule or standard prescribed by the state."[47] "When one of two different versions of events must be accepted, a question of fact is raised."[48] As can be seen, the ideological stand (i.e. the de-juridifying dysanthropomorphization of the fact, distinguished from the law) is revealed by commonly having as a touchstone the fact as

41 Cf. MAUTHNER, F.: *Wörterbuch der Philosophie* (Leipzig 1924), p. 303, quoted by H. Silving, "Law and Fact in the Light of the Pure Theory of Law" in P. Sayre (ed.): *Interpretations of Modern Legal Philosophies* (New York 1947), pp. 644 and 656, notes 13–14.

42 Cf. MAUTHNER: p. 349, by Silving, pp. 644 and 656, notes 15–16.

43 KENDAL: p. 21.

44 *Ibidem.*

45 "Ad questionem facti non respondent judices; ad questionem juris non respondent juratores." *Isack v. Clarke*, 1 Rolle, 125, 132 (1613) and Coke *Co. Lit.* (1628) 155b as quoted by R. POUND: *Jurisprudence* V (St. Paul, Minn. 1959), p. 547.

46 SALMOND, J.W.: *Jurisprudence*, 3rd ed. (London 1902), p. 15.

47 BROWN, R. A.: "Fact and Law in Judicial Review" *Harvard Law Review*, 56 (1943), p. 901.

48 MORRIS, C.: "Law and Fact" *Harvard Law Review*, 55 (1942), p. 1314.

given self-evidently in itself. But what criterion is adopted to substantiate such a claim for distinction?

To be sure, there is a logic proper to this institutional differentiation and there are formal arguments to support it. According to one of them, "[t]he issuable facts [...] should be alleged as they actually existed or occurred [...]. Every attempt to combine fact and law, to give the facts a legal colouring and aspect, to present them in their legal bearing upon the issues rather than in their actual naked simplicity, is so far forth an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading. [...] [T]he allegation must be dry, naked, actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom, must be left entirely to the courts".[49] However, the basic idea unfounded as "naked fact" is itself an abstraction that actually does not exist. What do exist are situations that are lived through exclusively, from the endless potentialities of fact (and aspects of potentialities of fact) of which only the evaluation of the user can provide a selection, which is obviously a function of the use the user has in mind; and in order to communicate the result of the selection, the user also has to name it, i.e. also to interpret it, which again is a function of the intended use.[50] This is to say that fact exists exclusively in concrete context, and not in abstract generality. Accordingly, to formulate a question about it is only meaningful if it involves the considerations leading to it, that is, its whole context.[51]

Notwithstanding, there is a common stand according to which these are "distinct categories, involving real differences for the lawyer and judge. And the difference is one of kind, and not merely one of degree [...]. The difference between the two kinds of questions is qualitative, not relative; but the discrimination can be made only after the position of the disputants is fully known".[52] Or, the attempt at making a distinction is doomed to failure from the start because what renders them differentiated lies outside them. At the same time it is clear that, no matter whether they can be distinguished or not, their differentiation (as expressed, e.g., in their channelling into differing paths or procedure) will be realised in practice. For the distinction of questions of fact and law involves not only differing arena and procedure, and differing normative definitions and expectations in them, but also differing context, reference and, consequently, differing argumentation as well,[53] whilst the interdependency of the two sides, as well as the constitutive character of the whole process, are unchanged. "But I can find no reason for

49 POMEROY: *Code Remedies* (1904), pp. 560–561, quoted by COOK, W. W.: "'Facts' and 'Statements of Fact'" *The University of Chicago Law Review*, 4 (1936), pp. 236–237, note 7.

50 *Ibid.*, p. 238.

51 E.g. JACKSON, J.: "Questions of Fact and Questions of Law" in W. Twining (ed.): *Facts in Law* (Wiesbaden 1983), p. 87.

52 MORRIS: p. 1306.

53 E.g. JACKSON: p. 94.

supposing that the nature of the judicial process is different when the question is said to be one of fact from what it is when the question is said to be one of law."[54]

How can the apparent paradox be solved?

The solution is to be found in the reversal of the way of raising the question and, thereby, in the explanation why the question has been raised at all. That is to say, it is not the ideologically dysanthropomorphized evidence of the fact that is the basis upon which the evaluation of law is based, but it is the praxis, in the course of which, in order to standardise practical activity, humankind builds a system of normative expectations and references, in which, as differentiated from the purely normative mental operations with the conceptual components of the normative sphere, it is also humankind in practice that posits the normative appropriation of reality and its processing in the normative sphere as a kind of quasi-reality. This is an appropriation of reality too, albeit posited by, and in the interests of, law. Actually they differ, but only in a procedural sense. Their differentiation can only be made in a given procedural context. That is, it is a given procedure as an aggregate of normative projections defining a normative practical process that serves as a basis for the whole enterprise, at the same time determining the criteria of the differentiation itself, thereby deciding upon its final issue as well.

Or, the methodological dilemma is unchanged: in order to appropriate reality (practically or theoretically), we are expected to create concepts and to classify them, pretending as if the existence of our concepts as well as the discreteness were the mere transposition (i.e., pure consequence) of the existence of reality reflected by these concepts. Although we are aware of the fact that reality is not discrete but continuous; and in the interest, and within the context, of its appropriation it is we who make it conceptually discrete. In respect of law, what we have in mind is, however, not directly reality but a conventionalising conceptual network and referential practice, established artificially in order to exert an influence on reality. It is within this context that the question of the differentiation between 'questions of fact' and 'questions of law' is formulated. At the same time, I have no other choice than to formulate this in the medium of the same language which is also the object of the question. In point of principle, the question itself and its object can be distinguished on the abstract conceptual level of analysis; in practice, however, there is no label on the words I use and on the notions I refer to, which could signal this distinction in a clearly unambiguous way. Once I leave the field of abstract conceptual analysis, I am to cope with the chances of notional confusion and ambiguous connotation.

In sum, the duality and confrontation of the 'questions of fact' and 'questions of law' simply do not exist beyond the reach of the humanly-made legal reality. All this can only be interpreted as an institutional question, in the function of a system of norms laying the foundations of, and defining, a given system of procedure. As has been seen, (1) the differentiation has nothing but a merely law-posited foundation; (2) as relational

54 Lord REID, in *Griffiths v. J. P. Harrison, Ltd.* (1962) 909 at p. 916, quoted by WILSON, W. A.: "A Note on Fact and Law" *The Modern Law Review*, 26 (1963), p. 621, note 84.

categories, any of them has a meaning only vis-à-vis the other; in consequence, (3) their definition is reflexive, one being the negation of the other; while the answer to the question of (4) which is what can only be done exclusively in function of the position, i.e. in the course of the procedure, through the interpretation of the place, as related to one another, of the acts in succession to one another within the conceptual network and context of the procedure. It is like a move in the game, which cannot be defined beyond its scope as a merely physical or mental event, and which cannot define its own normative meaning and significance exclusively in itself within the game either, as it only becomes defined through the individual moves in succession of one another, strictly speaking, through their interpretation within the reach of the game. On the other hand, once it becomes defined, in addition to its channelling into a given procedural contexture (i.e., into a given procedural path and phase and availability of appeal, etc.), it may lay the foundations of an argumentation of a differing character and direction and of a reference of a differing nature in argumentation.

In sum, the institutional differentiation of questions of fact and law is imputatively defined, and not cognitively. The primary message it mediates is the idea according to which there are 'questions of fact' as distinct from 'questions of law'. This means that epistemological assumptions at the very foundations of legal ideology and institutional set-up are present here too, and, as principles of organisation and professional ideology defining the particularity and distinctiveness of law as a specific complex of mediation, they assert themselves even when it is not preconditioned, or posited, by any specific law of procedure. It is something more than merely a function, and concrete individual institutionalisation, of its positing by any given law. It bears testimony to our basic professional assumptions and to the distinctively legal thought, and at the same time to the common grounds of Common Law and Civil Law in Roman Law.

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('Ordinary' Words) The question itself is of the particular domain of the high technical complexity of the organisation of procedure and of the selective role of the differentiation between questions of fact and law, for there is no rule, practice or tradition to define which words qualify 'ordinary' ones, and it cannot be concluded from the nature of words by the force of any logic or consideration. From an external viewpoint, it is purely by chance what will qualify as 'ordinary word' in any culture of law, in any system of law, moreover, in any particular field or any given act thereof. There is no unambiguous criterion for defining it within the law, either.

To be sure, what has been defined by the law-maker (and, accordingly, what has to be interpreted by the agency applying it) cannot qualify as 'ordinary'. To put it in the reverse sense, every word that must not be interpreted by the agency applying the law (by force of the argument that it would have been defined by the law-maker if it were intended to do so) will qualify as 'ordinary'. All this does not imply, however, that the word not defined is *eo ipso* 'ordinary'; what is implied is only this: what is 'ordinary'

qualifies as a 'question of fact' and, *vice versa*, the word qualified as a 'question of fact' has to be treated as 'ordinary'.

That what stands behind this façade is a complex or confused practice,[55] with the basic task to free legal action—by classifying the terms of normative texts into questions of fact and law and, thereby, differentiating the ways and paths and agencies of their treatment—from the accumulation of the endless series of definitions and interpretations which would otherwise be an unmanageable burden on it.[56]

It is to be noted, however, that no matter how strong an effort has been made to qualify only words as 'ordinary' in respect of which both the establishment of relevant facts and their qualification as a case of the class defined by the words in question are presented as "question of degree",[57] to qualify a word as being 'ordinary' presupposes, in the absence of unambiguous criteria, a procedural decision. As to the jurisprudence of the English Road Traffic Acts, for instance, it is to be decided according to the everyday use of the word as a 'question of degree' whether driving has been "dangerous" to the community or not, but the question whether the same driving has actually led to what is called an "accident" by the law is a pure 'question of law', to be decided according to legal definitions. Notwithstanding, the same jurisprudence proves that not even the meaning of 'ordinary' words can be established in isolation, either, that is, it can only be established as a 'question of fact' differentiated from 'questions of law', i.e., in function of normative provisions institutionalising such a differentiation. And the other way round, 'questions of law' can qualify questions of non-degree only according to their own legal ideal.[58]

Fuzziness of Language

All what we have said till now about the problem of the establishment of facts has assumed a basic situation, namely that the facts to be established are being defined in a "simple, descriptive way" by the law. But we know that no matter of how many artificial components are displayed by law due to its internal definitions and normative linkages, law shares the attributes of natural language.[59] Albeit the normative usage may try to

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55 For a survey, see WILSON, W. W.: "Questions of Degree" *The Modern Law Review*, 32 (1969), pp. 361–362; WILLIAMS: in particular pp. 477–479 and 536–537 and OCKELTON, M.: "Comments on Jackson" in *Facts in Law*, pp. 103–104.

56 Cf., e.g., JACKSON: p. 93.

57 Cf., e.g., WILLIAMS, G.: "Language and the Law" *The Law Quarterly Review*, 61 (1945), pp. 179 et seq.

58 According to *R. v. Morris* [1972] I. All R.E. 384, 386 as quoted by JACKSON: p. 92, no matter how much the definition of "accident" as "an unintended occurrence which has an adverse physical result" is applicable in a criterion-like way to some situations, there are other situations (e.g. to what extent and in which seriousness of the case can an emotional shock or nervous breakdown be considered an accident) when it can only be decided as a 'question of degree'.

59 Cf. WRÓBLEWSKI, J.: "Zagadnienia jezyka prawnego prawniczego" in OPALEK, K. i WRÓBLEWSKI, J.: *Zagadnienia teorii prawa* (Warszawa 1971), ch. II and ZIEMBINSKI, Z.: "Le langage du droit et le langage juridique" in *Archives de Philosophie du Droit* [Le langage du Droit] XIX (Paris 1974).

differentiate it and the presence of specific semantics and syntax can be discerned through linguistic reconstruction, all this is not enough to lift it out of its embeddedness in the medium of natural language or to transcend its fuzziness and vagueness, fundamental characteristic of natural language.[60]

This makes it theoretically possible to reformulate the problem of the normative linguistic definition of the facts as the one of indefinability and indeterminacy inherent in language.[61] For, as a limit of linguistic-logical approach, it has already been formulated: the certainty of any conclusion, connection or proposition can be guaranteed only if a "a meaning precise enough" is assured.[62] That is, only in the extreme, ideal (hence not realistic) case when there is no longer any interpretation; consequently any evaluative choice (or any alternative) is excluded from the start.

However, at this point we are bound to ask: What kind of definition of facts is this when it is not a "simple, descriptive" one? Well, it may be either composite or relational or axiological.[63] However, any other possibility will differ from the "simple, descriptive" one only in the character, depth, and justification of indeterminacy.

As to the evaluative terms just as in the other kinds of linguistic indeterminacy, it will be obvious that they include a dual uncertainty. Notably, both the definition of the term and the determination of the set of facts—to be evaluated from the aspect of the term—are absent.[64] This is why we have to state that their reference is illusory,[65] since their uncertainty is embedded in the substance itself.

Accordingly, it must be clear for us that, while we may lessen the uncertainty to some degree by way of directives of interpretation, we cannot eliminate it completely,[66] for the very reason that it is impossible to cancel completely the inherent indeterminacy of the linguistic medium and, on the other hand, not even the interpretation directive is devoid of uncertainty.

As it is, in the case when the indeterminacy lies in the graduality of the term (e.g. 'young' and 'old', or 'grevious' and 'light' bodily harm), the insertion of intermediate terms will not lessen the uncertainty, but merely increase the number of borderline cases.[67] In other uncertainties, where a given semantic field tallies entirely with a given area through concepts whose extension is interchangeable (e.g. the denomination of kinships in the

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60 E.g. PECZENIK, A. and WRÓBLEWSKI, J.: "Fuzziness and Transformation" *Theoria*, 51 (1985), pp. 24–26 and 32–34.

61 Cf., e.g., SCHOLZ, K.: *A normatív tényálladéki elemek problémája* [The problem of normative facts constituting a case] (Budapest 1940), pp. 58 and 62 as an early formulation.

62 WRÓBLEWSKI, J.: "Statement on the Relation of Conduct and Norm" *Logique et Analyse* (1970) Nos. 49–50, p. 167.

63 E.g. WRÓBLEWSKI, J.: "Facts in Law" *Archiv für Rechts- und Sozialphilosophie*, 59 (1973), p. 175.

64 Cf., e.g., TARUFFO, M.: "Value Judgements in the Judgement of Fact" *Archivum Iuridicum Cracoviense*, (1985) No. 18, p. 50.

65 STONE, J.: *Precedent and Law* (Sydney, etc. 1985), term used in ch. 4.

66 Cf., e.g., GIZBERT-STUDNICKI, T.: "Vagueness, Open Texture and Law" *Archivum Iuridicum Cracoviense*, (1983) No. 16, p. 27.

67 E.g. *ibid.*, p. 18.

natural language; or the grade of the participation in the crime in the legal language), the basic indeterminacy cannot be eliminated, yet whatever our interpretation of whichever element, the interpretation will merely start a chain reaction that will eventually influence all the other components.[68]

So, there arises an unavoidable dilemma: either one must avoid the specifying definitions (even the unification of the usage of the terminology), lest the judicial evaluation be infringed or made impossible and thus the entire construction be rendered useless.[69] Or—in the opposite case—one must try to eliminate the uncertainty by way of definition. The letter, however, has the defect that it can never be complete or devoid of discrepancies. (For instance, if we define drunkenness as "absence of control over own actions", then we have coupled the cause with only one of the concomitant effects, while drunkenness is only one of the possible causes that may result in the loss of self-control. When, on the other side, one tries to define drunkenness in a measurable and demonstrable way, i.e. by the concentration of alcohol in the blood, then one becomes involved in the web of various reasons that may generate the alcohol-concentration; however, the limits of proof may exclude a number of directions. For instance, in the event when the taking of blood, or its valuation as the definition of drunkenness, are made impossible by forensic considerations.[70]

Accordingly, it is especially in the cases of deliberate uncertainties (i.e. in the case of the use of evaluative terms) that the claim of quantification will arise (i.e., their reduction to quantitative determinations). In the literature that appears as the condition of a guaranteed statutory regulation, i.e., *nullum crimen sine lege* and *nulla poena sine lege*.[71] At the same time, it is known from practice that any such reduction will remain a *desideratum* since it cannot eliminate the uncertainty, at most it may lessen it partially and in certain directions. In other words, it will transfer the source of indeterminacy onto the quantifying term, yet at the cost of leaving the uncertainty intact in the non-quantified directions.[72]

The analytical theory of law summarises the position as follows: whilst our insight, our experience and our routine may suggest an identity; nevertheless, as soon as it becomes debated or questionable that the facts of a given case are, in effect, the facts of a normative definition, then we are forced to adopt the following reasoning: the former "resembles [the latter] 'sufficiently' in 'relevant' respects". However, this reasoning lacks two basic definitions. To wit: it is not unequivocal, what we mean by "relevant respects",

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68 E.g., *ibid.*, pp. 20–21.

69 BOLAND, G.: "La notion d'urgence dans la jurisprudence du Conseil d'Etat de Belgique" in *Le fait et le droit* (Bruxelles 1961), pp. 175 et seq.

70 Cf., e.g., MOTTE, M. Th.: "L'évolution de la notion d'état d'ivresse dans la répression de l'ivresse au volant" in *Le fait et le droit*, pp. 245 et seq.

71 Cf. WOLTER, W.: "Sadowe zastepowanie ilosciowych znamion ocennych przez znamiona okreslone liczbowo" *Panstwo i Prawo* 32 (1977) 1, p. 4 and Gizbert-Studnicki, p. 26.

72 Cf. GIZBERT-STUDNICKI, pp. 25–26.

secondly, what will qualify (and under what conditions) as being ascertainable as "'sufficiently' resembling".[73]

Thus, on the one hand, "certainty at the borderline is the price to be paid for the use of general classifying terms". On the other hand, this is not simply an abandonment of something. In point of fact, it is an inevitable condition that the continued adaptation to the varying circumstances should be assured (while leaving the normative web intact), that is that, even in the medium of constancy, the desired—and still supportable—degree of change will be made possible.[74]

Formerly, we had considered the apparently differing sides of fact and law in a unity; now, in a similar manner, the question "What is?" and the question "What we want to do or to achieve?" will also be intertwined. Thus the sources of uncertainty are twofold while at the same time being strictly interrelated. So we might say that these two connected handicaps can be expressed by the "relative ignorance of fact" and the "relative indeterminacy of aim".[75]

As to the place of facts in this duality, they are characterised—as seen before—partly by indeterminacies, partly by the impossibility of determination. We might say that: "If the world in which we live were characterised only by a finite number of features, and these together with all the modes in which they could combine were known to us, the provision could be made in advance for every possibility."[76] But that is sheer utopia. It is not merely an utopia which cannot be realised accidentally; it is one that is conceptually excluded. For fact is a relational concept, standing for the actual possession of the outside world in our changing practice.

It may appear paradoxical that not even Leibniz had reckoned with this. Although he had aimed at the linguistic denomination of every possible concept in his *Characteristica universalis*, in creating the *Calculus rationator*, he aimed at the logical projection of their every possible mode.[77] Meanwhile, the question is not just whether these facts are discrete and whether they exist in an objective manner (i.e., independently of their cognisance), further whether it is possible to compile their complete catalogue. Instead, the question is also, what is the role of the language in these cognitive operations, and what are the instrumental consequences of the circumstances in which the use of language cannot be avoided.

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73 Terms by HART, H. L. A.: *The Concept of Law* (Oxford 1961), p. 124.

74 Cf., e.g., *ibid.*, p. 125 and WRÓBLEWSKI, J.: "Fuzziness of Legal System" in A. Peczenik et al. (eds.) *Essays in Legal Theory* (Dordrecht 1983), p. 328.

75 HART, p. 125.

76 *Ibidem.*

77 Cf. VARGA, Cs.: "On the Socially Determined Nature of Legal Reasoning" in Ch. Perelman (ed.) *Etudes de logique juridique*, V (Bruxelles 1973), p. 602 and RÖD, W.: *Geometrischer Geist und Naturrecht* (München 1970), ch. IV. Only in WITTGENSTEIN, L.: *Tractatus logico-philosophicus* (1921), section 4.26, p. 137, can we read the productive ambiguity on that the total number of *Elementarsätze* describes reality exhaustively. At the same time this formulation, as a principle of explanation, applies exclusively to the given reconstruction, and not to reality.

At this juncture I refer to the relation of language and reality, more precisely, to the appropriation of reality through language, for in the said relation language shows a multiple linkage inducing a structural particularity; an almost inevitable discrepancy. The mentioned discrepancy is truly expressed in the paradoxical statement "particularly in respect of the law", according to which "the more precise its concepts are, the less they represent reality".[78]

The answer is found in what language philosophy designates as the open texture of natural language. The following is at issue here: "We introduce a concept and limit it in *some* directions[...]. This suffices for our present needs [...]. We tend to *overlook* the fact that there are always other directions in which the concept has not been defined." Thus, the "open texture" is an objectively present, inextricable limitation (due to the inherent indeterminacy of any linguistic communication) with the result that "it is not possible to define a concept [...] with absolute precision", for "the extension of the concept is *not* closed by a frontier [...]. It is not everywhere circumscribed by rules". As we know, this situation cannot be changed by any subsequent effort at limitation.[79]

While the open texture of language may constitute a problem in everyday communication, or in science, nowhere does it appear as such an unavoidable limitation and a criterion as in legal reasoning. In the latter, namely, the subject matter of communication is not some kind of external reality (expressed, indicated or merely referred to by linguistic means), but a conceptual construction within the frame of an authoritative text, where the construction is inextricably intertwined with its linguistic form. Here we are faced with a fact determined in a normative context as an individual occurrence, which has to be subsumed under facts that, according to their generalised abstract linguistic definition, constitute a legal case.[80]

When the concrete is subjected to the abstract, one has to deal, exclusively, with the normative correspondence of the former to the externally recognisable signs of these facts that constitute a case in law. So much so that the said signs or the underlying conceptual construction may be irrecognisably detached from the teleological projection that had, originally, served as a basis of the legislation in the given matter. All that need not change even slightly the functional importance of the given normative regulation. For the advantages derived from this instrumental transformation, we merely have to pay with the possibility of certain specific discrepancies.[81]

In the said linguistic medium, there is always the possibility of an alternative solution (in the sense of approximate definitions); there is always another path, solution or leeway. Of course, this secondary solution can, ultimately, be only justified by an evaluative choice.[82]

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78 PARAIN-VIAL, A.: "La nature du concept juridique et la logique" in *Archives de Philosohie du Droit* [La logique du droit] XI (Paris 1961), p. 49.

79 WAISMANN, F.: "Verifiability" in A. Flew (ed.) *Essays on Logic and Language* (Oxford: 1961), p. 49.

80 WILLIAMS (1945): p. 191, presenting it as a common feature of law and theology.

81 Cf., e.g., VARGA, Cs. and SZÁJER, J.: "Presumption and Fiction" *Archiv für Rechts- und Sozial-philosophie*, 48 (1988) 2, pp. 168 et seq.

82 E.g. WRÓBLEWSKI (1983), p. 323.

That explains the fact that, in order to replace the logic of norms, there was already introduced, at an early stage, the logic of choice as a seemingly all-redeeming answer. The underlying consideration hold that while logic was present in legal reasoning, yet it was not as a means of the identification of already made premises, and the conclusions derived from the latter, but rather as the means of controlling the selection and the definition of these very premises.

According to its doctrine, "rules are understood to be tools for guiding inferences leading to action".[83] In other words, the logic of choice is called to see to it that "the interpretation of laws be consistent with the policy of legal rules" in a rationally justifiable way;[84] moreover, its conceptual framework should be such where the "policy" is synonymous with the term "purpose".[85]

Consequently, the question, "Is there always a right answer?"[86] may be extended, as it is warranted even if applied to facts. In the process which culminates in the decision,[87] any other consideration regarding the facts can solely be expressed in that what is called "firm determination".[88]

As a result, all that can be of a cognitive character for the decision-maker faced with the facts and their conceptual classification, will be dissolved by the normative subordination—i.e., when the decision classifying the concrete-individual is justified in the normative context. For centuries, some classical judicial dicta have relied on this perception. One of such outbursts says: "Courts of Justice ought not to be puzzled by such old scholastic questions as to where the horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail', at some time."[89]

Nothing more should be said in this respect. It is not our language that has to be blamed but our false expectations. The uncertainty lies not in linguistic deficiency. "It is a vague rule [...], it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day, but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is."[90]

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83 GOTTLIEB, G.: *The Logic of Choice* (London 1968), p. 157.

84 *Ibid.*, p. 128.

85 WRÓBLEWSKI, J.: "Comments" *Logique et Analyse*, (1970) No. 51, p. 382.

86 Cf. PECZENIK, A.: "Is There Always a Right Answer to a Legal Question?" in *Essays in Legal Theory*, pp. 239 et seq.

87 GUEST, A. G.: "Logic in the Law" in A. G. Guest (ed.): *Oxford Essays in Jurisprudence* (Oxford 1961) stresses this on p. 188.

88 Thus, e.g., OCKELTON: p. 107.

89 CHITTY, J.: in *Lavery v. Pursell* 39 Ch. D. 508 (1888), p. 517; see WILLIAMS: (1945), p. 184.

90 *Hobbs v. L.* and *S. W. Ry.* (1875) L. R. 10 Q. B. 111 at 121, quoted by WILLIAMS (1945): p. 184.

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Economic Analysis of Post-Communist Legal Reforms: The Case of Hungarian Contract Law*

Economic analysis of law plays a central role in American legal education.[1] Several contemporary journals are devoted to the topic, and most major law schools have allocated at least one full-time faculty position to a professional

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1 By economic analysis of law we refer to that body of work usually traced to Ronald Coase's seminal essay and currently expounded by Judge Richard A. Posner. See, COASE, R.: "The Problem of Social Cost", 3 *Journal of Law & Economics*, 1 (1960); POSNER, R. A.: *Economic Analysis of Law* (3d ed. 1986). Economics has long been used to critique various areas of administrative law such as utility regulation and antitrust. The new scholarship extends economic analysis to the common law—property, tort, contracts—and to the laws of crimes and civil procedure. See e.g., CALABRESI, G: "Some Thoughts on Risk Distribution and the Law of Torts", 70 *Yale Law Journal*, 499 (1961) (a seminal application of economics to the law of tort); BECKER, G. S.: *The Economic Approach to Human Behavior* (1976) (economic analysis of marriage and crime). For a discussion of the central tenets of law and economics see *infra* notes 60-81 and accompanying text.

economist.[2] Interest in law and economics research is growing overseas as well. In a recent issue of the *International Review of Law and Economics*, scholars from seven Western European nations and Japan report an expanding influence of economic analysis of law in their respective countries.[3] Conspicuously absent from this symposium issue is any representative from the emerging democracies of East-Central Europe. Yet, it is in these emerging democracies that the insights of law and economics research are most needed. This article demonstrates that the economic approach to law can be particularly useful as East-Central Europeans seek to implement legal reforms.

Hungarian contract law provides our paradigm. A commission of legal experts has recently been impaneled to suggest reforms to the contract provisions of the Hungarian Civil Code. Although panel members agree on the ultimate goal of the reforms—a contract system attuned to a modern market economy—there is some debate on how this is best achieved. We advance this debate by providing an economic analysis of selected provisions of the Hungarian Civil Code. We argue that similar economic analyses would prove useful in other areas of Hungarian law and in other East-Central European nations as well.

Part I of this article provides a brief history of Hungarian contract law so as to place current reform issues in historical context. Part II identifies and discusses three fundamental tenets of contemporary economic analysis of law as it has developed in the United States. In Part III, we use these tenets to critique three provisions of the Hungarian Civil Code. We compare each Hungarian provision to analogous provisions in various Western nations and then provide an economic critique. These critiques illustrate the power of economic analysis to guide the legal reform process now underway throughout East-Central Europe. We conclude by raising and addressing four potential obstacles to the implementation of economic jurisprudence in the post-communist world.

I. Twentieth Century Evolution of Hungarian Contract Law

In the past fifty years Hungarians have transformed their economy from market capitalism to central planning to market socialism. With the advent of each economic regime, the rules of business, including contract law, changed. Once again, reform is in the offing. In this section, we place current contract reform issues in historical context.

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2 See LANDES, W. M. and POSNER, R. A.: "The Influence of Economics on Law: A Quantitative Study", 36 *Journal of Law & Economics* 385 (1993) (chronicling the growing influence of law & economics in legal citations); Symposium, "The Place of Economics in Legal Education", 33 *Journal of Legal Education*, 183 (1983).

3 Symposium, "Economic Analysis in Civil Law Countries: Past, Present, Future", 11 *International Review of Law and Economics*, 261 (1991).

Contract Law under Central Planning: 1949–1968

Hungary emerged as an independent nation with the fall of the Hapsburg dynasty at the end of World War I.[4] During the interwar period much of Hungarian law was codified. Contract law was not.[5] Hungarians relied on their courts to develop a set of contract precedents reflecting market principles.[6] These precedents, often borrowed from German experience, established a contract law regime largely indistinguishable from regimes found in other market economies during the 1930's.[7]

Communism was ushered in with the 1949 Hungarian Constitution. The new economic orthodoxy argued that markets polarized wealth, underproduced public goods, overproduced externalities, and generally led to the exploitation of working people.[8] Central planning would be the answer to these social ills. To implement planning, property was divided into three types: *social* property held by state organs and cooperatives; *personal* property such as flats and clothing held by individuals; and *private* property such as the work tools of small artisans.[9]

Planning necessitated changes in contract law as well.[10] These changes, initially implemented through governmental decrees, were codified in the Hungarian Civil Code of 1959.[11] Under the new system, contract law was bifurcated.[12] Contracts involving personal or private property continued to be regulated under the traditional doctrines of the 1930's. Hungarian interwar precedents were not erased, they were codified. Hence, in the area of petty trade, Hungarian courts, even at the height of central planning, continued to gain experience with traditional contract doctrines. Contracts involving social

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4 See KOVÁCS, I.: "Hungary", in 1 *International Encyclopedia of Comparative Law*, 13 (1978) (chronicling the early twentieth century history of Hungarian law).

5 *See* LONTAI, E.: "Codification of the Law of Contracts", in *Questions of Civil Law Codification* 111, 111–117 (A. Harmathy & Á. Németh eds., 1990).

6 *Id.* at 113.

7 KOVÁCS, *supra* note 4, at 15.

8 See generally BERGSON, A.: "Socialist Economics", in 1 A *Survey of Contemporary Economics* 412 (E. Howard ed., 1948) (summarizing the debate between market advocates and leading socialist economists).

9 This property scheme was reflected in Act XX of 1949 the Hungarian Constitution and codified in the Hungarian Civil Code of 1959 [hereinafter PTK (1959)].

10 For a general discussion of contract law under central planning see: FARNSWORTH, E. A. & MOZOLIN, V. P.: *Contract Law in the U.S.S.R.* (1987).

11 An English translation of the Hungarian Civil Code of 1959 complete with amendments was published by the Hungarian Chamber of Commerce in 1990. This translation is particularly useful because it collects the original 1959 language in bold face type and presents amendments in standard typeface. Hereinafter, references to the Hungarian Code rely on that translation.

12 This bifurcation between contracts involving personal or private property and contracts involving state property was common to all socialist countries. See KISHIN, A.: "Economic Reform and Contract Law in the U.S.S.R.", 28 *Columbia Journal of Transnational Law* 253 (1990) (describing a similar dichotomy in the Soviet contract system); CLOS, G. G.: "The Czechoslovak Civil Code of 1964 and its 1982 Amendment Within the Framework of Czechoslovak Civil Law", 6 *New York Law School Journal of International and Comparative Law*, 215 (1986) (identifying the same dichotomy in Czechoslovak contract law).

property, by contrast, were administered under special rules designed to support planning.[13] Of course, since most property was state owned, these so called "planned" contracts were dominant.

From a legalistic viewpoint, a planned contract looked much like any other.[14] There was an offer and acceptance, damages for breach, and other legal issues common to all contracts. The key distinction lay in the scope of the "free will" of the parties.[15] State enterprises entered into planned contracts pursuant to directive. Offers and acceptances were compulsory, not voluntary.[16] In the event of breach, the parties were compelled to sue so as to activate the jurisdiction of the Central Economic Arbitration Committee.[17] These arbiters had wide discretion to rework the contract to account for changing economic conditions.[18] The language of the parties, if relevant at all, was secondary to the needs of the plan.[19] In short, planned contracts were public matters, not private. There was no change of ownership because both parties to the contract were owned by the state. Planned contracts simply served as means of administering the state plan.

Contract Law Under Market Socialism: 1968–1989

By 1968 Hungarians had become disenchanted with the economic theory of central planning. Socialism had largely succeeded in evening the distribution of wealth and was not seen as the culprit. The problem was central planning. Planners simply did not have sufficient information to effectively coordinate a national economy.[20] Hungarians responded by turning to the theory of market socialism.[21] Coined the "New Economic

13 The distinctively socialistic elements of Hungarian contract law appeared most notably in a chapter on "planned contracts". That chapter was repealed in 1978.

14 For a fuller development of this argument see OSTAS, D. T.: "Institutional Reform in East-Central Europe: Hungarian and Polish Contract Law", 26 *Journal of Economic Issues*, 513 (1992).

15 See EÖRSI, Gy.: "Contracts in Socialist Economy", 7 *International Encyclopedia of Comparative Law*, 3 (1981) (providing a similar observation).

16 See, e.g., PTK, para. 206 (1959) (compulsory contracts).

17 See, e.g., PTK, para. 316, 318 (1959) (compulsory law suit). The Central Economic Arbitration Committee was formally abolished in 1972.

18 EÖRSI, *supra* note 15, at 5.

19 *Id.*

20 The most severe criticisms of central planning came from Austrian economists. See HAYEK, F. A.: Socialist Calculation: The Competitive Solution, 7 *Economica* 125 (1940) (a seminal critique identifying information problems as the source of planning failures); MISES, L. von: *Economic Calculation in Socialism* (1922), reprinted in BORNSTEIN, M.: *Comparative Economic Systems: Models and Cases* (1969) (complexities of modern economies doom planning to failure).

21 The theory of market socialism was initially designed to answer the criticisms of Hayek and Mises. See LANGE, O.: "On the Economic Theory of Socialism", 4 *Review of Economic Studies*, 60 (1936) (a seminal work on the economic theory of market socialism); LEARNER, A. P.: *The Economics of Control* (1944) (the first formal model of decentralized socialism). See also MURRELL, P.: "Did the Theory of Market Socialism Answer the Challenge of Ludwig von Mises? A Reinterpretation of the Socialist Controversy", 15 *History*

Mechanism", the new theory called for decentralizing the decision making process.[22] The government would continue to plan, but the plans would no longer be implemented through compulsory contracts.[23] National goals were to be achieved through indirect means: wage and price controls, subsidies, credits, taxes, and assorted regulations. The idea was to place the various state enterprises in a regulatory environment where their independent contractual choices would implement the plan.[24] Whereas central planning had combined state property with state contracting, market socialism linked state property with the principle of freedom of contract.[25]

The contract provisions of the Civil Code were amended in 1978 to reflect the new economic system.[26] The chapter on planned contracts was repealed and the formal distinction between planned contracts and private contracts was abolished.[27] Henceforth, all contractual disputes would be resolved in the civil courts.[28] The provisions designed to support compulsory contracts remained on the books but fell into disuse. Enterprise autonomy and the primacy of contractual relations were formally recognized.[29] By 1978, the contract provisions of the Hungarian Civil Code looked distinctively western.[30]

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of Political Economy, 92 (1983) (discussing the debate between the market socialists and their Austrian critics).

22 See IZDEBSKI, H.: "Legal Aspects of Economic Reform in Socialist Countries", 37 *American Journal of Comparative Law*, 455 (1989) (comparing the Hungarian experiment with market socialism to similar efforts in other centrally planned economies).

23 Direct planning officially ended with Act VIII of 1972 on Economic Planning (plan from above not binding on state enterprises).

24 The legal foundations of the New Economic Mechanism were reflected in the Hungarian Constitution as amended by Act I of 1972 amending Act XX of 1949. These essential points were: (1) social ownership of the means of production; (2) state planning; (3) enterprise autonomy; and (4) the exercise of private property rights must not be prejudicial to the interests of the state. See HARMATHY, A.: "Building Contracts and Variations in Hungarian Law", 31 *Acta Juridica* 307, 308 (1989).

25 Additional legislation provided a host of institutions designed to support market activity: joint venture law (1980); antitrust law (1984); bankruptcy law (1986); commercial banks (1987); value added tax (1988); income tax (1988); and joint stock companies (1988). For a taxonomy and discussion of these laws see IZDEBSKI, H.: "Legal Aspects of Economic Reform in Socialist Countries", 37 *American Journal of Comparative Law* 703 (1989). Of course, all of this was achieved without abandoning socialist principles. The state remained the residual owner of most Hungarian wealth.

26 See SZILBEREKY, J.: "The Civil Code Amended and Restated", 20 *Acta Juridica*, 5 (1978) (discussing the key 1978 amendments).

27 See EÖRSI, Gy.: "Contracts in Hungary after the Economic Reform", 11 *Acta Juridica*, 25 (1969) (analyzing the changes in contract law needed to implement market socialism).

28 Act IV of 1972 abolished the Central Economic Arbitration Committee.

29 Autonomy is recognized in PTK, para. 57–61 and para. 170–171. The primacy of contractual relations is codified in PTK, para. 31–36 and para. 43–56.

30 Of course, there are some differences from contemporary American contract law. For example, reflecting a civil law tradition, the Hungarian Code does not require an exchange of consideration. Promises to give gifts are fully enforceable. PTK, para. 579–582 (1959). Reflecting a shortage economy, there is also a presumption in favor of specific performance over damages. PTK, para. 295–311 (1959).

Notwithstanding its theoretical virtues, the twenty year experiment with market socialism is now regarded as a dismal failure.[31] Empirical evidence suggests that Hungarian economic performance was actually worse under the New Economic Mechanism than it would have been under central planning.[32] Several explanations have been offered. Some argue that market socialism was never given a fair chance because interest groups forced the government to reverse many reforms.[33] Others argue that planners intervened so much in the decision making process that enterprise managers did not enjoy true autonomy.[34] Any market efficiency gains were drowned in a sea of wage and price controls, government regulations, subsidies, and credits.[35] At least one commentator has identified monopoly power as a central culprit.[36] Each of these criticisms could be answered with further reforms. Theoretically, Hungarians could retain market socialism and reform it by controlling interest groups, removing price controls, and providing effective antitrust enforcement.

The more radical criticisms come from those who resurrect the arguments of Hayek and Mises.[37] From an Austrian perspective, there is no room for mere reform; a radical change to market capitalism provides the *only* means of effectively organizing the Hungarian economy. Any system that retains state ownership will be hopelessly inefficient.[38] In Hungary, these more radical voices have carried the day. There is

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31 Eastern Europeans who once championed market socialism are now completely disillusioned with the theory. See, e.g., BRUS, W.: "The Eastern European Reforms: What Happened to Them?", 31 *Soviet Studies*, 257 (1979); KORNAI, J.: "The Hungarian Reform Process", 24 J. *Economic Literature*, 1687 (1986); SÁRKÖZY, T.: "Legal Problems of the Improvement of the Hungarian Economic Management System", 28 *Acta Juridica*, 29 (1986).

32 See RICHET, X.: *The Hungarian Model: Markets and Planning in a Socialist Economy* (1985); WHITESELL, R. S.: "Estimates of the Output Loss from Allocative Inefficiency: A Comparison of Hungary and West Germany", 16 *Eastern European Economy*, 89 (1989).

33 See, e.g., BEREND, I. T.: "The Crisis of Hungarian Reform in the 1970's", 40 *Acta Oeconomica* 105 (1989); SIPOS, A. & TARDOS, M.: "Economic Control and the Structural Interdependence of Organizations in Hungary at the End of the Second Reform Decade", 16 *Eastern European Economy*, 153 (1989).

34 See, e.g., KORNAI, *supra* note 31.

35 See ERICSON, R.: "The Classical Soviet Type Economy: Nature of the System and Implications for Reform", 5 *Journal of Economic Perspectives*, 11 (1991) (market socialism failures due to price controls).

36 See HARE, P. G.: "From Central Planning to Market Economy: Some Microeconomic Issues", 100 *Economic Journal*, 581 (1990).

37 See *supra* notes 20–21 and accompanying text.

38 The inefficiencies associated with market socialism derive from two primary factors. First, state ownership generates a host of "agency costs". No single individual or group of individuals bears the risk of loss or has claim to residual profits of enterprise activity. Without a residual owner, there is no one to restrain enterprise managers from using the firm's assets for their own purposes or to control managerial shirking. See SAJÓ, A.: "Diffuse Rights in Search of an Agent: A Property Rights Analysis of the Firm in the Socialist Market Economy", 10 *International Review of Law and Economics*, 41 (1990). The second inefficiency derives from imperfect information. The success or failure of a state enterprise is determined with reference to the state plan. The problem, of course, is that planners must rely on information supplied by enterprise managers. This creates an incentive to supply false information. See generally KORNAI, J.: *Economics of Shortage* (1980). Even assuming that planners had true information and that planners were loyal fiduciaries to state interests, one would

virtually no constituency advocating the mere reform of market socialism. The question is how best to privatize.[39]

Current Issues in Hungarian Contract Law Reform

The Hungarian Civil Code divides into six parts.[40] Part Four arranges the rules of "obligation" under three titles.[41] Title One contains rules common to any type of contract. Here one finds rules of offer and acceptance,[42] modification,[43] performance,[44] breach,[45] assignment,[46] and the like. Title Three provides standard terms and regulations for about twenty-five specific types of transactions. For example, the Code provides rules on sale contracts,[47] delivery contracts,[48] leases,[49] bank loans,[50] and insurance contracts.[51]

The Hungarian reform commission is currently focussing on three issues. First, there is a general feeling among panel members that the rules contained in Title One may need to be updated. These rules initially codified the contract precedents of the 1930's; most have not been modified since. Second, there may be a need to add some modern "transaction-types" to Title Three. For example, the Hungarian Code does not provide standard terms governing franchise agreements. If one were to draft standard franchise

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still be left with the insurmountable problems of coordinating a national economy See HAYEK: *supra* note 21; MISES *supra* note 20.

39 During the current transition, changes in property law and issues involving the distribution of property rights must take center stage. The vast majority of Hungarian wealth is still in state hands and transferring this wealth to private owners is no small task. Western scholars have responded with a virtual avalanche of advise on how to privatize state assets. For a sampling of this literature see DANIELS, R. & HOWSE, R.: "Reforming the Reform Process: A Critique of Proposals for Privatization in Central and Eastern Europe", 25 *New York University Journal of International Law & Politics*, 27 (1992); GÁBOR, F. A.: "The Quest for Transformation to a Market Economy: Privatization and Foreign Investment in Hungary", 24 *Vanderbilt Journal of Transnational Law*, 269 (1991).

40 The six parts are: (I) Introduction; (II) Persons; (III) Ownership; (IV) Obligations; (V) Inheritance; and (VI) Closing. The parts are divided into titles, chapters, and paragraphs. The chapters and paragraphs are numbered consecutively throughout the Code. Citation is to paragraph number. See PTK, (1959). The structure of the Code has remained intact since 1959. The contract provisions have not been significantly amended since 1978. A few "cosmetic" changes intended to remove socialist rhetoric from the Code were enacted in 1990, 1991, and 1993.

41 The three titles are: Contracts, Torts, and Individual Contracts. PTK (1959).

42 PTK, para. 205–218 (1959).

43 PTK, para. 240–246 (1959).

44 PTK, para. 277–297 (1959).

45 PTK, para. 298–318 (1959).

46 PTK, para. 328–333 (1959).

47 PTK, para. 365–378 (1959).

48 PTK, para. 379–388 (1959).

49 PTK, para. 423–451 (1959).

50 PTK, para. 522–535 (1959).

51 PTK, para. 536–567 (1959).

terms, what should these terms be?[52] The commission's third concern is more general. Some panel members fear an over-reaction to the *laissez faire* rhetoric of free-market advocates. Although Western nations vary on the judicial intervention allowed in private contracting, no Western nation follows a completely *laissez faire* policy. Yet, balancing government intervention in a society seeking to deregulate is tricky business.

These reform issues are not unique to Hungary. In fact, they are not even unique to post-communist societies. Similar contract issues are present in every market economy. For example, Professor Allan Farnsworth provides a list of ten contemporary American contract issues.[53] This list would provide a useful agenda for Hungarian reforms as well. What makes Hungary and other post-communist societies unique is the current reform atmosphere which encourages reconsideration of fundamental legal preconceptions.

II. Economic Analysis of Contract Law: Three Central Tenets

Over the past twenty years Western scholars have produced an unprecedented array of contract theories. Some have seen contract in retreat from tort law with the growth of government crowding out the market.[54] Others have sought to denigrate traditional freedom of contract principles as outdated "neoclassicism" and to replace the doctrine with sociologically based relational concepts.[55] Others have sought to unify contract doctrine based on moral philosophy or cultural history.[56] Still others have found an

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52 This is no easy matter; a review of American franchise law reveals a host of contentious issues with no clear judicial consensus on many. See EMERSON, R. W.: "Franchise Liability When Franchisees Are Apparent Agents: An Empirical and Policy Analysis of 'Common Knowledge' about Franchising", 20 *Hofstra Law Review*, 609 (1992) (exploring some vagaries of American franchise law); STADFELD, L. S.: "Comment on Proposed U.S. Franchise Legislation: A Search for Balance", 97 *Com. L. J.* 540 (1992).

53 FARNSWORTH, E. A.: "Developments in Contract Law during the 1980's: The Top Ten", 41 *Case Western Reserve Law Review*, 203 (1990). The list includes: (1) "bad faith breach" and the role of punitive damages in contract law; (2) erosion of the "employment at will" doctrine and expansion of contractual liability for wrongful discharge; (3) liability based on precontractual negotiations; (4) interpreting "long-term contracts" in the light of relational factors such as trust; (5) public policy limitations on "intimate" contracts; (6) the role of reliance and/or formalities in contract formation; (7) the relationship between contract and tort; (8) the role of "unconscionability" and related doctrines; (9) the impact of various abstract theories on legal practice; and (10) the role of international and comparative law in shaping domestic policy.

54 See, e.g., GILMORE, G.: *The Death of Contract* (1974) (tort law has all but replaced contract as a source of civil liability); ATIYAH, P. S.: *The Rise and Fall of Freedom of Contract* (1979) (waning of contract a direct result of government growth).

55 See, e.g., MACNEIL, I. R.: "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law", 72 *Northwestern University Law Review*, 854 (1978). For an even more biting critique of free contracting see UNGER, R. M.: *The Critical Legal Studies Movement* (1983) (market systems based on oppression).

56 See, e.g., FRIED, C.: *Contract as Promise* (1981) (contract law best understood with reference to libertarian moral philosophy); HORWITZ, M. J.: *The Transformation of American Law 1780–1860* (1974) (explaining the logic of contract law in a historical context).

underlying economic logic to contract law.[57] In this section, we identify and explore three central tenets associated with this economic approach to contract law: "deferring to individual autonomy;" "reducing transaction costs;" and "providing stability." We argue that strict adherence to these tenets provides the best means of updating the Hungarian Code to reflect the needs of a modern market economy.[58]

Tenet 1: Deferring to Individual Autonomy

The economic approach to contract law begins with the premise that private agreements should be enforced in accordance with their terms. A party does not agree to an exchange unless he or she believes it is in his or her interest to do so, and a voluntary exchange, duly consummated, makes both parties better off. This potential for mutual advantage through private contracting has been the principal lesson of economic theory since the time of Adam Smith.[59] Institutionalized in the principle of freedom of contract, this lesson continues to guide the economic approach to contract law.

A general regime of freedom of contract can be justified on either libertarian or utilitarian grounds.[60] Economic analysis of law tends to emphasize the utilitarian, or consequentialist, base.[61] In other words, freedom of contract is justified not as a moral right, but as a pragmatic institution designed to solve economic and social problems.

No one has been more articulate in explaining the economic consequences of a general regime of freedom of contract than the Austrian economist, Friedrich von

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57 See, e.g., KRONMAN, A. T. & POSNER, R. A.: *The Economics of Contract Law* (1979); *Readings in the Economics of Contract Law* (Victor P. Goldberg ed., 1989) (a collection of works illustrating a variety of approaches to the law and economics interface).

58 Economic analysis of law can be either positive, demonstrating that the law has an internal economic logic, or normative, proposing that law should conform to external economic criteria. Both forms of analysis have their supporters and critics. See POSNER, R. A.: *The Problems of Jurisprudence* 353–392 (1990) (discussing the normative/positive dichotomy and identifying the chief criticisms and central virtues of each approach). Since we argue that Hungarian law should respond to economic criteria, our analysis is distinctively normative.

59 See SCHUMPETER, J.: *History of Economic Analysis* 187 (1954) (observing that for Adam Smith, specialization and the resulting gains from trade are "practically the only factors in economic progress"); BUCHANAN, J.: *Economics: Between Predictive Science and Moral Philosophy* 26–29 (1987) (arguing that the potential gains from voluntary exchange is virtually the sole lesson of economic theory).

60 See EPSTEIN, R. A.: "Unconscionability: A Critical Reappraisal", 18 *Journal of Law & Economics*, 293, 293–295 (1975). The libertarian approach places contracting within a broader scheme of moral entitlements that specifies how resources may be acquired (property law), used (tort law), and transferred (contract law). See EPSTEIN, R. A.: "The Static Conception of the Common Law", 9 *Journal of Legal Studies*, 253, 255 (1980). In a liberal conception of justice, property rights carve out zones of individual authority with which others may not interfere. For property rights to have meaning, the parties must be free to transfer their entitlements as they see fit and free from non-voluntary confiscation of their rights by others. See NOZICK, R.: *Anarchy State and Utopia* (1974) (specifying the moral underpinnings of a libertarian entitlement theory).

61 See POSNER, *supra* note 58, at 353–392 (linking economic jurisprudence to a mature form of pragmatism).

Hayek.[62] Hayek was concerned with the inherent problems created by the dispersal of knowledge in society.[63] Human beings confront myriad ways of using physical resources, including their own labor. Knowledge of the uses to which resources may be put and of individual preferences is widely dispersed throughout society. Much of this knowledge is difficult, if not impossible, to communicate. To complicate matters, individual preferences change over time. For an economic system to operate efficiently, it must account for this dispersal of knowledge and for the temporal quality of individual preferences. Hayek saw two options—central planning or decentralized markets. For a centralized system to work, someone would have to (1) collect information on a grand scale, (2) process that information into a coherent plan, and (3) administer the plan by controlling and directing all relevant actions.[64] Information problems frustrate each step in this process. In this light, the failure of central planning derives not from the impossibility of central planning *per se*, but from the impossibility of using central controls to handle dispersed knowledge.

The principle of freedom of contract provides a means of addressing information problems. The principle encompasses two distinct subparts: freedom *to* contract and freedom *from* contract.[65] Freedom to contract means that parties are free to transfer their rights in any way they deem fit. This enables individuals to take advantage of their own idiosyncratic preferences and personal knowledge of closely held resources. Freedom from contract ensures that rights will not be transferred without prior consent. By insisting that each party secure the consent of the other, each must take into account the idiosyncratic information of the other. Such a requirement enables the evolution of a powerful institution that allows information to be "encoded" and communicated. In short, an unencumbered principle of freedom of contract generates resource prices. Both non-consensual transfers (*e.g.*, required contract terms) and prohibited transfers (*e.g.*, terms that are prohibited by public policy) short-circuit the price system and make it impossible for individuals to take the knowledge of others into account.[66]

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62 See *supra* notes 20–21 and accompanying text. See also HAYEK, F. A.: *Individualism and Economic Order* (1948).

63 See HAYEK, F. A.: "The Use of Knowledge in Society", 35 *American Economic Review*, 519 (1945).

64 Hierarchies exist outside of centrally planned economies. The bureaucratic organization of corporate life also involves hierarchical control and is consequently plagued with informational problems. Hierarchies introduce agency costs as those in control seek self gain at the cost of the collective. They also introduce incentive problems because each participant suffers the full costs of her inputs, but shares the benefits of the collective output. Hence, each has an incentive to shirk his or her duties. See WILLIAMSON, O. E.: *Markets and Hierarchies* (1975) (analyzing the systematic inefficiencies found in large organizations).

65 See SPEIDEL, R. E.: "The New Spirit of Contract", 2 *Journal of Law and Commmerce*, 193 (1982) (employing the same dichotomy).

66 Not every resource is alienable. For example, public policies in most Western nations prohibit child labor contracts. Slavery has been abolished virtually worldwide, and most nations either prohibit or strictly regulate prostitution. Properly conceived, such limitations are not matters of contract law, but reside more deeply within a general theory of entitlements. See KRONMAN, A.: "Paternalism and the Law of Contracts", 92 *Yale Law Journal*, 763 (1983) (discussing the contract law implications of the distinction between alienable and inalienable rights).

In summary, the first tenet of economic jurisprudence dictates a strong presumption against governmental intervention into the substance of private contractual matters. Contractual language that reflects a subjective agreement between the parties should be summarily enforced.

Tenet 2: Reducing Transaction Costs

The second tenet of law and economics provides that the law should do more than passively enforce private transfers, it should be proactive, seeking to make transfers less costly for the parties. This tenet is embodied in the economist's notion of "allocative efficiency". Economists define an efficient allocation of resources as that allocation which would result, in the absence of transaction costs, from the exhaustion of all mutually advantageous exchanges.[67] Transaction costs include the costs of negotiating, performing, and enforcing the transfer of entitlements. High transaction costs frustrate private exchanges, impede the flow of resources, and distort prices. If contract law follows an economic logic, it should seek to reduce the costs of conducting private transfers.

Contract law reduces transaction costs in three ways: (1) it encourages the performance of voluntary agreements by providing a sanction for breach; (2) it reduces negotiation costs by providing standard, or customary, terms for various types of transactions; and (3) it discourages misleading conduct in contract negotiations.[68] We address each function in turn.

The first function of contract law is to determine which transfers will be enforced and which will not. Our first tenet, deference to individual autonomy, suggests that the courts should enforce every transfer that reflects the free will of the entitlement holder, and refuse to enforce all non-consensual transfers. Only subjectively understood transfers give true signals of individual preferences and knowledge. Given information problems, however, it is often difficult for parties to reach a true meeting-of-the-minds *ex ante* and for the courts to resolve subjective claims *ex post*.[69] If a party were free to argue that he or she did not subjectively understand the promise he or she made, a serious erosion in the security of contracting would ensue. Hence, the law, by necessity, must rely on *objective evidence of subjective consent*.[70]

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67 POSNER, *supra* note 1, at 11–15.

68 KRONMAN & POSNER, *supra* note 57, at 4–5.

69 See BARNETT, R. E.: "A Consent Theory of Contract", 86 *Columbia Law Review*, 269, 272–274 (1986). "It has long been recognized that a system of contractual enforcement would be unworkable if it adhered to will theory requiring a *subjective* inquiry into the putative promisor's intent." *Id.* at 272 (emphasis added). See also COHEN, F.: "The Basis of Contract", 46 *Harvard Law Review*, 533 (1933) (discussing the interplay between objective and subjective inquiries into contractual consent).

70 Anthony Kronman and Richard Posner address the old dispute in contract law over whether the basis of contractual enforcement is objective or subjective. They write: Only a contract that involves an actual meeting of minds satisfies the economist's definition of a value-maximizing exchange; but the economist allows a place

Most contract doctrines serve this evidentiary function. For example, doctrines that require congruence between an offer and an acceptance, inquire into the reliance by the promisee, demand an exchange of consideration, require a writing, inquire into the presence of fraud or duress, or demand evidence of other bargaining formality all attend this evidentiary function. Each seeks to "objectify" an inherently subjective inquiry. The inevitable slippage in these evidentiary surrogates leads to problems of both over-enforcement and under-enforcement of contractual language. Under-enforcement results when subjectively intended exchanges are not legally recognized. Over-enforcement occurs when a court forces a transfer that was not subjectively assented to by the affected party. The second tenet of economic jurisprudence suggests that the courts should resolve evidentiary disputes with an eye toward minimizing the sum of over-enforcement and under-enforcement costs.[71]

Contract law also reduces costs by providing standard terms. Every contract involves both express and implied terms. It is not cost effective, or even possible, for parties to contemplate and account *ex ante* for every contingency that may arise in a contractual exchange. Contract law responds by providing standard terms, or "default rules," that fill in the gaps left in express language.[72] Such rules reduce negotiation costs. Ideally, default rules reflect the terms the party would have drafted for themselves. This is achieved by enacting default rules that reflect the customs associated with various transaction types. So long as both parties to a transaction are familiar with these customs, their failure to expressly modify the default term gives presumptive evidence of their consent to it.[73] Troubles arise when parties to a contract do not share similar conventions.[74] In such scenarios, judicial enforcement of the default term threatens to violate the first tenet of economic jurisprudence. In such a case, economic analysis suggests an enforcement of the default rule so as to provide an incentive for each party to master the language of the trade.[75]

Economic reasoning also provides insights into the substance of customary terms. Many customs involve the allocation of risk. For example, an implied warranty in the sale of goods assigns the risk of faulty workmanship to the seller rather than to the buyer. Liability for goods damaged during shipping is customarily assigned to the common carrier. The purchase of real property customarily involves an equitable conversion which shifts the risk of fire damage to the buyer upon the signing of a contingent land sales

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for rules designed to prevent people from misleading others into thinking they have a contract with them; hence both the subjective and objective theories have a place in contract law. KRONMAN & POSNER, *supra* note 57, at 5.

71 For an application of this principle see OSTAS, D. T.: "Predicting Unconscionability Decisions: An Economic Model and an Empirical Test", 29 *American Business Law Journal*, 535 (providing evidence that American courts follow an economic logic in deciding unconscionability controversies).

72 For a thorough and provocative analysis of the gap-filling function of contract law see BARNETT, R. E.: "The Sound of Silence: Default Rules and Contractual Consent", 78 *Virginia Law Review*, 821 (1992).

73 *Id.* at 885–897.

74 *Id.*

75 See POSNER, *supra* note 1, at 84.

contract. In each case, it is in the interest of all parties that contractual risks be allocated to the party who can absorb them most efficiently.[76] Typically, the seller is in the best position to assure quality in the production process; the shipper is in the best position to take precautions; and the home buyer is more efficient in buying insurance against fire. Default rules reduce transaction costs by reflecting these efficient allocations.

Finally, contract law reduces transaction costs by assuring propriety in the contract negotiation process. Doctrines of fraud, undue influence, and unconscionability provide the paradigms. In a typical case, one party will assert that a contract reflects a voluntary agreement worthy of judicial enforcement, and the other party will seek to be excused from performing. The court must be alert to two forms of opportunism.[77] Perhaps the first party has misled the second into signing a contract the second did not fully understand. On the other hand, the second party may simply be trying to excuse itself from its own bad bargain. Either type of opportunism increases the costs of conducting exchanges. A court following an economic logic will decide such cases so as to minimize the potential for these two types of costly opportunism, and thereby provide an incentive structure that encourages future parties to bargain more effectively.[78]

In summary, the second tenet of law and economics provides a logic which unifies virtually all of the diverse doctrines that comprise contract law. It addresses the long-standing debate over whether the law requires an objective or subjective manifestation of intent, the substance of gap-filling terms, and the rules that discourage impropriety in contract negotiations. Every rule seeks to reduce the costs of conducting private exchanges.

Tenet 3: Providing Stability

Contract rules cannot have their instrumental effects unless they are communicated to the relevant actors and consistently and impartially enforced. In a well known passage, Lon Fuller identified potential miscarriages in any liberal system of justice:

> [T]he attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules; (6) rules that require conduct beyond the powers of the affected party; (7) introducing such

76 *Id.*

77 See OSTAS, *supra* note 71, at 550.

78 *Id.* at 551–552.

> frequent changes in the rules that the subject cannot orient his actions by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.[79]

These *caveats* ring with added fervor in the transforming nations. The communist heritage was linked to an almost total disregard for respect for the rule of law.[80] The recent pace and scope of legal reforms continues to introduce uncertainty. Post-communist societies need to develop stable legal institutions which enable people to order their affairs.

Strict adherence to the central tenets of economic theory provides a means of attaining legal stability. Taken collectively, the tenets provide a central logic that unifies contract doctrine in a predictable and communicable fashion. The first and third tenets provide a jurisprudential tone or attitude. The first admonishes against governmental intervention into the substance of private contracts; the third insists that legal rules be consistent and coherent. The details of individual doctrine are then determined with reference to the second tenet. Tenet 2 provides a powerful heuristic—cost reduction. Virtually every contract provision can be understood as a means of reducing transaction costs with due respect paid to individual autonomy and the need for legal stability.

III. An Economic Analysis of the Hungarian Civil Code

We now use the above tenets to analyze three selected provisions of the Hungarian Civil Code. The first provision, "socialist coexistence", provides an opportunity to analyze the economic approach to contractual ethics. The second, the "battle of the forms", applies an economic analysis to problems raised by the use of standardized form contracts. The final provision, "commercial impracticability", raises the economic issues associated with contract performance. We compare each Hungarian provision with its Western counterparts and provide an economic critique. The three critiques illustrate the power of economic reasoning to provide a coherent and stable approach to civil law doctrine.

An Economic Analysis of Contractual Ethics: The "Norms of Socialist Coexistence"

Every nation has contract provisions that specifically address the ethics of contractual behavior.[81] In the West, the doctrines of good faith and unconscionability provide the

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79 FULLER, L. L.: *The Morality of Law* 38–39 (rev. ed. 1969).

80 For an often cited analysis of the rule of law under communist regimes, see HAZARD, J. N.: *Communists and Their Law* (1969).

81 Contracting occurs within a context of social customs and shared ethical norms. Although these customs and norms ultimately derive from the individuals who make up a society, the law can play a role in reinforcing and promoting ethical conduct. See MacNEIL, I. R.: *The New Social Contract* (1980) (analyzing the social norms that support contractual behavior). Perhaps the most fundamental problem facing all post-communist societies is the lack of social consensus regarding the norms that support modern capitalism. The institutionalization of ethical norms takes time.

paradigms.[82] Parties generally are free to seek self gain, but they are also expected to deal honestly with one another and to not take undue advantage of disparities in bargaining power. The 1959 version of the Hungarian Code did not use the word unconscionable, it did, however, employ an ethically charged concept—"the norms of socialist coexistence." The Code provided: "A contract shall also be null and void if it evidently injures the interests of society or disregards the *norms of socialist coexistence.*"[83] The doctrine of socialist coexistence, like unconscionability, provided a flexible tool that could be used to instill an ethical baseline to private contractual activity.[84]

Hungarians have recently removed much of the socialistic rhetoric from their Civil Code. In 1991, the phrase "norms of socialist coexistence" was deleted in favor of the term "good morals".[85] The question, of course, is what does good morals, or alternatively, "unconscionable conduct" mean in a capitalist setting. This is no simple matter. Unconscionability means different things in different Western nations, and its use in any given nation is a matter of some controversy.[86] In short, reinterpretation of the doctrine of socialist coexistence will require difficult policy choices.

The economic tenets developed in Part II provide a useful guide to the reform process. Taken collectively, the tenets address the notion of contractual "fair play" in a reasoned and coherent fashion. In other words, they provide a means of replacing the "norms of socialist coexistence" with the "norms of market capitalism".

The notion of contractual "fairness" has two components. One may argue that the substance of a contract is overly one-sided and hence unfair. Or one may argue that there

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82 Although every rule of contract law can been seen as resting on an ethical base, the notions of good faith and unconscionability are directly phrased in ethical terms. Section 2–103(1)(b) of Uniform Commercial Code defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." The Legislative Comments to Section 2–302 of the Uniform Commercial Code refer to unconscionable conduct as an "abuse of bargaining power."

83 PTK, para. 200(2) (1959).

84 The doctrine of socialist coexistence was (is) common to all East-Central European civil codes. See ZIELINSKI, A.: "Civil Law", in *General Principles of Law of the Polish People's Republic* 161, 171 (L. Kurowski ed., 1984) (citing the use of socialist coexistence to protect long-term tenants from the harshness of eviction and to shield debtors against the demands to pay interest accumulated over long periods of time).

85 The term socialist coexistence appeared in two other paragraphs of the Hungarian Civil Code. Paragraph 206(4) provided: "If the agreement of the parties does not extend to some unessential question, ... the contract may be supplemented by the court—with attention paid to the aim and contents of the contract—on the basis of standard customs and of the *norms of socialist coexistence.*" PTK, para. 206(4) (1959) (emphasis added). Paragraph 237(4) stated that "the court may award to the State the service that would have to be returned to the party who has concluded a forbidden contract or one violating the interests of society or offending against the *norms of socialist coexistence.*" PTK, para. 237(4) (1959) (emphasis added). References to socialist norms were deleted from the Code in 1991.

86 See Symposium, "Unconscionability Around the World", 14 *Loyola of Los Angeles International and Comparative Law Journal*, 455 (1992) (comparing the role played by unconscionability in Germany, France, England, United States, Italy, and South Africa). For an economic analyses of unconscionability see TREBILCOCK, M. J.: "An Economic Approach to the Doctrine of Unconscionability", in *Studies in Contract Law* 381 (B. J. Reiter & J. Swan eds., 1980).

is unfairness in the contract negotiations. Economic analysis finds a limited role for the substantive inquiry.[87] The first tenet of law and economics demands respect for individual autonomy.[88] Any contract that involves a voluntary meeting of the minds between competent individuals is presumptively fair. This is true even if contractual language appears to be very one-sided to an outside observer. The Hungarian Civil Code directly violates this economic tenet. It states: "If there is a remarkably great difference between the value of a service and that of the return service at the date of the conclusion of the contract, although neither of the parties has the intention of donation, the injured party shall be allowed to avoid the contract."[89] This provision requires the Hungarian courts to measure every exchange with reference to criteria external to the wills of the contracting parties. By doing so it seems to draw upon a paternalistic ethic. Although the same requirement once guided American common law, it has long been discarded.[90] From an economic perspective, there simply is no external referent to fairness outside the will of the parties.[91]

Claims of contractual unfairness stand on an economic footing only when the complaining party can allege some sort of impropriety in the contract negotiations.[92] The doctrines of duress and misrepresentation are illustrative. We consider each in turn.

John R. Commons, a founding father of law and economics, provided an early economic critique of duress.[93] Defining duress as an abuse of bargaining power, he identified three types of power in contractual negotiations: political, personal, and economic.[94] Political power, held uniquely by the sovereign, is the right to compel by force. Personal power involves the use of superior mental faculties to persuade one's trading partner. Economic power resides in the right to withhold property from others. Economic theory clearly condemns the threat of physical force in contractual

87 See EPSTEIN, R. A.: "Unconscionability: A Critical Reappraisal", 18 *Journal of Law & Economics*, 293 (1975) (analyzing unconscionability with reference to its substantive and procedural components and suggesting abandonment of the substantive inquiry).

88 *Supra* notes 59–66 and accompanying text.

89 PTK, para 201(2) (1959).

90 The reference here is to the common law doctrine of *laesio enormois* which was largely abandoned in the early nineteenth century. See HORWITZ, M. J.: *The Transformation of American Law: 1780–1860* at 160–180 (1978).

91 The notion of economic efficiency can be used to fill in the gaps in contractual language. The law assumes that the parties would have agreed to assign the contractual risks in an efficient manner. Thus, efficiency can be seen as an external referent to fairness. See *supra* text accompanying note 76. However, if the parties expressly agree to vary from these efficient terms, the express language controls.

92 Here we are speaking of unfairness at the time of contractual agreement. Fairness issues also arise at the time of performance. We analyze performance issues later in the article. See *infra* notes 134–171 and accompanying text.

93 COMMONS, J. R.: *Legal Foundations of Capitalism* 34–59 (1924).

94 *Id.* at 34, 56–58.

negotiations; it also clearly permits the use of personal persuasion.[95] The difficult cases of fairness involve the exercise of Commons' third form of power: economic power.

Contract negotiations always involve the exercise of economic power. If I agree to pay a dollar for a loaf of bread, I do so because the baker will withhold the bread if I do not. The baker is exercising his economic power over me. The question is whether contract law should recognize a moral duty on the part of the baker to share his bread. The first tenet of law and economic answers with an emphatic no.[96] Respect for individual autonomy encompasses both freedom to contract and *freedom from contract*.[97] Hence, the baker is free to seek his or her best price. This is true even if I am in great need of the bread and do not have a dollar.[98] It is also true if the baker somehow had a monopoly on the production of bread.[99]

The Hungarian Code seems to expresses a contrary norm. It states: "If a contracting party has stipulated a remarkably disproportionate advantage at the conclusion of the contract by *making use of the situation of the other party*, the contract shall be null and void."[100] Not only does this provision again call for a substantive inquiry, it also introduces intractable problems of interpretation. Every contract involves "making use of the situation of the other party", and it is difficult to see how the line between permissible and impermissible advantage taking is to be drawn.[101] In short, it violates the third tenet of economic analysis: the need for predictability.

Economic analysis is much more receptive to fairness claims based on misleading conduct.[102] Consider a contract for the sale of a house. The house recently has been

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95 Commons wrote: "[I]t is perfectly lawful ... to exercise either superior economic power or superior mental and managerial faculties over others, provided advantage is not taken of recognized special personal relations of confidence, trust, dependence, or the like, which are deemed peculiarly liable to abuse." *Id.* at 59. The equitable doctrine of undue influence guards against abuses of personal persuasion in fiduciary settings. For an economic analysis of fiduciary relationships see EASTERBROOK, F. H. & FISCHEL, R. D.: "Contract and Fiduciary Duty", 36 *Journal of Law & Economics*, 385 (1993).

96 Economic analysis does suggest one exception. Sometimes called economic duress, it involves situations were the necessitous condition of the complaining party was initially caused by the wrongful act of the stronger. In such situations the stronger party would have no right to withhold his or her property. See, e.g., Thompson Crane & Trucking Co. v. Eyman, 123 Cal. App. 2d 904, 267 P. 2d 1043 (1954) (a classic case illustrating the doctrine of economic duress).

97 See *supra* notes 65–66 and accompanying text.

98 See LANDES, W. M. & POSNER, R. A.: "Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism", 7 *Journal of Legal Studies*, 83 (1978) (finding that the necessitous condition of the aggrieved party does not *per se* generate an affirmative duty of altruism).

99 See OSTAS, *supra* note 71, at 581–583 (arguing that monopoly power is largely irrelevant to issues of duress).

100 PTK, para. 202 (1959) (emphasis added).

101 In a private correspondence Professor Harmathy pointed out that in court practice and in the general understanding of Hungarian lawyers paragraph 202 only addresses usury contracts. Such an understanding would provide a much needed prophylatic to the breadth of the provision.

102 See STIGLER, G. J.: "The Economics of Information", 69 *Journal of Political Economics*, 213 (1961) (a seminal work on the economics of information asymmetries).

reappraised for tax purposes, and the house has a hidden defect—termites. The seller is aware of both facts; the buyer is aware of neither. Clearly, if the seller lies about either, the seller has committed fraud, and the buyer can rescind the contract.[103] The difficult ethical question is whether the seller has an affirmative duty to inform the buyer of either fact. The answer derives from the second tenet of law and economics—reducing transaction costs.[104] A court following an economic logic will inquire into how costly it would be for the buyer to discover the material facts.[105] It is easy for the buyer to check the appraised value, he or she needs only call the tax assessor's office. Failure to do so is mere carelessness, and consequently, the seller has no duty to speak. Termites, on the other hand, are costly to detect. Since the seller has reason to know that the presence of termites would be material to the buyer, the seller's failure to speak would be unfair, and would give the buyer grounds to rescind.[106]

The Hungarian Civil Code addresses the parties' respective duties to speak in paragraph 205(3). It provides: "The parties are obliged to co-operate at the conclusion of a contract and they shall observe each other's rightful interests. They shall inform each other on all essential circumstances affecting the contract to be concluded even prior to the conclusion of the contract."[107] Applying this language to the sale of the house, the seller would be expected to inform the buyer of both the termites and the appraisal. There is no reference to transaction costs. The Hungarian Code seems to once again call for greater degree of altruism and cooperation than that called for by economic theory.

An Economic Analysis of Standardized Form Contracts: The "Battle of the Forms"

The doctrine of freedom of contract was born in an era in which most contracts were individually negotiated by the parties. Much of modern contracting is to the contrary. Industrialization, mass marketing, and the creation of large and sometimes market-dominating firms has led to prevalence of contracting through standardized forms. Standardized forms reduce transaction costs by relieving parties of the burden of individually negotiating and drafting contract provisions that regulate relatively routine exchanges. Standard forms also reduce agency costs by limiting the contractual discretion of subordinates within a corporate hierarchy, and facilitate centralized control by

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103 For a useful introduction to the economic analysis of fraud see POSNER, *supra* note 1, at 96–101.

104 See *supra* text accompanying note 76.

105 "[L]iability for nondisclosure should turn on which of the parties to the transaction, seller or consumer, can produce or obtain information at lower cost. If the relevant characteristic is one that the purchaser can determine by casual inspection ... then it would be redundant to require the seller to disclose." POSNER, *supra* note 1, at 99.

106 A similar analysis can be used to address surprising and uncustomary provisions found in consumer contracts. If it would be too costly for the consumer to ferret out such provisions *ex ante*, the courts may require the seller to take affirmative steps to inform the buyer of the surprising language. See BARNETT, *supra* note 72, at 888–890.

107 PTK, para. 205(3) (1959).

harmonizing contracts throughout a firm's national or international business activities. Yet, standard forms also introduce problems. By deleting the necessity to negotiate, form contracting creates the possibility that the standardized language was not fully understood by the parties.[108] In such a scenario, the first economic tenet—deferring to individual autonomy—does not suffice to answer enforceability questions. It is simply unclear whether the contract represents a subjective meeting of the minds between the parties.[109] In such cases, the courts must turn to the second tenet and determine whether transactions-costs will be reduced by strictly enforcing the express terms, or by refusing to enforce such language so as to encourage future parties to bargain more fully. Of course, our third tenet reminds us that any such judicial intervention must be done in a predictable and stable manner.

A clear example of the problems posed by standard form contracting arises in the context of an offer and an acceptance of a sale of goods between businesses. The issue arises so commonly, it has been given a name—the "battle of forms".[110] The extensive use of standardized forms in ordering and invoicing products gives rise to the problem. Typically the buyer will order goods from the seller using its own purchase order which has a number of provisions printed on it concerning such subjects as warranty requirements, jurisdiction, and so on. The seller will then acknowledge the order with its own form that may have additional terms such as limitations of liability and terms that may contradict the terms of the buyer's purchase order. In most cases the goods are shipped,

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108 To complicate matters, the terms contained in these forms typically are slanted to favor the drafting party, restricting, if not removing, the rights granted by other areas of the law to the non-drafting party. For example, a standard form may restrict a warranty, excuse the seller for liability caused by its own negligence, provide for a penalty, or alter the burden of proof rules. Such clauses become troublesome in consumer contracts where the consumer may be unaware of the presence and effect of such clauses. See SLAWSON, W. D.: "Mass Contracts: Lawful Fraud in California", 48 *Southern California Law Review*, 1 (1974) (finding a dangerous proclivity to use fine print in consumer contracts to introduce surprising and oppressive language); KESSLER, F.: "Contracts of Adhesion—Some Thoughts about Freedom of Contract", 43 *Columbia Law Review*, 629 (1943) (discussing the use of standardized forms to surprise unwary consumers with uncustomary terms). Nations vary on their treatment of consumer contracts. In the U.S., courts address allegedly oppressive terms on a case by case basis under the rubric of unconscionability. See OSTAS: *supra* note 71. Legislative provisions in Germany and in the United Kingdom forbid the use of certain troublesome clauses. See ROLLAND, W.: "The Role of the Law of Obligations in the Legal System of a Free Industrial Society", in *Questions of Civil Law Codification* 142, 147–148 (A. Harmathy & Á. Németh eds., 1990) (citing German legislation that regulates standard business terms).

109 See MACAULAY, S.: "Non-Contractual Relations in Business: A Preliminary Study", 28 *American Society Review*, 55 (1963) (providing evidence that most business people do not known the contents of their own form contracts, never reading the fine print).

110 See, e.g., MEHREN, von A.: "The 'Battle of Forms': A Comparative View", 38 *Amererican Journal of Comparative Law*, 265 (1990); MOCCIA, C.: "The United Nations Convention on Contracts for the International Sale of Goods and the 'Battle of the Forms'", 13 *Fordham International Law Journal*, 649 (1989–90); VERGNE, F.: "The 'Battle of the Forms' under the 1980 United Nations Convention on Contracts for the International Sale of Goods", 33 *American Journal of Comparative Law*, 233 (1985); BAIRD, D. C. & WEISBERG, R.: "Rules, Standards, and the Battle of Forms: A Reassessment of 2–207", 68 *Virginia Law Review*, 1217 (1982).

accepted and paid for without difficulty and so the issue of contract formation does not arise. However, on occasion a problem arises with contractual performance or there is a significant change in market conditions that will lead one party to seek ways to escape any potential contract liability for non-performance. The question then arises as to whether a contract is concluded and if so, what are the terms of the contract.

The solutions to these questions vary depending upon what legal system is involved.[111] The more formalistic approach to contract formation, the so-called "mirror image" approach, is found in common law of countries such as Great Britain[112] and the United States,[113] as well as a number of civil law countries such as France.[114] Historically, centrally planned countries, including Hungary, took an approach similar to the "mirror image" rule.[115] The alternative "reliance" approach is exemplified by the Uniform Commercial Code of the United States and in the law of the Federal Republic of Germany. We will address each approach in turn.

Most nations follow the mirror image rule. The rule requires that there be no material variance in the acceptance when given in response to an offer.[116] If there is a material variance, then no contract is formed and the acceptance constitutes a counter offer terminating the offer.[117] The Hungarian Civil Code currently reflects this rule. Paragraph 213(2) states: "An acceptance deviating from the offer shall be considered a

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111 The fact that there is no uniform method for resolving these questions complicates the matter when international sales are involved. See HONNOLD, J.: *Uniform Law for International Sales Under the 1980 United Nations Convention 165* (1982).

112 VERGNE, *supra* note 110, at 241.

113 Restatement (Second) of Contracts (1981). Section 57 states: "Where notification is essential to acceptance by promise, the offeror is not bound by an acceptance in equivocal terms unless he reasonably understands it as an acceptance." Section 59 provides: "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer."

114 VERGNE, *supra* note 110, at 247.

115 Hungary joined other eastern bloc nations in forming the Council for Mutual Economic Assistance (CMEA). The organization adopted a mandatory set of rules called the "General Conditions for the Delivery of Goods" that regulated contracts between individuals of differing member nations. Chapter 1, Section 1(2) provided: "If the offeror receives a notification of acceptance that is other than unconditional acceptance... The notification shall be considered to be a counteroffer." The CMEA has been dissolved, and the CMEA General Conditions are no longer in force.

116 Some have also called this the "rule" approach. See BAIRD & WEISBERG, *supra* note 110, at 1228 (defining a rule as "a very specifically framed guide to conduct that is detailed in its normative content and that the lawmaker believes will directly implement his social or economic goals").

117 Recently, the mirror image rule has been relaxed somewhat. An example would be France. If the variance is on an essential element of the contract, then no contract is concluded. See VERGNE, *supra* note 110, at 249. But a contract may be concluded if the variance concerns a matter that is subsidiary to the contract. *Id.* Under French law the essential elements of a contract concern price and subject matter, and some variation in the acceptance is permitted so long as it does not concern the essential elements of price and subject matter. *Id.* (citing the French Code Civil, Article 1583). This trend toward relaxation of the inflexible application of the rule can also be found in the court decisions under the common law in both England and the United States. However, in all these countries, if the acceptance varies from the offer in any material way, a contract is not concluded.

new offer."[118] This language is not surprising considering that prior to break up of the Soviet bloc, the socialist countries took a rules oriented approach to the problem of acceptances that deviated from the offer. In fact because of the requirements of a planned economy the socialist legal systems took the strict view that a contract could not be concluded even if the acceptance deviates in unimportant ways from the offer.[119] According to Professor Eörsi, the reason for this approach to contracting is that in planned economies the "emphasis is on security without surprises—even at the expense of an otherwise desirable contract not coming into being".[120]

In light of our economic tenets, the mirror image rule has clear virtues. It responds to the first economic tenet by providing a safeguard against court imposed contract terms. Deference to individual autonomy guarantees both freedom *to* contract and freedom *from* contract.[121] Since the parties have not reached a meeting of the minds *ex ante*, no contract is imposed upon them. In addition, the rule seems to constrain judicial discretion and hence lends a degree of legal stability and predictability—the third tenet. Unfortunately, these virtues are not without costs. In particular, the rule provides an incentive for business actors to carefully read and discuss all contract terms. Such an incentive may not be practical given the production like contracting process that modern commerce demands.[122] Perhaps more importantly, the mirror image rule makes it too easy for one party to escape a contract when it is clear that a contract between the parties was intended. This, so called, "welsher" problem arises from opportunistic behavior and increases the costs of conducting exchanges.[123] And finally, note that declaring that no contract exist, does not end the court's involvement in the dispute. If there has been part performance, the court must still order restitution or fashion some sort or quasi-contractual adjustment. Hence, the gains to legal predictability may not be as great as would first appear.

Section 2–207 of the U.C.C. provides an interesting and much discussed alternative to the mirror image rule. In essence, the section states that in some circumstances where a purported acceptance deviates from the offer, the court will still find that a contract was concluded.[124] So long as the deviation does not concern central issues such as price and

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118 PTK, para. 213(2) (1959).

119 See EÖRSI, Gy.: "A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods", 31 *American Journal of Comparative Law*, 333, 341–342 (1983).

120 *Id.* at 342.

121 See *supra* note 65 and accompanying text.

122 See, e.g., MEHREN, *supra* note 110, at 270.

123 *Id.*

124 In particular, U.C.C. Section 2–207 provides:

(1) A definite and seasonable expression of acceptance or a written conformation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

quantity, a contract will arise and the court is to follow a precise, if somewhat complicated, set of rules to determine whether the terms contained in the offer or the in acceptance will control. While there has been a substantial amount of criticism of Section 2–207,[125] it represents one of the major attempts to reduce the costs created by the welsher problem, while simultaneously protecting the efficiency gains generated by form contracting.

When one examines the approach taken by the various legal systems to this problem, one is struck by the notion that few have taken a reliance approach similar to that of Section 2–207. Germany, through judicial interpretation of its Civil Code, appears to be an exception. Although the German Civil Code takes the position that a purported acceptance that deviates from the offer does not conclude a contract, judicial interpretation of the Code has resulted in an approach that is more reliance oriented.[126] Addressing German law, Professor Von Mehren writes:

> Failure to agree on the form terms that will govern in the event of dissonant forms does not, however, render the contract as a whole ineffective. To the extent the parties' terms are in agreement, these terms are accepted; for the rest, the court will draw the needed terms from the background law.[127]

Like Section 2–207 of the U.C.C., the German model would treat a conflicting form as generating a contract so long as the central terms provided by the parties are in agreement. The German model departs from the U.C.C., however, with reference to the treatment of the conflicting terms. In the U.S., either the terms reflected on the offeror's form or on the acceptor's form will control.[128] Under the German model, "business customs" will supply the contract terms when standardized forms conflict.

The international community has also recently addressed the battle of the forms during its negotiations concerning the adoption of the United Nations Convention on the International Sale of Goods (CISG).[129] At first blush, the final version of the CISG

(a) The offer expressly limits acceptance to the terms of the offer;

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such a case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

125 See, e.g., WHITE, J. J. & SUMMERS, R. S.: *Uniform Commercial Code* 28–49 (3rd ed. 1988) (observing that the section was originally drafted to deal with the "welsher" problem, but has been inappropriately applied to determine the terms of the contract); MURRAY, J. E.: "The Chaos of the 'Battle of the Forms': Solutions", 39 *Vanderbilt Law Review*, 1307 (1986).

126 See MEHREN, *supra* note 110, at 290.

127 *Id.* (citations omitted).

128 See *supra* note 124.

129 See LEETE, B. A.: "Contract Formation under the United Nations Convention on Contracts for the International Sale of Goods and the Uniform Commercial Code: Pitfalls for the Unwary", 6 *Temple International and Comparative Law Journal*, 193 (1993).

provision appears to be a compromise between Section 2–207 and the mirror image approach. Article 19 of the CISG states:

> (2) [A] reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance....
>
> (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

A close reading of the latter subsection indicates that the drafters clearly rejected the flexible philosophy to contract formation exemplified by Section 2–207 of the U.C.C. It defines "additional or different terms" so broadly, covering all of the essentials of any contract for the sale of goods, that it is hard to imagine a term that would not materially alter the terms of the offer with the result is that not contract is concluded. Hence, in essence, the CISG follows the mirror image rule.

Hungarian policy makers, like policy makers throughout the post-communist world, face an historic opportunity to implement fundamental legal reforms. One piece of the reform puzzle involves the legal treatment of standardized forms. Should Hungarians retain the mirror image rule, or should they modify their civil code to reflect a more reliance based approach? Although the mirror image rule has merit,[130] we believe that the more flexible approach to contract formation, particularly the German variant, is best suited to addresses economic concerns.

Recall that the battle of the forms arises in a context in which the parties initially believe that they have a contract. The buyer receives a non-conforming invoice, notices that the invoice matches the central terms contained in his or her purchase form, ignores the fine print, staples the two forms together, and then tosses both forms in a file cabinet. If the goods are shipped and received without incident, the forms remain uninspected. In the event that a problem arises, however, one party may seize upon the non-conforming forms as an excuse to renege on the agreement. The problem with the mirror image rule is that it creates two perverse incentives. First, it encourages parties to closely read their forms and to individually negotiate terms that do not match. This seriously erodes the cost savings associated with form contracts. Second, the mirror image rule rewards opportunistic behavior by allowing a party to repudiate a *bone fide* agreement that has subsequently turned sour.

The preferred approach is to find that a contract does indeed exist. The question, then, is to determine the terms of that contract. Two possibilities present themselves.

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130 Most of the parties that Hungarians contract with internationally operate under a legal system that employs the mirror image rule. This is particularly true of contracts covered under the CISG. In addition, the Hungarian system historically has taken a strict formalistic approach to the question; hence, the mirror image rule would call for less legal change. Finally, a rules oriented approach to contract formation may be easier to administer.

Section 2–207 provides that in certain circumstances the terms in the offer will control, and in other circumstances the acceptance will control.[131] The German approach focusses on business customs, suggesting that customary terms should be followed when the parties' forms conflict.[132] Comparing the two, the German variant appears to be more efficient. The problem with 2–207 is that it does not economize on transaction costs. Under 2–207, either party that ignores the fine print faces the possibility that the other party will introduce surprising and uncustomary terms into the exchange. Each ignores the fine print at his or her own peril. By contrast, under German law the parties can rely on court provided terms to at least assure that the ultimate contract will be customary and presumably not overly harsh or oppressive.

The German variant also provides the parties with a strong incentive to master business customs. The mastery of business customs is essential to all market economies, and is particularly important in the transforming nations. Shared customs facilitate communications, forestall misunderstandings between the parties, and generally promote contractual endeavors. In addition, most, if not all, business customs reflect an economic logic, assigning the various contractual duties and risks to the party who can address such concerns in the most efficient manner.[133]

In short, the German model best adheres to the dictates of our three economic tenets. Reflecting the first tenet—deference to autonomy—the model allows the parties to deviate from customary practices, if they wish to do so. The parties need only provide evidence to the court that such a negotiation has occurred. If parties choose to not negotiate, then business custom guides the transaction where the standard forms conflict. Party silence is taken as evidence of consent to customary language. Reflecting the second tenet—reducing transaction costs—the substance of these customary terms will be driven by an economic logic, allocating transactions costs in an efficient manner. Finally, the German approach should prove easy to administer. The court will simply follow custom when fine print conflicts. Ease of administration should lend stability and predictability to the law—the third tenet.

An Economic Analysis of Contractual Discharge: Excusing Performance on the Basis of Unforeseen Events

Parties do not enter contracts with perfect knowledge of the future. They make assumptions as to what events may or may not occur and attempt to account for these contingencies in the negotiation of the contract. But, lacking a crystal ball, the parties may find themselves subject to certain events that were not foreseen at the time the contract was formed. One issue to be resolved by any legal system concerns the circumstances under which a contract should be discharged based on the happening of

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131 See *supra* note 124.

132 See *supra* notes 126–127 and accompanying text.

133 See *supra* note 76 and accompanying text.

an unforeseen event. Not surprisingly, the answer differs from one legal system to another,[134] and the search for the proper answer to this problem has been the subject of a substantial number of articles in the literature.[135]

To illustrate the issue, we offer three examples. In the first, a farmer contracts to sell his or her crop; the crop is subsequently destroyed by flood and the farmer seeks a discharge. In the second, a builder agrees to construct a building for a specific sum. The builder later discovers the remains of an old school house immediately under the construction site. Excavating the remains is extremely expensive and the builder seeks to be excused from the contract. In the final example, a hotel contracts to rent its rooms at five times its normal rate. The increase reflects the fact that the hotel is strategically placed for viewing an upcoming parade. The parade is canceled, and the hotel customers seek to avoid their contracts.[136]

The central question in all three examples is the same: should the courts excuse performance due to the unforeseen event? Two corollary questions are also present. First, if the court grants an excuse, should it simply rescind the contract, ordering restitution where appropriate, or should it rewrite the contract for the parties? And secondly, if the parties agree to modify their agreement, should the courts enforce that modification? Note that this latter question is intertwined with the first; the likelihood of an excuse being granted will determine the relative bargaining power involved in negotiating the modification. The remainder of this section will address these three questions in turn. For each question, we use our economic tenets to suggest efficient policies, and then analyze Hungarian law in light of these economic prescriptions.

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134 For a brief, but useful, comparative law perspective see TALLON, D.: "Imprevision Revisited: Some Remarks on the Consequences of a Change of Circumstances on Contracts", In: *Binding Force of Contract* 107–112 (A. Harmathy ed., 1991).

135 E.g., POSNER, R. A. & ROSENFIELD, A. M.: "Impossibility and Related Doctrines in Contract Law: An Economic Analysis", 6 *Journal of Legal Studies*, 83 (1977); HALSON, R.: "Opportunism, Economic Duress and Contractual Modifications", 107 *The Law Quarterly Review*, 649 (1991); MURRAY, J. E.: "The Modification Mystery; Section 2–209 of the Uniform Commercial Code", 32 *Villanova Law Review*, 1 (1987); EISLER, B. A.: "Modification of Sales Contracts under the Uniform Commercial Code: Section 2–209 Reconsidered", 57 *Tennessee Law Review*, 401 (1990); TRIMARCHI, P.: "Commercial Impracticability in Contract Law: An Economic Analysis", 11 *International Review of Law and Economics*, 63 (1991).

136 In all three hypotheticals, the obligor seeks a discharge due to the occurrence of an unforseen event. Although the central issue is similar in all three cases, a common law court probably would address the three cases under different rubrics. The farmer case raises the issue of "impossibility of performance"; the farmer argues that it is "impossible" for him to deliver his crop. See, e.g., Matousek v Galligan, 178 N.W. 510 (Neb. 1920); Pearce-Young-Angel Co. v. Charles R. Allen, Inc., 50 S.E. 2d 698 (S.C. 1948). The builder case would probably be classified under the doctrine of "commercial impracticability". It is not impossible to remove the debris, but impractical to do so given the contract price. See Restatement (Second) of Contracts Section 261 (1981). The hotel case raises the issue of "frustration of purpose." The motivating purpose for the contract no longer exists. See, e.g., Krell v. Henry, 2 K.B. 740 (1903); Lloyd v. Murphy, 153 P. 2d 47 (Cal. 1944).

Question 1: When Should an Excuse be Granted?

We turn first to the question of when an excuse should be granted. The first economic tenet, respect for individual autonomy, dictates that an excuse is *not* to be granted in cases where the parties have expressly accounted for the contingency. In other words, if the parties addressed the event and allocated its risks *ex ante*, the courts should enforce that allocation. Of course, in the typical case the troublesome event has not been addressed *ex ante*. In such cases, the courts face the danger of forcing a party to perform a contract to which he or she never consented. For example, the builder will argue that he or she never agreed to clear away the unforseen debris. This argument is a direct appeal to the first economic tenet—the right to be free from court imposed transfers, or freedom *from* contract. Yet, if the courts make it too easy to avoid contractual obligations, the cost allocation functions of contracting will erode, and transaction costs will rise. Hence, an economically minded court will strike a balance, allowing an excuse only in appropriate circumstances.[137]

In an often-cited article, Richard Posner and Andrew Rosenfield use law and economics insights to suggest a rational basis for determining when an excuse should be granted.[138] They argue that an excuse should be granted when the obligee is the "superior risk bearer" and denied when the obligor is the superior risk bearer.[139] According to Posner and Rosenfield, a party is a superior risk bearer if he or she is relatively more efficient in preventing the event form occurring or in insuring against the risk.[140] For example, in the builder case, the builder would presumptively be in a better position to prevent the construction problems *ex ante*. A reasonable core sample of the subsurface soil would likely have revealed the unforseen debris. Such precautions are customary in building contexts, and failure to take such a precaution is tantamount to negligence.[141] By refusing to grant a contractual excuse in such cases, the courts provide an incentive for the relatively more efficient party to ferret out unforseen, but foreseeable difficulties. In the long run, such an incentive reduces transaction costs—Tenet 2.

In most cases neither party can prevent the unforseen event. If prevention is not feasible, Posner and Rosenfield would ask whether one of the two parties is more

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137 More particularly, the courts face three options: (1) they could routinely grant an excuse based on unforseen events; (2) they could never grant excuse on this ground; or (3) they could seek to strike a balance. See AIVAZIAN, V. A. et al., "The Law of Contract Modifications: The Uncertain Quest for a Benchmark of Enforceability", 22 *Osgood Hall Law Journal*, 173 (1984). The authors argue that neither a rule "that enforces all contract modifications nor one that invalidates all modifications is efficient, apart from the savings in adjudication costs associated with a clear legal policy favoring one polarity over the other". *Id.* at 175.

138 POSNER & ROSENFIELD, *supra* note 135.

139 *Id.* at 90.

140 For a critical view of this approach, see AIVAZIAN et al., *supra* note 137.

141 Brian Constr. & Dev. Co. v. Brighteni, 405 A.2d 72 (Conn. 1978) (customary for excavators to run test borings).

efficient in insuring against the unforeseen, but foreseeable, contingency.[142] Here, the relevant costs include the costs of risk-appraisal and the transaction-costs of taking insurance. This factor lends insights in the farmer case. The commercial buyer of grain can insure against natural disasters by diversifying its portfolio of grain contracts, contracting to buy grain from geographically disperse farms. To the commercial buyer, failure of any one crop is not a disaster. By contrast, the farmer enjoys no such ability to diversify. Since the obligor farmer cannot prevent the flood nor efficiently insure against its effects, the farmer's performance should be excused.

Of course, in some cases neither of the above two criteria will provide a guide. For example, in the hotel case, neither party could prevent the parade from being canceled, nor could either party effectively insure against the event. Neither party was at fault. In addition, since the parties did not address the contingency in their contract, it was presumptively outside the scope of their agreement. In such cases, the first economic tenet, guarantee to be free from court imposed transfers, would dictate in favor of discharge.

Turning to the Hungarian Civil Code, one finds several provisions addressing excuse for unforeseen events.[143] Of particular relevance is paragraph 312. It provides:

> (1) If fulfillment has become impossible out of a reason for which neither of the parities shall be liable, the contract shall be terminated....
>
> (2) If fulfillment has become impossible out of a reason for which the obligor is liable, the obligee may claim indemnification for failure of fulfillment.
>
> (3) If fulfillment has become impossible out of a reason for which the obligee is liable, the obligor shall be relieved from his obligation and may claim compensation for his damages.[144]

This language provides an excellent foundation upon which to build an economically sound approach to contractual excuse based on unforseen events. It avoids semantic distinctions such as the difference between "unforeseen" and "unforeseeable" events, and focusses on *fault*. If the event was no one's fault, or the fault rests on the obligee then excuse is granted. If fault lies with the obligor, then no excuse is permitted. Of course, the courts must determine the inquiries appropriate in determining fault.[145] Economic theory suggests that such an inquiry focus on efficiency in risk

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142 *Supra* note 135, at 93–94.

143 Para, 226 addresses the need for contractual modification due to unforeseen changes in the state's central economic plan. PTK. para. 226 (1959). Due to economic reforms, this section is of reduced importance today. See HARMATHY, A.: "The Binding Force of Contract in Hungarian Law", in *Binding Force of Contract* 35 (A. Harmathy ed., 1991). More generally, para. 227(2) provides: "A contract aimed at an impossible performance shall be null and void." PTK, para. 227(2) (1959).

144 PTK, para. 312 (1959).

145 Although many Hungarian statutes and codes have been translated to English, the same is not true of Hungarian judicial opinions. Fortunately, Professor Harmathy has provided a very useful analysis of Hungarian court opinions on contractual modifications for unforseen events. See HARMATHY, *supra* note 143. His

bearing. If the obligor could have prevented or insured against the contingency in an efficient manner, then discharge should not be forthcoming. On the other hand, if the obligor was not at fault and there is no contractual language or strong business custom to the contrary, then excuse is appropriate.

Question 2: What is the Appropriate Remedy?

Once the court has decided to excuse performance, it must determine the appropriate remedy. Most nations favor rescission and restitution, allowing no judicial authority to modify contractual language.[146] Other nations grant their courts the discretion to reform the contract.[147] Both the U.C.C. and the Restatement of Contracts are in the former camp. One commentator has noted: "The remedy contemplated by the U.C.C. and the Restatement clearly is the traditional remedy of Anglo-American law for impossibility of performance—discharge of both parties from any duty of further performance with restitution, if needed, of any performance already rendered."[148] Section 2–615 of the U.C.C. liberalizes the common law in some ways by allowing the seller to delay delivery when unforseen circumstances render timely delivery "impracticable," provided that the seller complies with sections (b) and (c) of 2–615 regarding allocation and notification to the buyer. However, the provisions do not give the court the power to fashion an independent remedy.[149]

German law is perhaps the best example of a system that allows the courts to revise a contract based upon impossibility of performance of the existing contract.[150] The origins of the current willingness of the German courts to revise contracts for the parties are found in the economic dislocation caused by World War I and the tremendous inflation that resulted. Initially, the contract revisions were limited to situations where parties were simply unable to perform their monetary obligations because of the inflation in the German currency. Using the German concept of "good faith" found in the civil

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analysis indicates that Hungarian judicial opinion is largely in accord with the efficiency analysis suggested here.

146 Denis Tallon cites France, Poland and Czechoslovakia as examples. See *supra* note 134, at 108.

147 Examples include the Federal Republic of Germany, Italy, Greece, and Algeria. *Id.* at 109.

148 DAWSON, J. P.: "Judicial Revision of Frustrated Contracts: The United States", 64 *Boston University Law Review*, 1, 3 (1984).

149 The case of Aluminum Co. of Am. v. Essex Group, 499 F. Supp. 53 (W.D.Pa. 1980) is a well known exception. It has been subjected to heavy criticism. For example, Professor Dawson observes that the case is "the only instance in which an American judge has tried to dictate entirely different substantive terms in a contract that was still being actively performed". *Id.* at 35. Professors WHITE and SUMMERS are equally critical. They write: "It is one thing for the court to say the parties should be freed from the contract, or that there should be allocation under 2–615 and 2–616; ... it is something else to redraft a contract that still has seven years to run." *Supra* note 125, at 168.

150 For a discussion of the experience of the German courts with court ordered adjustment or revision of contracts where unforeseen events destroyed the purpose or balance of the contract see DAWSON, J. P.: "Judicial Revision of Frustrated Contracts: Germany", 63 *Boston University Law Review*, 1039 (1983).

code[151] and examination of *gerschaftsgrundlage*, "foundation of the transaction," German law has evolved today to the point where courts now will revise many types of contracts.[152] Today, the standard doctrine of the German courts is to revise by court order those contracts "whose foundations have been destroyed by unexpected events or discoveries" rather than to rescind them.[153]

The German approach has been widely criticized, at least as a model that would be applied to law in the United States. It is not necessary to examine these criticisms in detail, but the central ideas are that judges have insufficient knowledge of contractual subject matter to fashion an intelligent revisions, and that judicial willingness to reform contracts introduces too much uncertainty.[154] In essence, third economic tenet—the need for predictability—is the guide.

Turning to the Hungarian Code, one finds two paragraphs addressing remedies. Paragraph 312 applies in cases in which performance has become literally impossible.[155] An example would be the farmer case; the flood makes it impossible for the farmer to deliver grain. In such a case, the Hungarian Code follows both economic theory and American common law by admitting no room for judicial redrafting. Either the obligor fully indemnifies the obligee, or the obligor is discharged.[156]

Paragraph 241 seems to allow for more judicial discretion. It provides: "A court *may modify* a contract if the contract injures an essential legal interest of one of the parties as a result of a condition that occurs in the permanent legal relationship of the parties following the conclusion of the contract."[157] Apparently this section of the Code has been interpreted to apply to a broad set of circumstances in which performance is not literally impossible, but has somehow changed in character, like the parade case, or has become commercially impractical, like the building case.[158]

Judicial efforts to redraft contract terms on the basis of unforseen events should be resisted on three grounds. First, redrafting of contractual terms threatens to violate the principle of respect for private autonomy. Redrafting subjects the parties to contractual terms to which they did not consent. Secondly, if either strict enforcement of contractual language or excuse coupled with rescission and restitution does not suit the parties needs, the *parties themselves* can agree to redraft the contract along equitable grounds. In fact,

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151 BGB § 242.

152 The German concept of *gerschaftsgrundlage* is akin to the English word used in the doctrine of "frustration of purpose" but has a much broader meaning. It would include the concepts of impossibility and impracticality as well as mistake. See DAWSON, *supra* note 150, at 1040.

153 *Id.* at 1087.

154 See DAWSON, *supra* note 148, at 37.

155 See *supra* text accompanying note 144.

156 HARMATHY, *supra* note 145, at 39.

157 PTK, para. 241 (1959) (emphasis added).

158 HARMATHY, *supra* note 145, at 35. Professor Harmathy notes that although the courts have discretion to redraft contract provisions, the tendency in the courts is to resist such actions. *Id.* at 35–38. More particularly, he writes: "The only published decision, I found, modifying the contract because of price changes concerned a contract having a public utility service character." *Id.* at 36.

party redrafting, or settlement, is the preferred solution. It allows for the parties to use idiosyncratic information not available to the courts. It also saves administration costs. In a perverse way, judicial willingness to redraft may introduce uncertainties into the private negotiations of the parties, making it more difficult for them to settle. This would increase transaction costs—Tenet 2. Finally, a proclivity for judicial redrafting will muddle the law, violating the third economic tenet, the need for predictability.

Question 3: Should Private Agreements to Modify be Enforced?

Facing an unforseen event, the parties may attempt to modify their contract. As discussed above, there are good reasons to encourage them to do so. Party settlement saves transaction costs and economizes on idiosyncratic knowledge. But party modifications can also be fraught with difficulties. Note that there are really two types of modifications. In the first, an excuse based on the doctrines of "impossibility" or "frustration" is in the offing, and if the parties do not modify their contract, the courts will order rescission and restitution.[159] Preferring the modification to rescission, the parties fashion a settlement. There is an exchange of consideration, both parties having agreed to something they were not required to do, and both parties are made better off.

The second type of modification occurs in a setting in which the courts will *not* grant an excuse, the obligor's duties being strictly enforceable. Nonetheless, the obligor refuses to perform, and seeks to negotiate a settlement. If the obligee cannot afford to wait for a court order enforcing the obligor's original commitment, the obligee may consent to the modification. Here, the settlement is one-sided; the obligee receives a worse deal than originally negotiated, and the obligor a better one. In short, modifications of contractual language open the door to costly opportunism.[160]

The common law requirement of consideration addresses the above distinction. Modifications of the first type which are mutually supported by consideration and are enforced. Those of the latter type are not enforced.[161] The rule of consideration allows

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159 In the United States the term "impracticability of performance" is often used. Thus the *Restatement (Second) of Contracts* § 261 (1981) provides:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

160 Professor HALSON defines "opportunism" as "the practice of bilateral monopolists, i.e. parties who have no practical alternative but to deal with each other, of using that strategic position to their advantage". *Supra* note 135, at 650. See MURIS, T. J.: "Opportunistic Behavior and the Law of Contracts", 65 *Minnesota Law Review*, 521 (1981).

161 Restatement (Second) of Contracts § 89 (1981) states with regard to executory contracts:

A promise modifying a duty under a contract not fully performed on either side is binding

(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or

(b) to the extent provided by statute; or

some modifications, while simultaneously providing a safeguard against opportunism.[162]

The Uniform Commercial Code seeks the same goal, but employs different means. First, Section 2–209 eliminates the requirement of consideration with regard to the modifications of contracts for the sale of goods.[163] The purpose of this provision, according to the drafters, is to make enforceable "all necessary and desirable modifications of sales contracts without regard to the technicalities which hamper such adjustments [under the common law]".[164] The U.C.C. approach is a blanket one, not relying on whether the unforseen event would render an excuse or not. If the parties agree to the modification then it is enforceable without consideration.

By eliminating the consideration requirement, however, the Code threatens to encourage costly opportunism.[165] As noted above, there are those who would take advantage of circumstances that would allow them to extort modifications from other parties to the contract. The Code answers this concern with reference to the concept of "good faith". The comments to Section 2–209 suggest a food faith limitation to contractual modifications.[166] Its application presumably would result in modifications being unenforceable when they are obtained through costly opportunism.

(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

162 The safeguard provided by consideration is not air tight. For example, an opportunistic obligor could insist that a nominal consideration be added to the exchange, rendering the agreement mutual under the common law, and enforceable. Traditionally, consideration provides a symbolic function evidencing the consent of the parties and providing a warning to each party that their agreement has legal effect, rather than serving as a safeguard against opportunism. See FULLER, L. E.: "Consideration and Form", 41 *Columbia Law Review*, 799, 820 (1941) (justifying nominal consideration as an indicator of consent).

163 U.C.C. Section 2–209 provides, in relevant part:

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or recision except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article ... must be satisfied if the contract as modified is within its provisions.

164 U.C.C. Section 2–209, comment 1.

165 HALSON, *supra* note 135 (making the same argument).

166 U.C.C. Section 2–209, comment 2 states, in part:

However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2–103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2–615 and 2–616.

The 2–209 references to good faith, however, are troublesome.[167] Suppose a contract is made for the purchase of a product by a wholesaler and the market price for the product begins to decline substantially. The wholesale purchaser determines that it will not be able to resell the product at cost and thus demands a reduced price from the seller. The seller agrees to the modification because he cannot sell the goods elsewhere. In effect the buyer has extorted the modification from the seller. Such behavior, however, is beyond the reach of the Code's good faith limitation. Comment 2 to Section 2–209 specifically states that modifications in response to a "market shift" are presumptively done in good faith.[168] This is true even if the market shift was fully anticipated by the parties, and the risk of a changing market allocated *ex ante*. Put another way, there is no requirement that the shift in market conditions be of the character that the parties would have assumed they would not occur. This seems to be unusually broad safe harbor for opportunistic behavior.[169]

The Hungarian Code addresses agreements to modify in paragraph 240. It provides:

> (1) Unless otherwise provided by statute, the parties may modify the content of a contract by consent....
>
> (2) The part of a contract with a changed content or legal title which was not affected by modification shall remain unchanged....
>
> (3) A contract may be modified by agreement. In the case of an agreement the parties settle disputed or uncertain questions originating from the contract by consent, making mutual concessions.[170]

The Hungarian approach is similar to that found in the U.C.C. No consideration is required, but agreements to modify are subject to a good faith limitation.[171] Again this calls for judicial interpretations informed by economic reasoning.

In summary, the Hungarian Code provides an efficient framework for addressing excuses based on unforeseen events. Paragraph 312 correctly focuses on the *fault* of the parties, enabling the courts to develop excuse doctrines with reference to the transaction-costs faced by the parties.[172] Obligors who can prevent or insure against an unforseen event would not be excused. Although paragraph 241 grants the courts the power to redraft contracts for the parties, the tendency in the courts has been to use the power sparingly.[173] Paragraph 240 respects the parties rights to modify their agreements.[174]

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167 For a thorough discussion of this problem see EISLER, *supra* note 135, at 410.

168 See *supra* note 166.

169 See HILLMAN, R. A.: "Policing Contract Modifications under the UCC: Good Faith and the Doctrine of Economic Duress", 64 *Iowa Law Review*, 849 (1979) (offering a similar criticism); POSNER, R. A.: "Gratuitous Promises in Economics and Law", 6 *Journal of Legal Studies*, 411, 422 (1977) (addressing a similar concern).

170 PTK, para. 240 (1959).

171 Although the Hungarian Code does not contain a general provision requiring good faith, it does require party respect for the "norms of socialist coexistence", an analogous concept. See *supra* notes 81–105 and accompanying text.

172 See *infra* notes 144–145 and accompanying text.

173 See *supra* note 158.

174 See *supra* note 170 and accompanying text.

Efficiency reasoning suggests that this right be subject to a good faith limitation on opportunism. Here, as elsewhere, the process of judicial interpretation will play a critical role. Awareness of economic principles will aid that process.

IV. Conclusion

The above applications demonstrate the power of economic reasoning to guide Hungarian contract law reforms. Similar analyses could be used to reform other areas of Hungarian law and to reform the laws of other post-communist societies. Of course, for economic analysis of law to have an impact, its central ideas must first be disseminated among policy makers and these policy makers must see value in the approach. We conclude our analysis by raising and addressing four potential obstacles to the implementation of economic jurisprudence in the post-communist world.

First, some policy makers may associate economic analysis with a common law tradition. Economic analysis of law originated in the United States and is generally perceived to be an American product.[175] Reflecting a common law orientation, American analysts tend to emphasize the role of the courts, with relatively less attention paid to legislation.[176] Hungary, like all East-Central European nations, works within a civil law tradition that tends to view judging as an administrative function, with little room for judicial discretion. Under a centralized civil law model, judges are seen as quasi-administrators following the dictates of parliament.[177] Given the policy orientation of the economic approach, one may wonder whether the insights can be transferred to a civil law culture.

Our analysis demonstrates that the differences between common and civil law systems are less important than may first appear.[178] Common law countries increasingly employ statutes and codes, and civil law countries rely on judicial interpretation to implement legislation. More importantly, the economics tenets prove equally adept at critiqueing legislation as judicial decisions. For example, our discussion of the "battle of

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175 The origins of modern economic analysis of law is generally traced to scholars at the University of Chicago. For a discussion of the early Chicago movement see COASE, R.: "Law and Economics at Chicago", 36 *Journal of Law & Economics* 239 (1993).

176 A survey of leading American texts on law and economic reveals that common law topics of contracts, tort, and property predominate. See, e.g., POSNER, *supra* note 1 (the seminal text); HIRSCH, W. Z.: *Law and Economics: An Introductory Analysis* (2nd ed. 1988) (discussing the common law in seven of ten substantive chapters); POLINSKY, A, M.: *An Introduction to Law and Economics* (1983) (focussing almost exclusively on common law topics).

177 Modern comparative law began in earnest in the 1950's with early scholarship tending to emphasize the distinctions between civil and common law systems. See, e.g., SCHLESINGER, R. B. et al., *Comparative Law* (5th ed. 1988); DAVID, R. & BRIERLEY, J.: *Major Legal Systems in the World Today* (2nd ed. 1978).

178 Modern comparative law scholars are beginning to emphasize the similarities between legal systems. See MATTEI, U. & PARDOLESI, R.: "Law and Economics in Comparative Law Countries: A Comparative Approach", 11 *International Review of Law and Economics*, 265, 266–267 (1991). See, e.g., WATSON, A.: *Legal Transplants: An Approach to Comparative Law* (1974).

the forms" focussed on a provision of the Uniform Commercial Code that has displaced the common law of contracts for the sale of goods. The analysis essentially compared American, German, and Hungarian codes, with a policy recommendation for legislative drafting and judicial interpretation. Such an approach applies equally in all legal systems.

The second potential obstacle centers on legal philosophy. The economic approach to law is unabashedly instrumental and pragmatic.[179] It is instrumental in the sense that legislation and judicial opinions are critiqued on the basis of the incentives they create for future business actions. Judges are encouraged to formulate decisions with references to comparative costs, openly admitting a policy orientation. Economic analysis is pragmatic in the sense that it recognizes the need for law to evolve in accord with changes in technology and business customs. Legal rules are tested in the crucible of experience; outdated rules are discarded or reformed.[180] Such overt anti-formalism may rankle policy makers grown distrustful of widespread governmental discretion. After all, the hallmark of totalitarian legal regimes has always been the subservience of the rule of law to the expedience of policy.[181] Professor Shozo Ota raises this very point in explaining a philosophical obstacle faced by law and economics scholars working in Japan.[182] He writes:

> Law used to be viewed as a tool to oppress people and an instrument to control people against their will, especially before World War II. Arguments based on the assumption that law is one of the instruments for social control have a strong association with the pre war era among liberals. Accordingly, law & economics receives a strong negative reaction from the liberals.[183]

A similar observation is made by Professor Christian Kirchner.[184] Kirchner argues that legal instrumentalism has been discredited in the Federal Republic of Germany by the Nazi experience, and that German courts insist upon formalistic reasoning, never citing policy.[185] Arguing that "legal reasoning matters" he suggests that jurisprudential

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179 See POSNER, *supra* note 58, at 353–393 (linking economic analysis of law to a mature form of instrumental pragmatism).

180 For an excellent discussion of the instrumental pragmatism see GORDON, W. & ADAMS, J.: *Economics as Social Science: An Evolutionary Approach* 72–77, 83 (1989) (identifying the historical roots of legal instrumentalism in the works of the American pragmatic philosophers, Charles Sanders Peirce, William James, and John Dewey).

181 See HAZARD, *supra* note 80.

182 OTA, S.: "Law & Economics in Japan: Hatching Stage", 11 *International Review of Law and Economics*, 301 (1991).

183 *Id.* at 306.

184 KIRCHNER, C.: "The Difficult Reception of Law & Economics in Germany", 11 *International Journal of Law and Economics*, 277 (1991).

185 *Id.* at 281–286. Notwithstanding the observations offered by Professor Kirchner, our discussions of the German approach to both the "battle of the forms" and the excuse doctrines for unforseen events suggest that the German courts enjoy a marked degree of discretion.

disputes are significantly retarding the influx of law and economics insights in Germany.[186]

One may wonder whether a similar cultural impediment may present itself in Hungary and other post-communist societies. These nations, too, have had a long experience with totalitarianism and the consequent disrespect for the rule of law. The third economic tenet—providing stability—is designed to allay these concerns. Law and economics scholars implicitly assume the need for legal predictability.[187] In a post-communist context, this tenet needs to be explicit. Due respect for the rule of law is essential to economic efficiency, and should not be taken for granted.

Perhaps more to the point, Hungarians cannot afford to ignore the pragmatic consequences of legal reform. They need legal change, and sensible change requires policy analysis. Insistence on legal formalism is really not an option.

Even if one accepts the need for a policy orientation to direct legal change, one may still challenge whether economic analysis of law provides the appropriate tools. This challenge presents a third obstacle to the influx of law and economics: the perception in many circles that the economic approach is fundamentally flawed either in its *method* or in the *goals* it seeks to attain.[188] We briefly address each concern.

According to orthodox (neoclassical) economic theory, people are rational, self interested, and calculative.[189] Differing legal institutions provide differing incentives, and legal change is assessed in terms of the incentives it creates. But what if people are not rational? And do not people follow altruistic impulses? In short, if one does not accept the economic assumptions regarding human behavior, how can one accept the policy prescriptions that flow from that analysis?[190] The answer to these questions is that assumptions of hyper-rationality are *not* central to economic theory; they are only central to *neoclassical* theory.[191] Although most economists work within the neoclassical paradigm, many do not. For example, Herbert Simon prefers an assumption

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186 *Id.* at 285.

187 We have found no explicit references to the need for "legal stability" in the law and economics literature. The principle, however, is implicit in all such work.

188 In the United States, an entire school of critical thought has arisen in direct response and opposition to the law and economics movement. See KELMAN, M.: *A Guide to the Critical Legal Studies Movement*, 114–185 (linking "legal economics" to "conservative preferences"); UNGER, *supra* note 55 (condemning law and economics scholarship as promoting oppression).

189 See BECKER, G. S.: *The Economic Approach to Human Behavior* 3–14 (1976) (defining any question that can be stated as a choice between rational alternatives as an "economic" question).

190 In a well known essay, Noble Laureate Milton Friedman argued that realistic assumptions are not necessary to scientific inquiry. According to Friedman, the value of an assumption depends solely on its ability if they generate testable hypotheses. FRIEDMAN, M.: *Essays in Positive Economics* (1953).

191 The hyper-rationality assumption of neoclassical theory becomes more realistic as one introduces the concepts of imperfect information and uncertainty. See STIGLER, G. J.: "The Economics of Information", 69 *Journal of Political Economy*, 213 (1961) (widely cited as a seminal work on the economics of imperfect information); KNIGHT, F. H.: *Risk, Uncertainty, and Profit* (1921) (the pioneering work on uncertainty from a neoclassical perspective).

of "bounded rationality";[192] Oliver Williamson couples Simon's bounded rationality with "opportunism";[193] and institutional economists working within the tradition set by Thorstein Veblen assume that people are creatures of habit, often following outdated behaviors that no longer generate good results.[194]

The economic approach to law is best conceived as a heuristic device. It directs the analyst to consider the impact that legal change will have on human behavior and insists upon a comparative cost perspective. These two directives define the approach as economic and provide a central core that facilitates the collaborative advancement of theory. Yet, within the two directives there is room for intellectual diversity.[195] Alternative behavioral assumptions are possible; the analysis can be static or dynamic; it can be cross cultural or it can ignore the cultural context. In short, economic analysis of law is not dependent on any given set of methodological assumptions.

A related objection focuses less on the method of economic analysis, than on the goals it is designed to achieve. To some, economics analysis is hopelessly tainted with a conservative political bias.[196] The trouble lies in the economic vision of "allocative efficiency". As discussed earlier, economists define an efficient allocation of resources as that allocation which would result, in the absence of transaction costs, from the exhaustion of all mutually advantageous exchanges.[197] The second economic tenet—reducing transaction costs—seeks to promote this goal. Yet, this notion of efficiency is a function of the initial *distribution* of societal wealth. Different initial distributions will generate different exchanges, hence, will result in different "efficient allocations."[198] This suggests that efficiency is somewhat limited as a moral precept; if the initial distribution of societal wealth is unjust, any resulting efficient allocation will be similarly unjust. Thus, the approach appears to be biased in favor of the status quo.

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192 See SIMON, H. A.: "Theories of Bounded Rationality", in *Decision and Organization* 161–76 (C. B. McGuire & Roy Radner eds., 1972) (bounded rationality results from a persons inability to assemble and use all available information); SIMON, H.: *Models of Man* (1957).

193 See WILLIAMSON, O. E.: *The Economic Institutions of Capitalism* 43–52 (1985) (defining opportunism as "self-interest with guile").

194 See, e.g., VEBLEN, T.: *The Theory of Business Enterprise* (1904) (providing a anthropological perspective on business decision making).

195 See LIEBHAFSKY, H. H.: "Law and Economics from Different Perspectives", 21 *Journal of Economic Issues*, 1809 (1987); OSTAS, D. T.: "Law and Economics Revisited: Distinguishing Three Contemporary Theories on the Basis of History and Policy", 10 *Journal of Legal Studies, Educ.* 171 (1992).

196 For example, Goran Skogh argues that many Sweeds resist economic analysis of law because they perceive it to be tainted with a "right wing political bias". See SKOGH, G.: "Law and Economic in Sweden", 11 *International Review of Law and Economics*, 319, 322 (1991). Wolfgang Weigel reports a similar perception among Austrian policy makers. WEIGEL, W.: "Prospects for Law and Economics in Civil Law Countries: Austria", 11 *International Review of Law and Economics*, 325, 327 (1991). The same objection motivates many who write within the Critical Legal Studies tradition in the United States. See *supra* note 188.

197 See *supra* note 67 and accompanying text.

198 See SAMUELS, W. J.: "Interrelations Between Legal and Economic Processes", 14 *Journal of Law & Economics*, 435 (1971) (offering the same observation in an applied context).

We find little merit in the above argument. First, there are areas of the law in which distributional concerns legitimately play no role. Contract law provides the most obvious example. Liberal democracies have elected to address distributional issues through general tax and transfer legislation, not through contract law.[199] A contract between a millionaire and a pauper raises the same issues as a contract between people of equal economic status. Second, and more fundamentally, economic analysis can be used to promote progressive policies, including the redistribution of wealth. In fact, the first great movement in law and economics arose in support of President Roosevelt's New Deal legislation.[200] The economic principle of "diminishing marginal utility" suggests that the marginal utility of a last dollar earned by a person is less than the marginal utility of the first dollar earned.[201] Thus, if one permits interpersonal utility comparisons,[202] progressive taxation coupled with wealth transfers is well within the purview of economic analysis.[203] Adopting a law and economics perspective does not preclude establishing a meaningful social safety net.[204] In fact, the perspective supports it.

In summary, we find that the first three obstacles to law and economics are largely based on perceptions, rather than substance. Law and economics insights apply equally well in civil law and common law countries; its jurisprudence is neither radically indeterminate nor overly formalistic; and criticisms of its methods or goals are driven by overly restrictive views of the economic discipline.

The fourth obstacle, however, is more substantive. For law and economics scholarship to have an impact in post-communist societies, its central tenets and insights must first be disseminated among the relevant policy-makers. Evidence suggests that advances are being made in the European Community. Faculty and student exchange programs are playing a role;[205] law and economics textbooks and scholarship that once appeared

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199 See KRONMAN, A. T.: "Contract Law and Distributive Justice", 89 *Yale Law Journal*, 472, 473–474 (1980) (finding a consensus among American scholars of all political leanings that distributive issues should play no role in contract law adjudication).

200 *See* HOVENKAMP, H.: "The First Great Law & Economics Movement", 42 *Stanford Law Review*, 993 (1990).

201 *Id.* at 1002–1009.

202 Some, but not all, economists argue that interpersonal utility comparisons are illegitimate. *Id.*

203 Economic analysis also points to "market failures" as a justification for government actions in the name of public welfare. Examples include: active antitrust policy to correct for monopoly power; consumer legislation to correct to information asymmetries; environmental policies to correct for externalities; and the provision of public goods such as education to correct for "free rider" market failures. None of these policies can be labelled "conservative".

204 Interestingly, Santos Pastor reports that there has been relatively little resistance to law and economics scholarship in Spain, governed currently by a socialist government. He writes: "[D]espite the rule of a socialist party, most policies tend to be pro-market and pro-competition. In the government's understanding, this is far from being contradictory, especially when redistribution policies are taken into account." PASTOR, S.: "Law and Economics in Spain", 11 *International Journal of Law and Economics*, 309, 309 (1991).

205 See HERTIG, G.: "Switzerland", 11 *International Journal Law and Economics*, 293 (law and economics influencing Swiss policy through study abroad).

exclusively in English are being translated into Japanese, Italian and other languages;[206] and several international seminars have been devoted to the topic. Similar institutional inroads need to be made in Hungary and other transforming nations. This article is offered in that spirit. Legal reform throughout the post-communist world can benefit from the insights offered by law and economics.

206 See OTA, *supra* note 182, at 306 (citing Japanese translations); MATTEI & PARDOLESI, *supra* note 178, at 274–275 (providing an extensive bibliography of law and economics scholarship either translated to or originally produced in Italian).

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Retributive or Restorative Justice?

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In a broader sense—as restitution, restoration of the legal order, which had been violated by the crime—every criminal justice system has restorative purposes, tendencies. Inflicting a punishment, however, means always a malum, a negative experience for the offender, a retribution, for the crime committed.

Restorative efforts from time to time appeared in the history of criminal law. The restoration has sometimes symbolic, sometimes more instrumental character.

The vast majority of crimes are defined as dangerous to society, even if the victim is a natural person. The prevailing criminal justice system—in the name of society—prosecutes the criminal offender, bringing accusation and proceeding against him at trial. This method has more guarantees and efficiency than the individual victim's action.

In a great number of the crimes of public prosecution, the crime is strictly directed against the citizen's person and/or property. According to this fact, the expectation would be a similar rate of victim's initiation to start a criminal procedure. In reality this occurs only in two-thirds of the cases. The difference can be explained by the fact that, according to cost-benefit balancing, it is sometimes more favourable for the victim to disregard a smaller damage, than a long, time-consuming and unpleasant procedure.

According to our law, the necessary condition to qualify a person as a victim is to be injured in rights or legal interests. This forms a basis to appear at the authority in the role of the victim, who has to be informed of all the important decisions already in the pre-trial phase.

As the accused is represented by the prosecutor in the case of public accusation, the victim's procedural role changes radically. The victim, who initiates the procedure, who

is the starting point of this process, paradoxically is not at the centre of the procedure. On the contrary, the victim is step by step displaced to a marginal position.

Criminal procedure has strict rules, and its participants have certain roles. Under such constraints, the will, wishes and claims of the victim have a limited possibility of fulfillment. *The accusation-monopoly of the state has a special consequence: the response to the crime given by criminal law is more repressive, than reparative or restitutive.* For this very reason we have to pay more attention to secure the rights and legitimate interests of the victim. In such a manner we can avoid or reduce the risk of so-called "secondary victimisation".

Whenever a crime is committed against person or property, the citizen suffers physical and/or psychological harm. This is the primary, actual process of victimisation. If the criminal proceeding is directed only for official, organisational interests, the victim will remain in a handicapped situation. The result is "secondary victimisation", for which it is not the offender who is to be blamed, but the organs and persons participating in the criminal procedure. In this way, criminal procedure serves the *system,* but not *justice.*

Criminal procedure, in neglecting the interests of the victim, compounds the future risk of the victim's reluctance to initiate and assist in prosecution. Further consequences are an increase in hidden criminality and encouragement to commit new crimes, etc. If criminal procedure neglects the victim's interests to such a degree that the organisational interests of proving evidence are considerably dominant, the victim's human rights may be violated.

In the case of crimes against the individual, the victim is primarily motivated by a claim for moral compensation. Therefore, the process can cause a new trauma, a harm, similar to the crime itself. We cannot avoid this unpleasant consequence by overruling procedure, but by instituting a practice which takes into consideration official, organisational and individual interests. When people are selected to work in the criminal justice system, we have to pay attention not only to their professional knowledge, but also to their human qualities.

It is said that criminal law has developed an *autonomous* and *repressive* character, while post-modern law needs a *responsive* direction.[1] I am convinced that present criminal law all three features have to be represented in harmony. Criminal law always has been more or less *repressive* because it has punitive sanctions. This character cannot be denied even in the most rehabilitation-oriented system. But to a certain degree, criminal law has to be *autonomous* to avoid to serving only dominant political interests. It is also an appropriate wish to strengthen the *responsive* character of criminal law, meaning that it should serve social interests. It cannot be too autonomous, though. For instance, the criminalization of a great number of acts which are not against public morals would be a dictatorical overemphasis of autonomy. This would also be unreasonable because the massive law-breaking that would arise under such circum-

1 HALLIDAY, T. C.: Civic Professionalism: Melding the Sociology of Law and Lawyers in Historical and Comparative Research p. 104. Onati Proceedings 1. Legal Culture and everyday life, 1989.

stances would reduce and not increase respect for the law. However, I have to remark that the widespread rule–breaking does not necessarily represent the inaccuracy of norms, but may reveal problems in other areas of society. Correction of such problems is not the task of criminal law alone.

Returning again to our original subject, all of this (namely my remarks on the repressive, autonomous and responsive character of criminal law) means, that responsiveness can be a basis for *strengthening the victim's position.* This is emphasised in the institution of mediation, which helps to reach an agreement between offender and victim. Of course, mediation is effective only in minor cases.

I should like to emphasize that the transformation of an individual harm to a social one cannot neglect the victims' interests, neither on a general nor on a concrete level. Criminal punishment is a special kind of response, social reaction to crime. The *repressive* character, the tendency of law and social order forward stability also cannot be denied. From the victim's view, to punish the offender serves also a moral judgement. In most cases however, the victim's aim is connected with material compensation. The situation is simple when stolen property is found and can be returned to its owner. But in this case, it is also necessary to make decision, as soon as possible. We have to avoid depriving the victim of his property longer than is absolutely necessary. When the property is not at our disposal, compensation of the victim is difficult and long, especially when he does not have insurance. The offender generally does not have property or regular income, and his prison work income–in consequence of the well-known causes–is not sufficient for victim compensation. In the field of insurance there are also many difficulties. If the offender is unknown, it is relatively simple to get compensation from an insurance company. Paradoxically, the victim's financial interests are positively against helping in the discovery of the offender by telling details of the crime or speaking of his suspicions. If he does, he has to wait until the end of the criminal procedure, which can last one to two years or more, to receive full compensation. The insurance company generally pays the whole sum of money after the criminal procedure is finished, and only for the value of property proven to have been stolen (with exception of cash and stocks, which are originally excluded from insurance coverage).

The offender is primarily liable for compensating the victim for damages sustained as a result of his criminal act. As a rule a civil claim can be filed in connection with the criminal trial (the principle of adhesion). (Adhesion makes it possible for the victim to follow the fate of the offender.) However, it is within the discretion of the criminal court to separate the civil claim and transfer it to a civil proceeding, if adhesion might protract the criminal proceedings to which the victim acceded as intervener.

The offender is encouraged to make restitution on a voluntary basis. An offender who abandons a crime or voluntarily prevents harmful consequences cannot be punished for attempt. It is one of the mitigating circumstances, if the offender makes efforts to provide restitution, compensation, reducement of damages, or the damages fully, sometimes partially are recovered even if independently from his own will.

In the course of the criminal process our aim has to be the protection of victims' rights and legal interests not only by legal regulation, but good practice. It is necessary

that the organisations and persons intervening in the process apply the principle of fairness, which can be respresented by such small gestures as respecting the victim's occupation in deciding the time of the hearing. If the victim is not regarded as a puppet to be summoned whenever the authority wants, then he will be more willing to participate in and clarify the case. This is not only question of legal regulation but also of human treatment and fairness.

In Hungary, we are facing changing opinion regarding criminal law, in which the focus is on the interests of the victim. Since the seventies, victimological questions have become the centre of attention, and several scientific studies have been dedicated to this subject. Since 1973, victimology also had a significant role in educational programs of the universities and the Police Academy.

In 1989, within the organisational framework of the Hungarian Society of Criminology, the Section of Victimology was formed with its own scientific program. This section has several special features, including regularly organised discussions in which foreign and non-lawyer experts are also involved; research and development of scientific activity of this field; provision of information; and national and international relations, too.

Of the recent victimological research, I should like to mention two empirical studies. The first is on the victims of traffic offences, and the second is on the compensation of burglary-victims. The latter, initiated by the president of the Hungarian Section of Victimology, also described a model victim/witness service, based on the experiences of the research.[2]

In 1989, the White Ring was created as an independent social organisation, aimed at financial, physical and legal assistance for victims of crime, and also at the prevention of crime. The organisation is in the early stages of activity, but there are promising views concerning its future.

The re-codification of our criminal and procedural law offers the possibility to enlarge the rights of victims. We must pay more attention to the idea of state compensation. As it is well known, this idea is based on different theories, as follows:

1) *Idea of law-breaking*—since the state prohibits private vengeance and arbitrary action for compensation of damages, the state must be responsible for the result if its measures do not effectively prevent crime.

2) *Idea of social contract*—the citizens transferred the responsibility of crime prevention to the state, so the state bears the burden for its failures and has a moral obligation to remedy the harms.

3) *Idea of rationality*—A state compensation is beneficial because if the victim is assured redress he is more willing to cooperate with the criminal investigation authorities, consequently improving public security.

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2 FEHÉR, L.: A betöréses lopás sértettjének kártalanítása — empírikus vizsgálat). (Compensation of victims of burglary—an empirical study) Kriminológiai Közlemények No. 38–39. pp. 45–65, Budapest, 1991.

4) *Idea of insurance*—the state itself is a contractor/entrepreneur that collects taxes and is responsible for any negative results during its operation. State compensation is a measure of distributing the losses and the risk of crime.[3]

In summation, under these arguments the state is responsible for compensating the victims of crime. In the majority of western countries the institution of state compensation is already effectively functioning. I believe that Hungary should adopt the same system in the near future.

I should like to conclude that:

— As long as the criminal justice system cannot assure the victim's rights and legal interests on a higher level, there is a great demand for effective victim/witness services and projects.

— In order to solve the problems of compensation, it is unavoidable to deal with the idea of state compensation, as well as mediation as a sanction-variant or diversion.

— The intensity of scientific research in victimology is an effective method of discovering and solving the victims' problems.

— The results of victimology has to be applied in the practice of criminal prosecution and prevention as well as in court procedure to a higher degree.[4]

— The victim plays a dual role: he is an *instrument* in the truth-finding process as well as an *agent*, asserting his personal rights. It is necessary to provide victims with better information regarding not only their duties, but also how to exercise their rights. The clear tendency is to give the victim a more active role in the proceedings.

— There is great demand for mobilisation of supportive, assisting forces in society. The mass media has a great responsibility and important role in this effort.[5]

— Lastly, we must examine the further realisation of the principles of the international declarations and recommendations in our law and legal practice. We regard as especially important the recommendations of the Council of Europe and UN declarations on victims.

Our legal regulation concerning victims is open to the possibility development. We should start dealing with compensation problems and encouraging mediation between offenders and victims, as in most cases the victim's primary interest is material redress. Material compensation involves a humanitarian attitude toward the victim, as well as the offender, dominantly expressing at the same time the *responsive* character of postmodern law.[6]

Lenke FEHÉR

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3 KRATOCHWILL, F.: A sértett jogi helyzete a magyar büntető eljárási jogban. Separatum, p. 13. (Legal situation of victims of crime in the Hungarian criminal procedure.)

4 VIGH, J.: Szolgáltassunk igazságot a bűncselekmények áldozatainak is. Separatum, p. 20. (Let's be just to the victims of crime.)

5 VIGH, J.: l. c.

6 De SOUSA SANTOS, B.: Towards a Postmodern Understanding of Law p. 117. *Onati Proceedings 1. Legal Culture and everyday life*, 1989.

The New Croatian Maritime Code

1. Introduction

After promulgating the Constitution in 1990 (Official Gazette of the Republic of Croatia—hereafter OGRC, No. 56/90) and after declaring its independence by the Dissolution Act of 8 October (OGRC, No. 31/91), the Republic of Croatia embarks upon the task of regulating numerous issues, thus creating a genuine legal constellation and legal system. Part of the above are the rules which govern the field of maritime navigation. So the Croatian Maritime Code (hereafter—CMC) was passed on February 2, 1994, and came into force on March 22, 1994 (OGRC, No. 17/94).[1] The new Code regulates maritime navigation and encompasses all law of the sea, administrative law, property law, contact law, incident of navigation and conflict of laws rules.[2]

2. Structure of the CMC

The CMC extensive text is divided into thirteen parts and has 1.056 Articles.

Part I (Articles 1–5) of common provisions and contains 38 definitions some of which call for certain comments (e.g. ship, boat, ship operator...).

Part II (Articles 6–47) deals with the fundamental institutes of the law of the sea in the Republic of Croatia (internal waters, territorial sea, exclusive economic zone, continental shelf and right of hot pursuit) which are regulated in conformity the UN Convention on the Law of the Sea, 1982.

Part III (Articles 48–80) describes the public maritime domain (order and consessions).[3]

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1 The CMC derogated The Maritime and Inland Navigation Law of the Republic of Croatia (OGRC, No. 53/91) which is still on force only for inland navigation.

2 For more details see GRABOVAC, I.: Novo hrvatsko pomorsko pravo, *Informator*, Zagreb, No. 4064, 1993. pp. 1–2.

3 Cf. STANKOVIĆ, G.: Pomorsko dobro u Pomorskom zakoniku Republike Hrvatske, *Informator*, Zagreb, No. 4197–4198, 1994, pp. 6–7, ČIZMIĆ, J.: New Law on concession of the Republic of Croatia, *International Business Lawyer*, London, Vol. 21, No. 6, June 1993, p. 287.

Part IV (Articles 81–192) includes safety of maritime navigation (navigable waterways, ports, navigation and pilotage, ship-floating object, boat, ship's crew).[4]

In part V (Articles 193–222) the nationality, identification and registration of ships are elaborated. In this part the CMC adopts the relevant solutions of the UN Convention on the Law of the Sea, 1982 and the UN Convention on Conditions for Registration of Ships, 1986.[5]

Part VI (Articles 223–404) treats law of property matters concerning ships (the rights on ships). The CMC incorporates the clauses of the International Convention Relating to Maritime Liens and Hypothecs of 1926 so that its provisions conform to the rules of the Convention.[6]

Part VII (Articles 405–447) regulates the liability of the ship operator and procedure for the limitation of his liability. The central person in the Law is the ship operator, who is defined as "a natural person or a legal entity who as the holder of the ship is in charge of navigation ventures, the presumption being, until the opposite is proved, that the ship operator is the person enterd in the register of ships as the owner of the ship". Substantive-law provisions on the limitation of the liability of the operator are taken over from the Convention on Limitation of Liability for Maritime Claims, 1976.[7] The procedure for the limitation of liability was originally drafted by Croatian law-makers in keeping with the rules of the nonlitigious procedure.

Part VIII (Articles 448–760) deals with contracts (shipbuilding contract, contracts for the employment of ships, contract for maritime ship agency services and contract of maritime insurance).[8] In this connection it should be emphasized that under Croatian law contracts for the exploitation of ships are divided into two groups: maritime contracts, which are contracts for work (locatio operis) and hire of a ship (locatio navis), which is a contract of using a ship (the latter contract has been translated as "charter by demise" because this is the nearest to the English system of ship exploitation). The maritime

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4 In content of part IV the CMC enacted new provisions in the matter of the ship operator's liability for death and physical injury of crewmembers (Art. 161). His liability is based on presumed negligence or strict liability—see BOLANČA, D.: Nekoliko pogleda na materijalnu odgovornost pomoraca de *lege lata i de lege ferenda*, *Privreda i pravo*, Zagreb, No. 5–6, 1993, p. 399.

5 See HODAK, L. M.: Hrvatski upisnik pomorskih brodova, *Pomorski zbornik*, Rijeka, No. 30, 1992, pp. 259–279. See also STANKOVIĆ, G.: Upis brodova i brodica u novom pomorskom zakonodavstvu Republike Hrvatske (*Informator*, Zagreb, No. 4186, p. 9), Postupak upisivanja brodova i brodica u upisnike (*Informator*, Zagreb, No. 4189, p. 17), Neka pitanja u svezi s postupkom za upisivanje brodova (*Informator* Zagreb, No. 4190, p. 14).

6 GRABOVAC, I.–STANKOVIĆ, G.: Hipoteka na brodu kao stvarnopravni oblik osiguranja tražbina prema Pomorskom zakoniku, *Informator*, Zagreb, No. 4192–4193, pp. 19–20.

7 It is the first convention of maritime law ratified by Republic of Croatia (OGRC-International Treaties, No. 2, 1992)—see BAKOTIĆ, B.: Bilješka povodom početka službenog objavljivanja međunarodnih ugovora u Republici Hrvatskoj, *Zakonitost*, Zagreb, No. 1. 1993. p. 23.

8 For more details see GRABOVAC, I.: Neke napomene o posebnostima ugovora o gradnji broda u Pomorskom zakoniku, *Informator*, Zagreb, No. 4204–4205, p. 13, Drago Pavič Plovidbeno (pomorsko) osiguranje u reformiranom plovidbenom pravu Hrvatske, *Pomorski zbornik*, Rijeka, No. 30, 1992, pp. 237–258.

contracts are carriage of goods (the Croatia received the solutions of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924,[9] the Brussels Protocol 1968—Visby Rules and the Brussels Protocol 1979), carriage of passengers and luggage (the CMC follows the instance of the Athens Convention on Shipping of Passengers and their Luggage, 1974, and the Londons Protocol 1976), towing and pushing and other maritime contracts (e.g. biological exploration, pipe and cable laying...).

In part IX the legislator analyses the incidents of navigation (collision of ships, salvage, wreck, general average, tort liability of operator, liability of operator of nuclear ship). In the subject of collision of ships the CMC accepts the provisions of the International Convention for the Unification of Certain Rules of Law in Regard to Collisions, 1910. The institute of salvage consists of the rules of civil and administrative law from the International Convention for the Safety of Life at Sea (SOLAS) 1974, and the International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 1910 (with the Brussels Protocol 1970). Also, the new Code adopts some principles from the new International Convention on Salvage at Sea, 1989 (e.g. the payment of a special compensation to salvors according to established criteria).[10]

Part X (Articles 867–988) spells out the legal consequences of the execution and measures provisional on the ships and goods.[11]

Part XI (Articles 989–1009) contains conflict of laws rules.[12]

Part XII (Article 1010–1037) describes the maritime transgressions.

Part XIII (Article 1038–1056) provides the transitional and final clauses.

3. Concluding Remarks

The CMC has been enacted in order to provide clear and consistent regulations governing the most important institutes of the law of the sea and maritime law (particularly its administrative and civil aspects). In this field the Republic of Croatia has always most

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9 The former socialist Federative Republic of Yugoslavia (SFRY) ratified that convention 1959. The Republic of Croatia has determined its position as to the treaties to which SFRY was a Contracting Party by the Treaties Conclusion and Application Act of 8 October 1991 (OGRC, No. 53/91). According to the transitional provision of Art. 33 of this Act, treaties ratified by SFRY, or to which SFRY acceded, will apply in the Republic of Croatia, if they are not contrary to the Constitution and the legal order of the Republic of Croatia, in accordance with the rules of international law on the succession of states with respect to treaties. According to Art. 134. of the Croatian Constitution, international agreements to which the Republic of Croatia is a party and, in terms of legal effect, have primacy over internal law.

10 See STANKOVIĆ, P.: Nova Međunarodna konvencija o spašavanju na moru, 1989, *Uporedno pomorsko pravo*, Zagreb, No. 2–4. 1989, p. 296, Ljerka Mintas Hodak: Novi Pomorski zakonik, *Pomorski zbornik*, Rijeka, No. 31, 1993, pp. 35–36.

11 See GRABOVAC, I.-STANKOVIĆ, G.: Osiguranje tražbina u svjetlu novog pomorskog zakonodavstva Republike Hrvatske, rewiew from Zbornik radova: Zaštita vjerovnika, Zabreb, 1994, pp. 61–71.

12 Cf. GRABOVAC, I.: Mjerodavno pravo Republike Hrvatske o pomorskoj plovidbi, *Informator*, Zagreb, No. 4143, 1994, pp. 1–2.

administrative and civil aspects). In this field the Republic of Croatia has always most extensively respected the provisions and principles of various international conventions in creating its own maritime legislation. With respect to the maritime orientation of the Republic of Croatia at the time when this recently recognized country is engaged in establishing new proprietary and commercial relations based on market economy and private enterprise, the CMC satisfies the legal requirements of modern sea transport document. The maritime transport is the pillar of the world trade, and for a small economy such as that of the Republic of Croatia, the world market is a condicio sine qua non of its existence.[13]

Jožo ČIZMIĆ

13 Compara BOLANĆA, D.: Položaj Republike Hrvatske u odnosu na pravo i politiku Europske zajednice prema pomorskom transportu, *Pravni vjesnik*, Osijek, No. 1–4, 1992. p. 149.

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BOOK REVIEW

Peter DORALT–Gábor TÖRÖK: **AG-Mustersatzung Ungarn. Ungarisch-deutsch mit Kommentar** (Model Charter for Joint-Stock Companies, with Bilingual, Hungarian-German Commentary, Fachverlag Service, Wien, 1995. pp. 221)

The Vienna University of Economic Sciences, Institute of Research on Central and Eastern European Economic Law (FOWI) has enlarged its series of publications presenting the former socialist countries' economic legislation and forms of companies, so far consisting of six works, by a new publication probably arousing the attention and interest of practising lawyers.

This publication is the first one, and hopefully not the last one in the series that, following the presentation of legal solutions introduced and applied in other countries of the region (Slovenia, Czech Republic, Russia), deals with Hungarian legislation in force, in a way that makes it especially useful for practitioners.

The two co-authors do not need a long introduction since both of them are active and well-known representatives of the domestic and international scientific life dealing with economic law.

Professor Peter Doralt is a Head of Department at the Vienna University of Economic Sciences, and Director of FOWI, while Gábor Török is an Associate Professor at the Budapest University of Economic Sciences, as well as at the College for Public Administration.

The book's main part consists of a Model Charter of Joint-Stock Companies complying with the legal rules in force in Hungary.

It is unique from the point of view that the Model Charter is bilingual (Hungarian-German) and, for better orientation, it is edited in a mirror-structure.

The intention of the authors is obvious: the book is intended to serve as a point of reference for practitioners in the course of establishing a joint-stock company which is an increasingly wide-spread form of companies in Hungary.

Guided by this intention, the authors do not present the system of companies accord-

ing to Hungarian company law, they do not place joint-stock company in this system or delimit it from other forms, their intention is solely to assist those who practice law.

Indisputably the book has come in time and has been of good use since investments coming from German-speaking countries are dominant in Hungary. Those German-Hungarian, Austrian-Hungarian or entirely German or Austrian companies that were founded after the entry into force of the Act No. VI of 1988, primarily in the form of Ltd, as far as they proved to be viable and had serious intentions of remaining in Hungary's economic life, nowadays—being mostly companies of a bigger size, having numerous owners or a considerable capital—face difficulties due to the form of Ltd in attracting or mobilizing capital.

Due to this recognition, mostly since the beginning of 1994, many German and Austrian companies originally established as Ltd., have transformed into the form of joint-stock company, hoping to strengthen their economic position with help of the opportunities inherent in this capital-uniting form of company.

The wave of transformation will probably increase in the years to follow, therefore attorneys, legal advisers and even judges destined to carry out the transformations will get useful assistance by studying the precise and authentic terms and the clear structure.

It is a special value of the publication that each Article of the Charter is supplemented with a bilingual commentary in the form of footnotes that helps to find one's way around the difficulties of interpretation.

In a number of cases, besides presenting the Hungarian legal background, the commentary refers to German or Austrian company law solutions.

The Model Charter is introduced by a brief description of the development of Hungarian legislation relating to joint-stock companies and is supplemented by an annex indicating the relevant sources of law.

This enables the users of the book to compare, without a significant loss of time, legal rules regulating Hungarian, German and Austrian legal institutions and solutions.

Considering the values referred to and other virtues of the book not mentioned in the present review, the book, being also published in Hungary in the first part of 1995 by the Közgazdasági és Jogi Könyvkiadó, will certainly engage the attention of legal practitioners.

János Tamás VARGA

András BRAGYOVA: **Az alkotmánybíráskodás elmélete** (Theory of Constitutional Review, Közgazdasági és Jogi Könyvkiadó — MTA Állam- és Jogtudományi Intézete, Budapest, 1994., pp. 208)

I. Having read the book under review, the reviewer has two different approaches to follow. Either he reads it as a monograph of legal theory, the subject of which is constitutional jurisdiction, or by reason of its subject he treats it as a work of constitutional theory that tries to grab the background of this important constitutional institution by taking into account aspects of legal philosophy as well. The reviewer has chosen the former approach because of his own interest.

If we estimate the work from a legal theory point of view and first of all briefly, we have to say that it is a great intellectual accomplishment on two accounts. Hungarian legal theory literature is beginnig to wake from its four decades' slumber and takes a look around the world. For, apart from a few exceptions, no writings came into being in the last periode that would have been worthy of the intellectual standard that was hallmarked in the international legal literature by the names of Felix Somló or Barna Horváth. But reading this monograph or certain parts of it, the reader gets the definite feeling that something is beginning to revive in this field of jurisprudence that was always very close to politics and therefore teemed with theories putting forward political considerations.

But the reviewer finds this work remarkable not only with respect to domestic legal theory literature. He claims that certain parts of the book contain such chains of thoughts or inspiring findings that can be regarded as novelties in general and enrich legal theory literature by all means. We will try to prove this statement in the next part.

Here, we must mention another feature of the book that makes the critiques against it understandable. This is the ambivalent standard of the work. For it is hard to understand that following a promising Introduction, a First Chapter (Constitutional Jurisdiction and Legality of the Legal System) abounding in ideas and an excellent Second Chapter (Constitution and Constitutional Jurisdiction) why the author produced Third Chapter (Constitutional Jurisdiction as Constitutional Justification of Legal Norms) and a perhaps even more disintegrable Fourth Chapter (Constitutional Review and Legal Reasoning). The general explanation may be found in the answer to the question of why the author developed the first two chapters' chain of thoughts the way he did.

We can support this statement by the fact that the proportion of footnotes compared to the length of chapters increases throughout the work. The reviewer has come to the conclusion that the author did not succeed in making the last two chapters as consise and coherent as the first two chapters. Furthermore, the above statement is supported by the fact that while the footnotes in the first two chapters usually refer to names belonging to the neo-kantian school, in the third and fourth chapters, we can find references to sociologists (N. Luhmann, J. Habermas), political scientists (R. Dworkin), hermeneutic philosopher (H-G. Gadamer), writer on theory of science (P. Winch). These names show that the author changed his general, neo-kantian legal theory and philosophy methods into a specialist approach wanting to take into account all sorts of aspects that has led, as the reviewer sees it, to a significant decline in the standard of the work. And strict methods are fundamental for a neo-kantian theoretician. This trend in legal theory shuts out all metajuristic elements from research and deals with law as law. The author has fully succeeded in doing so in the first two chapters as we try to show it after this long but justified introduction.

II. His basic propositions are as follows:

a) the basic category of constitutional jurisdiction is the validity of legal norms;

b) its function is to decide on the constitutional validity of norms;

c) and its task is to ensure the legality of the legal system.

The author argues that constitutional jurisdiction as function and, depending on

the type of constitution, also as organization is the category that is capable of and suitable for deciding on the validity, necessarily constitutional validity, of a given norm and judging whether the norm satisfies the requirements that are set by the rules relating to norm-making, usually to be found in constitutions.

Here, we only focus on one of the answers to the prepositions. The author applies certain distinctions that show that he is in possession of an analytic capacity comparable to very few others. The reviewer found the categorization between constitutions (statutory and substative constitutions: pages 58-59), accordingly the perception of the existence of differences between various systems of constitutional jurisdiction ("Statute" jurisdiction and norm jurisdiction: pages 66-67) and what had been said about promulgation, derogation and abrogation (pages 77-82), as well as the clear explanation of the differences between consistency and coherency of the legal system (pages 90-92) especially ingenious.

The author managed to create models that are suitable for helping to understand the differences between various categories that are seemingly alike but very different in their origin and consequences. He also managed to avoid the risk of actualization though it is very tempting to apply the ideal types (e.g. in case of constitution types) to their realized forms.

The reviewer, however, cannot find an explanation to the questions of why those issues are covered under the headings of the last two chapters that can be read in the third and fourth chapters, why the author turns away in these chapters from the previously successfully applied method of using ideal types and thinking the ideas consistently over, and why he fails to go on with the praising convincingly his propositions.

III. Summing up, we can state that in spite of the above-mentioned ambiguities the author produced a valuable work for those who like theory (and hopefully for lawyers practicing in the field of law-making).

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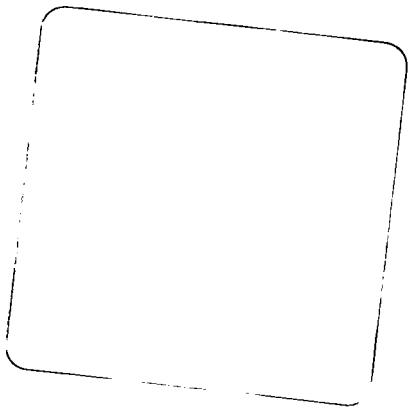

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