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Some Thoughts on the Codification Process in Latin America. Andrés Bello, from America to Japan?[1]

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Abstract. This article describes the reception of Roman law in Latin America and its first codification attempts, establishing the influence of Andrés Bello's code as the base of most Latin American legal systems and even of one out of the continent, that of Japan.

Keywords: Japanese New Civil Code, Andrés Bello, codification, Latin America

I. Introduction

Law is a mirror in which society reflects, where it expresses its wishes and fears trying to self define. For instance, a society that perceives itself as unequal, will probably express its wish to improve proclaiming the fundamental equality of all men in its constitution. It might also express rejection of some common conducts that are believed to be harmful by regulating them as crimes in its penal laws. Nevertheless, the legal dogmatic that most civil codes contain is quite similar, mostly coming from Ancient Rome, and is ruling societies that seem culturally very different. The autonomous character of Roman legal development may be the reason for this adaptability of Roman dogmatic to different social and cultural environments. In fact, if we take a look at the XII Tables, we can immediately appreciate the neutrality of the norms contained by it. For instance, in T, 5 '*si intestato moritur, tui suis heres necescit, adgantus proximus familiam habeto*' (if [he] dies untested and has no *sui* heirs, may the nearest agnate have the family). Many questions arise as, for instance, whether who dies? A man, a

1 This article was presented in Japan before the JALHA (Japan Legal History Association) at the Kyoto University as also in a staff seminar before the professors of Legal history at the Osaka University. It is part of the investigation project VRI 2009/1 Roma y el concepto de propiedad en el Código Civil del Japón and Fondecyt 1100452.

woman, a plebeian, a patrician? The validity of the norm does not depend on the person's social or political conditions. Law remains neuter before the cultural circumstances of society.[2] We may also add that *familia*, as an object of Law is also an open concept in the norm. Does it include cults? Only physical goods? This tendency to abstraction deepens itself with the development of professional jurisprudence during the 2nd and 1st centuries B.C., until it became a model of scientific legal knowledge, which could be valid independently from the cultural and social particularities of any society. That is why its fundamental structure has remained valid for very different communities, as Classical Rome, the Byzantine Empire, late medieval Europe, Japan or Latin America.

Nevertheless, the particular way these institutions are summoned by each society, putting local flavour into them, harmonising them with the ideological particularities of each community, permits these institutions and legal reasoning to become a part of the local culture. To say it in short, who the legally valid actor is and which exactly the objects of any legal institution are, cannot be answered from an abstract and dogmatic point of view. These questions need some definitions that can only come from the cultural atmosphere in which the norm will be applied. The reception of Roman law cannot be a simple copy of legal ideas. The juridical institutions must be adapted to the cultural atmosphere in which they should be applied. The Japanese codification process appears as a model where a profound work of adaptation of Western legal institutions was necessary in order to successfully accomplish the elaboration of the New Civil Code of 1898.

For Latin America, the process of elaborating civil codes also needed a significant amount of adaptation, which turned the process slow and difficult. Eventually, after the Chilean codification of 1856, the process was accelerated and the adaptation was easily completed by most countries, thanks to which they were able to express their particular perception of reality through Roman legal dogmatic. This was the first mirror in which Latin American societies could reflect themselves, as an expression of their own spirit.

In the present work we will study this process, starting with the forced reception of Roman legal ideas in America, through Spanish conquest, and the elaboration of a particular legal system for the Indies. Then we will describe the first codification attempts, to focus ourselves on the first success in this process, which we can identify with Andrés Bello's code of 1856. This Code was the basis for most Latin American codifications of the 19th century and, therefore, is the foundation of South American legal systems. Finally, we will approach the influence of this Code – it is not limited to Latin American legal subsystem boundaries. We will finish raising a question, could its influence extend to the Japanese code of 1898?

2 On the problem, and making a comparison between Chinese and Roman law, see Miquel 2007. 461–479.

II. Roman Law and the Conquest of America

The history of the penetration of Roman law in Latin America is the chronicle of its incorporation into the Spanish Empire. Naturally, by 1492, when the discovery and conquest begian, there were many different native laws among the people that populated the continent that would eventually be known as America. Nevertheless, the conquest provoked a heavy cultural mixture between Spanish and native elements that also included Law. The institutions that ruled in Spanish America soon acquired a distinctive character. A particular legal system (the law for the Indies) was formed, which ruled the American colonies all through the Spanish domination. This system was quite complex and had different types of rules that should apply to regulate social life in a specific order. The top place in the structure was for the statutes which were made specifically for the territories of Spanish colonies, whether they were made for all of them or for a specific Viceroyalty or 'Capitanía General'. Most of these statutes were concerned with public law, intending to organise the American territories and regulate the statue of the Catholic Church and natives. Formulated by the Counsel of the Indies (Consejo de Indias)[3] and formally promulgated by the Spanish kings, they covered different matters in an unsystematic fashion. In short time, there were so many statutes of such different nature that to avoid the growing tendency to chaos they were ordered in an extensive compilation called *Recopilación de Leyes de Indias* in 1680. Nevertheless, it was only a partial solution, for not all the valid statutes for America were compiled in it and the legal instruments that were not part of it still remained valid. On the other hand, the 'Consejo de Indias' kept actively legislating after 1680, so the compilation was only a partial solution for the entropic nature of legal proliferation.

Formally, the second place in the law for the Indies was for the different laws of the native people of America, called *Derecho indígena*. Surprisingly, these laws were not formally abolished by the Spanish kings, who, against what one would expect, even pronounced actively for their validity, maybe expecting to secure the collaboration of the local elites. The native laws were mainly pieces of oral tradition that belonged to the different Native American societies. They kept being in force for the Spanish kings recognised their validity when they were not incompatible with Christianity or with the specific statutes given for

3 The 'Consejo de Indias' was an administrative organ of the Crown of Castile. It was in charge of the administration of the American colonies. Created by the emperor Charles V in 1542, it was initially composed of a President, a Great Chancellor of the Indies, eight counselors and a Tenet of the Great Chancellor. (See, *Recopilación de las Leyes de Indias*, Second Book, Tit. II, L. I, vol. II. Madrid, 1889. 215.) Its faculties covered different aspects of American administration, and at the very top position regarding legal matters, where it had not only legislative competence, but also acted as a Supreme Court.

America.[4] These native legal traditions also had a second influence on the law of the Indies, for some institutions specifically designed for America were based on Pre-Columbine models.[5] Nevertheless, given the small scope of matters these law traditions covered, and the fact that the members of the courts in charge of applying law in America were educated in Spanish law, from a theoretical point of view native law was valid, in practice its rule was rather exceptional. In fact, most of the members of the *Reales Audiencias*,[6] the jurisdictional organs that applied law in Spanish America, were judges trained in *ius commune* at university.[7]

The third element in the complex Indian legal system was the Law of Castile. At the time of the conquest of America, Spain did not have a unified legal system. What we now call Spain was nothing more than a group of kingdoms dynastically united by the marriage of Isabella of Castile and Ferdinand of Aragon. Each of the territories (or kingdoms) that composed it kept their own legal systems. Nevertheless, all of these systems were pretty close to each other, for they were all based on *ius commune* and, therefore, had a strong roman component. The territories of the Empire overseas belonged to the Kingdom of Castile, for Christopher Columbus was under the service of this latter when he made his discoveries. Therefore, the American colonies came under Castile's law after the conquest.[8]

4 On the matter, in 1555 Charles V specifically establishes: '*We order and mandate that all laws and good traditions that previously the Indians had for their good government and police, and their uses and costumes must be observed and kept if they [the Indians] are Christians and they [the laws] are not against the sacred religion and the laws of this book. (Ordenamos y mandamos, que las leyes y buenas costumbres que antiguamente tenían los indios para su buen gobierno y policía, y sus usos y costumbres observadas y guardadas después que son cristianos, y que no se encuentran con nuestra sagrada religión, ni con las leyes de este libro, y las que se han hecho y ordenado de nuevo se guarden y ejecuten…)*' *Recopilación de las Leyes de Indias* 1889. 197. See also Ravi Mumford 2008. 5–40.

5 With the words of Levene 1920. 144. '*The native law survived after the Spanish conquest and inspired Indian legislation beyond what is commonly believed. (El derecho indígena sobrevivió después de la conquista española e inspiró la legislación indiana más de lo que comúnmente se cree.)*' We can find an interesting example of it in the '*yanaconazgo*'. On the problem see Cuena Boy 2006. 401–424.

6 For a recent study, with abundant bibliography on the Reales Audiencias in Chile, see Barrientos Grandon 2003. 233–338.

7 For instance, in 1605, when the Real Audiencia of Santiago de Chile was created, every candidate to be a judge in it ('*oidor*', as Audiencia means hearing, the *oidor* is the one that hears) had a university degree in Law. See Barrientos Grandon 2003. 233–338.
Fort the case of the Real Audiencia of Lima one can see the same phenomenon. See Puente Brunke 2001. 23.

8 In the ordinances for the 'Reales Audiencias' emperor Charles V specifies that: '*In all the cases, contracts and litigations that [are not specially solved by the statutes provided for America should come under] the law of our kingdom of Castile. (En todos los casos, negocios y pleitos que [no estuviesen especialmente resueltos por una legislación específica destinada a América se rigiesen por] las leyes de nuestro reino de Castilla.)*' *Recopilación de las Leyes de Indias*, book II, Tit. I, L. II, v. II. 1889. 196.
On the incorporation of America into the Kingdom of Castile, see Sánchez Prieto 2004. 294–295, as also the classical work by García Gallo 1972. 473 ff.

Castile's law was quite complicated. It was formed by a group of different legal texts that came from different eras, product of the curious medieval Spanish history. Among them, there was the whole *ius commune*, that is to say, the medieval interpretations of Justinian's *Corpus Iuris* made by the glossators and commentators; the *Siete Partidas*, an extensive work written in archaic Spanish, made under the personal direction of King Alphonse the Wise around 1265, which basically collected *ius commune* adapting it to the kingdom of Castile. There was also the extremely complex *fueros* and *cartas pueblas* system. These were particular legal statutes of different cities and regions that were given by different kings granting them special privileges. With all the above mentioned, the ancient *Fuero Juzgo* was still in force in some regions. This was the Spanish translation of the extremely old *Liber Iudiciorum*,[9] a legal text composed by the time of the Visigothic kings, which remained as the traditional law of the Christians *(mozárabes)* during the Arabic occupation of the Hispanic Peninsula. By the time of the conquest of America, in the city of Toro, the Courts of Castile (an equivalent to English medieval Parliament or to French medieval États Généraux) were summoned to try to give some coherence to their legal system and decide the precise order in which the different legal texts should be applied. The result was the *Leyes de Toro* (1505), which fixed an order for their appliance. The absolute preference was given to the *Leyes de Toro* and the other statues given by the monarchs; secondly, the particular *fueros* of each city or region, among which it was included the *Fuero Juzgo* and, in third place, the *Siete Partidas*.[10] Although formally the *ius commune* was excluded from Castile's law system, in reality it was still very much in use, for it was at the very heart of the legal education both in Castile and America.[11] In fact, *ius commune* was the only thing studied at universities, while the *Siete Partidas*, the different *fueros* and the statutes given by the different kings were not. The judges used to found their decisions on *ius commune* although it was specifically forbidden, claiming its internal rationality *(pro ratione)*,[12] so finally *ius commune* ended up being one of the main sources of Castile's law.

Summarising, the Law of the Indies was formed by: (1) the statutes specifically given for the American territories, (2) the native law and (3) the law of Castile. Nevertheless, for most of the above mentioned were mainly concerned with public law, generally speaking, the majority of cases were solved using the *Siete Partidas*, the content of which was basically Roman law, what was anyway reinforced with the fact that all judges and lawyers were educated in *ius commune*. In a way, Roman law came up as the centre of traditional law in Latin America. With all the complexities of the Hispanic legal tradition, Justinian's Roman law came to America.

9 See Nótári 2013. 180.
10 See Leyes de Toro 1826. 4 ff. For a general outlook, see Guzmán Brito 2000. 152 ff.
11 For the specific case of Colonial Chile, see Bravo Lira 1998. passim.
12 See Guzmán Brito 2000. 23–36.

III. Independence Process and Criticism of Traditional Law of Indies

During the first decade of the 19th century, the whole of Latin America entered into a revolutionary process of deep historical consequences. As a result of Napoleon's invasion of Spain in 1808, the whole Hispanic Empire crumbled and the different regions that composed it turned into independent states. Generally speaking, we can say that around 1810 local elites formed autonomous governments in Latin America. In the Capitanía General of Venezuela (April 19, 1810), the Viceroyalty of Nueva Granada (May 20, 1810), the Viceroyalty of La Plata (May 25, 1810), and the Capitanía General of Chile (September 18, 1810) local government commissions (Juntas de Gobierno) were constituted and, although all of them declared themselves loyal to Ferdinand VII of Spain, who was made a captive by Napoleon, in reality they started the independence wars which would only end in the Ayacucho battle on December 9, 1824, after taking the lives of nearly one fourth of the population in some regions.[13]

Anyway, political independence of the different territories of Latin America did not mean a complete break with the law system of the Indies. Although public law did experience fundamental changes,[14] especially after the dictation of several constitutions for the new American nations, private law remained stable. All countries that once had been part of the old Spanish Empire kept the traditional Law for the Indies. We might add that '*never a political change, for radical that it might be, affects necessarily and immediately Private law*'.[15] The system, with all

13 Maybe the cruellest wars were those of Venezuela and Chile, where vast zones became practically depopulated. For the first of those, we can remember Bolívar's decree of July 15, 1813 declaring what came to be known as war to the death: '*Any Spanish who does not conspire against the tyranny and in favour of the just cause, by the most active and efficient means, will be counted as an enemy and punished for treason, and consequently, will be put to death. (Todo español que no conspire contra la tiranía en favor de la justa causa, por los medios más activos y eficaces, será tenido por enemigo, y castigado como traidor a la patria y, por consecuencia, será irremisiblemente pasado por las armas.)*' In the case of Chile, most of the natives were forced to take a side, whether for or against the independence.

14 The transformations brought by the Independence in public law were vast and this might not be the place to focus on them. Nevertheless, the complex system of personal status that established a blood nobility, the difference between the 'peninsulares' (people born in Spain), the 'criollos' (the ones born in the colonies, but with Spanish antecessors), the 'mestizos' (half breeds between natives and Spanish) and the natives were abolished. Also, it was declared the freedom of newborn from slaves and, finally, the complete prohibition of all ways of slavery. All these changes made possible the end of the semi-feudal regime that lived in Spanish America. For the Chilean case, the freedom of newborn was decreed on October 11, 1813, the abolition of nobility in September 15, 1817, the full legal capacity for natives on March 4, 1819 and on July 24, 1823 slavery was finally abolished. See Guzmán Brito 1982. 83.

15 '*[N]unca una pura mudanza en el régimen político, por radical que resulte, afecta necesaria e inmediatamente a la disciplina del Derecho privado.*' Guzmán Brito 2000. 181.

its complexity, was still valid for there was nothing to replace it. On the other side, however radical the independence revolution was, society had still an economic and social structure similar to the late colonial period, and it would take decades of republicanism and, what is even more important, peace, to vary those structures. The end of the colonial regime in the Spanish America meant the beginning of a long period of civil wars in the different regions that were once part of the Spanish Empire, which, in most cases, covered the whole 19th century.

Although the replacement of the old Spanish legal structure was part of the revolutionary programme of independence, imitating French law under the ideological model of the 1789 revolution, still long time was needed before society was in a condition to produce jurists and men of culture who were able to fulfil such a task. It is worth calling the attention on the fact that some of the revolutionary leaders, who new quite little about law but were strongly influenced by the French ideology, pointed the incompatibility of the Spanish legal structure with independence. For instance, Bolívar declared before the Congress in Angostura in 1819 that: '*our laws are fatal residues of ancient and modern despotism. This monstrous structure must be turned to the ground and from its ruins we must build a temple for Justice*'.[16] Nevertheless, most of the new American states established by statute the validity of the old legal regime, including the Great Colombia founded by the same Bolívar.[17]

Anyway, harsh criticism of the old Spanish law became a common place in the recently independent societies, especially on its formal side, for it was composed by a multitude of different legal texts, many times contradicting one another and written in different languages (Latin, Archaic Spanish and Modern Spanish). Most of the criticism was fair and it was even taken from Spanish authors that criticised their own legal system and also wanted to replace it with a legal code. In this context, there was the idea in the intellectual atmosphere to simply translate the Code Napoleon and enact it. The arguments on behalf of it were the indisputable prestige of the Code Napoleon as a model of rational ordination of

16 '*Nuestras leyes son funestas reliquias de despotismos antiguos y modernos; que este edificio monstruoso se derribe, caiga y apartando hasta sus ruinas, elevemos un templo a la justicia.*' Guzmán Brito 2000. 190 f.

17 This was made expressly by:
- The Reglamento Provisorio para la Administración del Estado of 1817, sec. II, cap. I, art. 2. of the United Provinces of River la Plata (the future Argentina) and its Constitution of 1819 in its article 135.
- The Provisionary Constitution of Chile of 1818, tit. V, cap. I, art.2.
- The Constitution of the Great Colombia of 1821 (the state created by Simón Bolívar which covered nowadays Venezuela, Colombia and Ecuador).
- Estatuto Provisorio given by the Protector of Freedom of Peru (José de San Martín) of 1821
- Reglamento Provisional of the Empire of Mexico of 1822, art. 2.
- The Constitution of El Salvador of 1824, art. 81
- The Constitution of Honduras of 1825, art. 97
- The Constitution of Nicaragua of 1826, art. 164

law and the fact that the ideological matrix of the independence was the French Revolution. In 1822, the Chilean leader of the independence, O'Higgins, who governed the country at the time, proposed to simply substitute the Law for the Indies with the five French codes, although the idea did not prosper. The French codes were enacted in Haiti, Oxaca (a state of Mexican Federal Republic), the Northern and Southern Peruvian states of the fleeting Confederation of Peru and Bolivia and in Bolivia. Nevertheless, its force was somehow transitory,[18] maybe for the lack of connection with local traditions, or for its incompatibility with local legal culture. The most curious example of this tendency is, without any doubt, the case of the Dominican Republic, which enacted the Code Napoleon in its original French language, although it is a Spanish speaking country, and had it in force for nearly forty (1844–1884) years![19]

It was only in 1852 that the first truly Latin American Civil Code came out in Peru. Although its significance is high, its influence was limited to Guatemala, maybe because of its conservative structure.[20] For instance, it kept the validity of slavery[21] and regulated in a very conservative way the statue of clergy.[22] For practical terms, it would not be until 1856, when the Civil Code of the Republic of Chile was enacted, that Latin America had its first autochthonous codification model, which dominated legal thought for the next fifty years. Due to its importance we will centre our attention on such a process, for the Chilean codification is the base for most Latin American ones.

IV. Codification in Chile

During the second and third decades of the 19th century, in Chile the debate on the need to codify law became central.[23] It was focused not on the need to codify but on the way to do it. The discussion focused on whether codification should be a simple reception of French law or an adaptation of the Spanish legal material putting it in a modern mold, that is to say, to follow the axiomatic method of Leibniz and the Gaian-Justinian order, or to create an all inclusive code, whether under Bentham's model, the *Allgemeines Landrecht*'s one or another newly

18 See: Guzmán Brito, Alejandro, El tradicionalismo del Código Civil Peruano de 1852 in Revista de Estudios Histórico-Jurídicos (2001) 23.

19 This happened for many historical circumstances. The Dominican Republic was incorporated into Haiti, which is a French-speaking country, and simply adopted the French code in its original language. When Dominican Republic finally separated itself from Haiti, the discussions about the translation of the code became endless and there was no agreement on the matter until 1884. For the details see Guzmán Brito 2000. 289–301.

20 On the matter see Guzmán Brito 2001. 23; Guzmán Brito 2000. 338–342.

21 Book I, sec. II, tit. V.

22 Book I, sec. II, tit. IV.

23 For a detailed discussion see Guzmán Brito 1982. 115–238.

designed.[24] For it was not likely that a decision would be taken, Diego Portales, one of the state ministers, around 1834 privately commended the mission to Andrés Bello.[25] From then on, the destiny of Chilean codification would be united with the fate of a man who was not only born outside of Chile, but did not even have a degree in law!

It was chance that brought such a character to Chile. He was born in Caracas in 1781 and graduated as a bachelor of arts in 1800. He did start to study law, but he quit under his father's pressure.[26] He tutored Bolívar, with whom he maintained a somehow distant relation, once the old pupil became the bright star of American independence. He was a self educated man, learned English and French on his own. As for his language skills, he was in quite an exceptional position in 1810, when Venezuela was looking for English support for its independence. Probably his knowledge of the English language, which was very uncommon at that time in Caracas, encouraged the government to send him, together with Bolívar and Luis López Méndez to London to try and convince England to aid Venezuela.

Soon enough it was evident that England would never support Venezuela's independence, for, once Spain had been invaded by Napoleon, it became an ally against France. Therefore, Bolívar returned to Venezuela and left Bello in England. Bello, without any economical support from Venezuela stayed at the very edge of misery permanently for the next twenty years. Given his intellectual capacity, he entered John Mill's circle, one of the main utilitarian philosophers, who hired him to help in copying Jeremy Bentham's notes. By this time he became aware of the codification, because Bentham was not only an active promoter of it, but he even invented the word 'codification'.

His law studies seem to have started in quite an unusual way. As a student of philology he focused on the *Cantar del Mio Cid*, a medieval epical poem composed in the 12th century and finally written down under Alphonse the Wise. In order to understand the language of the poem he studied the *Siete Partidas*, which were written in the same historical period. His contact with Bentham brought him under the influence of Blackstone and Kent, whom he quotes on several occasions. In other to approach Roman legal thinking, he also studied Vinnius and Heinnecius. He even made a Spanish translation of this latter author, which was in use in Chile during the whole 19th century.

In 1822, he was hired by the Chilean diplomatic delegation in London and, in 1829, he finally abandoned England and moved into Chile. He elaborated most of his works in this last country, which he never left until his death in 1865.

24 It was even discussed to make a kind of legal encyclopedia, imitating a Spanish work from the 18th century from Antonio Xavier Pérez y López called *Teatro de la legislación universal de España e Indias*.

25 We follow Guzmán Brito's thesis on the problem. See Guzmán Brito 2005. 16 ff.

26 An interesting description of this scene can be found in Edwards Bello 1978. 14.

It was in his Chilean period that he was commissioned for the civil law codification and this took him to deepen his knowledge about the Code Napoleon and the works of Pothier, as well as about the commentaries made by the first exegetic school, that is to say, Rogron, Delvincourt and Troplong. He also made extensive comparative studies of the different civil codes that existed by his time, especially through the Concordances of Saint Joseph. Last, but not least, we should mention the influence of Savigny, whom he studied thanks to the publication of the famous translation of his *System* made by Charles Guenoux, published in 8 volumes in 1840 under the title *Traité de Droit Romain*. All this cultural baggage was poured into his Civil Code, which he wrote alone. Form 1840 on, his work was revised by a commission appointed by congress.

Bello's idea for codification was not focused on changing the dogmatic content of Spanish law, but to reorganise it in a more rational way. On the problem he states: '*The codification plan must be separated carefully from the reform plan. To mix one with the other would be to fight with two different difficulties at the same time, and to sink in a swamp of speculations in which there are so many and too terrible difficulties.*' So the project should limit to the '*sole organizing of our written and not written law*'[27] and finally convert *'all civil laws into a well organized body, without the litter of preambles and redundant phrases, without the multitude of words and expressions out of use*'.[28]

His intention seems to have been not to change the fundamental legal dogmatic, but to adapt and rationalise it. The result was a deeply original work, though inspired by the codification techniques of the first half of the 19th century, as the presentation of the work in congress suggests: '*Of course, you will understand that we cannot simply copy any of the modern codes. It was necessary to use them, but without forgetting the particular circumstances of our own country. But, when there were no obstacles for it, we took the chance of innovating.*'[29]

By the year 1841, the book of successions *mortis causa* was finished and, therefore, Bello decided to publish it in the newspaper called *El Araucano*, which he directed. Bello's idea of codification involved public discussion of the content of the Code. He was intellectually close to the Historical School, so this was a way of making the Code a national work, reflection of its 'spirit'. In fact

27 '*El plan de codificación debe, a nuestro concepto, separarse cuidadosamente del plan de reforma. Amalgamar desde el principio uno y otro sería luchar de frente contra dos dificultades a un tiempo, y engolfarnos desde luego en el vasto piélago de las especulaciones, en que son tantos y tan temibles los escollos.*' Bello 1885. 36.

28 '[...] *las leyes civiles a un cuerpo bien ordenado, sin la hojarasca de preámbulos y frases redundantes, sin la multitud de vocablos y locuciones desusadas que ahora embrollan y oscurecen.*' Bello 1885. 37.

29 'Mensaje' of the Chilean Civil Code: '*Desde luego concebiréis que no nos hallábamos en el caso de copiar a la letra ninguno de los códigos modernos. Era menester servirse de ellos sin perder de vista las circunstancias peculiares de nuestro país. Pero en lo que éstas no presentaban obstáculos reales, no se ha trepidado en introducir provechosas innovaciones.*'

there was some debate on the content of the code, which was developed publicly through letters sent to the newspaper and published by it.[30]

While the commission revised the book of *mortis causa* successions and the Preliminary Title of the Code, Bello worked on the book of contracts, which was examined by the commission and published afterwards. By 1844 some of the commissioners died, so the commission ceased to exist and Bello continued his work alone. Although a new commission was appointed, it never retook the revision work. Finally, in 1846 Bello edited and published a corrected version of the book of *mortis causa* succession and, in 1847 he made a second edition of the book of contracts. The hardness of the solitary work of an old man is manifest in a note he added in the book of contracts: '*soon our work will be finish, if our age and strength allows it*'.[31] But making the Civil Code was not his only duty, for by that time he was also senator of the Republic, president of the University of Chile, which he founded, and, as we already mentioned, editor of a newspaper. While he was working on the Code, he also wrote an impressive work of philosophy (quite close to utilitarianism), the first Spanish grammar written in America, a general book on international law, many other philological works and even some books of poetry.

Fortunately, age and strength allowed him to continue, for in 1853 he finished the first complete draft of the Civil Code. This draft contains also footnotes that enable us to trace some of the sources used. A new commission was appointed and after two years the project known as the 1855 Code was finally sent to Congress. It was approved without any discussion on December 14, 1855 to be enacted the on January 1, 1857. Nevertheless, the Congress commissioned Bello to correct some errata in the text and he introduced some 200 changes to the text originally approved by Congress. In 1856 the final edition of the Civil Code of the Republic of Chile was published.

By its structure, the Code belongs to the French family, for it follows the Gaian-Justinian order. It starts with a Preliminary Title, where it gives some general rules and definitions, including a set of rules to interpret statues, where it shows the influence of the Louisiana Code and Blackstone.[32] The first book is dedicated to persons, incorporating the notion of artificial persons. The second book is dedicated to *iura in rem*. He follows the *ius commune* system of transfer of property, distinguishing between *titulus* and *modus*, incorporating a special title on *actiones possessoriae*, which is rather exceptional. The third book is on succession *mortis causa*, while the fourth one regulates contracts.

On the sources, though the structure is quite close to the Code Napoleon, the order of that is altered on several occasions, adopting the structure of the *Siete*

30 The whole debate is in Bello 1885. 300 ff.

31 '*Dentro de poco habremos terminado nuestro trabajo, si la vida y las fuerzas nos alcanzan*.' Taken from Guzmán Brito 2005. 44.

32 See Guzmán Brito 2010.

Partidas (for instance, when it includes a title for *actiones possessoriae* after the one concerned with *servitudines*) or to the Louisianas (including rules to interpret statutes), the content seems closer to Pothier and the Siete Partidas rather than to the French Code,[33] which is especially evident when it adopts the *titulus-modus* system for transference of property.

V. Expansion of Andrés Bello's Civil Code. Did it Influence the Japanese Code?

It was the local flavour of Bello's Code and its reception of traditional Spanish law what guaranteed its success and its quick adoption by other Latin American countries. Therefore, it was enacted in El Salvador (1859), Equator (1860), Colombia (1887), Venezuela (briefly from 1860), Nicaragua (1867–1904) and Panama (since its independence from Colombia). It was a fundamental influence for the Argentinean, Uruguayan and Paraguayan codes, as also to the first codification project of Brasil, Freita's Esboço. Nowadays it is the third oldest Civil Code still in force, after the Code Napoleon and the Austrian ABGB.

Although its continental influence is completely out of discussion, we would like to finish this paper by raising a question. Did it have any influence in a wider outlook, as for instance, in the New Japanese Civil Code of 1898? It was Professor Domingo who called our attention to the complex set of materials that inspired the Japanese Civil Code.[34] As a matter of fact, Hozumi, one of the three members of the commission appointed to make the New Civil Code of 1898, states that the commission consulted more than thirty different codes[35] while preparing it. He even declares that the material content of the Code was taken from different places: '*In some parts, rules were adopted from the French Civil Code; in others, the principles of English common law were followed; in others again, such laws as the Swiss Federal Code of Obligations of 1881, the new Spanish Civil Code of 1889, the Property Code*

33 For instance, the definition of property seems to be a mixture between the one given by the Siete Partidas and the Book on Property of Pothier, and is not based on the Code Napoleon. Art. 544 of the Code states: '*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*' Pothier: '*le droit de disposer á son gré d'une chose sans donner néanmoins atteinte au droit d'autrui, ni aux lois; ius de re libere disponendi, ou ius utendi et abutendi.*' Pothier 1827. 114. And the Siete Partidas (P 3, t. XXVIII, L. 1) '*Señorío es poder que ome ha en su cosa de fazer della, e enella lo que quisiere: segun Dios e segund fuero.*' While Art. 582 of the Chilean Civil Code: '*El dominio (que se llama también propiedad) es un derecho real en una cosa corporal para gozar y disponer de ella arbitrariamente no siendo contra ley o derecho ajeno.*' For a detailed explanation see Amunátegui Perelló 2010. 107–118.

34 Especially Domingo 2006. 289–304.

35 Hozumi 1904. 10.

of Montenegro, Indian Succession and Contract Acts or the Civil Codes of Louisiana, Lower Canada or the South American Republics or the draft Civil Code of New York, and the like have given materials for the framers of the Code.'[36]

Hozumi expressly mentions codes of 'South American Republics', which probably, for its diffusion and influence, could mean Andrés Bello's Code. Also, when he, in different parts of his study, *The new Japanese civil code as a material for the study of comparative jurisprudence*, mentions generically the codes of South America,[37] the declarations seem to fit Bello's Code. This might enable us to speculate about an influence of this Code to Japan's, although this is quite hard to prove, especially for most civil codes seem to have similar rules and it is not easy to demonstrate the belonging of any particular rule to one specific code. To try and determine some reception of Bello's Code into the New Japanese Code we will briefly analyse an exceptional rule contained in Bello's Code, were eventually an influence could be clearly established. Both codes give the possibility of obtaining compensation in the *uti possidetis* interdict. So declares article 198 of the New Japanese Civil Code: '*If a possessor is disturbed in his possession, he may by an action for the maintenance of possession claim the stoppage of the disturbance and compensation for damage.*'[38] The Chilean Code also declares: Art. 921. '*The possessor has the right to demand that he is not disturbed or embarrassed in his possession nor striped from it, and to be compensated for the damage suffered, and guaranteed against the one he rightly fears.*'

Both articles are quite close in wording and content. This similarity becomes more significant when one considers that Bello's regime for *actiones possessoriae* is very exceptional. In fact, Bello did not follow the French model, which does not even regulate *actiones possessoriae*, just as he did not follow the majority of the existing codes of his time. Civil codes usually left the problem to procedure codes, following the French model.[39] Specialised textbooks used to explain the problem after having finished substantive law, when explaining procedures, following the Gain-Justinian structure[40] or treat them while explaining either

36 Hozumi 1904. 11.

37 Hozumi 1904. 36; 45.

38 Taken from the English version of Lonholm 1898.

39 Nevertheless paragraph 339 of the ABGB does regulate the matter and, probably also under the same influence of Heneccius, includes the possibility of compensation: '*Der Besitz mag von was immer für einer Beschaffenheit seyn, so ist niemand befugt, denselben eigenmächtig zu stören. Der Gestörte hat das Recht, die Untersagung des Eingriffes, und den Ersatz des erweislichen Schadens gerichtlich zu fordern.*' Still, the ABGB is very general about it. It simply contemplates the possibility of the possessor demanding compensation without really regulating the *interdictae*, as the Japanese and Chilean codes do. In fact, the compensation is claimed in a common procedure, without the character of *actiones possessoriae*.

40 In Gaius's *Institutes*, and consequently in Justinian's ones, the *interdicta possessoria* are explained in the fourth book on actions. Therefore, this is the traditional order to study the problem, as, for example, does Juan Sala, an 18th century scholar, whose works were very much in use at the beginning of the 19th century. See Sala 1845. book II, tit. XI, par. 10 ff.

possession[41] or *usucapio*.[42] Bello's Code regulated the problem in its second book, dedicated to things, right after *servitudines*. The exact location seems to come from the *Siete Partidas*.[43]

But what is more interesting to the case is that the material content of the rule comes from a misunderstood interpretation of Classical Roman law. In principle, Roman law did not contemplate compensation of damages in *interdictae possessoriae*, for their exclusive aim was to stop the disturbances suffered by the possessor. Nevertheless, it was especially common opinion among Spanish scholars (though not exclusively Spanish[44]) of the 19th century that they in fact allowed it. The confusion seems to come from a wrong interpretation of D. 43, 17, 3, 11.[45] In the fragment it is discussed the amount of the *condemnatio* in a procedure for contravention of *interdictum uti possidetis*, which originally limited to the economical value of the thing at the moment of the interposition of the action. This, in the Roman legal system does not stand as a compensation of damages, for the punishment in any procedure always involved money, and the defendant was not condemned to give back the *res*. Nevertheless, this amount of the *condemnatio* discussed by Ulpian was interpreted as damage compensation, while the defendant was anyhow convicted to return the object to the possessor. The misinterpretation seems to come from Heneccius, who is the first to express it,[46] and for the high degree of diffusion that his works had among Spanish scholars, this became a commonplace by the beginning of the 19th century. It is quite revealing to read the explanation that Andrés Bello gives in his *Instituciones de Derecho Romano*, which is a translation of Heneccius's comments on Justinian: '*The rentinendae interdicts are uti possidetis and utrubi. The first is given to the possessor of a real estate that, by the time of litiscontestatio posses it nec vi, nec clam, nec precario against the one that disturbs this possession, for him to cease, give compensation and gives non turbando guarantee.*'[47]

41 See Pothier 1846. 291 ff.

42 Troplong 1835. I. 459 ff.

43 P. 3, t. XXXII.

44 See, for instance, Troplong 1835. I. 462 f. '*Ils avaient pour but de défendre le possesseur d'une agression ou d'un trouble, et ils étaient accordés: 1º lorsque la force ou la voie de fait exercée contre le possesseur lui causait un dommage actuel dont il voulait obtenir réparation.*' Then, to justify his opinion, he quotes Ulpian l, 1, D. *uti possidetis*.

45 D. 43, 17, 3, 11 [Ulpianus libro sexagensimo nono ad edictum] *Non videor vi possidere, qui ab eo, quem scirem vi in possessionem esse, fundum accipiam. In hoc interdicto condemnationis summa refertur ad rei ipsius aestimationem. 'Quanti res est' sic accipimus 'quanti uniuscuiusque interest possessionem retinere'. Servii autem sententia est existimantis tanti possessionem aestimandam, quanti ipsa res est: sed hoc nequaquam opinandum est: longe enim aliud est rei pretium, aliud possessionis.*

46 Heineccius, Recitaciones, Lib. IV, Tit XV, par. IV.

47 Bello 1878. 214. '*Son interdictos retinendae, el uti possidetis y el utrubi. Dase el primero al poseedor de una finca que al tiempo de la listiscontestación la posee nec vi, nec clam, nec precario, contra el que turba esta posesión, para que desista, le indemnice y le preste fianza de non turbando.*'

So, Bello's Code, trying to return to Roman law, was really innovative including a damage compensation system in *actiones possessoriae*.

Article 198 of the New Japanese Civil Code is usually believed to be taken from paragraph 862 on the BGB.[48] Nevertheless, the wording of this last regulation does not seem compatible with the Japanese one. Even more, the BGB, in accordance with Classical Roman law, does not even contemplate the possibility of compensation: '*(1) Wird der Besitzer durch verbotene Eigenmacht im Besitz gestört, so kann er von dem Störer die Beseitigung der Störung verlangen. Sind weitere Störungen zu besorgen, so kann der Besitzer auf Unterlassung klagen. (2) Der Anspruch ist ausgeschlossen, wenn der Besitzer dem Störer oder dessen Rechtsvorgänger gegenüber fehlerhaft besitzt und der Besitz in dem letzten Jahr vor der Störung erlangt worden ist.*'

We believe that the special nature of articles 921 of the Chilean Civil Code and 198 of the Japanese Code allows us to assert an influence of Andrés Bello's Code upon the New Japanese Code of 1898. This finds confirmation in Hozumi's statement where he mentions taking some dispositions from some South American codes – which would probably be Bello's Code. It also explains the plural used by him, 'codes', for Bello's Code was valid in several countries. It is possible that, once this first influence is detected, others might appear, but that is something to be left to future investigations.

Conclusions

We would like to point out that our main conclusion on the problem is that the scope and application of an historical comparative perspective to understand legal studies is far from being done. Unexpected relations between codified legal systems are still to be explored and the somehow obscure relation between the Japanese Civil Code and the Chilean one is just one example to how different legal systems happen to relate if taken in an historical context.

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48 As, for instance, Domingo does in his translation of the New Japanese Civil Code. See art. 198 in Domingo 2000.

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Wine-Growers and Vineyard Tenants in Hungary in the Middle Ages

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Abstract. Viticulture and wine-production were of significant importance even in the economy of the Middle Ages. Wine-growers carrying out economic activity, formed a special group amongst servants being under the obligation of the owner of the land. Permanency of their title, furthermore their services and benefits arising from this special type of economy also indicate this. Wine-growing established special contractual relationships, too. Lease, lease of usage of vineyards bore the speciality of viticulture. These contracts were frequently concluded by owners with lessees aiming the planting of grapes, who – as a result of their investments – took over the lands put at their disposal usually for an indefinite term and also acquired rights on these lands based on agreements, further their male descendant heirs inherited the lease right according to the contractual terms. In most cases in the 13th century, vineyards were leased by members of privileged *hospes* communities. According to the contract between the lessor and the *hospes, civis* tenant, the latter has the obligation to pay rent in return for getting the profits of the vineyard. Further the tenant – as a consequence of his legal status and in lack of other stipulation – had other obligations, too, arising from his economic activity, among others the payment of the *decima*. On the territories under the jurisdiction of their *hospites, cives* communities, the members also planted grape if the land was suitable for this. From the 14th century, tenants planting grape were mostly serfs, who, further to the payment of the rent fee, were obliged to pay taxes, to deliver some kind of gifts after the profit of the vineyard and the wine produced.

Keywords: wine-growing, Hungary, Middle Ages

I. Viticulture in Medieval Hungary

Viticulture in Hungary, in the Pannon area, goes back almost 2000 years. The deeds born after the establishment of the Christian kingdom, in the 11th century mention vineyards, their owners and wine-growers for the first time. The founding deed of the Abbey of Pannonhalma in 1055 mentions 20 wine-growers of the

abbey. Their number is significant in comparison with the number of other group of people such as ploughmen, cavalry servants, fishermen, stablemen, herdsmen, shepherds and swineherds ('*sunt igitur aratra XX cum LX mansionibus, vinitores cum vineis XX, equites XX, piscatores, agasones V, bubulci III, pastores ovium III, subulci II*, […]'). Certainly, the 20 wine-growers meant 20 families, households *(mansiones)*, like in the case of ploughmen.[1]

András II on abbot Uros's request made palatine Pot and chancellor Tamás register the lands and people of the Abbey of Pannonhalma. In this register, finalised in 1211, 44 wine-grower families were mentioned in 7 towns of Zala, 4 towns of Somogy and 1 town of Tolna county. In Zala county most wine-growers lived in Aszófő, 17 men in 9 families, while in Somogy the number of wine-growers was the greatest in Török, namely 21 men from 8 families.[2]

The register of the Abbey of Pannonhalma, from 1093, the time of Ladislaus I of Hungary, compiled the donation from Stephen I of Hungary, his heirs, princes, dignitaries of the Church, bailiffs and others to the Church and the lands, people and services of the Abbey, it mentioned 88 wine-grower families.[3] Before the Mongol invasion of Hungary (1237–1240), Albeus canon of Esztergom, archdeacon of Nyitra registered the land, people and services of the Abbacy on the order of Béla IV. At this time the Abbey had in Győr county, in Alsók 57, in Semjéncsuka 30, in Örkény 28, in Ság 20, in Perecse 13, in Écs 10, in Nyúl 8, in Ravaszd 3, in Tényő and Csé 1 wine-growers, or rather wine-grower families. In Somogy county in Rád 10, in Ölyvös 5, in Endréd 2, and in Fér 1 wine-grower family served the Abbey of Pannonhalma. In Zala county, along the river Zala, Albeus reported on 6 families, designated by the name of ploughmen and wine-growers ('*in eodem comitatu de Zala iuxta fluvium eiusdem nominis* […] *habet* [namely monasterium] *servos aratores et vinitores VI mansiones cum filiis et cognatis*'). The number of registered wine-grower families was 197 all together.[4]

In a royal letter dated 3 September 1138, Béla II ordered the registration of the land's servants and their obligations to the church of Dömös, established

1 Erdélyi–Füssy–Sörös 1902–1908. X. 487.

2 Erdélyi–Füssy–Sörös 1902–1908. X. 502.

3 Erdélyi–Füssy–Sörös 1902–1908. I. 590. According to László Erdélyi, the register was born between 1038 and 1095. Correctly, Szentpétery 1923. I. 11. (29.)

4 Erdélyi–Füssy–Sörös 1902–1908. I. 771. The number of wine-growers is 256 in the chart divided by villages and people, prepared by László Erdélyi based on the registration of Albeus. This arose from the mistake of designating 62 families as wine-growers, while these were cavalry servants possessing plough-land, reeds, hayfields, forests and groves with royal servants, but did not have vineyard ('*in predio Hegmogos, quod alio nomine dicitur Apati, sunt sexaginta due mansiones preter parvulos et iuvenes* […] *de quibus in quolibet mense duo cum uno equo suo debent tenere et custodire equos abbatis, ubicunque ipse abbas fuerit, in stabulo non in campo [in] expensis abbatis, terram autem habeant* […] *ad XII aratra preter arundineta, feneta silvas et nemora et colles et pascua pecorum, que omnia sunt eis communia* […] *cum udvornicis regis de predicta villa Heygmogos*'). Also according to Erdélyi, half of the 6 families living along the river Zala was ploughman and the other half was wine-grower.

by Béla's father, prince Álmos, together with the donations made by himself and his wife, queen Ilona. The church of Dömös had 18 vineyards and 14 wine grower-families in Tengőd, 10 vineyards and 20 households in Csepel and 7 vineyards and 7 households in Jaba, Somogy county. In Tolna county the number of vineyards was 10 and the number of households was 9 in Ősi, and 4 vineyards and 4 wine-grower families were in Kánya. Besides, the church of Dömös had 10 vineyards and 10 wine-growers in another village, one named Csepel, and 9 vineyards and 6 wine-growers in Vadács and Pomáz. Also the people of the village Koppány, who belonged to this church, had vineyards, but these were not mentioned in the royal letter.[5]

Among the donations of secular nobles establishing monasteries, there were vineyards and wine-growers. In 1157 Walfer, who established an abbey on the hill of Küszén in Vas county donated 4 estates to the monastery. 10 vineyards with wine-growers belonged to one of these, the Gyarmat *predium*.[6]

From the 12th century, the testaments kept memory of numerous data about vineyards and wine-growers of secular nobles. During the reign of Stephen II (1116–1131) Acha, the noble servant of the castle of Veszprém ('*Vespremiensis joubagio*') made a will in favour of the Abbey of Pannonhalma. Acha gave a vineyard and a mill together with 4 men, of which a certain Burd was the wine-grower. During the reign of Béla II (1131–1141) András, provost of Nána, the bishop of Veszprém made a will with the permission of the king and queen Ilona, when he chose to live his life as a hermit. András left his estates in Somogy county and 38 liberated men in 3 villages, Besen, Karád and Rád, also 3 vineyards and 6 wine-growers in Rád to the Abbey of Pannonhalma. Comes Márton and his wife, Magdolna got permission to make a will in favour of their monastery in Zala county, the church of Csatár, on the occasion of the assembly held by Béla II in Esztergom in 1137. According to the letters born in 1141–1146, under the reign of Géza II, Márton left 4 ploughs of land and 4 vineyards to his wife with the condition that she would use it until her death and in case of her death or new marriage it should fall to the monastery of Csatár. Márton also left some estates for his oldest daughter, including 3 vineyards with wine-growers. Márton's wife, Magdolna also made a significant donation, including 7 vineyards and 7 wine-growers, to the abbey of Szent Péter in Csatár, for the salvation of herself, her husband and his relatives.[7]

In 1146 lady Színes in her last will left 5 vineyards and 5 households in village Rád for the Abbey of Saint Martin in Pannonhalma. In the same year *hospes* Fulkó, who first served prince Álmos, then Szerafin, bishop of Esztergom, then Máté, Nána, Péter, finally Pál, bishops of Veszprém, left all his properties

5 Fejér 1829–1844. II. 94.
6 Erdélyi–Füssy–Sörös 1902–1908. I. 604.
7 Wenzel 1860–1874. I. 48; Fejér 1829–1844. II. 88, 92.

in Tath to the Abbey of Pannonhalma, including 3 vineyards. When Adalbert made preparations to visit Rogerius, king of Sicilia, Apulia and Capua as an ambassador, he left 2 vineyards from his estates next to the lake Balaton with 2 wine-growers, 2 vineyards in Zala county, a wine-grower and his son, and the estate in Piriza with 4 servants and 4 vineyards to his wife in a testament around 1153 with permission of the king, the nobles of the country and his relatives. Adalbert, concerning his wife's usufruct, laid down the condition in his last will that she had to commemorate him with funerals and prayers and if she married again befitting her rank, the Abbey of Pannonhalma inherited all estates. In 1171, Benedek *comes* from Veszprém decided that 'Jesus will be the heir' of his acquired properties, except for the Moysa land, which was taken away from Moysa by the king as a punishment for robbery and given to Benedek for 2000 *bizantinus*. So he left his 9 vineyards and 2 wine-growers in Zamárd village, Somogy county, and 2 households with 9 vineyards to Saint Michael's church in Veszprém. Benedek from his inherited properties left the land named Keschen with a vineyard, forest and one servant to her daughter, together with 2 vineyards and 2 wine-growers in Kengerce and 2 more wine-growers in Ninn, in Somogy county. Likewise in 1172, Konrad decided that 'Jesus will be his heir' so he left his lands named Hecse and Csicsó with all their income to the Abbey of Pannonhalma. Konrád kept his 3 vineyards, which belonged to his land named Écs for the moment and left them to Saint Martin's church in case of his and his wife's death, while he left the rest of the land to his 4 grandchildren.[8]

II. Wine-Growers

Wine-growers *(vinitor)* were under the obligation of some lord and were responsible for grape-growing and wine-production. The *vinitor* based on his legal status and situation was bound to do other services for his lord.

The royal letter of 3 September 1138, summarising the donations to the church of Dömös, registered the families of bread-giver servants in Koppány, Somogy county ('*in villa Cuppan hee sunt mansiones seruorum, qui preposito et canonicis Dymisiensis ecclesie dant panem*'). Because of the damage of the letter, 67 heads of families can be identified. Based on the damage their number could not exceed 70. These families were donated to the church together with their lands, forests and vineyards ('*Hii omnes cum terra et silva et vineis dati sunt*'). The register did not mention the wine-growers at this point, only later, in connection with the people living in villages near Koppány, who were obliged to deliver 60 butts of mead annually, except for those who were working in vineyards ('*qui habitant*

8 Wenzel 1860–1874. I. 56; Erdélyi–Füssy–Sörös 1902–1908. I. 599, 602; Fejér 1829–1844. IX/7. 632; Erdélyi–Füssy–Sörös 1902–1908. I. 604.

in villis, que sunt circa Cuppan, debent dare per annum LX cubulones marcii, sed qui laborant in vineis, marcium non dant'). The royal letter only identified 6 heads of families from the 20 wine-growers of the church in Dömös, living in Csepel, Somogy county. About the rest, the letter only said that they are those servants, mentioned earlier, who are obliged to deliver bread to the church ('*quos prescripsimus in numero seruorum, qui dant panem*'). In the first part of the register about lands, Csepel village in Somogy county was in fact mentioned; because of the damage of the letter only 11 servants can be identified for sure.

In her last will lady Színes described the services of her wine-growers and left them to the Abbey of Pannonhalma with the condition that they would not deliver to the abbey wine and flour as the supply of priests, and they would not be forced to do other work than the cultivation of the estate and wine-growing.

In Joakim and his wife, Anglia's last will, confirmed by king Imre in 1199, in lack of heir all their property was left to Saint Michael's church, including vineyards and wine-growers. Joakim gave 1 plough land, 1 vineyard and 1 ploughman cultivating it with his wife and son in Kozmadomján, over the river Zala. He also left a wine-grower called Kozma with his free wife and son in Kál village to the church. He put 4 vineyards at Kozma's diposal and 30 Hungarian acres (= 0.57 hectares or 1.42 English acres) of land and 3 oxes for personal use. Moreover, he left 2 households, namely Kabó with his wife and son, and Kárász with his wife and 2 sons to the church. These households got a vineyard each for organising commemoration every year. Those who were obliged to present a memorial service *(exequias dantes, exequiales,* in Hungarian *torlók* or *dusnokok)* served the church and were designated by the testator for commemorating him annually on the anniversary of his death, of his funeral. The two families were obliged to deliver 80 buckets of wine under the obligation of presenting funeral. Joakim had *exequiales* in Lőrinte village, Modu with his two sons and Chopos with his 2 sons. They delivered wine from Kál with their own cart for the funerals and 1 fat ox, 1 one-year-old pig, 5 geese, 10 hens, 100 breads and 40 buckets of wine and salt according to need. Joakim's wife, Anglia left a meadow with the profit of 60 carts of hay, an orchard and a vineyard in B[e]rencs to the church of Veszprém. Two thirds of these were left to the church of Veszprém, including 2 wine-grower families, and the other third was left to 2 families, together with 4 oxes and 1 plough land with the obligation of presenting funeral. These 'torlós' had the same obligations as those in Lőrinte village.[9]

In his register of Pannonhalma, Albeus mentioned also 'other' obligations of the wine-growers. For example the people living in Ság, Győr county were obliged to plough for the church, while those living in Alsók village had to carry wood on their back to the court of the abbot and clean it ('*isti* […] *tenentur in totam iemem portare ligna super dorsum ad domum vel curiam abbatis et purgare*'). Albeus also added that the people of Ság have this obligation because they were

9 Ipolyi–Nagy–Véghely 1873. V. 1.

all bought and donated servants ('*quia omnes sunt servi empticii et et donati*'). 28 wine-grower families had the same obligation in Örkény. Albeus in his register sometimes indicated the status of servants, for example of those living in Nyúl village, telling that they were real servants of the church ('*isti sunt veri servi ecclesie*'). Márton bailiff's wife, Magdolna also mentioned the legal status of wine-growers in her testament, among 5 wine-growers cultivating 5 vineyards in Saján 2 were unmarried servants, and 3 were servants obliged to do services ('*quorum duo serui sunt, sine vxoribus, tres vero debitores*').

Among the sources of the 13th century, the royal letter for servants of Győr castle dated from 25 April 1240 gives more information on the legal status of wine-growers, saying that the wine-growers living in Ság, Nyúl, Tarján and Écs villages belonged to the royal people unlike the above mentioned ones.

The customary law of the 4 villages, namely that wine-growers gave two-thirds of the produced wine to the king and one third to the *comes* of Győr by family and keep the half of the rest of the wine, was changed by Béla IV, who prescribed that the households (families) should give 20 buckets of wine to the *comes* of Győr and pay 1 *pondus* (in Hungarian *nehezék* = 1/48 mark = 10 denarius) by house, collected on Saint Michael's day by the *comes buchariorum*, the officer of the king, but these wine-growers had no other obligations towards the castle. The king cancelled those debts of the people of the four villages which other people *(ceteri castrenses)* had to pay, also the bounty due to the *comes castri* and the obligation to accommodate, and also limited the obligation to accommodate the king to the strict necessities. The king regulated the jurisdiction of the *comes curialis* over the wine-growers, prohibiting him to judge over their services while acting on behalf of the *comes castri*. In these cases the *comes castri* had jurisdiction in presence of the noble servants of the castle *(jobagiones castri)*. In addition, from the beginning of the 13th century, Béla IV exempted the wine-growers from the jurisdiction of judges under the *comes parochialis*. Formerly, these royal judges had jurisdiction in counties on the order of the king. These two judges, residing in every county *(judices magelas)*, also named as *biloti* after their summoning seal, were placed under the power of the *comes parochialis*, the leader of the county, also the head of the royal castle of the county as *comes castri* by András II.[10]

As opposed to the ploughmen, wine-growers seemed to be in favoured position, though their majority was slave *(servi)* at the beginning of the 13th century. From the examined sources it is also clear that there was a distinction between servants, also verified by the existence of services other than wine-growing. Among the wine-growers the number of liberated people *(libertini)* increased from the second half of the 12th century. *Libertini* were the wine-growers who were ordered to perform services for the Abbey of Pannonhalma by the last will of lady Színes, who expressed explicitly that these wine-growers are under the

10 Endlicher 1849. 448; Béli 2008. 12.

material obligation of Saint Michael's church in Pannonhalma. Those *debitores* who were left to the Abbey of Saint Peter in Csatár by Magdolna were also *libertini* under material obligation, and so was the wine-grower Kozma, with his free wife, left by Joakim to Saint Michael's church in Veszprém.

The wine-growers of the villages in Győr county were royal people who were under the obligation to serve by agreement (*conditionarii*), and who cultivated lands, vineyards as their own with own tools, and for performing the expected service (*pro cultura sua*) they disposed freely over one part of the wine produced.

After the wine-grower *libertinus* died, his male collateral or direct line relative inherited in the vineyard. This is verified by the point 11 of the royal letter to the people of Ság, Nyúl, Tarján and Écs dated from 25 April 1240, ordering that if the devisor dies without an heir, that is, without a male in direct line, or without a male relative in the male line, the heir shall be his male relative on female line. If he does not have such a relative, but has a wife and a daughter or daughters, these inherit half of his fortune and the other half goes to the *comes*. And if the devisor has no children, one third of his fortune goes to the wife as usual and fair ('*si quis ex ipsis fratrem uterinum habens sine herede decesserit, non dicitur, sine herede decessisse, sed fater eius uterinus pro filio* [...] *successore, si vero fratrem uterinum non habuerit, medietas bonorum desedentis ad uxorem et filiam vel filias, si habuerit, legitime deuoluatur, medietatem vero comes recipiat, si* [...] *penitus prole caruerit, tervia pars bonorum decedentis sit uxorem, due partes autem ad comitem perineant, sicut iustum et consuetum est*').

Some of the obligations and rights of the people of Ság, Nyúl, Tarján and Écs villages were repeated, some in exactly in the same form, some with partly the same content in the regulation issued by Stephen V in 1270 for border guards *(specultores)*, guards living in Őrimagyarósd, Vas county. The border guards, based on their legal status, belonged to the people or servants of the castle, namely to their noble classes. From the comparison it is clear that the wine-growers of the four villages had more favourable position than the border guards in respect of financial liabilities.[11]

Vineyards were not cultivated exclusively by wine-growers. Joakim's last will shows that people with special obligations also had one or several vineyards and the delivery of wine was part of their expected services. Vineyards were cultivated also by ploughmen but they were not considered and never categorised as wine-growers with special obligations.

11 Ipolyi–Nagy–Véghely 1873. VIII. *Custodes confiniorum,* the border guards appeared first in the sources in the 11th century. The 17th chapter of the second decree of Ladislaus I ruled on the delict of bailiffs and border guards of the frontier counties, providing that those border guards who let horses, oxes be sold abroad without permission shall lose their freedom. (Hidas 1999. I.) Border guards were military people settled in frontier counties, who served under their officer, the *maior speculatorum*. The border guards and their major belonged to the royal castle. The power over them was exercised by the *comes castri*.

Vinitor did not indicate independent legal status. Although Béla IV issued a regulation regarding the situation of the wine-growers of the castle of Győr, providing them with numerous advantages, and he may have issued more regulations of similar content, the people obliged to cultivate vineyards living on royal estates were distinguished from other servants only by the specialty of their activities. This difference was less evident among the people serving ecclesiastic and secular nobles and free landowners.

By the middle of the 14th century, considering also the decrease of royal lands as a consequence of land-grants, wine-growers merged into the unifying serfdom in all types of estates and their advantages, granted to them because of their economic activity, disappeared.

III. Tenants of Vineyards

On 25 March 1240 Bertalan, bishop of Veszprém reported in a letter that on the one hand the abbots of Telk and Kána, their *comes curialis* and military servants, and on the other hand Olbranth's son Henrik, Willam, Nerbort, Henrik the bell-maker and Pertold, Germans from 'bigger' Pest (*theutonici de maiori Pest*) made their appearance in front of him, and the two abbots leased out 200 Hungarian acres of land, what they had from the donation of Janus *comes* and Apa *banus*. According to the agreement, the tenants accepted the obligation of planting grape on the 200 Hungarian acres and pay a rent of 10 Friesach marks annually on Saint Michael's day, from the third year after the day of Saint Michael (29 September) in the year of the signing of the contract, or if they do not have the money at their disposal, they pay one tenth of the rent in fired silver ('*argentum decimae combustionis*'). The tenants were obliged to pay after the land and vineyards the legal tenths to the bishop of Veszprém. On the other hand the abbots accepted the obligation of protecting the tenants and keeping them in possession. It was also agreed that if the tenants sell or put the land in pledge, those who buy it or accept the pledge will have to pay a determined price and the tenths. And if the tenants or their heirs, or those who buy the land or accept it as a pledge do not pay the price, they would be obliged to pay twice the sum as penalty, and if they do not pay this (according to the formulation of the letter they completely default) the named vineyards revert into the right of the abbeys. And if only one of the tenants defaults the annual rent, he will be obliged to put the land in pledge to the double value, or he will be deprived of the part belonging to him.[12]

In 1289 Tamás, abbot of Tihany leased out his land named Urkuta, in Esztergom, suitable for viticulture for some residents of Esztergom. Formerly, Tamás had already planted grape on this land. He leased out one of his vineyards to Csépán,

12 Fejér 1829–1844. IX/7. 657.

canon of Esztergom for 50 Vienna denarius per year. Mikó's son Albert leased from abbot Tamás another vineyard, planted in the year of the contract, for 50 denarius for 5 years. Other 11 residents of Esztergom also leased vineyards from Tamás, one each. One of the latter was obliged to pay the rent, 50 denarius from the year of the contract, 4 others from the second year of the contract, two from the third year and three were obliged to pay the 50 denarius from the fourth year, while 2 tenants had to pay 40 denarius. Four residents of Esztergom leased only half vineyards. Three of them were obliged to pay 25 denarius rent annually from the fifth year of the contract and one had to start to pay the rent in the forth year. Finally, two residents leased a vineyard together for 50 denarius rent to be paid from the forth year of the lease. Abbot Tamás agreed with his tenants that they have to pay the rent on the 8th day of Saint Michael's feast every year and if they are unwilling to fulfil this obligation on the named day, they owe to pay double of the sum. All contracts, except for one, were for indeterminate term. Considering this, abbot Tamás agreed with his tenants that they and their heirs can alienate the vineyards among themselves. In case that one of the tenants does not cultivate his land, the abbot gives a notice of leaving and takes the vineyard back.[13]

Pál and Kozma, sons of Bazini wrote a letter about their agreement with the citizens of Nagyszombat on 20 February 1295. Pál and Kozma fixed 3 pensa (120 denarius) annual rent per a vineyard for the citizens of Nagyszombat to be paid in Vienna denarius twice a year, one third on Lent and the rest at vintage. The rent of a half vineyard was 60, of the quarter was 30 denarius. Besides, the tenants had to pay on the above mentioned days 4 denarius per vineyard, 2 denarius per half and 1 denarius per quarter of a vineyard to the officer of the owners and also on the pretext of 'rent after land' ('*terragium, quod purchrecht* [Burgrecht] *dicitur*') 2 bizan 'akó' (about 12 gallon each) of wine and 2 denarius. Considering the measure of the 'akó' of Pozsony (Bratislava), which was 54,3 litres, the bizan 'akó' could have been similar, around 50 litres. Moreover, the tenants had to pay 6 denarius as customs duty after every barrel of wine taken away from the leased vineyard and the villages of the owners. The heirs of the tenants could lease the vineyards under the same conditions, and the tenant without heir could leave the vineyards to anyone if 40 denarius were paid for that.[14]

These tenants, guests (*hospites, cives*) in all three cases, members of privileged communities were free agriculturists, who could freely contract with lessors. The specialty of the contract between the two abbots and the five Germans from Pest is that the abbots leased out their lands for indeterminate term with the primary purpose of grape-planting. Therefore, until the vineyard did not bring profit, they did not ask for rent. In the contracts between Tamás, abbot of Tihany and the residents of Esztergom, which were also for indefinite term, except for the one with Mikó's

13 Wenzel 1860–1874. IV. 349.
14 Wenzel 1860–1874. XII. 571.

son, Albert, the abbot guaranteed 2, 3, 4 or 5 years of free usage, consequently, the tenants were the planters of grape, so probably they were formerly under contractual obligation to the abbot. Thus it is just possible that Bazini Kozma's sons, Pál and Kozma concluded the contract with those residents of Nagyszombat who planted the grape or participated in planting. Planting did not mean only the actual activity as an obligation of tenants but also to cover expenses. In the contract drafted by the chapter of Győr on 19 August 1311, concluded between Baráti Márton's son István in his and his brothers' name and 30 so-called 'Fenus people' tenants, the parties agreed that the tenants would fulfil their obligations of planting grape on the territories given to them on their own efforts and expenses ('*quasdam particulas terrarum suarum et eciam unam particulam terre ecclesie beate Virginis, cuius patroni existunt, in territorio ville Barath existentes, dedit et locavit quibusdam hominibus Fenus nominatis pro plantandis vineis* […]*, quod iidem homines plantabunt vineas cum laboribus et expensis eorundem*').

The tenants of Baráti Márton's sons, possibly all from the same family judging by their name, leased 1 Hungarian acre of land each for plantation of grape, except for three cases, for 6 years from the year of the conclusion of the contract they were free from the delivery of the 1 vessel (1 *cubulus* ≈ 108 litres) of 'squeezed' wine, namely 'must' per acre ('*singulos* […] *cubulos vini in alveo torcularí*'). The lands ceded for plantation were 31 Hungarian acres together. The land between the Abbey of Pannonhalma and the estate of Ulrik's son Károly was of 9 acres. It was leased by 9 tenants. 16 tenants shared the land of 15 acres named Mercse, where Frank's two sons Pál and György accepted the plantation of one acre together. The land of 7 acres of the Holy Mary church in Ménfő in the neighbourhood of Ulrik's son Károly and Pál tailor, was leased by 6 tenants, including Pál tailor. Csepán's son Pál was one of the tenants who leased 1 acre here and 1 acre from the first piece of land. Another tenant, Pál's son Péter leased 2 acres in Ménfő accepting the obligation of planting and growing grapes.[15]

The common characteristic of the rental agreements of the 13th century was that the heirs of those tenants who leased the vineyards for indefinite term could continue grape-growing and wine production under the same conditions as their predecessors. Also the tenants, like the residents of Nagyszombat, could alienate the lease by failure of heirs, could transfer the right for third parties who were probably co-tenants or male relatives from the female line considering the regulations on succession of the letter given to the people of Ság, Nyúl, Tarján and Écs.

According to the contract dated on 19 March 1311 between Baráti Márton's sons and the 30 tenants, also the heirs of the tenants could keep the lease. Moreover, the tenants had the right to alienate their vineyards, according to the conditions drafted in the contract, for those who accepted the obligations of tenants ('*easdem vineas relinquere filiis et heredibus eorum, vel aliis, quibus*

15 Radvánszky–Závodszky 1909–1922. I. 14.

voluerit, vendere poterunt iuxta modum condicionis'). As mentioned before, earlier the five Germans from Pest had the same privilege from the abbots of Kána and Telk, thus they could transfer the leased vineyard, more exactly the right to lease for purchasing price, according to the text of the letter, they could sell the vineyards or put them in pledge if those who bought the vineyard or accept the pledge would pay the annual rent and the tenths, so fulfil the conditions of the contract ('*si dicti teheutonici vineas sive terras predictas vendent alteri* [...]*, vel obligarent pignori, tam hii, qui emunt, quam hii, quibus obligarunt, ad predictam pensionem annum et decimas persolvendas teneatur*'). Similar right of disposal was given to the tenants of Tamás, abbot of Tihany, with the limitation that they could only alienate the vineyards to their co-tenants.

The right of the lease or lease of usage was passed to the tenant's heir or heirs if the parties concluded the contract for indeterminate term and there was no other stipulation. The alienation of the lease was due to the tenants, under the contract, who invested in the land with their own effort on his own expenses, for example plantation of grape. As a matter of fact, between the investor tenant and the lessor, with the investment increasing the value of the land, a special joined property came into being, shown by the fact that the tenant won a kind of right of disposal over the alienation of the right to lease or purchase. The owner of the land guaranteed this right of disposal even in the 15th century for his tenants planting grape. In 1413 in Nagymihályi Péter's two villages, Tiba and Csertész he gave the privilege of plantation of grape to the servants of himself and of those living in his relative's villages, and in return they had the right to purchase or alienate it like the residents of Kassa.[16] It should be noted that when the owners of the vineyards gave the right of disposal to their tenants, they limited it with stipulating that the transfer cannot be done without their permission.

In the 13th century the vineyards were usually leased by the members of privileged *hospes* communities. According to the contract between the lessor and the *hospes, civis* tenant, the latter has the obligation to pay rent for getting the profits of the vineyard. If the tenant did not pay the rent, he owed the double sum and if he did not pay that either, the owner summoned him to quit and took the vineyard back. The tenant had other liabilities too, in lack of other stipulation, among others, the payment of the *decima*.

On the territories under the jurisdiction of their *hospites, cives* communities, the members also planted grape if the land was suitable for this. And if they had the possibility, they not only leased, but bought vineyards outside of the borders of the city. Point 6 of the charter of the residents of Sopron in 1277 provided that those who acquire vineyards for purchase price from nobles or others and want to have the privilege of citizens have to pay 63 denarius after every vineyard. This amount – basically a kind of fee – was due to the community, the city,

16 Nagy 1887–1889. II. 116.

because the recognition of the privileges practiced under the jurisdiction of the city on lands outside of the city was the old privilege of the city, according to the letter of László IV dated from 1277 ('*volumus, quod quiqunque de ipsis civibus terras seu vineas a nobilibus vel ab aliis extraneis precio comparauerint, in libertate Sopron possidere valeant et habere, et de qualibet vinea in terra nobilum existenti nonnisi sexaginta tres denarii persoluantur, iuxta antiquam eorum libertatem*').[17]

From the 14th century the tenants planting grape were mostly serfs, who, besides paying rent, were under the obligation to pay other taxes after the profit of the vineyard and the wine produced and also to deliver some kind of gift. These contracts bore the characteristics of villein socage.

According to the letter of the chapter of Pozsony dated from 13 August 1347, 4 nobles from Bél decided to plant grape on their new land in Bél. They wished to cede their land to their future tenants with the condition of paying one fourth of the wine annually as 'hegyvám' (*tributum fori*), paying the rent and delivering 1 hen, 12 denarius, census after 10 years of free usage. Among the other burdens the rent was 12 denarius. The contract of 2 nobles from Örs, Mihály's son Miklós and Miske's son Pál and 13 people on the replantation of a vineyard on a hill named Szömörcésmál was drafted on 23 April 1350 by the chapter of Veszprém. According to this contract the tenants were obliged to pay 5 'köböl' (= butt, 25 gallons) of wine per Hungarian acre as 'hegyvám' (*tributum fori*) and to deliver gifts, namely 1 capon, 2 sweet yeast-leavened egg breads and 1 'mérő' (an old and obsolete grain measure) oats after 8 years of free usage. The owners also stipulated that if anyone takes legal action against the tenants, they would reserve their jurisdiction.[18] In the contract between the nobles of Örs in possession of tenancy in common and the 13 persons no provision dealt with the rent. The services required by the owners and the obligation itself had the nature chracteristic to serfs.

IV. Decima, cibrio, tributum montis, Obligations of Wine-Growing and Wine Production

Among the Hungarian kings Ladislaus I was the first regulating the tenth. Chapter 4 of the 1st decree (issued in Szabolcs on the occasion of the council in 1092) prescribed that the bishop collects tenths from all produce. Chapter 66 of king Kálmán's so-called 1st decree (dated around 1100) regulated the obligation of paying tenths in more details, ordering for the priests and abbots, and persons holding any offices to pay it to the church on the land of which they cultivate or

17 Fejér 1829–1844. V/2. 397.

18 Nagy 1878–1891. V. 115; Nagy–Nagy–Véghely 1886–1890. I. 498.

harvest. In the decree this is the first reference to wine tenths because the harvest evidently referred to grape harvest ('*in territorio* […] *exercent aut vindemiant*').[19]

The tenth was to be paid from the agricultural products, as the two early sources regulated. In case of grape-growing, the tenth was collected after the harvested grape, more exactly after the must. From the 13th century the churches entitled to collect the tenths demanded it not only in kind, namely in must, but in money. This is confirmed by Chapter 20 of the decree dated from 1222, the Golden Bull, providing that no one has to pay the tenth in money, but as the land produces the wine or other crop, the tenth is to be paid in kind.[20] The payment of the tenth in money was supported not only by the churches but sometimes also by the taxpayers, as it is clear from point 9 of the regulations of 1277 determining the obligations and privileges of the residents of Sopron. The king, upon the request of the residents of Sopron, decided that the tenth had to be paid in money, denarius or in must at harvest ('*decime* […] *vini, tempore vindemie per decimatores cum musto, iuxta consuetudinem approbatam, exigantur, vel denarii pro ipsis decimis vini eo modo persolvantur, sicut tempore vindemie in torculari mustum comparatur*').

The regulation of Ladislaus IV dated on 1 July 1276 gives further information about the way of paying the tenth. This regulation was issued because of the abuses committed by the residents of Esztergom, who paid the tenth in their cellars in the city ignoring the universal custom of other citizens of the country and the Hungarian churches according to which the tenth shall be paid in the tents and sheds established outside of the city. They also delivered less and in worse quality than they owed to the provost and chapter of Esztergom. Therefore, the king decided that the provost and chapter of Esztergom, according to the customary law of other churches, at harvest, when tenth was collected from the grape could install tents and sheds at appropriate places outside of the city, and there they could collect the tenth from the citizens without any trickery on either side. The citizen who would deliver the must from there to his house shall be punished with the double sum of the tenth, as the letter says: besides the tenth he has to pay the ninth, as Stephen I once decided so ('*Si quis autem ipsorum civium decima de suis vineis in ipsis foliatis et tabernaculis non soluta, vinum sive mustum, exinde natum, ad domum suam deferre* […] *presumpserit, extunc, pro pena* […] *cogatur* […] *dare novem partes capitulo* […]*, prout sanctissimus rex Stephanus olim circa hoc dicitur statuisse*').[21] Though there is no sign of the above mentioned regulation attributed to the first Hungarian king and probably he did not have a decree regulating the way of payment of the tenths, but it is certain that the collection of the tenth goes back to the beginning of his reign.

19 Hidas 1999. I. 30.
20 Hidas 1999. I. 34.
21 MS II. 56.

On 23 June 1279 Ladislaus IV in his decree regulating the collection of the tenth of the chapter of Veszprém, specified even the measuring pot and based on the rules of the church of Esztergom decided that the wine tenth shall be collected with a pot of 3 palms counted with one thumb and two fingers ('*decime vini cum cubulo trium palmorum, adiunctis pollice et duobus digitis ab omnibus exigantur*'). Based on the given parameters, the height of the pot was around 0,3 meter.[22]

Article 15 of the decree of 1290 of king Andrew III also regulated the collection of the wine tenth and following the customs it determined the order of the collection of the tenths, prescribing that the tenths shall be collected on the spot in autumn in must, and if at the time of the collection there is no new wine or must any more it shall be paid in money. So this rule of the collection of wine tenth maintained the payment of tenths in kind as general rule, but also considered the special features of the tenths.[23]

The tenth was to be paid by the owner of the land giving the produce, the vineyard, but actually it was collected from the grower under the material and personal obligation of the owner, since the owner paid the part due to the church from the crop produced by the grower. The wine-grower who cultivated the land of the owner as his own, as *condicionarius*, having share in the profit, and also the free tenant had to deliver the tenth.

Among the referred contracts from the 13th century the one concluded between the abbots of Telk and Kána and the Germans of Pest mentioned the payment of the tenth after the vineyards because that was to be paid not to the Abbey of Telk and Kána, but to the bishop of Veszprém. In the contract of the tenants of Esztergom the tenth was not mentioned because the residents of Esztergom were the taxpayers of the church of Esztergom, as were the tenants of Bazini Kozma's sons. King Stephen V's letter, issued in 1271 enumerating the rights of the bishop and the chapter of Eger, offers precise data about the churches entitled to collect wine tenth. This letter was issued on the occasion of the council in Hajóhalom and Heves at the request of Lampert, bishop of Eger, because the charters of the church of Eger were destroyed. When with the help of 25 aged noblemen the rights were justified, it was established that the bishop and the chapter of Eger collect wine tenth in Borsod, Abaúj Zemplén, Ung, Szabolcs, Külső-Szolnok, Heves, Bereg and Ugocsa counties, but in Zaránd county the wine tenth is due only to the bishopric.[24]

The *cibrio*, in Hungarian 'csöbör' meant originally a pot for measuring liquids, from the 12th century a liability for wine production. Its measure was not based on the quantity of the wine produced but on the size of the vineyard and it was to be paid from the wine, in effect it was a special kind of rent, as it is clear from

22 MS II. 113.
23 Hidas 1999. I. 44.
24 Fejér 1829–1844. V/1. 153.

the contract between Bazini Konrád's sons and the citizens of Pozsony, written down on 20 February 1295. The formers collected 2 'akó' of wine per vineyard from their tenants as rent.

The *cibrio* was a royal income which could be remitted for the owner of the vineyard by the king. This is verified by the letter of king Imre dated around 1200, which relieved the abbey of Borsmonostor of this obligation, prohibiting the *comites* of Sopron to collect the *cibrio*, considering that the land of the abbey, donated by Dénes *comes*, Florentin and Domonkos *banus* had been free from this obligation earlier; the *cibrio* had not been paid even by the donators ('*omnibus comitibus Supruniensis castri* […] *mandamus, quatinus de vineis in terra abbatis et fratrum de monte sancte Marie cibriones non recipiatis* […] *possessio quippe libera est, et sicut aliorum accepimus testimonio, possessores eiusdem predii comes videlicet Dionisius et Florentinus, ipseque Dominicus banus, qui eandem terram ecclesie et fratribus illis tradidit, hactenus non persolverunt*').[25]

The collection of *cibrio* was first regulated by king Andrew II with general force in article 21 of his decree from 1231. He prohibited the *comites castri* from taking away from the income due to the king, among others those collected as *cibrio* ('*Comites iure sui comitatus sint contenti, cetera ad regem pertinencia, scilicet cibriones, tributa, boves, et due partes castrorum, ad regis voluntatem cui volet distribuantur*').[26]

Comparing the rule of Andrew II's decree of 1232 to the point 1 of Béla IV's letter issued on 25 April 1240 for the wine-growers living in Ság, Nyúl, Tarján and Écs villages of the castle of Győr, the 1 *pondus* per house, family, collected by the officer of the king can be identified with the *cibrio* ('*in festo sancti Michaelis solvant comiti buchariorum unum pondus* […] *de una quaque mansione*').

For the end of the 13th century it became a presumptive tax, an income due to the owner, who could collect it from his debtors who cultivated vineyards, and was generally referred to as 'hegyvám' (*tributum montis, tributum montanum, jus montanum*) from the 14th century.

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Chapters from the Legal History of Leprosy

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Abstract. Initiated by the French journalist Robert Follereau, in 1954 the UNO inaugurated the Leprosy Day (Martyrs' Day), which is celebrated on the last Sunday of January every year. Although the bacterium that causes leprosy was isolated by the Norwegian scientist Gerhard Henrik Armauer Hansen in 1873 and from 1982 this disease can be cured with a special pharmaceutic complex, still 219,826 new lepers are detected worldwide every year, according to the data published in August 2010 by WHO-experts. Ancient Chinese and Hindu sources from 600 BC already refer to leprosy; to Europe the disease was imported by the army of Alexander the Great from India around 327–326 BC. Even the Old and the New Testament of the Holy Bible mention leprosy in several details. During the Middle Ages the Military and Hospitaller Order of Saint Lazarus of Jerusalem, established in the Holy Land in 72 AD, did pioneer work in nursing lepers. In the process of time the medical attendance concerning lepers was organised in special hospitals called 'leprosoria' built on river banks. Special office and even services were organised for the treatment and isolation of the people infected. Although medical science has prevailed against leprosy, and almost simultaneously even jurisprudence defended the patients' rights via legislation, still mankind can regrettably not get rid of this disease that stigmatises seriously.

Keywords: leprosy, WHO, Holy Bible, Military and Hospitaller Order of Saint Lazarus of Jerusalem, leprosorium, patients' rights

I. International Leprosy Day

The International Leprosy Day (Martyrs' Day) is traditionally held on the last Sunday of January every year. It was inaugurated by the UNO in 1954, initiated by 'the missionary of healing love', Raoul Follereau.

For the impressive experiences he gathered among lepers in Ivory Coast, the French writer and journalist, Raoul Follereau, established an international foundation that aims to aid the total and worldwide liquidation of leprosy. In 1974 he even initiated the commemoration of lepers all over the World. Follereau

is a model that confirms us in the faith that God loves even those who confess: "I do not know God, however he knows me – and that is hope".[1]

The Raoul Follereau International Union – Friends of Raoul Follereau Association seated in Paris, France, that works for the liquidation of leprosy, has consultative status in the UNESCO, maintains relations with the UNO and several medical organisations struggling against leprosy and other infectious diseases, mainly in Africa. Its annual proceedings are called "Développement et santé".

The recent significant development of medical sciences and the fact that from 1982 this disease can be cured with a special pharmaceutical preparation, may induce advanced societies to suppose that leprosy does not exist anymore and forget about it.

This is, however, not true at all. Still 219,826 new lepers are detected every year, according to the data published in August 2010 by WHO-experts. There are almost 10 million people suffering from leprosy in the world.[2]

Nowadays, when the bacillus that causes leprosy – *mycobacterium leprae* – has been isolated and it can even be cured well, it seems to be only a matter of intention to get rid of this disease once and for all. Why is it still surrounded by superstitious fears, why does it still stigmatise, and why leprosy is that very malady and not any other infectious disease?

II. Leprosy as a Disease

Leprosy proper, or *lepra tuberculosa*, in contradistinction to other skin diseases commonly designated by the Greek word *lepra* (psoriasis), is a chronic infectious disease caused by the *bacillus leprae*, characterised by the formation of growths in the skin, mucous membranes, peripheral nerves, bones, and internal viscera, producing various deformities and mutilations of the human body, and usually terminating in death. This bacillus was discovered by the Norwegian scientist Gerhard Henrik Armauer Hansen in 1873.

How leprosy originated is unknown: bad nutrition, bad hygiene, constitutional conditions (tuberculosis, alcoholism, probably heredity) seem to favour its production and propagation. The disease is immediately caused by the infection of the *bacillus leprae*, a small rod bacillus from 0.003 mm to 0.007 mm in length and 0.0005 mm in diameter, straight or slightly curved, with pointed, rounded, or club-shaped extremities, usually found in short chains or beads.

The period of incubation is 'estimated at from a few weeks to twenty and even forty years'. Like most infections, leprosy has a preliminary stage, uncertain in its character: there are loss of appetite, dyspepsia, and nausea, neuralgia, rheumatic

1 Follereau 2005. 35.
2 Barragán 2007.

and articular pains, fever, intermittent or irregular, unaccountable lassitude and anxiety. These premonitory symptoms, which may last for months, are followed by periodical eruptions. Blotches, first reddish, then brown with a white border, appear and disappear in various parts of the body; sooner or later small tumours, filled with a yellowish substance fast turning to a darker hue, rise sometimes on the joints, but oftener on the articulations of the fingers and toes. These tumours, however, are not yet specifically leprous; at the end they may leave permanent spots, pale or brown, or nodules. Then the disease, manifested by the apparition of specifically leprous formations, diverges into different varieties, according as it affects the skin and mucous membranes (cutaneous leprosy), or the nerves (anaesthetic), or both (mixed, or complete); each of these varieties, however, merges frequently into the others, and it is sometimes difficult to draw the line between cases.

Cutaneous leprosy is either macular or tubercular. The former variety is characterised by dark *(lepra maculosa nigra)* or whitish *(lepra maculosa alba)* spots, usually forming on the place of the old blotches; the eruption, at first only intermittent, turns finally into an obstinate ulcer with constant destruction of tissue; the ulceration usually begins at the joints of the fingers and toes, which drop off joint by joint, leaving a well-healed stump *(lepra mutilans)*; it is sometimes preceded by, and ordinarily attended with, anaesthesia, which, starting at the extremities, extends up the limbs, rendering them insensible to heat and cold, pain, and even touch. In the tubercular type, nodosities of leprous tissue, which may reach the size of a walnut, are formed out of the blotches. They may occur on any part of the body, but usually affect the face (forehead, eyelids, nose, lips, chin, cheeks, and ears), thickening all the features and giving them a leonine appearance *(leontiasis, satyriasis)*. Tubercular leprosy develops rapidly, and, when attacking the extremities, its destructive process has the same effect of ulceration, mutilation, and deformity as has been mentioned above. Scarcely different from the preceding in the period of invasion is the course of anaesthetic leprosy, one of the characteristic symptoms of which is the anaesthesia of the little finger, which may occur even before any lesions appear. The ulcer, at first usually localised on one finger, attacks one by one the other fingers, then the other hand; in some cases the feet are affected at the same time, in others their ulceration follows that of the hands. Neuralgic pains accompany the invasion, and a thickening of certain nerves may be observed; motor-paralysis gradually invades the face, the hands and the feet. Consequent upon this, the muscles of the face become contracted and distorted by atrophy; ectropion of the lower lids prevents the patient from shutting his eyes; the lips become flabby, and the lower one drops. The sense of touch and muscle-control being lost, the hands are unable to grasp, and the contraction affecting the muscles of the forearm produces the claw-hand. In the lower extremities analogous effects are produced, resulting first in a shuffling gait and finally in complete incapacity of motion. Then the

skin shrinks, the hair, teeth, and nails fall, and the lopping-off process of necrosis may extend to the loss of the entire hand or foot.[3]

Leprosy was not uncommon in India as far back as the 15th century BC and in Japan during the 10th century BC. Of its origin in these regions little is known, but Egypt has always been regarded as the place whence the disease was carried into the Western world. That it was well known in that country is evidenced by documents of the 16th century BC; ancient writers attribute the infection to the waters of the Nile[4] and the unsanitary diet of the people as Galen referred to. Various causes helped to spread the disease beyond Egypt. Foremost among these causes Manetho places the Hebrews, for, according to him, they were a mass of leprosy of which the Egyptians rid their land. Though this is romance, there is no doubt but at the Exodus the contamination had affected the Hebrews. From Egypt Phœnician sailors also brought leprosy into Syria and the countries with which they had commercial relations, hence the name 'Phœnician disease' given it by Hippocrates (*Prorrhetics*, II); this seems to be borne out by the fact that we find traces of it along the Ionian coasts about the 8th century BC, and in Persia towards the 5th century BC (Herodotus). The dispersion of the Jews after the Restoration (5th century) and the campaigns of the Roman armies are held responsible for the propagation of the disease in Western Europe: thus were the Roman colonies of Spain, Gaul and Britain soon infected.

III. Leprosy as a Divine Punishment

The foregoing sketch of the pathology of leprosy may serve to illustrate some of the many passages of the Bible where the disease is mentioned. From the epoch of the sojourn of the people of God in the desert down to the times of Christ, leprosy seems to have been prevalent in Palestine: not only was it in some particular cases (Numbers 12, 10; 2 Kings 5, 27; Isaiah 53, 4) looked upon as a divine punishment, but at all times the Hebrews believed it to be contagious and hereditary (2 Samuel 3, 29); hence it was considered as a cause of defilement, and involved exclusion from the community. From this idea proceeded the minute regulations concerning the diagnosis of the disease and the restoration to social and religious life of those who were cleansed. All decisions in this matter pertained to the priest, before whom should appear personally both those who were suspected of leprosy and those who claimed to be healed. If, at the first examination, the signs – coloured nodule, blister, shining spot, discolouration of the hair – were manifest, isolation was pronounced at once; but if some of the signs were wanting, a seven-days quarantine was ordered, at the term of which a new inspection had to take place;

3 The Catholic Encyclopedia 1918, webpage.
4 Lucretius, De rerum natura 1864.

should then the symptoms remain doubtful, another week's quarantine was imposed. The appearance of 'the living flesh' in connection with whitish blotches was deemed an evident sign of the infection. White formations covering the whole body are no sign of leprosy unless 'live flesh' (ulceration) accompany them; in the latter case, the patient was isolated as suspect, and if the sores, which might be only temporary pustules, should heal up, he had to appear again before the priest, who would then declare him clean. A white or reddish nodule affecting the cicatrix of an ulcer or of a burn would be regarded a doubtful sign of leprosy, and condemned the patient to a seven-days quarantine, after which, according as clearer signs appeared or not, he would be declared clean or unclean. Another suspicious case to be re-examined after a week's seclusion is that of the leprosy of the scalp, in which not leprosy proper but ringworm should most likely be recognised. In all cases of acknowledged leprous infection, the patient was to 'have his clothes hanging loose, his head bare, his mouth covered with a cloth' and he was commanded to cry out that he was defiled and unclean. As long as the disease lasted, he had to 'dwell alone without the camp' or the city.

Like the presence of leprosy, so the recovery was the object of a sentence of the priest, and the reinstatement in the community was solemnly made according to an elaborate ritual given in Leviticus (15).

In connection with leprosy proper, Leviticus speaks also of the 'leprosy of the garments'[5] and 'leprosy of the house'.[6] These kinds of leprosy, probably due to fungus formations, have nothing to do with leprosy proper, which is a specifically human disease.

IV. Knights of Saint Lazarus

In Christian times the canons of the early councils (Ancyra, 314), the regulations of the popes, the erection of leper-houses, called 'leprosoria' – special hospitals for lepers, built on river-banks – bear witness to the existence of the disease in Western Europe during the Middle Ages. The invasions of the Arabs and, later on, the Crusades greatly aggravated the scourge, which spared no station in life and attacked even royal families. Lepers were then subjected to most stringent regulations. They were excluded from the church by a funeral mass and a symbolic burial. In every important community asylums, mostly dedicated to Saint Lazarus and attended by religious orders, were erected for the unfortunate victims.

During the Middle Ages the Military and Hospitaller Order of Saint Lazarus of Jerusalem, established in the Holy Land in 72 AD, did pioneer work in nursing lepers.

5 The Holy Bible, Leviticus 13. 47–59.
6 The Holy Bible, Leviticus 14. 34–53.

The Order of Saint Lazarus, like the other orders born in the Holy Land during the Crusades, had a turbulent and honourable beginning, a brief but very useful role in exterminating leprosy in Europe during the Middle Ages, another brief naval period when it served with distinction attacking pirates in the Mediterranean during the 17th century, after which it became an honorific distinction bestowed by the King of France.

Gerard de Martigues, a Provençal, later known as the 'Blessed Gerard', founded the Order of Saint John and was director of the Hospital of Notre Dame in the Holy City sometime before the Crusaders conquered Jerusalem in 1099. At first, Gerard directed the Hospital under the authority of the Abbot of St. Mary. Later he and his companions left and created a special congregation, adopted a Rule, took vows and were accredited by the Popes. The first bull in their favor is dated February 15, 1113 and refers to 'Gerard, Founder and Governor of the Hospital at Jerusalem and his Legitimate Successors'. Godfrey de Bouillon, uncrowned 'king' of Jerusalem was so impressed with the dedication of Gerard and his companions towards the sick and the wounded that he supported and gave them funds and facilities. Some believe that the Order of Saint Lazarus took on a separate identity in 1120 when Boyand Roger, Rector of the Hospital of Jerusalem was elected Master of the Hospitallers of Saint Lazarus. Those suffering from the 'living death' of leprosy regarded Lazarus[7] as their patron saint and usually dedicated their hospices to him. The first written reference we have to Saint Lazarus as a 'knightly' order is a letter written by Henry II, King of England and Duke of Normandy, dated 1159, in which he makes a large donation to it, and refers to the 'Knights and Brethren of Saint Lazarus'.[8]

Five major orders were formed in the Holy Land in the late 11th–early 12th century: the Knights Templar, Knights Hospitaller (St. John), Knights of the Holy Sepulchre, Knights of the Hospital of St. Mary of Jerusalem (Teutonic Knights) and Knights of Saint Lazarus. Templar knights who contracted leprosy were sent to the care of the Order of Saint Lazarus. These knights trained the brethren of Saint Lazarus in the military arts and were responsible for transforming the Order into a military one. William, archbishop of Tyre, as well as other historians of the period, appeared unaware of the difference between the Orders of Saint Lazarus and Saint John and lumped them together, referring to them in their accounts only as 'Hospitallers'. By 1256 the Order of Saint Lazarus had grown considerably and its existence was recognised by Pope Alexander IV under the Rule of St. Augustine. It acquired a church, a convent and a mill in Jerusalem and property near the Mount of Olives. It built a chapel at Tiberias and two hospitals for pilgrims in Armenia. It acquired more establishments at Nablus, Ascalon and Caesarea.

In 1187 Saladin invaded and reconquered the Holy Land at the battle of Acre. The Order lost its main hospital and convent, and a contingent of knights

7 The Holy Bible, Luke 19, 9–31.

8 Algrant, webpage.

perished in the loss of Jerusalem. In 1191 Richard Coeur de Lion defeated Saladin at Azoof and recaptured Jaffa. He and Saladin made a treaty by which the sea coast from Tyre to Jaffa remained in the possession of the Crusaders, and Christians were allowed full liberty to visit the Holy Sepulchre. The Order relocated to Acre built a hospital, convent and church, and carried on with its hospitaller functions. It secured sovereign rights over a portion of the city on territory ceded to it by the Templars, and Pope Urban IV confirmed its privileges in 1264. They were mentioned as being present at the battle of Gaza in 1244 and at the final siege in 1291 when Acre fell to the greatly superior Mameluke forces. The Christian knights present in Acre perished, as did Christian hopes in the East. The green cross of Saint Lazarus disappeared from the Holy Land after two hundred years. It moved to Cyprus, then Sicily, then returned to its headquarters at Boigny near Orléans in France. The property at Boigny was given to it by King Louis VII in 1154 and erected as a barony in 1288. Many knights who had become used to the Mediterranean climate decided not to return to France and went no farther than Sicily, where they established themselves on properties given to them by the Germanic Roman Emperor Frederick von Hohenstauff. Their headquarters was in Capua, on the Italian mainland. These expatriates eventually became a completely separate branch of the Order under Papal jurisdiction when in 1489 Pope Innocent VIII fulminated a bull giving the properties of the Orders of Saint Lazarus and of the Holy Sepulchre to the Order of St. John, in effect dissolving the two. The branch of Saint Lazarus at Boigny refused to recognise the validity of the bull.

By the early 16th century the Order was moribund. Leprosy had been virtually eliminated in Europe. The Crusades were over, and in Papal eyes there was very little to justify the continued existence of Saint Lazarus. Though the knights of Saint Lazarus at Boigny continued to function as an order, as far as the Pope was concerned, the Order in France had ceased to exist. The properties of the Sicilian branch had been transferred by the Pope to the Savoyan Order of Saint Maurice, which became the Order of Saints Maurice and Lazarus. Originally created as a military order whose mission was to protect the Papal States' shoreline from the Barbary pirates, it soon became nothing more than a distinction of the House of Savoy and after the unification of Italy, a state order along with that of the Crown of Italy. Following the Second World War, King Umberto exercised from his exile in Portugal his right of *fons honorum* and proffered these Savoyan orders to many of his deserving friends.

His son, Prince Victor Emanuel, continues to award the order. On July 25, 1593, King Henry of Navarre abjured the Protestant faith in order to accede to the French throne as Henri IV. In 1608, two years before his assassination, he created with the blessing of Pope Paul V the Order of Our Lady of Mount Carmel and named Philibert, Marquis de Nerestang, Grand Master of Saint Lazarus, Grand

Master of the new order. He in effect amalgamated the two orders, which then became known as the Order of Our Lady of Mount Carmel and Saint Lazarus.

There is a good deal of controversy as to the King's reasons for founding this new order and then joining it to Saint Lazarus. Some historians see it as a move to prove to the Pope that he was now a good Catholic fulfilling the vows he took to create institutions to glorify the Church and the faith when he abjured Protestantism. Others hold that the King was being wily and his only desire was to prevent the considerable properties of a moribund Saint Lazarus from falling into the hands of the Hospitallers of Saint John and, in effect to revive Saint Lazarus (which was dissolved by Pope Innocent VIII in 1489). Since over the years he had made several efforts to have the Pope annul the 1489 bull, it is reasonable to assume that the truth lies somewhere in between. Historians of the Order claim that, although they owed allegiance to a common grand master, neither Order lost its sovereign identity.[9]

In theory the Order was military, but with the exception of a brief period in the 17th century when it manned ten naval frigates it played no military role after it left the Holy Land. It was composed of diplomats, high-level civil servants and members of the titled nobility and one hundred knights.

Nowadays the Order is active not only in France, but also in Italy, Hungary, Austria, Portugal, Scandinavia and Malta. Since 1961 due to the regulation of the Grand Master, the Order has restarted its charity work even in the English-speaking countries, such as Great Britain, the United States, Canada, Australia and New Zealand. There are some independent commands in India, Thailand and Niger, as well.

The historical continuity of the Order is traceable upon the array of the Grand Masters' succession. The Chancellery of the Order is now seated in Malta. The Order has never stopped caring about lepers and other patients suffering from skin-disease. The Order also gathers medicine and forwards it to countries where there are still lepers. It founded hospitals for lepers in Congo, Senegal, Syria, Lebanon, Israel, Malaysia and Turkey. The most famous member of the Order was probably Albert Schweitzer, who cured lepers himself in Africa.

V. Legislation in the Middle Ages in Western Europe

As a consequence of the dissemination of leprosy in Europe, legislation provided against the spread of the disease and regulations concerning the marriage of leprous persons, as well as their segregation and detention in institutions – which were more charitable and philanthropic than medical, partaking of the character of asylums or almshouses – gradually came into operation. The leper-houses,

9 Algrant, webpage.

called 'leprosoria' existed in France as early as the 7th century at Verdun, Metz, Maastricht. These institutions were a couple of lodges built on river banks. In the 8th century St. Othmar in Germany and St. Nicholas of Corbis in France founded leper-houses, and many such existed in Italy. Legislative enactments against the marriage of lepers, and providing for their segregation, were made and enforced as early as the 7th century by Rothar, King of the Lombards, and by Pepin (757) and Charlemagne (789) for the Empire of the Franks. The earliest accounts of the founding of leper-houses in Germany is in the 8th and 9th century; in Ireland, 869 (Innisfallen); England, 950; Spain, 1007 (Malaga) and 1008 (Valencia); Scotland, 1170 (Aldnestun); the Netherlands, 1147 (Ghent). The founding of these houses did not take place until the disease had spread considerably and had become a menace to the public health. It is said to have been most prevalent about the time of the Crusades, assuming epidemic proportions in some localities: in France alone, at the time of the death of Louis IX, it was computed that there were some two thousand such houses, and in all Christendom not less than nineteen thousand.[10]

These institutions were intended principally as houses to seclude the infected, and not so much as hospices for the curative treatment of the disease, which was considered then, as now, an incurable disorder. They were founded and endowed as religious establishments, and as such they were generally placed under the control and management of some abbey or monastery by a papal Bull, which appointed every leper-house to be provided with its own churchyard, chapel, and ecclesiastics.

The following extracts from the regulations of the leper-hospital at Illeford (Essex), in 1346, by Baldock, Bishop of London, illustrate this point: 'We also command that the lepers omit not attendance at their church, to hear divine service unless prevented by previous bodily infirmity, and they are to preserve silence and hear matins and mass throughout if they are able; and whilst there to be intent on devotion and prayer as far as their infirmity permit them. We advise also and command that as it was ordained of old in the said hospital every leprous brother shall every day say for the morning duty, an Our Father and Hail Mary thirteen times and for the other hours of the day […] respectively an Our Father and a Hail Mary seven times, etc. […] If a leprous brother secretly [occulte] fails in the performance of these articles let him consult the priest of the said hospital in the tribunal of penance'.[11] The Church, therefore, from a remote period has taken a most active part in promoting the well-being and care of the lepers, both spiritual and temporal.

10 Hirsch 1885. 7.
11 Dugdale 1693. passim.

VI. Leprosy in Transylvania; the Leprosy Pulpit of Sighişoara

The most leprosy cases were diagnosed in Europe form the 11th to the 14th century. It culminated in the 13th century, however, even the 18th century was not immune from leprosy. We find the first data concerning leprosy in the 15th century. Lepers diagnosed were isolated everywhere. For this purpose were the first leprosoria built in Braşov (Hungarian: Brassó) in 1413, in Codlea (Hungarian: Feketehalom) in 1413, in Bistriţa (Hungarian: Beszterce) in 1454, in Sibiu (Hungarian: Szeben) in 1474, in Cluj (Hungarian: Kolozsvár) in 1559, in Rožňava, now in Slovakia (Hungarian: Rozsnyó) in 1575 and in Sighişoara (Hungarian: Segesvár) in 1575.[12]

Sighişoara is a city in county Mureş (Hungarian: Maros) in Transylvania, Romania. Among the files of Sighişoara documents referring to a hospital can be found already from 1461. In this hospital, however, only the poor, the old, the invalid and the disabled patients were cured. In 1549 still only one hospital was mentioned, but from 1575 there were two hospitals in the city, one of them – the new one – was the leprosorium. This leprosorium consisted only of a couple of lodges built on the outside of the walls of the city, on the right bank of the river Küküllő. The lowland plain where the leprosorium was built was referred to as 'Gringraas'. One of those little lodges still existed at the beginning of the 19th century. A small chapel was also built next to the hospital, since lepers – suffering for 20–30 years from their illness – needed much of spiritual consolation. A special pulpit was walled on the outside of the church, too, because lepers were not allowed to enter the church.

The surroundings of the church is now built upon, and dwelling-houses enclose this sorrowful monument. A bridge spans over the river Küküllő leading us here. The small bridge was mentioned in the 16th century as 'pons leprosorium'.

VII. Patients' Rights – are We Overly Patient?

Alas, leprosy even in these days – such as in the ancient times and the Middle Ages – is a disease that stigmatises. Its advanced symptoms, i.e. somatic distortion and amputations still cause excommunication, even if the patient has recovered and is not infectious any more. On April 19, 1997, the representatives of leprous patients issued the 'Global Appeal 2007' (Appeal for Building Global Humanitarian Response Capability), which aims to start public fight against condemnation and discrimination.

12 Tarr, 2003. 8 ff.

Even the label of Leprosy Day – Martyrs' Day – refers to the fact that the martyrs of this day are not the lepers because they now can effectively be healed. The martyr is actually the ideal of human dignity, the equality of human and civil rights.

Human dignity originates from the unity of spirit and body, which means that the body is able to receive the elements of the material world and exist among them, while the spirit secures the basis. Body and spirit are, however, not two isolated kinds, but they exist together as a unit. This unit makes mankind prevail over the other living creatures, since we do have reason and free will in our acts. On the understanding of the fact above, we can state that this ability means the substance of human dignity.[13]

Tamás Lábady, the great Hungarian jurist of our days, defines human dignity as a quality that goes hand in hand with our life; an absolute right, which is indivisible and equal for each human creature.[14] Considering the principles seized above we have to reject not only each classic motive of discrimination (i.e. race, sex, religion), but also the discrimination because of illness.

Finally, we have to mention patients' rights as well, which emerged via the legislation of the US, in the 'Salgó-case' in 1957. In this case both legs of the patient were paralysed after an operation done properly. The paralysis was caused by a rare complication, so the basis of the judgment was not malpractice, but the absence of patient's information. From this legal action, European governments of laws started denominating patients' rights. This new approach manifests in the first 'Patient's Bill of Rights' of the Hospitals' Society of the US in 1973, and later on in 'Patients' Charter' issued by the WHO in Amsterdam in 1989.[15]

Patients' rights nowadays are constitutional rights in the better part of the world. Although with the isolation of the bacillus that causes leprosy medical science has prevailed against this disease, and almost simultaneously even jurisprudence defended the patients' rights via legislation, regrettably, mankind still can not get rid of this disease that stigmatises seriously.

The battle against leprosy appears to be a social problem transcending the aspects of both medical science and jurisprudence. In the last analysis, it seems to be the battlefield of a war that is fought for everlasting human dignity and against discrimination. I am sorry to say that mankind can still not triumph in this battle even in the 21st century.

13 Tarr 2003. 8–9.
14 Lábady 1997. 223.
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Unbeendenbarer Krieg – die Korruption[1]

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Zusammenfassung. Die Korruptionsdelikte gefährden das gesunde Funktionieren der Gesellschaften in ihren Grundzügen. Die Existenz einer korruptionsfreien Zivilisation[2] ist in der einige Jahrtausende alten Geschichte der Menschheit nicht bekannt, aber man will selbstverständlich auf den Wunsch (Traum) über das Erreichen dieses idyllischen Zustands nicht verzichten. Ein kardinales Problem der ungarischen Korruption stammt aus der Funktionsstörung des ungarischen Wirtschaftssystems.[3] Während es früher, in der Epoche des Sozialismus der Mangel[4] an Produkten und Dienstleistungen zur Korruption führte, ist die Überproduktion in unseren Tagen „die schuldige Ursache". Der Auftritt gegen die Korruption wird von dem sich in der Richtung dieser kriminellen Erscheinung zeigenden

1 Dieser Aufsatz war gefördert von dem János Bolyai Forschungsstipendium (Bolyai János Kutatási Ösztöndíj) im Rahmen des Forschungsprojekts „Die strafrechtliche und kriminologische Mittel des Kampfes gegen der Korruption (A korrupció elleni küzdelem büntetőjogi és kriminológiai eszközei).

2 Alemann 2006. 22. „Durch das ganze Alte Testament zieht sich die Unterscheidung des Guten, Gerechten, am Gemeinwohl Orientierten gegen das Böse, Verderbte, den Frevel, die Habgier, und eben das ist die Korruption. Im Zweiten Buch Mose 23,8 heißt es: »Du sollst dich nicht durch Geschenke bestechen lassen; denn Geschenke machen die Sehenden blind und verdrehen die Sache derer, die im Recht sind.« Auch im Neuen Testament spielt der Kampf Jesu gegen die Korruption eine große Rolle. Korruption ist aber keinesfalls als ein typisches Phänomen des griechisch-römischen oder christlich-jüdischen Abendlandes anzusehen. Im alten China sollte nach der Lehre von Konfuzius der Herrscher als Vaterfigur Vorbild sittlicher Vollkommenheit sein, der Staat auf moralischen Prinzipien beruhen und die Beamten diese Vorbildfunktion nach unten weitertragen."

3 „Schattenwirtschaft nimmt in korrupten Ökonomien eine zentrale Rolle ein. Denn sie begrenzt die Macht korrupter Institutionen, indem die Unternehmen eine Ausweichmöglichkeit schafft. Die größere Flexibilität der Unternehmen alleine reicht bereits aus, um die Bestechungsforderungen von Unternehmen in der offiziellen Wirtschaft abzumindern. Durch die Existenz der Schattenwirtschaft kann sogar die offizielle Wirtschaft wachsen. Es besteht also eine Komplementarität zwischen diesen beiden Sektoren." Thum 2005. 22.

4 „Der erste Schritt besteht darin, einen kausalen (!) Zusammenhang zwischen Korruption und Armut herzustellen, so dass Maßnahmen von Unternehmen gegen aktive und passive Korruption im eigenen Hause auch Armut lindern können. Dabei wollen wir unter »Armut« im folgenden das Unterschreiten eines absoluten Wohlstandsniveaus verstehen. Relative Maße wie etwa der Prozentsatz der Bevölkerung, die weniger als einen bestimmten Prozentsatz des durchschnittlich verfügbaren Einkommens erhalten, und auch die Verteilung außerhalb des »Armutsbereichs« sollen uns nicht interessieren." Beckmann–Gerrits 2008. 4.

ambivalenten Verhältnis der Menschen erschwert: Einerseits betrachten sie die Korruption als einen organischen Teil des politischen Systems,[5] andererseits erheben sie mit voller Kraft Protest gegen sie. Der Kampf gegen die Korruption scheint ein nicht vollendbarer Krieg zu sein und man muss wissen, dass sich auch der (oft) minimale Erfolg erst nach einer sehr langen Zeit zeigt, wir dürfen auf ihre Verfolgung trotzdem nicht verzichten, weil das nichts anderes, als eine stille Einlassung ins Handeln mit der Schuld wäre.

Schlüsselbegriffe: Korruption, Perceptions Index, Transparency International, Bestechlichkeit, Bestechung, Strafrecht.

Abstract. Crimes of corruption endanger the well-being of societies fundamentally. The existence of corruption-free civilisation is unknown in the history of mankind stretching back a few millennia, but naturally one cannot give up the (dream) desire of achieving this idyllic state. A principal problem of corruption in Hungary stems from the functioning disorder of the Hungarian economic system. While earlier, in the era of socialism, corruption was caused by the lack of products and services, today the 'cause to be blamed' is overproduction. The ambivalent attitude manifested by people toward this criminal phenomenon complicates action against corruption: on the one hand, they regard corruption as an organic part of the political system, on the other hand, they protest against it with all their might. The fight against corruption seems an interminable war and one should be aware that (often) even the minimal success may only be seen after a long-long time; nevertheless, one must not give up the persecution of corruption because that would be equal to a silent compromise with guilt.

Keywords: corruption, Perceptions Index, Transparency International, corruptibility, bribery, criminal law.

I. Grundrisse zur Naturkunde der Korruption

Die Korruptionsdelikte gefährden das gesunde Funktionieren der Gesellschaften in ihren Grundzügen. Die Korruption stellt eine „immergrüne" Kategorie dar, seit langen Jahrzehnten verliert sie nicht an ihrer Aktualität und es gibt nur wenige Probleme in Ungarn, die über eine größere aktualpolitische Bedeutung verfügen.

Die umfassendste Analyse der Korruption ist in der ungarischen Fachliteratur von Mariann Kránitz[6] durchgeführt worden, die im Zuge ihrer Forschungen

5 „Im Vergleich zwischen präsidentiellen und parlamentarischen Systemen erweisen sich die präsidentiellen Systeme regelmäßig als korruptionsanfälliger. Eine hierfür angebotene Erklärung lautet, dass Parteien ein stärkeres Interesse am langfristigen Aufbau einer Reputation für Vertrauenswürdigkeit besitzen als Präsidenten, die in nahezu allen präsidentiellen Systemen term-limits Regeln unterworfen sind, also für gewöhnlich nur ein Mal wieder gewählt werden können…" Manow 2003. 18.

6 Kránitz 2005.1.

festgestellt hat, dass jede Gesellschaft „den Preis der Demokratie“[7] zu zahlen hat, in diesem Preis ist etwa – unter anderem – der Zuwachs des Umgangs und der Änderung der Qualität der Kriminalität, weiterhin der eigenartige Werdegang der Korruption inbegriffen.[8]

Der Systemwechsel behob an und für sich – vermochte es auch nicht – die Korruption nicht, sondern er formte und wandelte ihren Charakter und ihre Richtung um.

Die Korruption ist nämlich mit dem wirtschaftlichen,[9] politischen[10] Milieu, in dem sie verwirklicht wird, sehr eng verbunden.[11] Und darüber hinaus: Es gibt wenige solche gesellschaftliche Phänomene, die so sehr auf dem neusten Stand sind und mit einer so schnellen Reaktionszeit[12] die in ihrem Existenzmedium stattfindenden Änderungen verfolgt wie die Korruption.[13] Diese schnelle Anpassungsfähigkeit lässt sich sowohl in den Jahren der Wende, wie auch in der darauf folgenden Epoche zu bekunden.

Bei der Erörterung der Korruption beabsichtige ich mit einem prinzipiellen Nachdruck zu betonen – und meiner Meinung nach ist das die ewige, „vergifteter-Apfel Problematik“ dieser Erscheinung –, dass sie über einen äußerst effektiven Problem lösenden und Interesse durchsetzenden Charakter verfügt, und so die diskrete Charme der Verführung sich ständig vor den Augen schwebt.

Die Existenz einer korruptionsfreien Zivilisation[14] ist in der einige Jahrtausende alten Geschichte der Menschheit nicht bekannt, aber man will selbstverständlich

7 „Befragt man die Forschungsliteratur nach den Zusammenhängen zwischen Korruption und Demokratisierung, so ergibt sich die Schwierigkeit, dass unterschiedliche Studien mit Korruption beziehungsweise Demokratisierung unterschiedliche Dinge verbinden und abweichenden Messkonzepten folgen. Differenzen und Kontroversen sollen im Folgenden erörtert werden; dies kann freilich nur in der gebotenen Kürze und für besonders relevant erscheinende Aspekte geschehen.“ Pech 2009. 7.

8 Kránitz 2006. 26–28.

9 Lamsdorff 1999. 5.

10 Rose-Ackermann 2010. 128–132; Amundsen 1999. 3–4.

11 „In Politik und Medien erscheint Korruption als jeweils skandalöser Einzelfall. Das hängt mit der lobend oder kritisch gemeinten Auffassung zusammen, der gegenwärtige Kapitalismus und dessen neoliberale Ausgestaltung stellen „die Herrschaft des Marktes“ dar. So harmlos ist die Sache jedoch keineswegs. Die „unsichtbare Hand“ des Marktes – die angeblich von selbst Angebot und Nachfrage regelt – war und ist organisch verbunden mit anderen Instrumenten, und zwar nicht nur mit der sichtbaren eingesetzt wird. Der »Markt« funktioniert nirgends nach der Lehrbuchdoktrin vom »freien Spiel der Kräfte«.“ Rügemer 2003. 235.

12 Rohwer 2009. 42.

13 Mauro 1997. 4–6.

14 „Durch das ganze Alte Testament zieht sich die Unterscheidung des Guten, Gerechten, am Gemeinwohl Orientierten gegen das Böse, Verderbte, den Frevel, die Habgier, und eben das ist die Korruption. Im Zweiten Buch Mose 23,8 heißt es: „Du sollst dich nicht durch Geschenke bestechen lassen; denn Geschenke machen die Sehenden blind und verdrehen die Sache derer, die im Recht sind.“ Auch im Neuen Testament spielt der Kampf Jesu gegen die Korruption eine große Rolle. Korruption ist aber keinesfalls als ein typisches Phänomen des griechisch-römischen oder christlich-jüdischen Abendlandes anzusehen. Im alten China sollte nach der Lehre von Konfuzius der Herrscher als Vaterfigur Vorbild sittlicher Vollkommenheit sein, der Staat auf moralischen Prinzipien beruhen und die Beamten diese Vorbildfunktion nach unten weitertragen.“ Alemann 2006. 22.

auf den Wunsch (Traum) über das Erreichen dieses idyllischen Zustands nicht verzichten. Uns stehen jedoch überzeugende Kenntnisse darüber zur Verfügung, dass in den Gemeinschaften, in denen der Kampf gegen die Korruption ernst genommen wurde, nahm die Intensität der Korruption in der Tat wesentlich ab. Man muss jedoch darüber im Klaren sein, dass die Korruption äußerst sensibel auf die Änderungen in dem Regelungsumfeld reagiert – sie benimmt sich wie das Wasser oder das Licht –, sie findet gleich einen Ausweg und aktiviert sich, und sie vermag eine ganze Lawine korrupter Akten auszulösen.

Das Problem wird noch dadurch gesteigert, dass die Korruption nie eine besondere „Achtung" vor den Landes- und Kontinentsgrenzen gezeigt hat. Diese Erscheinung war mit Sicherheit unter den ersten – wenn sie nicht die allererste war –, die sich globalisiert hat.[15]

Der Kampf gegen eine unerwünschte Erscheinung kann erfolgreich aufgenommen werden, wenn einem ihre Merkmale bekannt sind. Das Problem bezüglich der Korruption bedeutet gerade das, dass man „im Dunkeln tappt".

Im Allgemeinen werden zweierlei Methoden, die uns zu dem besseren, gründlicheren Kennen lernen, der Erscheinung näher bringen und ihren Betätigungsmechanismus verdeutlichen, angewandt: Die eine ist der von der internationalen Organisation namens Transparency International ausgearbeitete Korruption zeigender Index,[16] der sog. Corruption Perceptions Index, die anderen sind die kriminalstatistischen Daten.

Aufgrund des Perceptions Index von Transparency International,[17] mit einer Rangliste von eins bis zehn als Grundlage, waren zum Beispiel im Jahre 2010 Dänemark, Island und Singapur am wenigsten von der Korruption betroffen, und nahmen mit 9,3 Punkten in einer Punktgleichheit die ersten drei Plätze ein, während am Schluss der Liste Afghanistan mit 1,4 Punkten, Myanmar mit 1,3 Punkten, weiterhin Somalia mit 1,1 Punkten waren.[18] Ein völlig korruptionsloses Land könnte die maximale 10 Punkte erhalten, so eins hat es jedoch in der Geschichte des Corruption Perceptions Index (des Weiteren: CPI) bislang noch

15 Kránitz 2006. 5.

16 „Daher hat Transparency International mit seinem »Corruption Perceptions Index« einen Metaindex geschaffen. Um die subjektiven Einflüsse in der Ermittlung des Korruptionsausmaßes zu relativieren, werden bei diesem Index die Ergebnisse verschiedener Umfragen herangezogen und zu einem einzigen Wert aggregiert. Während für manche Länder eine Vielzahl an Quellen vorliegt und genutzt wird, sind für andere Länder nur wenige Daten erhältlich." Pohl 2004. 23.

17 „Der Corruption Perceptions Index (CPI) von Transparency International ist ein Versuch, einen validen Indikator für die Verbreitung von Korruption zu entwickeln ... Auf einer Skala von 10 („äußerst sauber") bis 0 („äußerst korrupt") werden derzeit rund 90 Länder eingeordnet. Der Index-Wert steht für „the degreeto which corruption is perceived to exist among public officials and politicians" (ebd.). Er konzentriert sich also auf im weiteren Sinne politische Korruption und basiert auf der Wahrnehmung von Korruption in einem Land durch Auskunftspersonen." Delhey 2002. 28.

18 http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (11.10.2012).

nicht gegeben. (Ungarn stand das letzte Mal mit 4,7 Punkten auf Platz 50 der Korruptionsrangliste.)

Der Corruption Perception Index jedoch, da er auf die Empfindung gegründet und deswegen subjektiv ist, ist „lediglich" dazu geeignet, dass er irgendeine Orientierung in Bezug auf die Infektion der einzelnen Länder leistet. Ein subjektiver Maßstab vermag aber eine objektive, an das Fragment der Wirtschaft,[19] der Bürokratie und die Gewalt knüpfende Erscheinung wie die Korruption nicht zu messen.

Der CPI leitet weiterhin einen „Etikettierungseffekt" ein, sie klebt eine positive oder negative Marke auf das gegebene Land. Gleichzeitig funktioniert selbst diese Etikettierung als Korruptionsgen Faktor. Auf diese Weise wird aus einem durch die Korruption nur wenig oder kaum verseuchtem Land ein noch saubereres Land, und aus dem durch die Korruption verseuchten Land ein noch mehr gefährdetes Land.

Der CPI ist ein international anerkannter Standard, aber sie produziert bei der Beurteilung der Korruptionslage eines Landes in Abrede zu stellende Ergebnisse und Folgen.[20]

Aufgrund der kriminalstatistischen Daten lässt sich jedoch die Schlussfolgerung ziehen, dass die Korruptionskriminalität als weiße Raabe in der ungarischen Kriminalität gilt.[21] Das ist offenbar eine falsche Diagnose wegen der Latenz, da wegen der ungerechtfertigten Vorteil gebenden und ihn abnehmenden Interesseneinheit kommt es nur in einer geringen Anzahl zu der Einleitung eines Strafverfahrens wegen Korruptionsdelikte.[22]

Die niedrige Anzahl der Strafprozesse[23] lässt sich damit erklären, dass die Mehrheit der Strafverfahren mit einer Privatanklage eingeleitet wird – wie es im Zuge seiner Latenzforschungen von László Korinek festgestellt wurde:[24] „Die Augen des Gesetzes sind die Staatsbürger und die Staatsbürgerinnen" – und im Falle der Korruption ist der Maß der Anklagebereitschaft äußerst gering.[25]

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19 „Die Anhänger der grundlosen Optimismus rechneten zudem überhaupt nicht mit einer entgegensetzten Tendenz: den neuen Quellen der Korruption, der Ablösung früherer Seilschaften durch neue, dem Missbrauch im Zusammenhang mit der Privatisierung und der stärkeren Verflechtung politischer und individueller wirtschaftlicher Interessen." Tóth 2006. 200.

20 Kránitz 2006. 5.

21 „Die früheren Hoffnungen, nach denen man noch Anfang der 70er Jahre ausschließlich von der Anwendung strengerer strafrechtlicher Mittel oder der Zurückdrängung der latenten, nicht greifbaren Kriminalität sowie der Verbesserung der Aufdeckungsrate ein wirksames Auftreten gegen die Korruption erwartete, haben sich nicht erfüllt." Tóth 2006. 199–200.

22 Die ungarische Polizei kann den Fall als großen Erfolg erzeigen, als sie einen Parlamentarier bei der Übernahme von 20 Millionen Forint (= 69.000 Euro) Schmiergeld auf frischer Tat ergriff. Sein Freistellungsrecht wurde von dem Parlament suspendiert, und das ungarische Gericht verurteilte ihn rechtskräftig zu 6 Jahren auszuführende Freiheitsstrafe und 9 Millionen Forint (= 31.000 Euro) Geldnebenstrafe.

23 Korinek 2010. 270.

24 Korinek 2006. 251.

25 Gál 2007. 78.

Es ist keine Übertreibung zu behaupten, dass die Indikatoren bezüglich des Umfangs der Korruptionskriminalität und ihres Anteils innerhalb der Gesamtkriminalität in Ungarn als tragikomisch bezeichnet werden können.[26] (2010 wurden 447.186 Straftaten von den ungarischen Strafverfolgungsbehörden registriert, und davon wurden lediglich 481 als Korruptionsdelikt bezeichnet.)

Falls wir unsere aus Perceptions-Index sowie der Kriminalstatistik gewonnenen Kenntnisse „addieren", können wir noch lange nicht behaupten, dass uns der völlige Umfang der Korruption bekannt ist.

Ein kardinales Problem der ungarischen Korruption stammt aus der Funktionsstörung des ungarischen Wirtschaftssystems.[27] Während es früher, in der Epoche des Sozialismus der Mangel[28] an Produkten und Dienstleistungen zur Korruption führte, ist die Überproduktion in unseren Tagen „die schuldige Ursache". Die Mehrheit der Marktakteure würde gerne eine Dienstleistung dem staatlichen und kommunalen Sektor verkaufen. In vielen Fällen wird die Entscheidung durch ein kleines, dem Bürgermeister oder einem Abgeordneten gegebenes Geschenk (z. B. ein Bonus-Urlaub) in diese oder jene Richtung erleichtert. Die beiden, die Säuberung der Marktverhältnisse bezweckenden und bis jetzt verabschiedeten Gesetze für das öffentliche Auftragswesen endeten in einer Sackgasse,[29] es mag als eine etwas kühne Bemerkung betrachtet werden, dass der in der früheren Periode angewandte, sog. „freihändiger Kauf" das öffentliche Geld auf eine viel günstigere Weise als heutzutage ausgegeben wurde.

II. Die strafrechtliche Regelung der Korruption de lege lata in Ungarn

Das Gesetz vom Jahre 1978 über das Strafgesetzbuch (des Weiteren StGB) trat am 1-en Juli 1979 in Kraft. Der ungarische Gesetzgeber fügte die Korruptionsdelikte

26 Kránitz 2006. 6.

27 „Schattenwirtschaft nimmt in korrupten Ökonomien eine zentrale Rolle ein. Denn sie begrenzt die Macht korrupter Institutionen, indem sie den Unternehmen eine Ausweichmöglichkeit schafft. Die größere Flexibilität der Unternehmen alleine reicht bereits aus, um die Bestechungsforderungen von Unternehmen in der offiziellen Wirtschaft abzumindern. Durch die Existenz der Schattenwirtschaft kann sogar die offizielle Wirtschaft wachsen. Es besteht also eine Komplementarität zwischen diesen beiden Sektoren." Thum 2005. 22.

28 „Der erste Schritt besteht darin, einen kausalen (!) Zusammenhang zwischen Korruption und Armut herzustellen, so dass Maßnahmen von Unternehmen gegen aktive und passive Korruption im eigenen Hause auch Armut lindern können. Dabei wollen wir unter »Armut« im folgenden das Unterschreiten eines absoluten Wohlstandsniveaus verstehen. Relative Maße wie etwa der Prozentsatz der Bevölkerung, die weniger als einen bestimmten Prozentsatz des durchschnittlich verfügbaren Einkommens erhalten, und auch die Verteilung außerhalb des »Armutsbereichs« sollen uns nicht interessieren." Beckmann–Gerrits 2008. 4.

29 Beck 2012. 44–49.

in Kapitel XV StGB mit dem Titel „Straftaten gegen die staatliche Verwaltung, die Rechtspflege und die Reinheit des öffentlichen Lebens" ein.[30]

Diese Delikte verdienen richtige Aufmerksamkeit,[31] es stellt ja für jede Gesellschaft eine grundlegende Frage dar, dass die amtlichen Personen, die Akteure des gesellschaftlichen-wirtschaftlichen und politischen Lebens, bzw. die legitimen leitenden Personen einer Gemeinde ihre Aufgaben ohne Voreingenommenheit versehen. Das Vertrauen der Staatsangehörigen, letztendlich ihre über das politisch-gesellschaftliche System gebildete Meinung gegenüber den verschiedenen staatlichen-kommunalen Organen werden von diesem Umstand entscheidend bestimmt.

Angesichts der hochgradigen demoralisierenden Wirkung der Korruptionsdelikte gibt es fünfzehn Paragraphen, die sich in dem Gesetz mit den Straftaten gegen die Reinheit der staatlichen Verwaltung, der Rechtspflege und des öffentlichen Lebens beschäftigen.

Die Straftaten gegen die Reinheit der staatlichen Verwaltung, der Rechtspflege und des öffentlichen Lebens sind die Folgenden:

– Bestechlichkeit und Bestechung StGB § 250-255/A;

– Versäumen der Anzeige von Bestechlichkeit und Bestechung § 255/B StGB;[32]

– Geschäfte unter Einflussmissbrauch § 256 StGB;

– Kauf von Einfluss § 256/A;

– Verfolgung einer Person, die eine Anzeige von öffentlichem Interesse tätigt § 257 StGB.

Die Straftaten gegen die Reinheit des internationalen öffentlichen Lebens sind die Folgenden:

– Bestechlichkeit und Bestechung in internationalen Beziehungen § 258/B-258/D

– Geschäfte unter Einflussmissbrauch und Kauf von Einfluss in internationalen Beziehungen § 258/E

– Versäumen der Anzeige von Bestechlichkeit und Bestechung in internationalen Beziehungen § 258/F

Der geltende Wortlaut von den zwei typischsten Straftaten gegen das öffentliche Leben – nämlich der Bestechlichkeit und Bestechung und der Geschäfte unter Einflussmissbrauch ist der Folgende:

Bestechlichkeit und Bestechung StGB § 250:

„§ 250 (1) Der Amtsträger, der in Verbindung mit seiner Tätigkeit einen unberechtigten Vorteil fordert, bzw. einen unberechtigten Vorteil oder dessen Versprechen annimmt, bzw. sich mit der den unberechtigten Vorteil fordernden

30 Erdősy–Földvári–Tóth 2007. 293.

31 Küpper 2009. 400–404.

32 „§ 255/B (1) Der Amtsträger, der in dieser Eigenschaft glaubhaft Kenntnis davon erlangt, dass eine noch nicht entlarvte Bestechlichkeit bzw. Bestechung (§§ 250 bis 255 StGB) begangen wurde, und bei der Behörde nicht so bald wie möglich Anzeige erstattet, begeht ein Vergehen und ist mit Freiheitsstrafe bis zu drei Jahren zu bestrafen. (2) Ein Angehöriger des Täters darf aufgrund von Absatz 1 nicht bestraft werden."

oder annehmenden Person einig ist, begeht ein Verbrechen und ist mit Freiheitsstrafe von einem Jahr bis zu fünf Jahren zu bestrafen. (2) Die Strafe ist eine Freiheitsstrafe von zwei Jahren bis zu acht Jahren, wenn die Straftat a) von einem Amtsträger in leitender Position oder einem Amtsträger, der zu Maßnahmen in wichtigeren Angelegenheiten befugt ist, b) von einem anderen Amtsträger in wichtigeren Angelegenheiten begangen wird. (3) Der in den Absätzen 1 und 2 festgehaltenen Unterscheidung entsprechend ist der Täter mit Freiheitsstrafe von zwei Jahren bis zu acht Jahren, bzw. von fünf Jahren bis zu zehn Jahren zu bestrafen, wenn er für den unberechtigten Vorteil seine Amtspflicht verletzt, seine Kompetenz überschreitet oder seine Stellung im Amt auf andere Weise missbraucht, bzw. wenn er die Tat in einer Bande oder gewerbsmäßig begeht."

Geschäfte unter Einflussmissbrauch § 256 StGB:

„*§ 256 (1) Wer unter Berufung darauf, dass er einen Amtsträger beeinflusst, für sich selbst oder für andere einen unberechtigten Vorteil fordert oder annimmt, begeht ein Verbrechen und ist mit Freiheitsstrafe von einem Jahr bis zu fünf Jahren zu bestrafen. (2) Die Strafe ist eine Freiheitsstrafe von zwei Jahren bis zu acht Jahren, wenn der Täter a) behauptet oder den Eindruck erweckt, dass er einen Amtsträger besticht, b) sich als Amtsträger ausgibt, c) die Straftat gewerbsmäßig begeht. (3) Wer die in Absatz 1 festgelegte Straftat a) in Verbindung mit dem Mitarbeiter bzw. Mitglied einer Wirtschaftsorganisation oder eines Vereins begeht, ist wegen eines Vergehens mit Freiheitsstrafe bis zu zwei Jahren, b) in Verbindung mit dem zu selbständigen Maßnahmen berechtigten Mitarbeiter, bzw. Mitglied einer Wirtschaftsorganisation oder eines Vereins begeht, ist wegen eines Verbrechens mit Freiheitsstrafe bis zu drei Jahren zu bestrafen. (4) Wer die in Absatz 3 festgelegte Straftat gewerbsmäßig begeht, ist wegen eines Verbrechens, entsprechend der dort vorgenommenen Differenzierung mit Freiheitsstrafe bis zu drei Jahren, bzw. von einem Jahr bis zu fünf Jahren zu bestrafen.*"

Meines Erachtens werden in dem StGB recht strenge Sanktionen (in bestimmten Fällen eine Freiheitsstrafe von bis zu 10 Jahren) gegenüber Tätern von Korruptionsdelikten vorgesehen, und auch die Praxis der richterlichen Rechtsprechung ist dadurch charakterisiert, dass sogar gegenüber dem Abnehmer von einem Schmiergeld von einigen Zehntausend Forint – eine zu vollstreckende Freiheitsstrafe – verhängt wird.

Das Argument von Mihály Tóth ist nachdenklich, nach dem die übertriebenen und lebensfremden Verbote sogar eine entgegengesetzte Wirkung auslösen dürften: Falls ein Teil der Rechtsnormen nicht einzuhalten ist, kann das rechtmäßige Verhalten auch anderswo zweifelhaft werden.[33]

33 Tóth 2010. 286.

III. Strafrechtliche Mittel im Kampf gegen die Korruption in Ungarn

Der Kampf gegen die Korruption ist eine ziemlich heikle Frage, weil die Verfolger und die Verfolgten, die Verantwortlichmacher und die Verantwortlich gemachten oft die Mitglieder derselben Machtelite sind.[34] Die Machtbesitzer bestrafen die Machtmissbraucher, und so kann die Sache leicht zu einer „Familienangelegenheit" werden, die jedoch auf die Effektivität des Kampfes gegen die Korruption auswirkt.

Der Auftritt gegen die Korruption wird von dem sich in der Richtung dieser kriminellen Erscheinung zeigenden ambivalenten Verhältnis der Menschen erschwert: Einerseits betrachten sie die Korruption als einen organischen Teil des politischen Systems,[35] andererseits erheben sie mit voller Kraft Protest gegen sie.[36]

Die Erscheinungen der Korruption, so auch ihre rechtliche Beurteilung sind nicht eindeutig. Hat derjenige Parlamentsabgeordnete eine strafrechtliche Verantwortung, der im Falle einer Investition von mehreren Milliarden Forint die Interessen seines Wahlbezirkes denen des Landes vorzöge?

Der Kampf gegen die Korruption ist kontextabhängig: Es wird von den Kräfteverhältnissen innerhalb der Elite,[37] beziehungsweise von dem von der zivilen Gesellschaft abhängigen Verhältnis der Elite bestimmt, ob die Strategien gegen die Korruption mit großer Wahrscheinlichkeit nur die öffentliche Meinung zu beruhigen beabsichtigende Scheinstrategien oder sachliche Maßnahmen sein werden.

Die den Kampf gegen die Korruption verkündenden Gesetzgeber (Politiker) brauchen außer dem System der rechtlichen Mittel auch moralische[38] Legitimierung,[39] damit ihr Antikorruptionskampf von Erfolg gekrönt werde.[40] Die eine Zerokorruption verkündenden Regierungen können jedoch leicht zu

34 Alemann 2007. 426.

35 „Im Vergleich zwischen präsidentiellen und parlamentarischen Systemen erweisen sich die präsidentiellen Systeme regelmäßig als korruptionsanfälliger. Eine hierfür angebotene Erklärung lautet, dass Parteien ein stärkeres Interesse am langfristigen Aufbau einer Reputation für Vertrauenswürdigkeit besitzen als Präsidenten, die in nahezu allen präsidentiellen Systemen term-limits Regeln unterworfen sind, also für gewöhnlich nur ein Mal wieder gewählt werden können…" Manow 2003. 18.

36 Gulyás 2004. 40.

37 Gál 2010. 307.

38 Maravić–Reichard 2003. 85.

39 „Korruption schwächt die Zufriedenheit der Mittel- und Osteuropäer mit dem neuen politischen und wirtschaftlichen System und damit auch indirekt die Befürwortung der Demokratie. Von einem normativen Gesichtspunkt aus betrachtet, läßt sich dieser Tatsache auch etwas Positives abgewinnen. Indirekt zeigt dies nämlich, daß den Bürgern Korruption in Wirtschaft und Staat nicht gleichgültig ist. Deshalb wird sich die Eindämmung von Korruption positiv auf die Systemzufriedenheit der Bürger und die Stabilität der Demokratie auswirken." Delhey 2002. 25.

40 Gulyás 2004. 41.

Gefangenen ihrer eigenen Versprechungen werden, und einen schnellen und nicht umkehrbaren Legitimierungsverlust[41] erleiden.

Falls wir die Genesis der Korruption in der moralischen Schwäche sehen, ist die Antikorruptionsstrategie mit der richtigen Kombinierung der Strafpolitik und Zahlungspolitik zu behandeln. Das kann einerseits die Einführung eines äußerst strengen Sanktionssystems wegen der Korruptionshandlungen begründen, andererseits verlangt sie die Erhöhung der Durchschnittslöhne.

Man muss es jedoch damit im Klaren sein, dass der Kampf gegen die Korruption auch ein ökonomisch rationelles Optimum hat. Falls der Staat (z. B. Singapur) seine Politiker übermäßig gut bezahlt, kann die auf solche Weise entstandene staatliche Ausgabe den dem Staat infolge der Korruption herbeigeführten Schaden übersteigen, also lohnt es sich dem Staat eher – aufgrund der Rentabilitäts- und nicht moralischen Aspekte – den Korruptionsschaden, als die den Politikern zu bezahlende Pluszuwendung zu übernehmen.

Im Zusammenhang mit der Zurückdrängung der Korruption haben die Pfleger der verschiedenen Disziplinen in Abhängigkeit von ihrem Tätigkeitsbereich und ihren Fachkenntnissen zahlreiche Gedanken vorgeschlagen.[42] Als Pfleger der Strafrechtswissenschaften formuliere ich im Folgenden einige Vorschläge[43] und Ideen:

– Zum Erfolg des Kampfes gegen die Korruption braucht man zuerst ein einfacheres Rechtssystem. Die veralteten, aus der Mode gekommenen Rechtsnormen bedürfen einer Revision, die schlechten Rechtsnormen muss man aussieben. Die Rechtsetzung soll vereinfacht werden, und soll keine lex imperfecta sein. Die Rechtsanwendung soll die Beteiligten am Wirtschaftsleben und zugleich die Staatsbürger nicht behindern (verhindern), sondern fördern.[44]

– Die ultima ratio Rolle des Strafrechts. Man darf die Rolle der strafrechtlichen Strafen bezüglich der Korruption weder unter-, noch überschätzen. Die Lösung

41 „Die öffentlichen Angestellten (Agenten) besitzen einen Informationsvorsprung gegenüber ihren öffentlichen Auftraggebern (Prinzipal). Diesen Vorteil suchen sie zu ihrem persönlichen Vorteil auszunutzen, indem sie sich über die Regeln, die ihnen von ihrem wohlwollenden Prinzipal auferlegt wurden, hinwegsetzen. Sie nehmen Bestehungsgelder von Dritten für die Vergabe von Aufträgen, Lizenzen oder Genehmigungen an. Solche Korruptionsfälle führen nicht nur zu einem Vertrauensschwund unter der Bevölkerung in die Unparteilichkeit und Verlässigkeit der öffentlichen Amtsträger.“ Lambsdorff–Beck 2009. 21.

42 Schließlich wird das globale öffentliche Gut der Korruptionskontrolle nur dann dauerhaft Bestand haben, wenn es von der Öffentlichkeit eingefordert, überwacht und gestärkt wird. Von zentraler Bedeutung für diesen Prozess sind attraktive und kaum umkehrbare Maßnahmen wie die Verbesserung der Bildung, die Stärkung der Demokratie und die Erhöhung der Transparenz und des Zugangs zu Informationen. Wo es gilt, Verbindlichkeit herzustellen und divergierende Interessen zu bündeln, ist die Zivilgesellschaft zu einem wirklichen Partner stattlicher und privater Akteure geworden.“ Eigen–Eigen-Zucchi 2003. 279.

43 „I. Verbesserung der Kenntnisstandes zur Korruption 1. Ein Berichtsystem ist einzuführen über die nationalen Regeln und Massnahmen der präventiven und repressiven Korruptionskontrolle. 2. Über die mitgeteilten Informationen sind von einer unabhängigen Expertenkommissionen Berichte zu erstellen…“ Alemann 2006. 573.

44 Kőhalmi 2010. 302.

der Probleme des gesellschaftlichen und politischen Lebens ist keine Rolle und keine Aufgabe des Strafrechts. In Ungarn hat sich nach der Wende eine große Tradition dessen ausgestaltet, dass die jeweilige Macht die Funktionsstörungen der Gesellschaft mit strafrechtlichen Mitteln zu behandeln versucht. Auf dem Gebiet der Korruption sind die Fragen grundlegend nicht strafrechtlich, sondern sie betreffen den Bereich anderer Rechtszweige.[45]

– Eine bessere Ausnützung der Möglichkeiten des Zeugenschutzes. In Korruptionssachen könnten oft solche Personen (z. B. Sekretärin, Kraftfahrer) Kronzeugen sein, die fast über alle beschwerlichen Sachen je eines Leiters (z. B. Bürgermeister, Unternehmungsdirektor) Informationen haben, und zugleich ihre existenzielle Möglichkeit eingeschränkt ist. In dem Falle, wenn die Personen, die über die Korruptionsstrafsachen Informationen geben können, eines Zeugenschutzes teilhaftig sein würden, würde sich die „Zeugenaussagebereitschaft" vermutlich erhöhen und auch die Erinnerungsfähigkeit der Zeugen würde sich erhöhen. Im Zusammenhang mit dem Zeugenschutz soll es jedoch vermerkt werden, dass das gegenwärtige Regelungssystem einer Weiterentwicklung bedarf, die vom Staat gewährleistete Einkommensebene des im gegebenen Fall einen neuen Wohnsitz und/oder eine neue Identität erhaltenden Zeugen ist nämlich nicht sehr anstrebenswert.

Der Zeugenschutz hängt oft mit der Anwendung der Absprache über Schuldigerklärung, bzw. damit zusammen, dass der Gesetzgeber bemüht ist, die Absicht- und Interesseneinheit der mit der Korruption betroffenen Parteien mit „Selbstanzeige" und mit der Versprechung der Straffreiheit [§ 255/A StGB] zu brechen.

– Die Welt der Korruptionsdelikte wird oft von der tiefen Konspiration, vom Kontakt durch die Vermittlungskette, vom „kodierten" (chiffrierten) Sprech- und Nachrichtenwechsel (z. B. „Lobbygeld", „Fettgeld", „Gebäck", „Klub der begünstigten Unternehmer", „Rosine" usw.) charakterisiert. Um die Ermittlungsergebnisse zu erhöhen, darf man die Anwendung der gedeckten Ermittlungsbeamten, bzw. der Mittel des Geheimdienstes nicht umgehen.

– Unter den sowohl theoretischen als auch praktischen Fachleuten entsteht zeitweilig der Anspruch dessen, dass sich die speziellen Normen der Beweisführung im Falle der Korruptionsdelikte auf die vermuteten Täter beziehen sollen. Die Umkehrung der sog. Beweislast als ein Novum im Strafrecht würde bedeuten, dass der Beschuldigte den legalen Ursprung des Korruptionsvermögens beweisen muss, und falls er das nicht machen kann, – z. B. es hinter dem Vermögen kein besteuertes oder vergebührtes Einkommen usw. gibt – würde es für ihn einen belastenden Umstand (belastende Tatsache) bedeuten. Meines Erachtens kann die Umkehrung der Beweislast den die staatliche Strafmacht ausübenden Organen Möglichkeit für schwere Missbräuche geben – z. B. moralische Liquidierung der politischen Gegner – und das ist eine auf jeden Fall verwerfliche Erneuerung.

45 Márki 2001. 37–38.

– Von der Seite der jeweiligen Regierungen entsteht der Vorschlag, dass eine selbstständige Behörde/ein Amt (z.B. ein Amt für den Schutz der öffentlichen Ordnung, ein Amt gegen die Korruption) für den Kampf gegen die Korruption begründet werden sollte. Meiner Meinung nach ist das eine völlig falsche und fachlich unbegründete Vorstellung, weil das nur zur Verdoppelung der Strafverfolgungsbehörden, zum Zusammenstoß der Kompetenzen, zum Informationsverlust und zum Prestigekampf (zur Rivalisierung zwischen den amtlichen Organen führen könnte.

– Der schnelle Beitritt zu den internationalen und europäischen (politischen) korruptionswidrigen Abkommen vom strafgerichtlichen Gegenstand, bzw. die Anpassung der ungarischen materiellen Rechtsnormen[46] des Strafverfahrens und der Vollstreckung an die internationalen Standards[47] (Harmonisierung).

Im Kampf gegen die Korruption kann – meines Erachtens – das Gesetz Nr. LXXXIX vom Jahre 2011 über die Änderung der einzelnen Gesetze des Verfahrens und der die Justiz betreffenden anderen Gesetze als ein eigenartiger negativer Meilenstein betrachtet werden, der das Gesetz Nr. XIX vom Jahre 1998 über das Strafverfahren änderte.

Diese Modifizierung der Rechtsnorm ist im Falle der sog. Strafsachen von hervorragender Bedeutung – so der Korruptionsverbrechen – mit dem Zweck der Beschleunigung des Verfahrens spezielle Strafrechtsnormen festgesetzt.

In der Geschichte des ungarischen Strafprozessrechts kann beinahe als ohne Beispiel genannt werden, dass die Zeitdauer der Haft in der Strafsache von hervorragender Bedeutung statt der nach den allgemeinen Normen festgestellten 72 Stunden 120 Stunden dauern kann, und in den ersten 48 Stunden der Haft darf der Staatsanwalt (!) den Kontakt des Beschuldigten und des Verteidigers verbieten.

Das – und andere im Gesetz beschriebenen – Änderungen haben ein so ernstes fachliches Befremden hervorgerufen, dass der Präsident des Obersten Gerichts der Republik Ungarn die nachträgliche Feststellung der Verfassungswidrigkeit und die Untersuchung der Kollision mit dem internationalen Vertrag bei dem Verfassungsgericht der Republik Ungarn beantragte.

Das Verfassungsgericht hat mit seinem Beschluss 115/2011 (20. 12.) AB die Einschränkung der Rechte des Beschuldigten und des Verteidigers von solchem Volumen für verfassungswidrig erklärt. Man soll einsehen, dass die mehrere Jahrhunderte lang bewährten Garantierechtsinstitutionen des verfassungsmäßigen (konstitutionellen) Strafrechts im Interesse des Erfolgs der Strafverfolgung nicht aufgegeben werden dürfen.

46 Végvári 2002. 99–100.
47 Végvári 2008. 468–469.

Zusammenfassung

Der Kampf gegen die Korruption scheint ein nicht vollendbarer Krieg zu sein und man muss wissen, dass sich auch der (oft) minimale Erfolg erst nach einer sehr langen Zeit zeigt, wir dürfen auf ihre Verfolgung trotzdem nicht verzichten, weil das nichts anderes, als eine stille Einlassung ins Handeln mit der Schuld wäre.

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Criminal Law in *Lex Baiuvariorum*[1]

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Abstract. With respect to early medieval German law, the concept of 'criminal law' should be handled cautiously as the *Volksrechte* do not contain any principle to distinguish criminal law – or public law – from private law. At the same time, early medieval folk laws basically and clearly show the traces of 'punitive' lawmaking, to be more precise, compilation. Therefore, all efforts to systematise this field of law more or less interpret past phenomena in terms of our present approach to law as a system because all that we mean by criminal law needs to be discerned and systematised from various provisions lacking any principle and theoretical demand scattered in diverse codes.
Making this clear at the outset, this paper attempts to present the criminal law of early medieval Bavarian (folk) law, *Lex Baiuvariorum* as a system. First, it will try to create the chapter of 'general provisions' discerned from the passages of the code in accordance with the present system of criminal law; after that, it will develop the chapter of 'special provisions' setting out from specific states of facts systematised in terms of the protected legal object; finally, it will investigate the system of sanctions of *Lex Baiuvariorum*.

Keywords: criminal law, *Lex Baiuvariorum*

I. 'General Provisions' of the Criminal Law

As to the purpose of criminal law, provisions – and sometimes statutory provisions in general – *Lex Baiuvariorum*[2] formulates at several points that they are to keep peace: to prevent *scandalum* and hostility among the people.[3] The *Prologue* of the

1 This paper has been supported by TÁMOP-Project Nr. 4.2.2.B-10/1-2010-0015.
2 On *Baiuvariorum* see Nótári 2012; Nótári 2009; Nótári 2010; Beyerle 1926; Merkel 1858. 533–687; Schwind 1912. 415–451; Krusch 1924. 38–163; Kottje 9–23; Eckhardt 1927; Landau 2004.
3 *Lex Baiuvariorum* 2, 3; 8, 9; 13, 3; 16, 12.

code[4] clearly states as it were to reveal the lawmaker's intention that these statutes were made to ensure that fear of the above should control human depravity, that innocence, i.e., abidance by the law, should enjoy security and that fear should prevent people not abiding by the law from engaging any conduct that injures others: '*Factae sunt autem leges, ut earum metu humana coherceretur audacia tutaque sit inter probos innocentia, et in ipsis inprobis formido supplicia et refrenetur nocendi facultas* […].'[5] All this is definitely in harmony with the locus in Tacitus's *Germania*, which states that a part of the amount to paid as penalty was due to the injured party or his relatives, another part to the king or the community, which division is not alien from *Lex Baiuvariorum*[6] – this expresses that unlawful conduct injures the entire community as well as the leader of the community and it is his responsibility to ensure the peace of the community.[7] Consequently, the code of laws defines general prevention and special prevention as the purpose of the sanction. It defines them not as an abstract principle, which cannot be required from the lawmaking technique of the period, but in relation to certain states of facts; specifically, as regards special prevention, upon increase in the punishment in case of habitual offenders violating the prohibition of work on Sunday.[8] Similarly, in certain loci of the code – just as in the canons of the Council of Ascheim[9] – the requirement of asserting justness as a basic principle of dispensation of justice appears, which is applicable where appropriate to criminal law provisions too.[10]

The traces of the institution of private revenge as the earliest sign and form of legal awareness or restitution of violation of law can be found also in *Lex Baiuvariorum*, specifically in the lawful killing of adulterers caught in the act and thieves caught in the act.[11] Yet, to certify lawfulness of blood feud – as it is ordered also by the Council of Neuching[12] – after killing a thief caught in the act at night, the neighbours should be convened to investigate the signs and attest that no assassination has been committed, in other words, that taking action on one's own authority has been strictly confined. The definition of breach of peace and peace breaker acting unlawfully on his own authority, i.e., *faidosus/feidosus,* can be found in a negative form in the code: when a person kills somebody on the orders of the king or the duke, then he will not be considered *feidosus*, and neither he, nor his children will suffer any disadvantage and will enjoy the

4 *Lex Baiuvariorum* 2, 3; 2, 11; 8, 9; 13, 3; 16, 12.
5 *Lex Baiuvariorum Prologus*.
6 E.g. *Lex Baiuvariorum* 9, 15.
7 Tacitus, *Germania* (Edd. G. Forni–F. Galli, Roma 1964.) 12. *... pars multae regi vel civitati, pars ipsi qui vindicatur vel propinquis eius exsolvitur.*
8 *Lex Baiuvariorum* 1, 14.
9 *Synodus Aschaimensis* 14. 15. 41. 42.
10 *Lex Baiuvariorum* 2, 1. 16. 17.
11 *Lex Baiuvariorum* 8, 1; 9, 9.
12 *Synodus Niuhingensis* (Ed. G. H. Pertz, *MGH Leges, III.* Hannover 1863.) 3. 11.

duke's protection.[13] It can be deduced from the above that a *feidosus* will lose the protection of the ruler as well as law and order and will become an outlaw or, to use the terminology of Roman law, *sacer.*[14]

Simultaneously, however, as by the time it was written down the *Bavarian Volksrecht* left the stage of blood feud and the *talio* principle, except for exceptionally serious offences, primarily crimes against the state and the ruler (treason), the *conpositio* system prevailed, which in certain respects 'turned criminal law into private law'. By payment of the *conpositio* the matter was 'automatically' resolved: usually it was not brought before any body of administration of justice of the State but was settled through the *pactio* between the injured party and the perpetrator.[15]

In spite of the fact that in early medieval Bavarian law one cannot find the crystal clear system of liabilities of Roman law, which worked out the concepts of malice and negligence with respect to both private and criminal law in a form not surpassed ever since,[16] it is possible to demonstrate distinction between malice/contemplation *(dolus)*, negligence *(culpa)* and causing damage accidentally *(casus)* also in *Lex Baiuvariorum*.[17] In this respect, it can be observed that the noun *praesumptio*, having the meaning recklessness and turpitude and the verb *praesumpserit* usually occurs in descriptions of states of facts where the perpetrator acted knowingly with intention to do wrong.[18] In general, the code indicates intention to do wrong, undoubted contemplation by the terms *invidia*[19] and *inimicitia*.[20] The code does not clearly distinguish negligence *(culpa)* from causing damage accidentally *(casus)*; in these cases the perpetrator shall pay the loss only.[21]

In case of certain states of facts the code ordered to punish attempt and the intention to commit the act as well, however, it is not possible to arrive at a general rule on attempt, preparation, completed crimes and results even by taking specific cases into account. For example, after the lawful killing of the adulterer/adulteress caught in the act the code devotes a separate sentence to the case when somebody has only stepped into the bed but adultery has not been carried out.[22] Similarly, the code orders to punish the person who has bought something or taken over something for safekeeping while being aware that it has been stolen.[23] Plotting

13 *Lex Baiuvariorum* 2, 8.
14 Nótári 2011. 401. f.
15 Quitzmann 1866. 216.
16 Nótári 2011. 297. ff.
17 Marcianus, D. (Ed. Th. Mommsen: *Corpus Iuris Civilis, I.* Berlin 1954.[16]) 48, 19, 11, 2. *Delinquitur aut proposito, aut impetu, aut casu…*
18 *Lex Baiuvariorum* 1, 4–6. 9; 2, 5; 4, 30; 8, 7; 9, 4. 14. 15; 10, 6; 16, 4; 17, 1; 22, 11; 23, 1.
19 *Lex Baiuvariorum* 1, 6; 2, 1; 8, 15; 9, 19; 10, 1; 12, 11; 21, 1.
20 *Lex Baiuvariorum* 10, 6; 12, 11; 14, 6.
21 *Lex Baiuvariorum* 2, 18; 9, 14; 10, 6; 12, 3.
22 *Lex Baiuvariorum* 8, 1.
23 *Lex Baiuvariorum* 9, 15. 16.

against the duke's life will result in punishment, even if the plot has not been implemented.[24] If the duke's son attempts at throwing his father off the throne, although he is fully in possession of competencies necessary for ruling, the son's punishment can be determined by the father.[25] In case of making animals jump by violence or frightening, that is, endangering animals without actually causing damage, the perpetrator was obliged to compensate for the value of the animal.[26]

Nor is it possible to discern any general rules on acts committed as joint offenders, instigation and abetment from the code of laws, however, certain provisions seem to imply different sanctioning of perpetrators and persons privy to the act. The leader of a plot against the duke was obliged to pay six hundred, the persons in unity of intent with him two hundred and abettors in lower *status* following them forty *solidi*;[27] consequently, in these cases perpetrators and persons privy to the act were in theory judged differently. However, it is a question whether the persons 'following them' should be interpreted as persons privy to the act indeed or joint offenders, and whether the amount of *conpositio* to be paid by them is lower purely due to their lower social *status*. It is worth adding, that in case of acts committed on one's own authority called *heriraita*, i.e., carried out together with forty-two or more people[28] or acts of similar kind called *heimzuht*, performed with a lower number of people[29] the code orders to punish only the originator of the crime, to be more precise, he shall pay the *conpositio* whereas the rest of the people taking part in the act shall not. Two passages of the code can be connected with instigation: the owner of a slave who sells a free man on the orders or with the agreement of his master will be judged identically as the slave committing the act,[30] and if a slave commits theft on the orders or with the agreement of his master, the slave shall be flogged two hundred times and his master shall pay *conpositio* as a thief, that is, nine times the value of the thing stolen.[31]

It should be mentioned among the rules of the quasi-general provisions of *Lex Baiuvariorum* that its system of sanctions was developed in accordance with the *status* of the injured party – depending on whether he was a noble, a free man, a liberated slave or a slave. This will be elaborated in details in the part of this paper on sanctions, however, in summary this system can be described as follows: an injured party of noble standing was entitled to twofold, a freedman to half and a slave – to be more precise, his owner – to a third *conpositio*.[32] In case of

24 *Lex Baiuvariorum* 2, 1.
25 *Lex Baiuvariorum* 2, 9.
26 *Lex Baiuvariorum* 14, 2. 3.
27 *Lex Baiuvariorum* 2, 3.
28 *Lex Baiuvariorum* 4, 23.
29 *Lex Baiuvariorum* 4, 24.
30 *Lex Baiuvariorum* 9, 5.
31 *Lex Baiuvariorum* 9, 7.
32 Quintzmann 1866. 225.

perpetrators in a free man's or slave's *status* the code sets different sanctions again; accordingly, corporeal punishment usually applied to slaves could be used against free perpetrators as punishment only for breach of military discipline and recurrent or habitual violation of the prohibition of work on Sunday.[33] Also, the amount of *conpositio* was influenced by the gender of the injured party since the amount to be paid in case of female injured parties was twofold of the amount payable in case of male injured parties; for example, a woman in free *status* who did not want to take up arms to defend herself as a man was given twofold *conpositio*,[34] and in case somebody got another person's slave to run away, he had to pay twelve *solidi* but if it was a maidservant he had to pay twenty-four *solidi*.[35] Furthermore, the amount of *conpositio* was modified by the place where the act was committed, e.g., in case of theft committed at places of primary importance, in churches, the duke's court, mills, threefold of the usual redemption, that is, twenty-sevenfold of the stolen value *(triuniungeldo)* had to be paid.[36] Crimes committed in secret, by stealth[37] or crimes committed at night – a term sometimes used as a synonym for this form of commission[38] – were judged more seriously; in other words, they were not only considered as circumstances subject to judge's discretion but were regulated in the code as aggravated cases. As it has been noted above, the code ordered to punish violation of prohibition of work on Sunday committed as a habitual offence more seriously;[39] yet, no reference can be found in *Lex Baiuvariorum* whether habitual offence was so judged in case of each crime, and if it was, what sanction it involved.

II.'Special Provisions' of the Criminal Law

The states of facts under the 'special provisions' of *Lex Baiuvariorum* can be divided in terms of protected legal objects into the following groups: crimes against life, causing danger of life, bodily injury, other acts of violence, ruining things, numerous mixed acts of violence and acts causing damage, religious crimes and treason/lese-majesty.[40]

The terminology of crimes against life is relatively diverse: accordingly, in the description of the states of facts one can meet the verbs *occidere*,[41] *interficere*,[42] *vitam*

33 *Lex Baiuvariorum* 2, 4; 1, 14.
34 *Lex Baiuvariorum* 4, 29.
35 *Lex Baiuvariorum* 13, 9.
36 *Lex Baiuvariorum* 1, 3; 2, 10–12; 9, 2.
37 *Lex Baiuvariorum* 1, 6; 9, 10. 13; 19, 2. 3.
38 *Lex Baiuvariorum* 1, 6; 9, 6. 10; 10, 1; 20, 9.
39 *Lex Baiuvariorum* 1, 14; *Synodus Niuhingensis* 15.
40 Quitzmann 1966. 227. skk.
41 *Lex Baiuvariorum* 1, 5. 8. 9. 10; 2, 2. 8; 4, 28. 30. 31; 5, 9; 6, 12; 9, 6. 10. 11; 19, 2. 3. Cf. *Synodus Niuhingensis* 3. 10; *Synodus Dingolvingensis* 9.
42 *Lex Baiuvariorum* 8, 1. 2. 9; 18, 1; 19, 4. 6. Cf. *Synodus Niuhingensis* 3.

aufferre[43] and the nominals *mors* and *mortiferum*.[44] The term *homicidium* denotes simple manslaughter, the case when someone is killed in open clash or fight[45] and the term *homicida* refers to the perpetrator who hits a pregnant woman so that she aborts.[46] The phrase *murdrida* – just as in Alemannian law[47] – denotes the conduct engaged by a person who kills somebody in secret/by stealth and throws the corpse in the river or hides it.[48] With regard to killing a pregnant woman the code stipulates that if the foetus did not live, then the perpetrator had to pay twenty *solidi conpositio* in addition to the redemption of the woman, but if the foetus lived already, then the perpetrator had to pay the *conpositio* of homicide on the foetus too.[49] This provision was borrowed from the Alemannian law, which, however, determined the child's death in eight or nine days from birth.[50] Similarly, the prohibition of making or administering drinks causing abortion comes[51] from Alemannian law.[52]

The code defines causing danger of life by the phrase *in unwan/in unuuan*, and translates it by the Latin phrase *desperatio vitae*. This state of facts includes thrusting a person from the riverbank or a bridge into water,[53] pushing someone into fire,[54] wounding someone by a poisonous arrow,[55] administering poisonous drink that does not cause the death of the injured party,[56] causing fire hazard.[57] Likewise, the category of causing danger of life includes stopping a person from fleeing from his enemies by violence to enable his enemies to catch up with and kill him, but the code provides this state of facts with an independent name: *wancstodal*.[58] Quitzmann includes *wanclugi* in the scope of the same state of facts:[59] this is an act of a person who runs away with a free woman and discharges her on the way.[60]

With respect to bodily injury, *Lex Baiuvariorum* distinguishes acts in terms of the character of the injury (for example: fracture of bone, bleeding wound, paralysis, etc.), the intention and motivation to cause injury. The bodily injury denoted by

43 *Lex Baiuvariorum* 3, 1.
44 *Lex Baiuvariorum* 2, 1; 4, 22.
45 For example *Lex Baiuvariorum* 1, 10; 2, 4; 9, 6. Cf. *Synodus Dingolvingensis* 9; *Synodus Niuhingensis* 14.
46 *Lex Baiuvariorum* 8, 19.
47 *Lex Alamannorum* 49, 1; *Pactus Alamannorum* (Ed. G. H. Pertz, *MGH Leges, III.* Hannover 1863. 2, 14. *Si quis mortuatus fuerit …*
48 *Lex Baiuvariorum* 19, 2.
49 *Lex Baiuvariorum* 8, 19.
50 *Pactus Alamannorum* 2, 31; *Lex Alamannorum* 79.
51 *Lex Alamannorum* 94, 1.
52 *Lex Baiuvariorum* 8, 18.
53 *Lex Baiuvariorum* 4, 17; 6, 11.
54 *Lex Baiuvariorum* 4, 20.
55 *Lex Baiuvariorum* 4, 21.
56 *Lex Baiuvariorum* 4, 22.
57 *Lex Baiuvariorum* 10, 4.
58 *Lex Baiuvariorum* 4, 26.
59 Quitzmann 1866. 233.
60 *Lex Baiuvariorum* 8, 17.

the phrase *pulislac* means hitting or wounding someone out of sudden passion which does not cause fracture of bone or bleeding[61] but results in a swelling (cf. *Beulenschlag*).[62] The same phrase and state of facts can be found in *Lex Alamannorum*,[63] *Edictus Rothari*[64] and *Lex Ribuaria*[65] as well. *Palcprust* as a kind of bodily injury means *fracture of bone* that is not open and has developed without injury to the skin[66] – as it is clear from *Lex Alamannorum* already.[67] Therefore, it can be presumed that both Bavarians and Alemannians defined a state of facts covering bodily injury that causes damage to the skin since this state of facts is mentioned *expressis verbis* in *Lex Visigothorum*.[68] The phrase '*cute rupta*' used in *Lex Visigothorum* can be taken as the equivalent of the phrase '*cutem fregit*' of *Lex Baiuvariorum* and the phrase '*pellem ruit*' of *Lex Alamannorum*, more specifically of the negation of the state of facts in the latter two codes.[69] *Plotruns* as a form of bodily injury means bleeding wound, flow of blood,[70] however, the wound does not result in paralysis.[71] The injury caused was categorised in terms of whether its healing/cure required any medical intervention. That is how *adarcrati* as a form of bodily injury was determined: injury to the artery where bleeding can be stopped only by burning.[72] The word *adarcrati* literally means *venae percussio*, that is, wounding the artery.[73] They took into account whether the bone became visible due to injury to the head. The phrase *kepolsceni* means injury where the skull bone becomes visible.[74] Likewise, it influenced judgment of the act whether the arm was stabbed under or above the elbow, just as among the Alemannians[75] – as a matter of fact, the latter case resulted in twofold *conpositio* since it significantly influenced the capacity to fight and work of the injured party.[76] Similarly, twofold

61 *Lex Baiuvariorum* 4, 1*;* 5, 1. *Si quis eum percusserit, quod 'pulislac' vocant, cum medio solido conponat.*

62 Brunner 1906. II. 636; Kralik 1913. 98.

63 *Lex Alamannorum* 67, 1. *Si quis alium per iram percusserit, quod Alamanni 'pulislac' vocant …*

64 *Edictus Rothari* 125. *Si quis servum alienum rusticanum percusserit pro unam feritam id est pulslahi …*

65 *Lex Ribuaria* (Ed. R. Sohm: *Lex Ribuaria et Lex Francorum Chamavorum ex Monumentis germaniae Historiae recusae.* Hannover 1883.) 19. *Si ingenuus servum ictu percusserit ut sanguis non exeat usque ternos colpos, quod nos dicimus bunislege …*

66 *Lex Baiuvariorum* 4, 4.

67 *Lex Alamannorum* 67. *Si enim brachium fregerit, ita ut pellem non rumpit, quod Alamanni balcbrust ante cubitum dicunt …*

68 *Lex Visigothorum* 6, 4, 1. *Si quis ingenuum quolibet hictu in capite percusserit, pro libore det solidos V, pro cute rupta solidos X, pro plaga usque ad ossum solidos XX, pro osso fracto solidos C.*

69 Kralik 1913. 94. sk.

70 *Lex Baiuvariorum* 4, 2.

71 Brunner 1906. II. 636; Kralik 1913. 98.

72 *Lex Baiuvariorum* 4, 4.

73 Kralik 1913. 48.

74 *Lex Baiuvariorum* 4, 4.

75 *Pactus Alamannorum* 2, 5. *Si quis brachium super cubito transpunxerit…*; 2, 6. *Si subter cubitum fuerit…*

76 *Lex Baiuvariorum* 4, 12.

redemption had to be paid by a person who knocked out another person's *marchzand* compared to any other tooth – in *Lex Baiuvariorum marchzand* means molar,[77] just as in *Lex Alamannorum*.[78] The code devotes a separate passage to regulating the case where a person knocks out a bone from the skull or the humerus above the elbow,[79] however, contrary to the Alemannian statute, the Bavarian code does not mention the method used to determine the seriousness of the injury – the piece of bone had to be thrown from a distance of the width of the road against a shield and the thud heard would govern.[80] Bodily injury causing lasting injuries was, as a matter of fact, sanctioned by a higher *conpositio* in the code, even if it did not influence the capacity to work and fight and 'only' spoiled the appearance of the injured party. For example, *lidiscart* was considered such a state of facts, which meant cutting off the ears as mutilation distorting outward appearance[81] – *Lex Alamannorum* uses the phrase *orscardi* with regard to cutting off one of the ears.[82] Bodily injury causing injury to internal parts is denoted by the phrase *hrevawunt(i)* in the code.[83] This phrase can be related to the loci of *Pactus Alamannorum* where the word *revo* is used in the text, beside *latus*, that is, *side,* in the meaning of *internal part* in the sense of *injury to internal organs (placatus in revo)*,[84] which cannot mean mortal injury as the amount to be paid for it should be much higher. If bodily injury caused paralysis, then the *conpositio* amounted to half of the redemption to be paid for mutilation of the given part of the body.[85] The following two exceptions to bodily injury causing lasting damage or disability are interesting provisions. Causing lasting wound to the lower lip and lower eyelid resulting in – to use the words of the code – the injured party being unable to retain saliva or tears brought about twofold redemption compared to causing wound to the upper lip or upper eyelid; there are good chances that this twofold *conpositio* was meant to recompense for 'aesthetic shortcomings'.[86] The code calls the form of lameness caused by bodily injury when the relevant person's foot touches dew, i.e., he drags his foot, *taudregil*.[87] This phrase in the same sense and with the same explanation can be found in *Lex Alamannorum* too.[88] (It should be noted that the

77 *Lex Baiuvariorum* 4, 16; 6, 10.
78 *Lex Alamannorum* 67, 22. *Si autem dentem absciderit, quod marczan dicunt Alamanni…*
79 *Lex Baiuvariorum* 4, 5.
80 *Pactus Alamannorum* 1, 3. *Si quis alteri caput frangit ut ossus de capite ipsius tollatur et supra via in acuto sonet…*
81 *Lex Baiuvariorum* 4, 14.
82 *Lex Almannorum* 58. *Si enim medietatem auri absciderit quod scardi alamanni dicunt…*
83 *Lex Baiuvariorum* 4, 6; 5, 5; 6, 5.
84 *Pactus Alamannorum* 11. *Si quis in revo placatus fuerit aut in latus…*; 12. *Si quis in latus alium transpunxerit, sic ut in revo placatus non sit…*
85 *Lex Baiuvariorum* 4, 9; 5, 6; 6, 6; 4, 10; 4, 14.; 6, 11.
86 *Lex Baiuvariorum* 4, 15.
87 *Lex Baiuvariorum* 4, 27; 6, 11.
88 *Lex Alamannorum* 57, 62. *Si quis autem alium in genuculo placaverit, ita ut claudus permaneat, ut pes eius ros tangat, quod Alamanni taudragil dicunt…*

German technical terms of *Lex Baiuvariorum* at certain points are not in want of linguistic humour either: consider, for example, the folk language phrases for the valueless 'grass destroyer' horse, *angargnago*,[89] or the lame man 'walking on dew', *taudregil*.[90]) It can be explained definitely by military reasons that the code sets one-third higher *conpositio* on a finger paralysed by wounding than on a finger cut off, most probably because a paralysed finger (which cannot be bended) represented greater impediment in handling arms than lack of a finger.[91]

The code sanctions acts of violence in several passages. Attacks, acts of violence not causing bodily injury are summed up by the phrase *infanc* in the code.[92] As technical term – just as in the Alemannian statute[93] – *infanc* can be taken as the equivalent of the state of facts *manus inicere in aliquem*, i.e., *raising one's hand against somebody*, *attacking somebody*.[94] The phrase *hraopant*, just as in *Pactus Alamannorum*,[95] as a state of facts denotes the act of taking captive by violence but without binding,[96] and as a compound it means *binding roughly, by violence (rohes Binden)*.[97] Similarly, the following acts constitute independent states of facts implementing infringement of the freedom of a free man: binding by a rope,[98] throwing off a horse[99] – also defined in Alemannian law[100] – and shutting up the injured party by violence in his own house.[101] Acts of violence include acts against women's chastity and honour, specifically, lecherous touching of a free maiden or woman, i.e., *horcrift*,[102] lifting a woman's dress over the knee with immoral intention, i.e., *himilzorunga*[103] (this state of facts is defined also by the Alemannian statute – without referring to the German legal technical term[104]) and *walfvurf*, tearing off the kerchief[105] – this state of facts can be related to the state of facts of the Alemannian code that sanctions the act of stopping a woman

89 *Lex Baiuvariorum* 14, 12.
90 *Lex Baiuvariorum* 7, 24.
91 *Lex Baiuvariorum* 4, 11.
92 *Lex Baiuvariorum* 4, 3; 5, 3; 6, 3.
93 *Pactus Alamannorum* 3, 25. *Si quis alterius infanc minolledis fuerit III solidos conponat.*; 3, 26. *Si medianus fuerit VI solidos conponat.*; 3, 27. *Si meliorissimus fuerit XII solidos conponat.*
94 Kralik 1913. 90.
95 *Pactus Alamannorum* 3, 5. *Si quis altero per mano aut per drappo natus priserit solidos VI conponat.*
96 *Lex Baiuvariorum* 4, 8.
97 Kralik 1913. 85.
98 *Lex Baiuvariorum* 4, 7; 5, 5.
99 *Lex Baiuvariorum* 4, 7.
100 *Pactus Alamannorum* 3, 28; *Lex Alamannorum* 68.
101 *Lex Baiuvariorum* 4, 25.
102 *Lex Baiuvariorum* 8, 3.
103 *Lex Baiuvariorum* 8, 4.
104 *Lex Alamannorum* 58, 2. *Et si eius vestimenta levaverit usque ad genucla…*; 58, 3. *Et si eam denudaverit genitalia eius appareant vel posteriora…*
105 *Lex Baiuvariorum* 8, 5. *Si autem discriminalia eiecerit de capite, quod 'walcvurf' dicunt, vel virgini libidinose crimes de capite extraxerit, cum XII solidis conponat.*

with hostile intention and tearing off her kerchief.[106] (It should be added that the code does not order to punish a woman who voluntarily yields to seduction, only the 'seducer' contacting her was obliged to pay *conpositio*.[107] Concerning sex morals, the only provisions that definitely appear in the code primarily apply to prohibition of incestuous marriage[108] as well as to the obligatory nature of the redemption to be paid in case of adultery committed with a married free woman and liberated woman or maidservant, or to the husband's right to kill the adulteress caught in the act, with impunity.[109]) The provisions of the code sanctioning abduction of virgins, widows[110] and another person's fiancée[111] can also be ranked among acts of violence infringing sex morals.

Lex Baiuvariorum distinguishes numerous crimes against property. Robbery, i.e., misappropriation of another person's property by violence is defined by the verbs *rapere*, *furari*, *despoliare*, *aufferre* in the code, and as the *lex* does not contain any clear, specific technical term with regard to this crime, in all of the cases where the code does not refer to the fact that misappropriation was carried out by stealth, in secret or at night, the relevant act must have been robbery.[112] Similarly, it was considered robbery when a person intruded into a house on fire – pretending to bring help – and took something from there.[113] The German technical term for robbery used by the code is the compound *waluraupa*, i.e., the phrase denoting robbing the clothes of a killed man – that is, as a literal equivalent[114] of *vestitus occisorum*.[115] In *Lex Baiuvariorum* a peculiar state of facts is constituted by kidnapping and selling a free man, which brought about restitution of the free *status* of the injured party and payment of forty *solidi conpositio*, and if it was not possible to restore the *status*, it resulted in the perpetrator becoming a slave.[116] Likewise, persuading another person's slave to run away or assisting in the act can be ranked among crimes against property since it represented wilful impairment of the owner's assets.[117] It is a material element of the state of facts of theft that the act is committed by stealth, however, the code stresses this in

106 *Lex Alamannorum* 58, 1. *Si quis libera femina vadit in itinere suo … et obviaviat eam aliquis per raptum denudat eius caput…*
107 Cf. *Lex Baiuvariorum* 8, 8.
108 Cf. *Lex Baiuvariorum* 7, 1–3.
109 Cf. *Lex Baiuvariorum* 8, 1. 10. 11. 12.
110 *Lex Baiuvariorum* 8, 6. 7. Cf. *Lex Alamannorum* 54, 1. *Si quis filiam alterius non sponsatam acciperit sibi ad uxorem…*
111 *Lex Baiuvariorum* 8, 16; Cf. *Lex Alamannorum* 51, 1. *Si quis liber uxorem alterius contra legem tulerit…*; 52. *Si quis sponsatam alterius contra legem acciperit…*
112 Quitzmann 1866. 245.
113 *Lex Baiuvariorum* 15, 3.
114 Kralik 1913. 124.
115 *Lex Baiuvariorum* 19, 4.
116 *Lex Baiuvariorum* 15, 3. 9, 4. 5; 16, 5. Cf. *Synodus Niuhingensis* 3.
117 *Lex Baiuvariorum* 1, 4; 13, 9.

several passages by using the phrases *occulte* or *nocte*.[118] The code underlines the fact of committing the act at night as *differentia specifica*[119] with regard to hiding stolen things too. As a matter of fact, the *conpositio* was influenced by the value of the stolen thing, however, the code defines 'higher value' – most probably as a result of inconsistent *redactio* – in ten *solidi* in one locus[120] and twelve *solidi* in another locus.[121] Instead of the usual ninefold *conpositio* of theft *(niungeldo),*[122] the redemption for theft committed at places of primary importance, in churches, the duke's court, mills and forges amounted to twenty-sevenfold of the value of the stolen thing *(triuniungeldo).*[123] In case of thieves caught in the act, as a matter of fact, there was no need for special demonstration of evidence, and the thief could be killed with impunity.[124] In case of theft, house search was allowed, however, if the person carrying out the house search found nothing or the house search was carried out in the absence of the owner of the house, then six and three *solidi conpositio* placed on the threshold had to be paid respectively.[125] Accordingly, if the owner of the house refused or prevented house search, he was obliged to pay forty *solidi*.[126] Receivers of stolen goods were judged identically as thieves; so, they also had to pay *niungeldo*.[127] Among crimes against property the code devotes several passages to ruining a house and certain components of the house,[128] destroying the fence[129] and ploughing up another person's land and stealing his produce.[130] At several points the code refers to stealing wood that can be used as building material,[131] cutting down fruit-trees,[132] moving border marks and thereby impairing the territory of an estate[133] and killing animals (for example, domestic animals, hunting dogs and birds used for hunting as well as songbirds).[134]

With respect to form of commission and the protected legal object, a kind of 'mixed group of crimes' is composed by arson, poisoning wells/contaminating wells, breach of domicile, blocking public roads and false accusation.[135] Regarding

118 *Lex Baiuvariorum* 9, 6. 10; 20, 9.
119 *Lex Baiuvariorum* 2, 12.
120 *Lex Baiuvariorum* 9, 9.
121 *Lex Baiuvariorum* 9, 3.
122 *Lex Baiuvariorum* 9, 1.
123 *Lex Baiuvariorum* 1, 3; 2, 12; 9, 2.
124 *Lex Baiuvariorum* 9, 6. 9.
125 *Lex Baiuvariorum* 9, 2. 4.
126 *Lex Baiuvariorum* 9, 5. 7.
127 *Lex Baiuvariorum* 9, 8.
128 *Lex Baiuvariorum* 10, 5–15.
129 *Lex Baiuvariorum* 10, 6. 7.
130 *Lex Baiuvariorum* 13, 6. 7.
131 *Lex Baiuvariorum* 12, 11. 12; 22, 1.
132 *Lex Baiuvariorum* 22, 2–8.
133 *Lex Baiuvariorum* 12, 1–8.
134 *Lex Baiuvariorum* 1, 3; 9, 2. 9–11; 13, 4. 5; 14; 15, 1; 20; 21; 22, 8–10; 23.
135 Quitzmann 1866. 252.

arson it can be clearly established that *Lex Baiuvariorum* does not include this crime in the scope of causing public danger but interprets it as *delictum* against private property only since, for example, it sanctions setting agricultural buildings on fire by three *solidi* redemption.[136] If people stayed inside a residential property set on fire, then *conpositio* had to be paid in accordance with their *status* in case of their death or in case they were compelled to escape from danger undressed (as arson was considered an act of *inunwan*, i.e., *in desperationem vitae*[137]) – twofold amount for women. As a matter of fact, destroyed furnishings had to be paid for and collapsed roof had to be redeemed by forty *solidi*.[138] If arson committed wilfully or by stealth (at night) affected the property of the Church, the procedure was as follows: if the perpetrator was a slave, he was punished to lose his eyes and hands, and his owner was obliged to pay for the burnt property; if the perpetrator was a free man, he had to pay the *conpositio* of the persons who were wounded or died in accordance with the above; furthermore, he had to pay forty *solidi* for the act itself and twenty-four *solidi* for the building falling in.[139] The code sanctioned breach of domicile, that is, forcible entry to another person's house or courtyard by payment of three or six *solidi* redemption respectively.[140] With regard to blocking public roads unlawfully, it is necessary to refer to the sign set up at given points for strategic purposes called *wiffa*, usually a handful of straw tied to a stick, placed to block a road or protect or enlarge an area of pasture. Removing or transferring this sign brought about one *solidus conpositio*.[141] Due to the character of the road, depending on whether it was a duke's road or a road used by neighbours for going over or driving animals or simply a path, the *conpositio* amounted to twelve, six or three *solidi* respectively.[142] In case of contaminating or poisoning wells, on the one hand, the perpetrator was obliged to restore the original condition of the well, and, on the other hand, the *lex* distinguished wells used by private persons only from wells used by the entire community.[143] In case of false accusation – just as among the Alemannians[144] – the accuser suffered the same punishment that was imposed on the crime the accuser falsely charged another person with.[145] If the charge was a capital offence, the accuser had to prove his truth by tournament of doom in case he had no witnesses, so that nobody could cause the ruin of another person out of sheer

136 *Lex Baiuvariorum* 10, 2. 3.
137 *Lex Baiuvariorum* 10, 4.
138 *Lex Baiuvariorum* 10, 1.
139 *Lex Baiuvariorum* 1, 6.
140 *Lex Baiuvariorum* 11, 1. 2.
141 *Lex Baiuvariorum* 10, 18.
142 *Lex Baiuvariorum* 10, 19. 20. 21.
143 *Lex Baiuvariorum* 10, 22. 23.
144 *Lex Alamannorum* 44, 1.
145 *Lex Baiuvariorum* 9, 19.

hostility or hatred – as the code emphatically states.[146] A person falsely accused or intending to protect himself against false testimony could clear himself by tournament of doom as well.[147] It is worth adding that the person who accused a slave falsely and the slave died while being tortured had to give two slaves to the owner, or became a slave himself if he could not accomplish that.[148]

The scope of crimes offending the order of religion includes failure to sanctify Sunday, incest, desecration of graves or dead persons and magic. The code – in harmony with several Council regulations and ecclesiastical rules[149] – clearly forbids performance of serf's works, for example, ploughing, harvesting, haymaking and carriage-driving. The person who commits the act again in spite of punishment shall be flogged fifty times, in case of habitual offence half of his property shall be confiscated and in case of continued unwillingness to engage law abiding conduct he shall be deprived of his freedom. Similarly, the code forbids travelling on Sunday.[150] The impact of Christianity is shown again – as indicated by the regulations of the Penitentials[151] – by prohibition of incestuous marriage, which is highly emphasised in family law (within private law).[152] The Bavarian code of laws devotes a separate *titulus* to issues related to the dead and graves. *Murdrida* as state of facts denotes the crime when somebody commits homicide by stealth and throws the corpse into the river or hides it so that it could not be found and the dead person could not be provided with proper burial.[153] A person who wounds a corpse by an arrow to drive away birds settling on it shall pay twelve *solidi*.[154] Also, the burial of the dead person is served by the rule stating that an alien burier shall receive reward.[155] The *lex* unambiguously takes a stand against pagan burial

146 *Lex Baiuvariorum* 2, 1.
147 *Lex Baiuvariorum* 17, 6.
148 *Lex Baiuvariorum* 9, 20.
149 On sanctifying Sunday see *Concilium Aurelianense III.* (*a.* 538) (Ed. F. Maassen, MGH Concilia aevi Merovingici, I. Hannover 1893.) 28; *Concilium Cabilonense* (*a.* 644) 18; *Concilium Rotomagense* (*a.* 650) (Ed. J. D. Mansi: *Sacrorum conciliorum nova amplissima collectio, X.* Firenze 1764.) 15; *Concilium Narbonense* (*a.* 589) (Ed. J. D. Mansi: *Sacrorum conciliorum nova amplissima collectio, IX.* Firenze 1763.) 4; *Concilium Matisconense II.* (*a.* 585) (Ed. F. Maassen: *MGH Concilia aevi Merovingici, I.* Hannover 1893.) 1; Isidorus, *De ecclesiasticis officiis* (Ed. C. M. Lawson: *Corpus Christianorum, Series Latina, 113.* Turnhout 1989.) 1, 24, 1; *Poenitentiale Gregorii* (Ed. J.-P. Migne: *Patrologia Latina, 89.* Paris 1830.) 54; *Poenitentiale Cummeani* (Hrsg. J. Zettinger, Archiv für katholisches Kirchenrecht 82. 1902.) 12, 3. 4; *Decretio Childeberti II.* (*a.* 596) (Ed. G. H. Pertz: *MGH Leges, I.* Hannover 1835.) 14. On the prohibition of travelling on Sundays see *Poenitentiale Pseudotheodori* (Hrsg. F. W. H. Wasserschleben: *Die Bußordnungen der Abendländischen Kirche nebst einer rechtsgeschichtlichen Einleitnung.* Halle 1851.) 23, 8.
150 *Lex Baiuvariorum* 1, 14.
151 Cf. *Poenitentiale Gregorii* 78; *Poenitentiale Theodori Cantuariensis* (Ed. J.-P. Migne: *Patrologia Latina, 99.* Paris 1851.) 2, 12, 25; *Poenitentiale Cummeani* 3, 24.
152 *Lex Baiuvariorum* 7, 1. 2. 3.
153 *Lex Baiuvariorum* 19, 2.
154 *Lex Baiuvariorum* 19, 5.
155 *Lex Baiuvariorum* 19, 7.

rituals as well.[156] As penalty of robbing a grave – if the deceased was a man in free *status* – the code stipulates payment of forty *solidi*, and with respect to the valuables taken from there, it prescribes the *conpositio* imposed on theft.[157] *Lex Baiuvariorum* contains two stipulations that sanction taking the boat of another person.[158] It cannot be ruled out that this provision has to do with the ancient pagan burial form where the dead person and his valuables were put on a boat and were set afloat. Furthermore, the order of religion was offended by magic art and exercise of pagan burial rituals, which continued to exist in Bavaria as implied by Council regulations.[159] *Lex Baiuvariorum* mentions *expressis verbis* the state of facts of *maleficae artes* in relation to practising magic on another person's burial.[160] It arises as a question whether the state of facts of *suezcholi* or *sweizcholi*,[161] i.e., when somebody frightens another person's animals so that they sweat blood,[162] refer to some kind of pagan or magical crime – as it is made probable by Quitzmann[163] – more specifically, whether this state of facts is connected with the belief that witches ride animals at night, but a fully reassuring answer can be hardly given to this question. Two regulations of the Council of Neuching refers to two further forms and sanctioning of magical intervention: taking stolen things across the border in stealth,[164] and reducing the champion's force by magic art in tournament of doom.[165]

The most important crime against the state (treason) is calling the enemy into the country, where punishment depended on the duke's deliberation and – just as in the Alemannian code[166] – could involve death penalty.[167] The code orders to punish the act of stirring up discord in the army *(scandalum)* – in harmony with the Alemannian *lex*[168] – in such form that it places imposition of the sanction in the duke's hands, which could be capital punishment or exile, as the case may be.[169] Similarly, crimes

156 *Lex Baiuvariorum* 19, 8.
157 *Lex Baiuvariorum* 19, 1.
158 *Lex Baiuvariorum* 9, 9. 10.
159 *Synodus Niuhingensis* 6. *...verbis, quibus ex vetusta consuetudiue paganorum idiolatriam reperimus...*
160 *Lex Baiuvariorum* 13, 8.
161 *Lex Baiuvariorum* 14, 15.
162 Kralik 1913. 107.
163 Quitzmann 1866. 261.
164 *Synodus Niuhingensis* 2. *...extra finem Baiowariorum venundare vel machinis diabolicis extraminare insidiis tentit...*
165 *Synodus Niuhingensis* 4. *De pugna duorum quod uuehadinc voratur, ut prius insortiantur quam parati sunt, ne forte carminibus vel maschinis diabolicis vel magicis artibus insidiantur.*
166 *Lex Alamannorum* 25. *Si quis homo aliqis gentem extraneam infra provinciam intraverit, ubi praedam vastet hostiliter vel somos incendat et de hoc convictus fuerit, aut vitam perdam aut exilio exeat…*
167 *Lex Baiuvariorum* 1, 10; 2, 1.
168 *Lex Alamannorum* 16. *Si quis in exercitu litem commiserit ita ut cum clamore populus concurrat cum armis et ibi pugna orta fucrit infra propria oste et alitiui ibi occissi fuerint ... aut vitam perdat aut in exilium exeat…*
169 *Lex Baiuvariorum* 2, 4.

against the State included plotting against the duke's life,[170] which – at the duke's discretion – brought about death penalty and confiscation of one's total property.[171] It is considered a crime against the State, which can be committed by the duke's sons only – either from their own resolution or on other persons' advice as noted in the Alemannian statute too[172] – when an attempt is made at throwing their father off the throne although he is still capable of ruling: in this case, in addition to optionally being exiled by their father, they lost their right of succession to the throne.[173] In case of *carmulum*, i.e., instigating revolt against the duke[174] – which state of facts is also defined by the Alemannian code but typically without the Bavarian technical term[175] – the code clearly differentiates the punishment imposed on the leader of the revolt from the punishment of his followers and persons in lower *status* participating in the event. In the light of all that, it is absolutely clear that killing the duke brought about death penalty and confiscation of one's total property.[176]

III. System of Punishment of Lex Baiuvariorum

The provisions of *Lex Baiuvariorum* on sanctions are in harmony with the description of Tacitus's *Germania*, which states that the punishments of specific crimes – both in their extent and character – are somehow connected with and reflect the acts committed.[177] As an example, Tacitus notes that traitors and deserters were hanged, while cowards, people unfit for fighting and fornicators were drowned in a swamp; in case of crimes of lower weight, however, private revenge could be redeemed by handing over a determined number of horses or other animals, for even in case of homicide the option to discharge this kind of *conpositio* was offered, a part of which was given to the king or the State, another part to the family of the injured party in order to ward off private fight disintegrating the community.[178] Apart from

170 Cf. *Lex Alamannorum* 24. *Si quis homo in mortem ducis consiliatus fuerit et inde convictus fuerit aut vitam perdat aut se redimat…*

171 *Lex Baiuvariorum* 2, 1.

172 *Lex Alamannorum* 35. *Si quis dux habet filium contumacem et malum qui rebellare conetur contra ipsum per stultitiam suam vel per consilium malorum hominum et volunt dissipare provinciam et hosliliter surrexit contra ipsum patrem suum…*

173 *Lex Baiuvariorum* 2, 9.

174 *Lex Baiuvariorum* 2, 3.

175 *Lex Alamannorum* 34. *Si quis praesumpserit infra provinca hostiliter res ducis invadere et ipsas tollere et post haec convictus fuerit…*

176 *Lex Baiuvariorum* 2, 2.

177 Quitzmann 1866. 265.

178 Tacitus, *Germania* 12. *Proditores et transfugas arboribus suspendunt, ignavos et imbelles et corpore infames caeno ac palude, iniecta insuper crate, mergunt.*; 21. *Suscipere tam inimicitias seu patris seu propinqui quam amicitias necesse est; nec implacabiles durant: luitur enim etiam homicidium certo armentorum ac pecorum numero recipitque satisfactionem universa domus, utiliter in publicum, quia periculosiores sunt inimicitiae iuxta libertatem.*

three capital offences, the Bavarian *lex* prescribed payment of *conpositio* or, in the event that the perpetrator's property seemed to be insufficient for discharging this penalty, threatened with debt slavery;[179] in other words, it completely superseded the application of the *talio* principle. *Conpositio* as technical term conveyed the meaning of *reparation, restitution, settlement*, that is, it appeared as a penalty functioning as compensation for damage, which – as noted by Grimm – could provide a solution more favourable for both the perpetrator and the injured party: the perpetrator could evade danger threatening his life and honour by handing over his property or a part of it, and the injured party could count on pecuniary growth to recompense him for the injury that could be taken for granted, instead of private revenge uncertain both in its occurrence and outcome.

The code does not contain too many statements of principle as to the purpose of the criminal law sanction being fundamentally to keep peace of the province; yet, the reference to indicate this aim of the lawmaker was most probably borrowed from the Alemannian statute.[180] In terms of keeping peace as a legal objective, the *lex* clearly underlines the importance of the so-called *Heerfrieden*, because anybody who robbed and looted during campaigns or stole things from military equipment was punished not by the usual sanction generally applied in 'civil criminal law' but by one which could represent *conpositio* of a higher amount (ranging from two hundred to forty *solidi*) and, in certain cases, death penalty as well.[181] To keep the so-called *Heimfrieden*, i.e., inviolability of private persons' dwelling, the code contains several provisions that guarantee the security of the house/yard/garden and sanction violation of security.[182] Similarly, forcible entry to an abode without the permit of the owner of the property and armed attack against residential property are judged as aggravated crime.[183] Furthermore, the code determined four places which, having become the scene of committing crime, brought about threefold of the usual sanction (e.g., in case of theft, twenty-sevenfold instead of ninefold *conpositio*) – such scenes were churches, the king's/duke's court, (armour)smiths' forges and mills, which were considered places of primary importance in terms of economic and military affairs.[184] It needs to be added, however, that there are several contradictions between statutory provisions on keeping the peace and property of the Church; e.g., whereas one locus stipulated payment of twofold redemption,[185] another one prescribed single

179 *Lex Baiuvariorum* 2, 1.

180 *Lex Baiuvariorum* 2, 14. Cf. *Lex Alamannorum* 36. *Ut conventus secundum consuetudinem antiquam fiat in omne centina … de VII in VII noctis quando pax parva est in provincia; quando autem melior post XIV noctis.*

181 *Lex Baiuvariorum* 2, 4. 5. 6.

182 *Lex Baiuvariorum* 10, 6–17; 22, 1.

183 *Lex Baiuvariorum* 11, 1–4; 4, 23–25.

184 *Lex Baiuvariorum* 9, 2.

185 *Lex Baiuvariorum* 1, 2. 5.

or ninefold redemption for harming the property of the Church;[186] likewise, while one locus imposed twenty-sevenfold redemption on theft from churches every time, the other one restricted the scope of this stipulation to misappropriation of liturgical accessories only.[187]

The right of church asylum *(asylum):* the opportunity for perpetrators of crimes to find shelter and protection in church or at other sacred places, as a matter of fact, did not mean that the person concerned could completely avoid the punitive power of the State. By entering the church he could escape from the direct consequences of possible blood feud only, however, thereby he surrendered to the punitive power of the Church.[188] To keep peace of the duke's court, a regulation set forth that a person who stirred up discord or private fight in it was more severely punished than in case of committing these acts at other places, and the *conpositio* for theft committed in the duke's court amounted to threefold of the usual redemption, and the person who concealed any assets found there was automatically considered a thief.[189] It can be deduced from the option to redeem the above listed crimes ranked into the category of breach of peace by *conpositio* that early medieval German laws – including Bavarian folk law – were inclined to re-rank them from the category of public crimes to the category of private crimes even in case of offences more seriously threatening the order of society.[190] This process can be identified most clearly, perhaps, in the highly disputed loci of *Lex Salica*: whereas one locus classified a person who committed robbing of a grave or desecration of a grave *wargus*, i.e., an outlaw,[191] the other locus regulating the same state of facts imposed 'merely' payment of two hundred *solidi*.[192]

In the code, peace money is most often called *fretum*, *publicum*, *dominicum*, *fiscus* or simply penalty to be paid to the duke, by which the perpetrator as it were redeems or purchases *(redimere)* the peace violated by him by committing the crime and – as the case may be – his life or body by which he would suffer punishment in theory in accordance with the *talio* principle.[193] The rate of peace money depended on the seriousness of the act committed – or, in more general terms, the seriousness of breach of peace implemented by the crime: the two fundamental amounts used in *Lex Baiuvariorum* (although the code, of course, does not apply these penalty amounts absolutely consistently) are twelve and forty *solidi*, and, accordingly, most of the *conpositio* amounts are produced as

186 *Lex Baiuvariorum* 1, 4. 6.
187 *Lex Baiuvariorum* 9, 2; 1, 3.
188 *Lex Baiuvariorum* 1, 7.
189 *Lex Baiuvariorum* 2, 10. 11. 12; 9, 2.
190 Quitzmann 1866. 272.
191 *Lex Salica* 55, 4. (A, C)
192 *Lex Salica* 14, 10. (A2)
193 *Lex Baiuvariorum* 2, 6. 11.

the multiple of these numbers.[194] As a matter of fact, both in the Alemannian and Bavarian code one can find peace money amounts different from the above; e.g., sixty *solidi* as a higher[195] and fifteen *solidi* as a lower peace money amount.[196] The usual technical terms for payment of peace money are as follows: *duci pro freto*, *pro freto in publico*, *ad partem fisci pro fredo*.[197] Higher peace money – usually forty *solidi* in accordance with the Bavarian code and sixty *solidi* in the Alemannian statute – had to be paid, among others, in case of uprising against the duke,[198] robbery committed in the army, breach of peace committed in the duke's court or the venue of administration of justice, arson, homicide, kidnapping a free man, abduction of women, receiving stolen goods, certain cases of breach of domicile,[199] *heriraita*[200] and breach of ecclesiastical peace.[201] In case of the above listed crimes, payment of higher peace money was stipulated by the Bavarian *lex* as well – as it has been noted – by other German statutes, however, in several cases when the rest of German laws require the perpetrator to pay peace money in lower amount only, the Bavarian code stipulates the higher amount. This category includes the act of refusing house search in case of suspicion of theft; holding things in pledge unlawfully, refusing mandatory appearance before the law and contempt of the duke's seal as a habitual offender as well as bribing the judge proceeding in a case.[202] Accordingly, the sanction of payment of lower peace money (amounting to twelve *solidi*) in *Lex Baiuvariorum* is restricted to a narrower scope of acts: e.g., abetment in theft, concealing things found in the duke's court and contempt of the duke's seal not as a habitual offender.[203] In exceptional cases, extraordinary peace money, which cannot be adjusted to the above-mentioned calculation system, was imposed; e.g., in case of killing the bishop: payment of gold equal to the weight of the victim's statue cast in lead; however, the code does not define it unambiguously whether it was due to the king or the people or the Church or the relatives of the bishop killed.[204]

194 Quitzmann 1866. 274.
195 Cf. *Lex Alamannorum* 55. 34; *Lex Baiuvariorum* 1, 7, 2, 3.
196 *Lex Baiuvariorum* 2, 12. 13. 14; *Lex Alamannorum* 28, 1; 36, 4.
197 *Lex Baiuvariorum* 13, 2. Cf. Quitzmann 1866. 275.
198 *Lex Baiuvariorum* 2, 3. *Lex Alamannorum* 34.
199 *Lex Baiuvariorum* 2, 5. 6. 10. 11; 1, 6; 10, 10; 1, 9. Cf. *Synodus Niuhingensis* 10. *Lex Baiuvariorum* 7, 4; 9, 4; 8, 6. 7. Cf. 2. 7.
200 *Lex Baiuvariorum* 4, 23.
201 *Lex Baiuvariorum* 1, 7. *Lex Alamannorum* 4.
202 *Lex Baiuvarioum* 11, 5. 7; 13, 2. 3. Cf. *Synodus Niuhingensis* 15. 2, 17; *Lex Alamannorum* 41, 2. *Si autem per cupiditatem … contra legem iudicaverit, cognoscat se delinquisse et XII solidos sit culpabilis.*
203 *Lex Baiuvarioum* 9, 11. 12. 15. 16; 2, 13. Cf. *Lex Alamannorum* 28, 1. *Si quis sigillum ducis neglexerit … XII solidos conponat.*; *Lex Baiuvariorum* 2, 14. Cf. *Lex Alamannorum* 36, 4. *Si quis liber ad ipsum placitum neglexerit venire … XII solidos sit culpabilis qualis persona sit aut vassus ducis aut comitis.*
204 *Lex Baiuvariorum* 1, 10.

In a narrower sense, *conpositio* is nothing else than *Wergeld* due to the injured party or his relatives, which, as a matter of fact, includes acknowledgement of the commission of the crime – while the original function of peace money was to redeem breach of peace of the community and the blood feud of the clan of the injured party, the purpose of *conpositio* was to redress legal injury suffered by an individual, the injured party, and redeem the blood feud of the narrower family.[205] In harmony with the above outlined process of re-ranking specific states of facts from the category of public crimes into the scope of private crimes it can be established that among the punishments of *Lex Baiuvariorum conpositio* (i.e., *werageldo*) appears with greater weight than peace money *(fredum)* and the function of the latter is mostly restricted to aggravated acts and acts more seriously violating public order and social integration.[206] Quite often, it is possible to meet the solution where *conpositio* and peace money appear side by side, as sanctions incurred simultaneously for the same crime. An example for that is the sanction of cutting down fruit-trees of another person: twenty *solidi* were due to the treasury and twenty to the owner, furthermore, the perpetrator was obliged to plant new trees to replace those cut down and pay one *solidus* redemption *per annum* for each tree cut down until the new trees became productive.[207]

The amounts of *Wergeld* also changed in accordance with differentiation of social *status*. For it can be made probable from the provision of the code which determines *Wergeld* of a free man in twice eighty[208] *solidi* that originally the amount of this *Wergeld* was no more than eighty solidus since otherwise it would have been senseless for the code to use twofold multiplier for a given amount.[209] On the other hand, Quitzmann presumes that the eighty *solidi* are already the product of doubling since originally merely two statuses were taken into account among the Germans: of free men and of slaves.[210] Accordingly, originally the amount of *conpositio* to be paid to the owner on killing a slave might have been twenty *solidi*. As a result of the process that freedmen appeared beside free men and slaves as a social class, the code was compelled to raise the *Wergeld* of free men to eighty *solidi* in order to express the difference between persons belonging to these three social statuses. In view of the fact that the code defined the *Wergeld* of freedmen in forty *solidi*, there are good chances that rising of the *Wergeld* of free men to one hundred and sixty *solidi* can be attributed to the fact that as a *status* higher than that of common freedmen but lower than that of free men the category of persons manumitted by the king or the Church appeared,

205 Quitzmann 1866. 277.
206 *Lex Baiuvariorum* 2, 3. 10–14. 17; 10, 19–23; *Synodus Niuhingensis* 2. 7.
207 *Lex Baiuvariorum* 22, 1.
208 *Lex Baiuvariorum* 4, 28. Cf. *Lex Alamannorum* 69, 1. *Si quis autem liber liberum occiderit, conponat eum bis LXXX solidos…*
209 Quitzmann 1866. 283.
210 Quitzmann 1866. 281.

whose *Wergeld* was determined now in eighty *solidi*.[211] However, the aforesaid one hundred and sixty *solidi* were again multiplied in case of groups of certain people; consequently, twofold *Wergeld* was due to monks and servants of the Church up to subdeacons, members of the five great noble clans and women.[212] *Wergeld* of priests was defined in threefold of that of free men,[213] members of the duke's family were entitled to fourfold, the duke himself to sixfold *Wergeld*.[214] Compensation of loss that can be measured in terms of property can be ranked into the category of penalty functioning as compensation for damage as well.[215] Single amount of the loss caused had to be reimbursed, for example, in case of arson, theft committed in the army, assisting a thief by covering the act, damage caused to animals and fruit-trees.[216] Twofold compensation was stipulated in case of harming the property of the Church, passing unlawful judgment in bad faith, unlawful sale of another person's property and plundering killed persons.[217] In case of robbery fourfold,[218] in case of theft ninefold[219] and in case of theft committed at the above listed places provided with special protection twenty-sevenfold compensation obligation was imposed on the perpetrator.[220]

Actual punishments, which are not penalties functioning as compensation for damage, appear in *Lex Baiuvariorum* consistently in case of more serious crimes that cannot be redeemed by pecuniary compensation, composition. In the code, punishment is usually called *poena*[221] or *disciplina*,[222] and with regard to the purpose of punishment at a particular locus the code formulates – although it lacks any kind of legal principle of either private or criminal law or abstraction – that the function of punishment is special prevention, in other words, to hinder the perpetrator from committing further crimes.[223] In several cases, the code emphatically leaves it to the duke's or the ruler's discretion to impose the punishment or set the rate of sanction.[224] The major types of punishment

211 *Synodus Niuhingensis* 10. *Liberi, qui ad ecclesiam dimissi sunt vel per cartam acceperunt libertatem a rege si occidantur LXXX sol. conponantur ecclesiae vel filiis eorum…* Cf. *Lex Alamannorum* 17. *Liberi qui per cartam firmitatem acceperint, si occidantur LXXX sol. conponantur ad ecclesiam vel ad filius eius.*
212 *Lex Baiuvariorum* 1, 8; 3, 1; 1, 11; 4, 29. Cf. *Lex Alamannorum* 49, 2; 58, 3; 59, 3.
213 *Lex Baiuvariorum* 1, 9; 2, 3. 4.
214 *Lex Baiuvariorum* 3, 1. 2.
215 Quitzmann 1866. 288.
216 *Lex Baiuvariorum* 1, 4; 10, 1; 2, 5. 6; 9, 15. 16; 14, 3. 5. 6; 15, 1; 20, 1. 3. 4. 7; 21, 1–3; 12, 11; 22, 1. 3. 4. 6.
217 *Lex Baiuvariorum* 1, 2. 5. 6; 2, 17; 16, 1. 4. 5; 19, 4. 1, 2. 5. 6. 2, 17. 16, 1. 4. 5. 19, 4.
218 *Lex Baiuvariorum* 15, 3.
219 *Lex Baiuvariorum* 1, 3; 9, 11. 15, 5; 19, 1. 4. 10; 21, 5.
220 *Lex Baiuvariorum* 1, 3; 2, 12; 9, 2.
221 *Lex Baiuvariorum* 2, 4; 8, 9.
222 *Lex Baiuvariorum* 2, 4; 9, 5.
223 *Lex Baiuvariorum* 1, 6.
224 *Lex Baiuvariorum* 2, 1. 4. 5; 9, 5.

in the Bavarian code are capital punishment, maiming of the body or corporeal punishment, penalties implying reduction of honour, depriving somebody of his freedom, exile and confiscation of property.

Regarding capital punishment, the code only determines the scope of crimes where this sanction was to be or could be imposed, however, contains no reference to the form of execution.[225] The *lex* ordered to punish high treason, uprising and desertion *(harisliz)* by death penalty.[226] It should be underlined that in case of several offences the slave perpetrator was punished by death penalty, while a perpetrator in free *status* could redeem himself from this punishment by the amount of *conpositio* determined in the code.[227] It is worth pointing at the inconsistency in regulating the sanction of killing the duke: while one locus (presumably the older one) determines nine hundred *solidi Wergeld* in case of killing the duke,[228] the other passage (most probably inserted in the text as a result of a later editor's activity) orders to punish killing of the duke by death.[229] The same duality can be noticed in the Alemannian statute as well. While one passage judges the duke identically as the bishop with respect to *Wergeld*,[230] the later revision attributed to King Chlothar threatens with death penalty in case of killing the duke.[231] With regard to the form of execution of capital punishment, Quitzmann lists the following forms: hanging,[232] beheading,[233] burying alive, burning at the stake – imposed on the perpetrator in case of knowingly causing fire hazard in adherence to the *talio* principle – and breaking on the wheel.[234]

The code defines two major types of corporeal punishment: maiming of the body and flogging of the perpetrator. As a general rule, corporeal punishment was applied against slaves, however, in exceptional cases this sanction could be imposed on persons in free *status*. In several cases, regarding imposition of corporeal punishment it was left to the judge's discretion whether he applied it or not, and if he did, to what extent.[235] Maiming of the body and blinding was applied against slaves primarily in case of arson and kidnapping/abduction.[236]

225 *Lex Baiuvariorum* 2, 1. 2. 4. 5; 9, 9.
226 *Lex Baiuvariorum* 2, 1. 2. 4.
227 *Lex Baiuvariorum* 2, 5; 8, 2. 9.
228 *Lex Baiuvariorum* 3, 2.
229 *Lex Baiuvariorum* 2, 2.
230 *Lex Alamannorum* 11, 2.
231 *Lex Alamannorum* 24.
232 Cf. *Vita Corbiniani* 7; *Annales Fuldenses* (Ed. F. Kurze: *MGH Scriptores rerum Germanicarum in usum scholarum, 7*. Hannover 1891.) *a.* 899. *…femina nomine Rudpurc quae eiusdem sceleris auctrix deprehensa certa examinatione inveniebatur Ebilinga in patibulo suspensa interiit…*
233 *Annales Fuldenses a.* 893. *…Willihelmus, filius patruelis ejus, missos suos ad Zuentibaldum ducem dirigens reum maiestatis habebatur capite detruncatus est.*; *a.* 899. *…quorum unus vocabatur Graman qui reus maiestatis convictus et ideo Otinga docollatus est...*
234 Quitzmann 1866. 292 ff.
235 *Lex Baiuvariorum* 2, 4.
236 *Lex Baiuvariorum* 1, 6; 9, 5.

Against free men and persons of high rank this punishment was applied primarily in politically relevant cases, e.g., in judgments passed on plotting.[237] No reference to cutting off the nose and ears as mutilation punishment can be found in the code.[238] Cutting off hands was applied either independently or together with other mutilation penalties; e.g., against slaves in case of kidnapping/abduction or theft committed in the duke's court.[239] The code orders to impose corporeal punishment on free men in case of two states of facts: failure to sanctify Sunday and breach of military discipline;[240] it should be noted that contrary to slaves they were not flogged but beaten by a stick.

As penalty implying reduction of honour, primarily ruining the house of the convicted person, e.g., demolishing the roof, the main beam or certain columns, was applied.[241] This punishment most probably dates from the remotest ages since it is not by chance that the code contains regulation of and compensation for loss caused to the house in the minutest details.[242]

Deprivation of freedom – as it is clear, among others, from Tasilo III's dethronement trial – was often replaced by confinement in a monastery, especially in judgments passed in trials of political nature.[243] Also, it was considered deprivation of freedom when the sanction appeared in the form of debt slavery in case of perpetrators unable or unwilling to pay the *conpositio* arising from more serious crime.[244] It can be interpreted as manifestation of the family head's power that in these cases the perpetrator could submit himself as well as his wife and sons to slavery. Deprivation of freedom, i.e., becoming a slave was brought about by failure to sanctify Sunday as habitual offender, incestuous relation between free persons – which was punished only by confiscation of property in case of persons in high rank – abortion, kidnapping/abduction and in case of false accusation of another person's slave when the slave died from torture.[245] The Council of Neuching set forth that all persons liberated by the Church and their descendants should enjoy free *status* without violation until they commit a crime that cannot be redeemed by *conpositio*, in which case they became slaves of the injured party or the Church.[246]

237 *Annales Fuldenses a.* 792. *…auctoribus partim morte partim et caecitate dampnatis...*; 870. *...morte dampnatum luminibus tantum oculorum privari praecepit…*; 893. *Engilscalcus ... audacter contra primores Baioarie in rebus sibi submissis agens iudicio eorum Radispona urbe obcaecatus est.*

238 Quitzmann 1866. 299.

239 *Lex Baiuvariorum* 2, 6. 11. 12.

240 *Lex Baiuvariorum* 1, 14; 2, 4.

241 *Lex Baiuvariorum* 10, 6–10.

242 Quitzmann 1866. 303.

243 *Annales Fuldenses a.* 895. *Hildigardis filia Hludowici Francorum regis contra fidelitatem regis agere accusata inde publicis honoribus deposita in Baioaria quadam insula palude Chiemicse nominata inclusa est.*

244 *Lex Baiuvariorum* 1, 10.

245 *Lex Baiuvariorum* 1, 14; 7, 3; 8, 18; 9, 4. 20.

246 *Synodus Niuhingensis* 9. Cf. *Lex Baiuvariorum* 8, 18.

Exile as punishment was applied quite often in political cases; for example, after Tasilo III's dethronement a part of his adherents were exiled or forced dwelling was assigned to them by Charlemagne.[247] According to *Lex Baiuvariorum* imposition of exile, in case of certain states of facts, was left to the duke's discretion: he could use this option in case of his son making an attempt at throwing him off the throne[248] or a nun abductor who was unable or unwilling to pay the *conpositio*.[249]

Confiscation of property as punishment could stand alone or could be imposed as main punishment. Accordingly, e.g., in case of treason the property of the person sentenced to death was confiscated as second punishment.[250] Sometimes, confiscation of property affected not only the movable property of the perpetrator but his immovable property as well – that is, the part of property passed from generation to generation as estate handed down within the family.[251] Confiscation of property was imposed as independent punishment in case the family or the clan exercised the (in this case unauthorised) option of blood feud against the person who killed a thief caught in the act or cast off a wife caught in adultery.[252]

Conclusions

This paper first dealt with the issues of criminal law. In early medieval German laws we cannot find dogmatic distinction between criminal and private law – yet, we have been able to establish that *Volksrechte* are basically the products of 'punitive' lawmaking. In the light of all that we tried to systematically outline the chapter of 'general provisions', 'special provisions' and the system of sanctions of *Lex Baiuvariorum*.

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248 *Lex Baiuvariorum* 2, 9.

249 *Lex Baiuvariorum* 1, 11.

250 *Lex Baiuvariorum* 2, 1. 2. Cf. *Synodus Dingolvingensis* 9.

251 Quitzmann 1866. 307.

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Violation of Copyright in the Hungarian Regulation of the Late 19th and Early 20th Century

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Abstract. Hungarian Criminal Code provides sanctions for the most serious cases of violation of copyright by determining the state of facts of infringement (usurpation). In practice it is rarely applied; usually civil law means must be used against occurring violations of rights; therefore, it is an important task of the act to develop methods in the field of civil law consequences that are suitable for repressing unlawful conduct and efficient redress of injuries. The principle of separating moral rights from economic rights followed by the act prevails also in determination of legal consequences; for this reason, it contains special legal consequences in case of infringement of moral rights. The act sanctions infringement of economic rights usually by compensation for damage. Compensation for damage is mostly equal to the fee due to the author in the case of lawful use. This consequence itself does not represent a repressive factor: the unauthorised user's risk is no more than he pays back the amount that he would have been obliged to pay anyway in case of conclusion of contract according to rules. For this reason, in each case when unauthorised use can be imputed to the user the act prescribes that the court proceedings in the case must impose the amount also as a fine to the debit of the user; which fine can be mitigated by the court solely under circumstances that deserve appreciation. This fine that can be imposed in civil proceedings is a peculiar institution, its introduction rests basically on the deliberation that in terms of legal policy it would be improper if the court awarded fine-type extra service to be discharged by one of the parties for the benefit of the other party. Accordingly, the implementing decree of the act will specify the public benefit goal on which the fine so received must be spent. Consequences of infringement of copyright must be as appropriate applied to cases of infringement of the so-called neighbouring rights too. The system of legal consequences corresponds with rules in force in the rest of the fields of intellectual property. The legal institution of fine that can be imposed in case of infringement of rights imputable to the user, however, must be terminated. The institution of copyright fine comes from the period of planned economy; originally it was due to the legal predecessor of the Ministry of National Cultural Heritage and the Central Statistical Office. In

the present system of civil law consequences, when in case of infringement of copyright, deprivation of the offender's enrichment can be requested from the court in addition to compensation for damage, and it is possible to enforce criminal law consequences, in terms of retaliation of infringement of rights it does not seem to be reasonable to maintain the institution of the fine. It is an outdated institution; it can be disputed in principle too, since it punishes infringement of private titles by obligation to make payments for the benefit of the State.

Keywords: copyright, Hungary, late 19th and early 20th century

I. Infringement of Copyright

In accordance with Act XVI of 1884,[1] infringement of copyright is implemented through exercise of the author's exclusive rights by an unauthorised person; acts implementing infringement can be various.

Infringer is the person who makes an alien intellectual work public as his own; thereby he deceives the buyer of the reprinted work, who for that matter does not incur any loss, and not the author. The sate of facts of the offence of infringement of copyright requires that the original work (which is to be reprinted) should belong to the scope of writer's works, the author's work should be reproduced, reproduction should be carried out mechanically, and mechanical reproduction should be performed without the copyright owner's consent. Having studied the act profoundly, it can be declared that mechanical reproduction is reproduction where several copies of the writer's work are produced by external appliances or aids simultaneously, at the same time, or where procedures apply technological means that enable production of a large number of copies in such form that the entire work or a part of it is produced at the same time.

It is indifferent whether the author intends to make his work public or not since works not meant to be made public ever by their authors are also covered by protection. Also, it is irrelevant whether the reproducer benefits from the activity or not because anybody who markets an alien author's work for charitable purposes or free of charge, without the author's consent, also commits infringement of copyright.[2]

Infringement of copyright means unauthorised reproduction of alien author's works. Unauthorised reproduction can be carried out in whole or part or connected with the reproducer's intellectual activity. The implementation of the

1 On the history of copyright in Hungary see Arany 1876. 225–257; Balás 1927; Balás 1942; Balogh 1991. 149–172; Boytha 1994. 42–58; Kelemen 1869. 305–317; Kenedi 1908; Knorr 1890; Kováts 1879; Mezei 2004; Nótári 2010; Petkó 2002. 23–27; Senkei-Kis 2007. 322–331; Szalai 1922; Szalai 1935.

2 Kenedi 1908. 135.

state of facts of infringement of copyright does not necessarily require that the work should be reproduced word for word; an expert should decide if the partly supplemented work is considered reprint. Partial reproduction is equal to full reproduction. This case, however, calls for circumspection since the act allows to quote smaller parts of a work already made public word for word, or to adopt already published papers in reasonable volume and form into works deemed larger independent scientific works, for ecclesiastical, school and educational purposes, with the source specified. It will qualify infringement of copyright solely when a fragment of an alien author's work is published without the reprinter's own contribution as an independent writer's work. The same applies to publication of the abridgement of a work in a foreign language. Quoting in critical activity does not qualify as infringement of copyright either, except when intention to publish the work is behind the critical study, review.[3]

It is a necessary condition of the occurrence of infringement of copyright that reproduction should be carried out without the copyright owner's permit. The person charged with unauthorised reproduction is obliged to prove, if he alleges it, that the reprint has been made with the copyright owner's consent. Consent can be manifested without any required formalities; therefore, it can be given either orally or in writing. Foreign writers' works will be protected solely to the extent to which protection is provided for foreigners by the cited act or international agreements. Publication of a work in Hungarian within the territory of the country in another language is a different issue. The answer is again negative; yet, this is no longer the case of unauthorised mechanical publication of the work but translation of the original work without the author's consent.[4]

Mechanical reproduction is to be interpreted as a procedure that makes it possible to reproduce whole works or their specific sheets by using external means. Writing down is the opposite of mechanical reproduction; in this case the original process of producing the work is repeated. Letters and punctuation marks are shaped one by one, individually; yet, the act considers writing down mechanical reproduction when its function is to substitute mechanical reproduction.

Section 6 of the act enumerates the cases that implement the offence of infringement of copyright in accordance with the general concept of infringement of copyright. The act specifies the manuscript not published in printing as the object of protection. Protection is provided solely for the author of the manuscript, irrespective whether the manuscript or a copy of it made in any form is lawfully in possession of another person.[5]

3 Kenedi 1908. 67.
4 Knorr 1890. 28. ff.; Kenedi 1908. 90. ff.
5 Knorr 1890. 31. f.

Oral presentations are usually held either freely or on the basis of a manuscript by reading – in the latter case there is a (written) writer's work and reading it corresponds to copying or duplicating it; so, it is clearly covered by protection. Free presentations, however, are not writer's works because they are held not for the purposes of putting them into literary circulation; in spite of that, the act provides protection for them in certain cases. As a matter of fact, these presentations must also meet the requirement that they should be suitable for being the object of literary circulation. Protection is not influenced by the fact whether the person holding the presentation has intended to reproduce it or sell it as literature.

In accordance with the provision regulating publisher's transactions[6] the author commits infringement of copyright against the publisher when he publishes the work assigned by him to the publisher again at another publisher or in his own edition. It is regarded identically as the above when the author has his work published in the edition of his complete works, without having applied for the publisher's consent or otherwise being entitled to do so. The publisher commits infringement of copyright when it issues the work in more copies than it is entitled to, or when it carries out a new edition in spite of the contract or the law, or when it separately publishes papers assigned to literary or scientific periodicals or includes them in a collected work.

Section 7 expounds cases of infringement of copyright that arise from translation of the original work without the author's consent. Translation of a writer's work into another language should be considered infringement of copyright in accordance with general principles, since the translator communicates the thought and original form of the work, and changes the language only. However, practice has narrowed the scope of protection: it covers only the language in which the author has made his work public. As legislation allowed reprinting foreign works, it had to permit their translation into Hungarian too, to enable transplantation of significant alien literary works into Hungarian literature through translation.

When a work published in several languages at the same time is published in translation into one of these languages, this is considered infringement. The reason for this prohibition can be that if, for example, a work is published both in Hungarian and German, and then somebody translates the German copy into Hungarian, then in content it is equal to reproduction of the original work issued in Hungarian. In this case it is irrelevant whether editions in different languages are from a single author or not. The term of protection in this case is five years; the reason for this short period is that translators would be injured if a foreign author, expecting his work to sell well in Hungary, had it published in Hungarian, in addition to the edition written in the original language, thereby providing himself with longer term of protection. It should be noted that this

6 Section 517 of Act XXXVII of 1875.

five years' protection applies to right of translation only because it is protected against reproduction just as any other original work.

Except for the cases expounded in the above paragraph, the act does not qualify translation of a work as infringement of copyright; yet, it gives the option to authors to ensure that others should not translate their works instead of them. They can do that by clearly reserving translation rights on the title page or at the beginning of the original work, and by ensuring that the translation comes out indeed within the time frame set out in the act, or by notifying the translation for registration. The act stipulates that the author who reserves translations rights shall make a part of the translation public within one year, or else the right will be lost, and the complete translation shall be made within three years. Registration, that is, notification to a public authority is required to enable the person who intends to translate the work to make sure that the author has indeed asserted right of reservation. Also, the act deems translation of manuscripts not published yet or presentations, recitations, readings held for education, entertainment purposes infringement of copyright.[7]

Section 8 states that translated writer's works – irrespective whether the translator has had translation right, or if translation rights reserved for the author of the original work have been injured by such translation – are provided with protection equally as original works. Section 9 of the act regulates the exceptional cases when author's rights are restricted.

General literary circulation demands that articles of newspapers and periodicals should be used freely since very rarely does the original newspaper or periodical suffer any pecuniary loss thereby.

Section 10 declares that statutes and decrees must be taken out of the scope of public files; their publication is regulated in a separate act, which stipulates that it is the State's exclusive right to publish and sell translations of statutes and decrees, which can be arranged for solely by the Government. The Minister of the Interior defines the forms of publishing and sale, makes arrangements to ensure that such editions should be easily obtainable throughout the territory of the country, determines the price of specific copies, and can apply administrative measures to seize editions published or sold unlawfully.

Officials of lawmaking must transfer the works written by them to the State, who, in accordance with this act too, is exclusively entitled to reproduce them, which right unambiguously belongs to author's rights and as such is provided with protection.

Finally, the act on copyright provides protection for works published by legal persons. It follows from the above that the State has copyright over statutes and decrees published in its own name as writer's works, however, this right is not original but derivative, more specifically copyright derived from civil servants as natural persons.

7 Knorr 1890. 34 ff.

Section 58 properly extends the provisions pertaining to legal consequences of infringement to public performing rights; this section does not refer to Section 22, which in its entirety is not suitable for being extended to public performance. It is certain, however, that commercial use mentioned there can be carried out through public performance.[8] Section 59 properly extends rules set out under writer's works with regard to judicial proceedings, copyright expert committee, limitation and registration, on condition that they are suitable for it, to public performing rights.

Section 61 uses the term 'remaking' in summary for any act that infringes copyright of fine art works to be able to contain various conducts of the widest scope. Remaking is different from reprint to the extent that committing this act does not require solely mechanical reproduction but any imitation by which, actually, the original work is produced. Regarding fine art works, it is unauthorised remaking and not making public that the act prohibits, for the right of making public and marketing belongs to the author, which is not lost and not restricted by the work being made public by somebody else instead of him. Remaking can be committed by several persons jointly, who are to be punished as perpetrators or parties privy to the act. A perpetrator is the person who prepares remaking or under whose assignment preparations are made. Persons who act under assignment given by others must be considered abettors, in this case again the general rules applicable to parties privy to the offence must be applied to them.

In accordance with Section 62 of the act, imitation is different from remaking: the latter conveys the artistic content of the work remade, while the former constitutes borrowing of the technique, form of representation of the artist's specific works only, and as such imitation does not convey the material content of a work; for this reason, the act does not qualify it as infringement of copyright.

Although the act refers photographs to the scope of copyright protection, and in Section 71 it describes the possibility of their infringement, with respect to portraits Section 72 contains special regulations.

Act XVI of 1884 on copyright does not stipulate what attacks, what persons it desires to protect authors against. The act takes the identity of the person infringing copyright into consideration only in the event that the attack has been committed abroad, and even then solely to the extent whether the perpetrator is a Hungarian citizen or not. Act LIV of 1921 calls the concept of violation copyright infringement. Without the consent of the author (including his legal successor) either reproduction or making public or marketing of the work itself is sufficient for infringement of copyright. One of the forms of unauthorised reproduction is plagiarism. We can speak about plagiarism when somebody communicates somebody else's intellectual product as his own. Also, plagiarism is realised when the infringer does not reproduce, make the whole work public

8 Kenedi 1890. 165 ff.; Knorr 1890. 146 ff.

word for word but carries out the above with changes, inclusions, deletions, in other words, by reworking that conceals infringement, or under a new title, other author's name. Use, reworking of somebody else's work which results in a new original work is not plagiarism.

If somebody makes his own work public unlawfully under somebody else's name, he will be responsible for prejudicing another person's personal rights in accordance with general private law only. The author is restricted in new use, adaptation of his own work already published to the extent that thereby he shall not prejudice the rights of the person who has acquired copyright from him on his already published work. The act forbids unauthorised reproduction by any procedure. Infringement will have been implemented already when the first copy of a work reproduced in spite of the law or the first copy of unauthorised remaking has been made; the act, however, allows production of a single copy free of charge without the author's consent, when it is intended for non-commercial use. Producing more copies than the permitted single copy is also production of a single copy against a fee; furthermore, production of a single copy free of charge but for commercial use, when the author's consent is missing, will establish infringement of copyright one by one. Commercial use is to mean use beyond the scope of private life for profitable or business purposes. The produced single copy can be used even for presenting the work by optical equipment only in case that presentation is free of charge, non-commercial; otherwise, commercial presentation as reproduction will become infringement. Presentation of already published writer's and musical works by optical equipment does not require the author's consent, and only presentation through phototelegraph, photoradio to an unlimited number of audience is bound to the author's special permit.

Section 6 of Act LIV of 1921 deals with infringement of copyright in details. The author has moral and economic interests in ensuring that his work should not be made public in spite of his will; therefore, only he can be vested with the right to communicate his work and its content for the first time.

Even if the manuscript or reproduced copy of the work has been taken possession of by somebody else lawfully, copyright with regard to the work will not devolve without any special transfer; it follows from this that copyright will be even less due to anybody purely on the grounds that he has acquired ownership right of the publication that embodies the work. The act forbids reproduction, marketing, making public and communication by radio of presentations, recitations, readings without the author's consent only in case it serves educational or entertainment purposes. Presentations, recitations and readings to this effect without the author's consent cannot be published in newspapers either.[9] The publisher commits infringement to the author's injury if it publishes translation of the work, or makes unauthorised changes to the work; if it issues a publication where it breaches the author's orders

9 Alföldy 1936. 47.

regarding the shape and price of copies; if it issues a new edition unlawfully; if it publishes a collected edition instead of single works or single works instead of a collected edition. Also, the publisher commits infringement when it produces the work in more copies than it is entitled to in accordance with the contract.[10]

In the event that the author makes changes subsequently to the work not prejudicing the publisher's lawful interests and the publisher publishes the work omitting such changes, this edition is to be considered an edition carried out in defiance of the law or contract and so will be qualified infringement by the publisher. And if the publisher refuses to publish a work with changes made subsequently by the author that prejudice the publisher's lawful interests, and thereupon the author himself publishes or causes to publish the work with such changes, then the author will commit infringement in defiance of the law or contract.[11]

If, however, the author or the publisher is in breach of the contract in any other form, then the legal consequences determined in private law will be incurred. The author will be responsible for the offence of infringement if the author, having transferred copyright of all his works to be created during a determined period to somebody under contract, transfers copyright on his work created during the contractual period to a third party, contrary to the contract, although such copyright has devolved to the other party from the first, and this third party publishes the work. The same applies to an individually determined work to be created in the future. If, however, the author has committed himself to somebody merely to write a certain number of works for him for publication, then this person will acquire copyright on the work completed later only in the event that he makes a special agreement with the author on publishing that work, without which the author can freely dispose over the completed work against third parties, and will be responsible for failure to fulfil obligations in accordance with general private law. The above, in a wider sense, is applicable to publisher's transactions whenever publication is in conflict with the contract concluded with the person whom the author has transferred his copyright to.[12]

The provisions of the act shall be properly applied to public performances; therefore, anybody who performs or causes to perform a theatre play, musical work, musical play or motion picture work in public in defiance of the law or contract concluded with the author will commit infringement.[13] Anybody who stages a play under right acquired for performance at a determined theatre without the author's consent at another theatre commits infringement in accordance with the provisions of the act. The relevant clauses of the act shall be applied properly to fine art, applied art and photographic works.

10 Alföldy 1936. 49.
11 Alföldy 1936. 49.
12 Alföldy 1936. 49 f.
13 Szalai 1935. 37.

If publication, public performance, presentation by mechanical or optical equipment, communication by radio has been unauthorised due to prohibition under the law, then infringement will be implemented. Co-authors' acts regarding publication of the joint work without consent of the rest of the authors will be considered unauthorised if they use the work made jointly without the other co-author's consent, unlawfully. If a co-author disposes over only his own separable part, then the other party will be responsible merely in accordance with general private law.[14]

The provisions of the act protect the author against unauthorised adopting of news of newspaper correspondence offices. Such companies deal with gathering reports and telegrams on daily events, and, having collected and reproduced them in a special edition, make them available to subscribers, and thereby subscribers acquire right to directly adopt news. However, newspapers that are not subscribers of such companies can adopt their reports and telegrams only in the event that the reports and telegrams have already appeared in the newspaper entitled to adopt them. The act considers breach of this prohibition infringement; here it protects activity of gathering news rather than author's intellectual work. If copyright on the so appeared announcement holds, then the author will be entitled to take action in case of further unauthorised adopting. Obviously, reports of newspaper correspondence offices can be communicated to the public by radio without their consent only in the event that they have already appeared in any newspaper entitled to adopt them.[15] It is the newspaper correspondence company that will have the right to take action due to infringement committed to their injury against anybody who adopts news of such company in defiance of the prohibition set out in law.

In accordance with Article 13 of the Rome Convention, it is the author's exclusive right to transmit his work to means, equipment that serves mechanical performance of the work. Mechanical performance is to mean that the equipment to which it has been transmitted is capable of reproducing it mechanically. In legal terms, appliances must be distinguished whether they are able to reproduce the work several times owing to the same adoption, or they are able to reproduce the transmitted work only once but at several places simultaneously. Transmission of the work to equipment that can reproduce the work mechanically repeatedly is to be considered reproduction. Anybody who makes or duplicates a gramophone record or roll of film of the work without the author's permit will commit infringement according to the law; however, a person who acquires right to transmit a musical work, musical play, play to such equipment and to duplicate the work by such equipment will not be entitled, purely for this reason, simultaneously to right of public performance through such equipment.

14 Alföldy 1936. 51 f.
15 Alföldy 1936. 52 f.

The question arises what should be considered infringement of copyright. By the provisions set out in section 9 the act sets exceptions for the sake of general education, criticism, news service of newspapers, publicity of political, administrative and court proceedings.

The given provision inures to the benefit of only independent scientific works, i.e., the benefit of works that, in terms of their content, constitute mostly their author's own intellectual product, and do not contain merely materials borrowed from others. Borrowing is allowed into collections that serve solely ecclesiastical or school use. To protect the authors' interests, the act deliberately does not mention educational use, in addition to school use; so, it forbids borrowing for the purposes of any education beyond education carried out strictly at school. According to proper interpretation of the act, wilful or negligent failure to specify the source or the author is offence, and will involve legal consequences. Text images, figures, drawings set in published works, on condition that they are protected as original works, are regarded identically as specific minor parts of larger writer's works in terms of the rules properly applicable to them; consequently, they can be included again only in independent scientific works or solely in collected works serving ecclesiastical and school use subject to specifying the source or the author.[16]

In accordance with paragraph 2, except for literary and scientific papers, other newspaper articles can be used in other newspapers, except when reprint is expressly forbidden, but the source and the author possibly indicated in it must be clearly named. So, borrowing literary articles requires the author's consent also in the event that prohibition of reprint is not indicated on them.

In case of using newspaper articles in newspapers these provisions cannot be applied in the event that the article has appeared or is used in a periodical and not in a newspaper. In accordance with Section 10 of Act LIV of 1921, separate rules of law govern reproduction, making public, marketing of statutes and decrees.

In accordance with Section 18 of the act, prejudicing copyright is infringement; copyright is covered by both criminal and private law protection.

II. Penalties

It is in the chapter *Penalties* that Act XVI of 1884 sets forth regulation, sanctions of infringement of copyright and other unlawful conduct related to it.

The state of facts distinguishes three forms by the content of consciousness related to the act: malice, negligence and accidental infringement. The perpetrator commits malicious infringement if with the aim of making a writer's work public he carries out or causes to carry out mechanical reproduction, being aware of the fact that thereby he prejudices another person's copyright. The perpetrator

16 Alföldy 1936. 78 f.

commits negligent infringement when, without being aware of the unlawfulness of his act, he carries out or causes to carry out mechanical reproduction of a writer's work, and by making it public he prejudices another person's copyright, although with due care he could have avoided this injury.[17]

To declare offence, it is not necessary that the writer's work should be reproduced for distribution since Section 5 of the act unambiguously sets forth that mechanical reproduction, making public and marketing of the work, when it is carried out without the copyright owner's consent, must be considered infringement. Section 22 declares that the act becomes completed by the fact that the first copy of the duplication of the work in defiance of the law has been made, and to declare penalty does not require that the perpetrator should intend to make public and market too.

The subject, i.e., perpetrator of infringement is a person who carries out or causes to carry out reproduction for himself or on his own account so that he could market them as the owner of the so reproduced copies.[18] This is usually the publisher since it is the publisher that makes reproduced copies so that it could market them as its property.

Obligation to compensate for the damage will bind the person who has committed infringement of copyright, or who has induced another person to commit infringement of copyright, or who has been party privy to infringement of copyright, finally, who has wilfully distributed, marketed the unlawfully reproduced copies. In case of attempt compensation does not lie. On the other hand, compensation claim must be distinguished from action for enrichment. For, if the person who has suffered injury has submitted compensation claim only, but later the injury has not been declared (accidental infringement of copyright), the perpetrator cannot be obliged to pay damages up to the extent of his enrichment because it has not been resolutely requested in the claim. [19]

Obligation to compensate applies both to real damage and lost profit. The act contains no measures to determine the amount of compensation. In a strict sense, the basis of damages shall be the value of the items not sold due to unauthorised reproduction from among the lawfully published copies; however, since it is not easy to determine the above in practice, it is more expedient to set out from the fact that saleability of a work is shaped by need and the audience's interest, in other words, just as many of the lawfully published copies would have been sold as many of the unlawfully reproduced ones have been sold – yet, this can be applied only if the original work is completely reprinted. Or else it is the duty of the court to declare the extent of the loss paying regard to circumstances. In setting the amount of damage, it is always mandatory to set out from the price

17 Knorr 1890. 85 f.
18 Kenedi 1908. 125 ff.; Knorr 1890. 87 ff.
19 Knorr 1890. 95 ff.; Kenedi 1908. 120 ff.

of the original work, since the author has hoped to gain profit from that; so, his loss will be the deficit arising from the price of such copies. Domestic approach represents the view that the gross price should be taken as basis, which means the actual shop price since the public can buy the work only at this price.[20]

If the number of copies made through unauthorised reproduction and sold exceeds the number of sold copies of the original work, then it will be a question whether indemnification from the difference is due to whom. The answer to this can be found in the publication contract, for if the author has transferred copyright without any reservations to the publisher, then his right has completely terminated, and the compensation can be due solely to the person empowered to publish the original work, i.e., the publisher. If, however, the author has assigned his right to the publisher only for publication of a determined number of copies, then compensation payable from the difference will be due to the author because the publisher has already received compensation on copies in stock for sale and its right resting on the publication contract has been fully enforced.[21]

Furthermore, the state of facts provides for the case when the perpetrator is not responsible for either malice or negligence in his act, i.e., he was in error in fact or error in law when committing the act, and acted in good faith (accidental infringement of copyright). Penalty will be imposed on an accidental infringer too, specifically by compensation up to the extent of his enrichment because the lawmaker cannot permit that anybody should gain benefit at somebody's expense from any unlawful act, albeit, innocently. However, he can prove that he has produced enrichment beyond the loss caused to the author, which he can keep, since he must repay it solely to the extent of the damage of the injured party.

Section 20 provides for parties privy to the act – instigators, abettors and accessories after the fact – and states that the penalties and obligations to compensate applicable to them are determined according to general legal principles. Section 21 sets the rules of confiscation. Equipment necessary for unauthorised reproduction will be confiscated in order to prevent continuation and repetition of infringement. Such equipment will be also confiscated if the perpetrator is not responsible either for malice or negligence because confiscation is not the consequence of offence but a title arising from the author's exclusive right that can be enforced against the possessor of all unlawfully reproduced copies; however, it is allowed to confiscate only the copies that are possessed for the purposes of distribution, but it is not allowed to confiscate copies that have been acquired for own use. Confiscation can be effected only with regard to objects that can be used solely for unauthorised reproduction.

Unlawfully reproduced copies still on hand, which are found in possession of the printer, bookseller, industrial distributor, the perpetrator or the instigator

20 Knorr 1890. 92 ff.; Kenedi 1908. 127 ff.

21 Kenedi 1908. 130 ff.

and are confiscated, must be annihilated. Annihilation of special tools intended to be used for unauthorised reproduction means that their shape will be changed so that they could not be used for their original purpose; yet, the material of the tools will be returned to the owner. Annihilation and confiscation can be performed on request, because the author has the right to purchase copies and equipment on hand. The author can exercise this right freely both in case he has suffered any loss indeed and in case he has not because this right of the author can be restricted solely by the right of a third party interested. For, if the author has assigned his work to the publisher for a single edition of one thousand copies, then neither the author nor the publisher can demand to hold unlawfully reproduced copies because thereby the other party's right would be injured. Partly unauthorised reproduction occurs when it affects certain parts of the work only; so, for example, the title page, the foreword, certain pages, full or half sheets. In this case, confiscation can extend only to these specific parts or the equipment necessary for producing them, on condition that these parts can be separated mechanically from the whole work.

Section 22 sets forth the stages of the state of facts of offence. Offence of infringement of copyright becomes completed when the first copy reproduced in defiance of the law has been made; it is not necessary for it to be made public or marketed. If somebody has made only a single copy of an alien work without having planned to make more copies of it, thereby he has commenced but has not finished offence, i.e., his act can be considered an attempt only. Regarding infringement of copyright, attempt can be declared only in the event that mechanical reproduction has already been started. This requires certain preparatory works, without which reproduction could not be carried out, and if preparatory works have been commenced, mechanical reproduction will become possible, i.e., infringement reaches the stage of attempt. The parts and equipment so produced can also be confiscated. If, however, no more than purchasing has been carried out, but other work activities have not been started, we cannot speak about attempt either. To commit offence, the act demands that at least the first copy should have been made in a publishable form. For this reason, if certain parts of the work have been completed only, we can again speak about attempt at infringement.

Section 23 formulates the state of facts of the offence of commercial distribution, and orders to punish it equally as infringement of copyright. As Section 22 considers the offence of infringement of copyright completed by the first copy having been made, therefore, distribution following it cannot be punished as being privy to the act either. This is supplemented by the provision that regards businesslike offering for sale, sale or distribution in other form, if they are committed by the perpetrator deliberately, as an act of committing offence too. If the distributor is responsible for negligence only, he will not be subject to any penalty or obliged to pay compensation because a bookseller cannot be expected

to be familiar with all works involved in bookselling and to know which is considered unauthorised reproduction and which is not.[22]

Thus, conducts of committing offence are offering for sale, sale and distribution in other forms. Distribution in other forms can be any act that makes it possible to acquire, get familiar with the unlawfully reproduced work.[23]

In accordance with Act LIV of 1921, the act implementing infringement will be subject to penalty and can be both deed and omission. Penalty will lie only in the event that the injured party submits his application seeking penalty in action at law. Penalty by fine is the criminal law consequence of infringement; private law consequences of infringement include compensation and confiscation, but the act does not mention claim seeking discontinuance of infringement in the enumeration of the legal consequences of infringement, although it is beyond doubt that the injured party can institute an action seeking measures to oblige the infringer to discontinue the act of infringement and to bar him from repetition or continuance of infringement. The act regulates the issue of compensation to the extent that in case of malice, negligence the infringer will be obliged to give proper pecuniary compensation to the injured party for both pecuniary loss and non-pecuniary loss. Pecuniary compensation extends to damage actually suffered as well as lost profit expected under normal circumstances. The infringer is obliged to recompense non-pecuniary loss, in addition to pecuniary loss caused by infringement.

Judicial practice acknowledged the right of compensation of non-pecuniary loss of the person whom the author has transferred his copyright to. In accordance with the act, the amount of compensation cannot be less than the infringer's enrichment. The infringer is obliged to surrender his enrichment even if it exceeds the pecuniary loss caused to the injured party. In accordance with the act, in case the infringer is not responsible for either malice or negligence, penalty does not lie, and the infringer will be liable up to the extent of his own enrichment only.[24] In general, enrichment is the amount that is usually paid to the author for the relevant use. Paying regard to general private law principles, an accidental infringer is responsible for enrichment only in the event that he still has the enrichment at the time when he learns of the infringement.[25]

It might happen that the injured party seeks declaration that a legal person has committed infringement to his injury and requests to punish the legal person in its medium specified by name. A natural person named by name can be punished only in the event that he has been sued personally as a party. His penalty and condemnation cannot be decided on the basis of the defence of the legal person involved in the lawsuit; however, if the individual empowered

22 Kenedi 1908. 135 ff.; Knorr 1890. 105 ff.
23 Kenedi 1908. 135.
24 Alföldy 1936. 91 f.
25 Alföldy 1936. 91.

to act on behalf of the legal person has committed offence contrary to the act within the scope of his duties of his employment, then the legal person will be also responsible for the demandable pecuniary and non-pecuniary loss or enrichment. Furthermore, it follows from the provisions of Act LIV of 1921 that if the legal person's enrichment due to infringement exceeds the amount of the loss caused by the natural person, then the legal person will be liable up to the extent of its enrichment. If the acting natural person is not responsible for either malice or negligence with respect to infringement, then the legal person will be again liable to the extent of its enrichment.

It might occur that an article appears in a newspaper, periodical that implements infringement. Responsibility for infringement will undoubtedly bind the person who has sent the article as his own to the newspaper, periodical for publication. However, commission of infringement will be assisted by the person who arranges the compilation of the journal and who has right of disposal over the content and articles that appear in the journal – this person is the responsible editor of the paper,[26] whose criminal liability with respect to infringement committed in the journal must be judged in accordance with general criminal law rules.

Only by deliberation of all the circumstances of the case being judged can it be decided whether the responsible editor has breached the obligation to review binding him. Against the injured party the responsible editor cannot refer to the fact that he has entrusted another person with editing the paper because regarding third parties it must always be presumed that publication has been carried out with the responsible editor's knowledge and approval; so, he can be held responsible by virtue of negligence even in this case. At the request of a person who finds an article published in the paper injurious on the grounds of Act LIV of 1921, the responsible editor is obliged to name the person who has sent in the article as his own for publication. If the responsible editor fails to fulfil his obligation to supply information, he will expose himself to the injured party bringing an action against him, and if the identity of the perpetrator is revealed in the lawsuit, the responsible editor, even if he wins the lawsuit, can be obliged to bear costs in accordance with the provisions of the civil procedure on the grounds that he has given cause for the lawsuit. In case publication of the article can be attributed to the responsible publisher's act, the responsible publisher's copyright responsibility cannot be higher than the responsible editor's responsibility.[27]

In accordance with Section 20, the injured party can request confiscation of the stock of copies produced through infringement and special tools and equipment used for infringement. Confiscation lies only in the event that the injured party has submitted special application to this effect, which specifies the objects in details that are requested to be confiscated. Confiscation can be the object of the

26 Alföldy 1936. 93 f.
27 Alföldy 1936. 95 f.

relief sought. The stock subject to confiscation is to mean copies that are meant to be marketed, which can be established from the circumstances of the case; it can be a single copy if it has been meant to be sold. Copies transferred from the infringer to the ownership, possession of persons where they are waiting for being sold will be also subject to confiscation. If the judgment has ordered to confiscate the copies in the stock in whole, they must be annihilated. [28]

Application for confiscation can be submitted against those who possess the copies as infringer, seller, or other commercial distributor, public exhibitor; confiscation of copies at members of the public, closed readers' circles, casinos, libraries and collections is not permitted. In accordance with the act, confiscation lies also against the person who is not responsible for either malice or negligence with respect to infringement as well as against inheritors and legatees. In accordance with the act, attempt at infringement will bring about confiscation, what is more, tools and equipment used for preparing infringement can be confiscated too. The injured party can request to use the copies, tools and equipment, but only in the event that third parties do not suffer any legal injury thereby. The above provisions must be properly applied to public performances, fine art exhibitions. [29]

Reasons for confiscation hold in case of advertising that prejudices another person's copyright as preparation, according to the nature of the thing, just as in case of attempt. If the planned reproduction, marketing of a work is advertised by a person who does not have copyright on the work, then such advertisement is suitable for thwarting publication of the work by the person who is actually entitled to copyright. If the unauthorised advertisement advertises a cheaper edition or an edition under otherwise more favourable terms, then everybody will refrain from buying the copies published by the person empowered to do so. By keeping in circulation the act means offering for sale, sale, distribution in other forms or use of copies. Offering for sale is implemented when the bookseller keeps the copies in stock in his shop ready for sale. Distribution is making the work available to the public or making the work public in other form, but only in case of malice and businesslike manner shall offering for sale, sale, distribution in other forms or use be considered offence that brings about penalty and compensation. The state of facts of this offence can be implemented only wilfully; negligence is not enough.[30]

In accordance with the act, copies kept unlawfully in circulation will be subject to confiscation at the distributor (user) even if he is not responsible for malice or negligence. In accordance with Section 23, offence will be committed by a person who breaches his obligation to name the source and possibly the

28 Alföldy 1936. 99 ff.
29 Alföldy 1936. 99 f.
30 Alföldy 1936. 104 ff.

author as well as who indicates or omits the author's name on the work in spite of his will; consequently, indication of the name of an author with pseudonym or an anonymous author is offence subject to this provision.[31]

This provision must be properly applied to public performances.

III. Procedural Rules

Chapter four of Act XVI of 1884 sums up procedural rules of infringement of copyright. Section 25 determines the jurisdiction rule, which states that infringement of copyright will be judged, based on the lawmaker's will – in spite of its criminal law character – in civil law proceedings. In accordance with Section 26, conducting proceedings on infringement of copyright will always fall within the jurisdiction of royal courts of justice irrespective if the claim seeks compensation, confiscation or penalty. The injured party can freely decide competence of courts of justice; so, he can choose the court of justice of the place of committing the act, or the domicile, residence of the perpetrator, or any of them if the two are not located at the same place; in case of several perpetrators he can choose the competent court of the domicile or residence of any of them.[32]

Section 27 regulates commencement of the proceedings. Infringement of copyright is an act subject to private complaint with request for prosecution, i.e., proceedings can be commenced solely upon the application of the injured party, for infringement contains violation of private law and it is usually not in the interest of the State to punish infringement if the injured party does not require it. It is different in criminal cases and civil cases against whom the injured party is obliged to submit his claim. In criminal actions, in case of several perpetrators, when proceedings can be commenced solely upon the motion of the injured party, then the motion submitted by the injured party against any of them will involve the rest of the perpetrators being subjected to proceedings, i.e., the injured cannot choose from them. In civil actions, however, the injured party can choose from joint obligors; consequently, he can sue one, several or all of them with regard to the same loss. Infringement of copyright, although it is a lawsuit conducted before civil courts, is determined by the lawmaker's intention due to its criminal law nature in such fashion that the injured party should not be able to choose from among those whom the law orders to be punished; so, the injured party is obliged to submit his claim against all the perpetrators known to him. A perpetrator subjected to lawsuit will have the right to name his accomplices having taken part in committing the act, and so the injured party can submit an accessory claim, until judgment is passed, against the perpetrators he has

31 Alföldy 1936. 106 f.

32 Kenedi 1908. 196 ff.; Knorr 1890. 112.

subsequently learned of. It is also in the interest of the injured party to sue all the perpetrators since they are jointly and severally responsible for compensation, i.e., in case of several perpetrators he will have greater security to ensure that one of them will compensate for his loss.[33]

The act provides the injured party with the right to withdraw his motion any time before pronouncement of judgment; in this case, penalty does not lie. The perpetrator's obligation to compensate will always continue to hold, except when the injured party expressly waives his right to this effect. Also, the question might arise whether the injured party can choose from among several perpetrators against whom he withdraws his claim. Setting out from the fact that he does not have the right to choose from among those against whom he submits his motion, so he does not have right to choose against whom he withdraws his claim; so, if he manifests his intention to withdraw his claim against any of the perpetrators, thereby the rest of the perpetrators will be released from penalty. Claims due to infringement of copyright can be submitted by those whose copyright has been prejudiced or endangered; accordingly, it is primarily the author who is entitled to right of action; however, if he has transferred the right of reproduction, making public or marketing of his work to another person, then such other person can become copyright owner in determining right of action.

This section sets up the reversible presumption that it is the person whose name is indicated on the work as the author that must be considered the author of a work already made public. This presumption is true with regard to the translator and the editor of collected works too because Sections 2–7 of this act states that in the cases regulated therein they are regarded identically as the author.[34] On the other hand, it sets up no presumption that the publisher indicated on the title page of the work as publisher of the work is indeed the authorised publisher of the work, for the publisher's right is set out in contract, for this reason, its right can be proved only by this contract or other tools of demonstration. In case of works published under pseudonyms or without any name, the act allows that the author's name should be subsequently notified for being registered and that it should be entered in the register; this, however, does not provide grounds for the presumption that it is him who must be considered the real author of the work because registration takes place at the unilateral request of the party concerned, and revision by court whether this fact is true is missing; furthermore, registration extends the term of protection only, and does not prove that the registered person has written the work. If the author's real name is indicated on the new edition of a work published under pseudonym or without any name, then the presumption will be valid with regard to the new edition; yet, this will have no effect on the first edition.[35]

33 Kenedi 1908. 196 ff.; Knorr 1908. 112 ff.
34 Knorr 1890. 116 ff.
35 Kenedi 1908. 196 ff.

If a work has been published in several editions by several publishers, then each publisher will be entitled to assert author's rights but only with regard to its own edition. [36]

If the author has transferred his copyright to the publisher not unconditionally, then he can at his discretion disclose his real name and can prove that he has written the work, and then he himself can take action against any person committing infringement of copyright, for the author has not lost his copyright by hiding behind a pseudonym because the act does not demand that he should have his real name registered in order to maintain right of action. Consequently, the aim of this section is to protect the rights of the author who intends to stay without any name. The other case is when the publisher or the commission agent asserts its right of action as the author's legal successor. For, in accordance with general rules, they could do that by proving that they are the copyright owners through attaching their contract concluded with the author, by which, however, they would disclose the author's name. As this is contrary to the lawmaker's will, it states that the publisher or commission agent indicated on the work will be without any further demonstration considered the author's legal successor; which, as a matter of fact, does not exclude that the perpetrator could prove that the publisher or commission agent indicated on the work is not the real publisher or commission agent.[37] Section 29 provides courts with the opportunity to proceed with respect to deliberation of evidence in accordance with the theory of free demonstration, which accepts a fact as having been proved not in the case set out in the rule of law but when it is made certain by the court, i.e., it demands the judge's personal conviction resting on reasonable causes complying with general laws.[38]

If the court deems that the evidence submitted by the parties is not sufficient for fully clarifying the circumstances of the case, but it hopes to reach success by continuing the proceedings, the court of first instance will have the right to order to extend the proceedings and conduct new demonstration.

The court can order hearing of experts if it deems it necessary for judging the case profoundly; the court is not bound by the parties' motion in deciding appointment of experts. In general, expert opinion is requested when a technical question arises that needs to be answered by all means in order to determine the fact of infringement, the volume of loss, or the extent of enrichment.

Section 31 of the act, by setting up permanent expert committees, ensures that courts should receive reliable opinion they can base their judgment on. As a matter of fact, courts are not obliged to invite these committees and are not bound by their opinion. Contacted experts must have sufficient technical information, literary and bookseller's experience, knowledge of relevant laws on

36 Knorr 1890. 117 f.
37 Knorr 1890. 118 ff.
38 Knorr 1890. 120 ff.

protection of copyright to be able to give full scope and well-founded opinion; for this reason, the committee consists of persons pursuing various occupations. Rules of procedure of expert committees were governed, temporarily, by the 1876 directive of the German imperial chancellery, which sets out the following: special committees consisting of seven members operate separately for writer's works, musical works, fine art works and photography; adoption of resolution requires presence of five members; resolutions are adopted based on the submission of two appointed experts by majority of the votes cast; in case of equality of votes the chairman will decide the case.

Section 25 of Act LIV of 1921 refers assertion of claims arising from infringement to civil action, which is supported by compelling reasons examined with knowledge of earlier regulation. Section 26 contains merely fundamental causes of competence: proceedings must be commenced before the court of the defendant's domicile. Section 27 stipulates that the proceedings seeking enforcement of both criminal and private law consequences of infringement can be commenced only upon the application of the injured party, and are governed by the rules of civil procedure. Section 28 intends to make it possible – in the lawful interest of the injured party, specifically in case of danger, and in order to prevent occurrence of any further legal injuries and losses – for the court to bar the infringer from continuance and repetition of infringement or to sequester tools, to prevent marketing, further unauthorised production, by temporary injunction, upon the application of the injured party. Before commencement of proceedings, ordering sequestration will fall within the competence of the court of justice on the territory of which sequestration must be effected. In case of several courts of justice having competence, ordering of sequestration can be applied for from any competent court of justice. Sequestration can be ordered in accordance with Section 22 of Act LIV of 1921 against the distributor or user also in the event that they are not responsible for malice or negligence, i.e., if they keep the infringed copy in circulation in good faith or perform the work in public in good faith. Based on condemning judgment, if the defendant has exercised contestation or appeal delaying enforcement, sequestration can be ordered. Ordering sequestration does not lie if the opponent of the party applying for sequestration makes it probable that the complainee has properly acquired right of reproduction, translation, remaking, putting into circulation, keeping in circulation, public performance or presentation. In this case the court will withdraw the sequestration ordered without hearing the parties. Endangering of the plaintiff's claims can be made probable from the mere fact that the defendant can market the work published by it.[39] Even surrendering all of the purportedly existing copies will not lead to exemption from ordering sequestration because the authorised party will be entitled to search for and find copies anywhere in

39 Pk. V. 6030/1923.

stocks. Sequestration should be preferably restricted to the part of the work, tool or equipment or performance or presentation that contains infringement. During or after effecting sequestration, the parties can make an agreement set out in minutes by the delegate to ensure that the sequestrator could carry out reproduction and remaking, sell the copies in stock, hold public performance, place the amount remaining after deduction of costs fruitfully until the lawsuit is finally decided or sequestration is withdrawn.[40] Section 30 regulates declaration of the fact and volume of loss and enrichment. This provision, however, does not prevent the judge from effecting inquiry and demonstration regarding the issue of pecuniary loss and enrichment, in accordance with other rules of civil procedure. The judge will have free hand especially in declaring the volume of non-pecuniary loss because the volume of such loss can be usually determined only by general deliberation of the circumstances of the case; consequently, declaration of such loss does not depend on particular data so much as declaration of pecuniary loss. Paragraph 2 of the section provides for making the judgment public. Making the judgment adopted on the issue of infringement public in some inland periodical paper can be applied for by the winning plaintiff or winning defendant in case infringement is declared if the court has dismissed the plaintiff's claim based on infringement. The judge will deliberate according to the circumstances of the case whether the party applying for it has any interest in making the judgment public in need of such protection. In this respect it should be taken into account that making the judgment public in a periodical paper incurs significant cost; therefore, obliging imposes pecuniary loss on the condemned party. At the party's request, the court may as well resolve that obligation of publication should be restricted to the enacting part of the judgment.

IV. Regulation of Limitation

It arises from the nature of infringement of copyright that legal injury can be redressed properly only within a short time. Among others, it is conditional upon the injured party submitting its claim within a short time because if he fails to do so, it can be presumed that he has not suffered any material loss. For this reason, Section 36 of Act XVI of 1884 shortens the ordinary deadline open for right of action (thirty-two years) to three years in case of infringement of copyright.

Limitation starts from the day when distribution of unlawfully reproduced copies has started; the reason for this is that Section 22 of this act states that offence must be considered completed when the unlawfully reproduced first copy has been made. If limitation started on this day – i.e., criminal law limitation were applicable to it – then the unauthorised reproducer could avoid penalty by

40 Alföldy 1936. 112 f.

making reproduction of as well a thousand copies and keeping it secret until three years have elapsed from making the first copy, then he could distribute them without being punished; that is why the day of distribution in this case is declared as the date of commencement. In case of infringement, limitation starts on the date of distribution, in other words, the day when distribution has started must be calculated as part of the deadline. The court does not need to take limitation into account ex officio.[41]

The deadline open for submitting the claim in case of committing this offence (identically with the offence of infringement of copyright) is again three years, however, there is a difference as to when this term of limitation begins.

The perpetrator cannot be punished if the injured party has not submitted its claim within three months; however, the perpetrator will not be exempted from obligation to compensate even in this case, because payment of damages is the consequence of the act and not penalty of the offence. Action for damages must be submitted within three years' term of limitation. In calculation the three months must include the day when the injured learns of commission of the offence or the identity of the perpetrator, and the last day of the deadline will be the day which owing to its number corresponds to the date of commencement.

Section 39 determines the deadline of confiscation and annihilation. Confiscation can be enforced independently as injunction, it is not bound to penalty, i.e., as long as unauthorised copies and their appliances exist they can be confiscated. No deadline applies to it, and it can be applied in spite of the injured party having failed to submit its claim during the term of limitation.

The injured party can submit its right of action within three months from commencement of distribution of the printed publication in the following cases:

– if the author or the source has not been clearly indicated when quoting specific points or minor parts of the already published work word for word,

– in case of adopting already reproduced or published minor papers in limited volume in a larger work that can be considered independent scientific work in terms of its content, or in collections that have been edited from several authors' works for ecclesiastical, school, educational purposes,

– against the person who makes the author's name public in spite of the author's will.

Section 41 states that interruption and rest of the term of limitation are governed by general rules; however, it does not specify if it refers to the rules of criminal law or civil law. As infringement of copyright is 'public offence' but proceedings can commence solely upon private complaint with request for prosecution, which is referred by the act to the jurisdiction of civil courts, and the criminal code usually contains measures regarding offences and infractions, it can be said that in this case again a peculiar mixture of the rules of the two

41 Kenedi 1908. 141 ff.

fields of law prevails. According to criminal law, limitation is interrupted by the resolution or measure of the court due to the offence against the perpetrator or the party privy to the act, while according to civil law, by commencement of the action, and, in case of offences and infractions committed in the scope of infringement of copyright, by the resolution or measure of the court adopted with regard to the submitted motion.[42]

Limitation will be interrupted only with regard to the scope of object which the claim applies to. Limitation will be interrupted only with regard to the person who the measure of the court applies to. If commencement of the action depends on decision adopted on some preliminary issue (and it becoming final and unappealable), then limitation will rest until such decision.[43]

In accordance with Act LIV of 1921, the proceedings that can be commenced due to penalty and compensation in case of infringement will lapse in three years. The claim seeking compensation for the damage, including the claim that can be laid with regard to enrichment, will lapse in three years too. The act sets compensation claim jointly with limitation of penalty for expediency purposes lest calculation should become more difficult and prosecution of infringement should become more complicated due to different limitation in public circulation. Paragraph 2, by setting up material preconditions, regulates commencement of limitation; accordingly, commencement of limitation is independent of when the injured party has learned of infringement and the identity of the infringer. In case of unauthorised reproduction, limitation will commence on the date it is completed; consequently, the injured party cannot take action seeking penalty and compensation due to unauthorised reproduction if three years have passed from completion of reproduction. If the injured party intends to assert his claims arising from unauthorised putting into circulation, he can do that within three years from commencement of unauthorised putting into circulation, irrespective when unauthorised reproduction has been completed. Accordingly, if the infringer has concealed the stock of unlawfully produced copies from the injured party for three years, and as such he cannot be held responsible for unauthorised reproduction, the author can take action due to subsequently occurred unauthorised marketing (putting into circulation), within three years from its commencement. This also applies to the case when reproduction of the copies has been carried out lawfully, but putting the copies into circulation is infringement due to unauthorised changes or lack of indication of the source or for other reasons.[44]

In case of unauthorised putting into circulation, the act calculates commencement of term of limitation from commencement of putting into circulation because putting into circulation is to mean commencement of the

42 Knorr 1890. 136 f.
43 Knorr 1890. 136 f.
44 Alföldy 1936. 119 f.

marketing of copies, and in several cases the date of completion of putting into circulation could not be determined. The injured party can take action due to unauthorised publication of unlawfully produced copies within three years from it. If only an attempt has been made at reproduction, making public or marketing, then limitation of enforceable compensation claim will begin upon discontinuance of the attempt.[45]

Paragraph 3 sets the term of limitation of the imposed penalty as being equal to the term of limitation of commencing proceedings. The provisions must be properly applied to unauthorised public performance and unauthorised presentation by mechanical or optical equipment.

The proceedings commenced in case of unauthorised keeping in circulation referred to in Section 22 and proceedings seeking compensation for the damage caused will also lapse in three years. In this case, limitation will start on the day when distribution or use was carried out for the last time. In case of offence of infringement, claim seeking penalty can be asserted, even within the three years' term of limitation, only during three months from the date of learning of the fact.

The act removes the claim seeking annihilation, confiscation of copies produced through infringement or the tools, equipment used for producing them – as a claim seeking termination of a permanently unlawful status – from the scope of short limitation and that for the full period of protection. It follows from the nature of the thing that this applies also in case of confiscation that can be enforced due to attempt at infringement or preliminary advertising, although the act does not specifically refer to it. The rules of general private law must be applied to interruption and rest of limitation of claim that can be laid due to infringement or an act regarded identically as that by virtue of damage.

Conclusion

This paper has set the task to present the regulation through the history of the violation of copyright in Hungary in the late 19th and early 20th century. This approach enables deeper understanding of specific legal institutions of copyright and their regulation as well as the underlying lawmaker's intention and economic reason. Comparison of the solutions of Act XVI of 1884 and Act LIV of 1921 clearly shows the arc of development these legal institutions have gone through, and how regulation of copyright – wanting to meet challenges posed by technological development – has been renewed and has been reinterpreting regulatory concepts again and again.

45 Alföldy 1936. 120 f.

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Economic Crisis – Contractual Relations in Hungary and in Europe

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Abstract. With the conclusion of a contract of civil law, the parties may take some reasonably unforeseeable economic risks that might disrupt the synallagmatic character of the contract; therefore, disproportionate, unviable extra burden may appear in the contractual relations on the side of some parties. The sudden increase of inflation or prices, the intense reduction of the purchasing power of wages, the radical changes in the relations between supply and demand, the collapse of the product market, the insolvency of the economic actors (especially in case of a contractual party), the negative changes of the market and financial relations and the production and liquidity problems of the economic sector shall result in this incalculable risk. In case of maintaining the original contractual content, an economic crisis affecting the whole economy and society of one or more countries may cause any or all the parties to take inequitable and intolerable risks.
In the following, we intend to analyse those reasons in the Hungarian judicial practice that are based on the Hungarian Civil Code and referred by the parties in order to get rid of the contractual obligation in the name of economic/business risk. Then we examine the importance of economic/business risk in those contractual relations that cannot be found in the Hungarian Civil Code and finally, we make a conclusion with respect to the current European regulations.

Keywords: economic/business risk, atypical contracts, Hungarian civil law, European regulation

I. The Legal Reasons of Obviating the Economic/Business Risk According to the Hungarian Civil Code

In case of the framework contract about the sales of natural gas, because of the Russian-Ukrainian dispute on natural gas at the beginning of 2006, the gas service was hampered, therefore, for supplying heat, the plaintiff produced the necessary quantity by oil heating, while the defendant could not receive any subsidy for gas

prices during the period of suspension; the legal action taken by the defendant was based on the Section 4 of the Hungarian Civil Code.[1] There is no subsidy referring to that amount of gas which was not consumed, however, the defendant had the possibility to enforce his economic interests in connection with the potential business risk emerging by changing to oil heating: the plaintiff is not responsible for missing this opportunity by the defendant. The court held that the party neither violated the principle of good faith and integrity nor realised unfair conduct on the market by not warning his partner of the possible economic consequences, business risks of facts known by both parties.[2]

In order to pass on or share the business risk, the parties intended to use the legal term of implied conduct:[3] in the above mentioned suit,[4] in the second half of 1989 the parties had negotiations about concluding an agreement in principle about a partnership of which aim was to set up a joint venture, but at the time of the conclusion of the contract, the Soviet market collapsed.

The party losing the investment wished to get compensation for the outstanding profit based on the above mentioned rule of 'implied conduct'. The court held that the company itself had to cover the costs belonging to ordinary business risk that could emerge at the time of preparing the contract (e.g. in case of an investment that cannot be realised because of the bankruptcy of the product market of a country). In another judgment[5] the court held that in general it had no legal base to refer to the rule of 'implied conduct' so as to pass on the business risk.

In many litigations[6] the same mistaken assumption (Civil Code § 210 (3))[7] was the legal base for those contractual conditions to be voidable that became disadvantaged because of the business failure due to the negative economic circumstances; notwithstanding the court declared several times that – in theory – the expectations and ideas falling under the business risk cannot mean that the

1 (1) In the course of exercising civil rights and fulfilling obligations, all parties shall act in the manner required by good faith and fairness, and they shall be obliged to cooperate with one another.
(4) Unless this Act prescribes stricter requirements, it shall be necessary to proceed in civil relations in a manner that can generally be expected in the particular situation. No person shall be entitled to refer to his own actionable conduct in order to obtain advantages. Whosoever has not proceeded in a manner that can generally be expected in the particular situation shall be entitled to refer to the other party's actionable conduct.

2 BDT 2008. 1900. [Casebook of the Courts]

3 The court may award damages payable in full or in part by a party whose willful conduct has explicitly induced another, bona fide person to act in a manner that has brought harm to this person through no fault of his own.

4 BH 1996.586. [Court Order]

5 BH 1994. 179. [Court order]

6 2003/1. Arbitration decision.

7 If the parties had the same mistaken assumption at the time the contract was concluded, either of them may contest the contract.

contract can be voidable based on vitiated consent,[8] if the parties estimated the future increase of the prices of the contractual object to be less then it was in the reality, cannot be regarded as same mistaken assumption.[9]

In the following case the plaintiffs considered the contract about purchase of business shares to be voidable based on deceit.[10] Before concluding the contract the defendants informed them in writing about the financial situation of the ltd. The plaintiffs omitted to check if the future expectations of the defendants, the estimated economic results were realistic or the value of the business share reflected their expectations or not. The conclusion of the contract about the purchase of the business share happened in November, 1994, while the so called 'Bokros-package' came into force from December, 1994. This economic event which was unforeseeable by the ltd. and the defendants meant the economic milieu and the changes of the relations, therefore, the arbitration held that the risks emerging in the operation of the association after the conclusion of the transaction and influencing the financial situation of the association in a negative way, must be taken by the buyer of the business share.

Based on § 241 of the Civil Code, the court may modify the contract under three conjunctive conditions: the aim of the agreement must be a persistent legal relation, after concluding the contract the contractual relation must change, therefore, the contract interferes with an important and justified interest of one of the parties.[11] In the judicial practice it occurred several times that the alteration of the contract by the court based on the economic crisis could not be applied in default of one of the conjunctive conditions: (1) the circumstance itself that some contractual provisions can be mistaken due to the unexpected changes of the market and financial relations cannot be used as a legal base for the modification of the contract by the court, as an extra condition, the important and justified offense of interests of the party is required;[12] (2) in case of a legal action that aims to modify the persistent legal relation, it is not enough to refer to general circumstances (e.g. to changes of the price level) that emerged after the conclusion of the contract, but its influence on the contract has to be specified too.[13] In connection with the modification of the contract by the court, not only § 241 of the Civil Code was analysed but the conditions were interpreted too:[14] if the parties considered the future insecurity of the level of production and the way how the profit turned out to be a mutual risk at the time of the conclusion of the contract, the parties, when they specified the contractual conditions, had to calculate with these types of changes in the circumstances that

8 BH 1998.272. [Arbitration decision]
9 BH 1983.205. [Court order]
10 1997/6.
11 Török 2006. 319; *Gellért* 2007. 905; *Petrik* 2008. 423.
12 BDT 2007. 1707. [Casebook of the Courts]
13 BH 1977.118. [Court order]
14 BH 1984.489. [Court order]

were expected in the certain situation and which did not exceed the limits of taking risk; in this case the modification of the contract based on important and justified offense of interests cannot be claimed. Neither can be suggested the alteration of the contract by the court with reference to § 241 of the Civil Code if it is about the widespread consequences of the basic social-economic changes.[15] The inflation and the changes of the relations of supply and demand belong to the economic risk, which shall not entitle any party to suggest the modification and these do not lead to automatic modification of the contract.[16] The ordinary changes of the market cannot be cited as a legal base for the alteration of a unique contract by the court: by concluding a contract both parties take business risk, the alteration of the contract by the court cannot be considered as a possibility to eliminate or redistribute the business risk taken by the parties.[17] In conclusion, the Civil Code does not entitle the courts to alter the unique contracts in case of changes that affect the whole economy or the subjects of agreements that belong to different contractual types:[18] changes in the economic milieu, the collapse of the market of certain products can be considered as a significant change in the circumstances of the conclusion of the contract that cannot be expected at the time of the conclusion of the contract and of which risks have to be borne mutually by the parties.[19]

The obligated party has tried to refer to economic impossibility[20] in order to get rid of the contractual relations that became disproportionate because of the negative economic and market circumstances. The court held that the economic impossibility was not absurd, however, in case of bank loan contracts, the economic changes or changes affecting the market during the period of repayment can be considered as business risk that cannot be ignored by the borrower (debtor) at moment of concluding a long-term contract of loan, therefore he must take this risk.[21] In another suit the court held that the modification of the contract by the court cannot be suggested based on economic impossibility since according to § 241 of the Civil Code, the judicial modification and the declaration of the impossibility shall be regarded as two different provisions of the judgment that exclude each other mutually.[22]

We can mention examples when the obligated party gave notice of termination[23] (unilateral termination) in order to get rid of the contract which meant extra

15 BH 1992.123. [Court order]; Török 2006. 323; *Nochta* 2010. 211.
16 BH 1996, 145. [Court order]; BH 1993. 670. [Court order]; Török 2000. 325; *Nochta 2010.* 211.
17 2003/1. Arbitration decision; BH 1988.80. [Court order]; BH 1988.80. [Court order]; BH 1985.470. [Court order]
18 Gellért 2007. § 241 of the Civil Code.
19 BDT 200.277. [Casebook of the Courts]
20 Code Civil § 312 (1) *If performance has become impossible for a reason that cannot be attributed to either of the parties, the contract shall be extinguished.*
21 FIT 4.Pf.21.148/2009./4. [Decision of the High Court of Appeal of Budapest]
22 BDT 2000.277. [Casebook of the Courts]
23 The defendant terminated a contract of loan concluded with a credit institution based on § 525 (1).

burden for him. The court held,[24] the defendant (debtor) breached the contract by terminating it since he cannot refer to the unfavorable tendencies of which existence he knew when he concluded the contract as a reason of the notice of termination. When judging the financial situation, the loss of revenue, the negative changes of the market and liquidity problems cannot be accepted, the real reason of the termination must be considered by the facts revealed later.

The above mentioned analysis following the dynamics of the contract demonstrates well that Hungarian courts regard the economic-financial crisis as a contractual risk and they use the principle *pacta sunt servanda*[25] instead of a broader sense of the *clausula rebus sic stantibus*. Similarly to the domestic courts, the European Court – the judicial practice of which affects the domestic judicial practice of the member states[26] – also considers the business-financial crisis to be contractual risk and the different actors of the economy shall take the risks in connection with their activity. For in every contractual relation there is a risk that one of the parties may not fulfil the agreement in an adequate way or becomes insolvent, in this case the parties must reduce the risk suitably in the contract itself.[27]

II. The Importance of the Economic/Business Risk in Case of Contracts not Included in the Hungarian Civil Code

In the following, we analyse the atypical and business association contracts from the aspect whether the business/financial crisis can be considered to belong to contractual risk.

In case of some atypical contracts we can deduce that the economic/business risk is part of the contractual risk:

– in case of distance contract, the consumer is not entitled to the right of objective cease (if not agreed otherwise) in connection with the changes of the prices or charges depending on a fluctuation that cannot be controlled by the salesman of the financial market;[28]

– the independent commercial agent must act in accordance with the principle of due diligence expected in a given situation in order to perform the independent commercial agency contract: this refers to the careful selection of the third party as well, the agent must examine the bonity of the client, however, he does not

24 BH 2005.63. [Court order]
25 On the historical roots of this principle see *Nótári 2011. 247; Nótári 2008. § 719.*
26 *Gombos* 2009. 27.
27 C-47/07; Masder Ltd. (UK) v the European Communities Committee.
28 *Papp* 2009. 45.

have to bear the liability for the creditability of the client (if the third party does not perform, the agent shall not be entitled to get profit);[29]

– in case of consort contracts (agreement with the purpose of taking part in the consumer group), to meet debt obligations are not impossible only because of the difficult financial situation of the consumer;[30]

– in connection with real factoring, debts shall be realised in the name and at the risk of the factor (if the factor cannot receive the debt from the debtor later on, he must take the risk), the invoice seller is not liable for the solvency of the debtor (in case of the unreal factoring, the factor does not bear the *del credere* risk).[31]

In case of concession contract, the economic/business risk may already be taken into consideration during the announcement of the tender (it can participate among the 'other, necessary information according to the tenderer'), however, if the tender does not mention about this, then, based on section (1) of § 19 of the Concession Act,[32] the rules of alteration of the contract according to the Civil Code shall be applied.[33]

There are some atypical contracts where the economic-financial changes that emerged after the conclusion of the contract may result in the termination of the contract:

– in case of timeshare contracts, if the property affected by the consumer's right to use is before or under construction and from the information of the company or by inspecting the property it becomes obvious that the property will be suitable to move in only with a significant delay that results in the loss of interest in part of the consumer or it will not be suitable to move in after 3 years after the conclusion of the contract, the consumer can rescind[34] (subjective right to rescind that sanctions the breach of the contract irrespectively of the reason);

– termination without successor due to the insolvency of any party may result in the termination of the license contract;[35]

– in case of a delayed incomplete or non paying of the leasing fee (even the financial-economic changes in the position of the lessee can result this), the lessor is entitled to terminate the contract immediately.[36]

The contract on business associations, due to the special nature of this legal relation, is an organisational (it creates a legal entity) and co-operational (it organises economy), *sui generis* agreement.[37] The general economic function of the

29 *Papp 2009.* 73.
30 FIT-H-PJ-2009-117. [Decision of the High Court of Appeal of Budapest]
31 BH 2005.72. [Court order]
32 Act XVI of 1991 about concession.
33 *Papp 2009.* 130.
34 *Papp 2009.* 91–92.
35 *Papp 2009.* 140.
36 *Papp 2009.* 165; 172.
37 *Farkas–Jenovai–Nótári–Papp* 2009. 52.

business association is realised by the contract, in other words, the organisation of the resources for a common goal.[38] The subjects of the contract form a special community of same interests (cooperation for the profit in a system of relations covered by a matrix of interests of many factors) that takes the risk for aiming the goal: liability for the result, for the risk of the jointly done management (liability for risk).[39] From the aspect of the contract of company law, the appearance and handling of the economic-financial crisis is a phenomenon that belongs to the operation of business associations. Besides, taking risk in an obviously not reasonable and unjustified way can lead to sanctions (e.g. the liability of the executive officer for the damage caused for the company): if the executive officer invests in buying or extracting diamonds in distant African countries hit by civil war in a way that cannot be controlled and by violating the rules of company law and also with a capital that originates from the so called 'pyramid scheme', from the money of more than twenty thousand retail investors, then it must be considered as a seriously unreasonable usage which is obviously opposite the interests of the company.[40]

III. European Overview in Respect of the Economic/ Business Risk

In connection with handling the imbalance arisen by the occurrence of some events that were unforeseeable at the time of the conclusion of the contract, the domestic rules of private law of the European countries and the codes (or the draft codes) aiming to integrate the European private law show us different pictures.

The French regulation[41] persists in the principle *pacta sunt servanda*, based on the belief that a judge cannot measure the effect of his judgments on the national economies, therefore, he is not entitled to alter the contract ('modifying the contract entails the risk of threatening the performance of the obligation committed by the other party in connection with another contract, hence, through an unstoppable and unforeseeable chain reaction it results in a general lack of imbalance […]').[42]

According to the Dutch, Italian and Serbian rules,[43] there is a difference between the ordinary contractual risk, arisen after making an agreement and originated from the character of the contract, and those changes of the circumstances that are irrespective of the nature of the agreement, as for the latter, the person under

38 *Kisfaludi* 2007. 42.
39 *Novotni* 1989. 65–73. *Kisfaludi* 2009. 119; *Farkas–Jenovai–Nótári–Papp* 2009. 38–39.
40 BDT 2004.959.II. [Casebook of the Courts]
41 BDT 2004.959. II. [Casebook of the Courts]
42 Code Civil Art. 1148, Art. 1134.
43 *Kadner-Graziano–Bóka* 2010. 435.

an unfair obligation in The Netherlands may ask the court for the modification or termination of the contract, while in Italy and Serbia the party for whom the completion of the contract is more burdensome, can only suggest the court terminate the contract.

In virtue of the Greek civil law regulation[44] and the draft of the common reference framework[45] (in this case only under conditions) – the same solution is implemented in the Rumanian civil law[46] –, the modification or termination of the contract because of extraordinary changes in the circumstances that affect the contract are allowed irrespectively to the relation of the risk factors to the contract.

The German Civil Code[47] provides the possibility of modifying a contract if – after its conclusion – an unforeseen change occurred according to which the contract would have not been concluded or it would have been concluded with different content and one of the parties cannot be expected to maintain this agreement in the same way. If the modification of the contract is not possible or it cannot be reasonably expected from the party, the one in a disadvantaged situation may rescind (or in case of permanent obligation he may cancel it).

In connection with the unforeseen events happening after the conclusion, English law introduced the legal terms 'frustration' and 'hardship'. In order to solve the economic-financial crisis, the following preferences have been defined: principally, the parties should create adequate provisions in their own contract (*'hardship clauses'*), in absence of these, there is a possibility to modify or terminate the contract by the court (*'intervene clause'*).[48]

The Civil Code of Gandolfi,[49] the Principles of European Contract Law[50] and the Principles of International Commercial Contract[51] urge the parties to negotiate again in connection with the contract in case of the occurrence of events that cannot be foreseen at the time of conclusion of the contract and that can cause contractual imbalance. If the parties cannot make an agreement in a reasonable time,[52] they can ask the court for alteration or termination.

According to the new Hungarian Civil Code,[53] which has not come into force yet and the Technical Proposal,[54] for the judicial modification of a contract, the above mentioned regulations require the possibility of any changes in the

44 § 388; *Kadner-Graziano–Bóka 2010.* 428.
45 Principles 2008. III/1. 110.
46 Codul civil Art. 1.271; *Veress* 2012. 110–113.
47 Bürgerliches Gesetzbuch § 313 Störung der Geschäftsgrundlage
48 *McKendrick* 1997. 255–256; 266–271; 282–284; *Kadner-Graziano–Bóka 2010.* 438–439.
49 European Contract Code 2001 (Academy of European Private Lawyers) Articles 97; 157.
50 Principles of European Contract Law 1995-2002 6. §111.
51 Principles of International Commercial Contract (UNIDROIT Convention, Rome, 2004) §§ 6.2.1; 6.2.2; 6.2.3.
52 3 or 6 months according to the Civil Code of Gandolfi.
53 Act CXX. of 2009. 5. § 168 (1)
54 5. § 175 (1)

circumstances not to be foreseen, this change in the circumstances is not due to the parties and it cannot belong to the ordinary business risks of the parties.[55] Analysing the last condition, there is a possibility to avoid considering the economic crisis and its effects as 'ordinary business risk', but it is necessary to change the current judicial practice.

Conclusion

We agree with Tibor Nochta[56] on the fact that the extra risks emerging after the conclusion of a contract need to be divided equitably and in our opinion, the Civil Code of Gandolfi, the Principles of the European Contract Law and the Principles of International Commercial Contracts provide the best instrument to realise it.

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55 Vékás 2008. 845. *The Proposal based on the requirements of the professional economic actors makes it clear that everybody should measure the business risks in connection with the conclusion of the contract on his own and there is no possibility to reduce it in a judicial way.*

56 *Nochta 2010.* 216.

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Die Änderungen, die Änderungsgründe und die Aktualität des ungarischen Vollstreckungsgesetzes aus dem Jahre 2012

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Zusammenfassung. Es ist unbestreitbar, dass die gerichtliche Vollstreckung zu den Grundsteinen der Rechtssicherheit gehört, weil jedes Urteil nur soviel wert ist, was von ihm vollstreckt werden kann.[1] Die Vollstreckung ist überhaupt kein neues Rechtsinstitut: von einem Vollstreckungsrecht kann seit der Entstehung der Gesellschaft und des Privateigentums die Rede sein.[2] Im engeren Sinne beinhaltet das Vollstreckungsrecht die Regeln der mit staatlicher Gewalt erzwingbaren Pflichterfüllung. Im ungarischen Vollstreckungsgesetz (Abs. 1 des Gesetzes Nr. LIII aus dem Jahre 1994) ist Folgendes zu lesen: „die Beschlüsse der Gerichte und anderer Rechtsprechungsorgane, bzw. die beurkundeten Forderungen sind gemäß diesem Gesetz auf dem gerichtlichen Vollzugsweg zu vollstrecken". Aus der zitierten Rechtsnorm ist – aus wirtschaftlicher Sicht – eindeutig zu entnehmen, dass wenn eine Pflicht, bzw. Forderung unerfüllt blieb, d. h. der Schuldner seinen Verpflichtungen nicht nachkam, der Berechtigte, der die Vollstreckung beansprucht, die Erfüllung seiner Forderungen mittels gerichtlicher (bzw. einer der gerichtlichen gleichkommenden) Abhilfe erreichen kann. Diese Möglichkeit ist zugleich eine Pflicht des Staates, den aus Gerichtsurteilen hervorgehenden Forderungen Geltung zu verschaffen: die gerichtliche Vollstreckung ist gleichsam eine auf dem Gebiet des Privatrechts realisierte Rechtsprechung. Die Vollstreckung wurde immer im Spiegel der Effektivität bewertet. Seit der Wende und der Entstehung der singulären Vollstreckung ist die Sicherung des Schuldner- und des Gläubigerschutzes eine der wichtigsten Aufgaben – bei der die stets wandelnden gesellschaftlichen und wirtschaftlichen Ansprüche mitberücksichtigt werden müssen –, die der Gesetzgeber zu lösen hat. Der Verlauf der gerichtlichen Vollstreckung kann aus gewisser Sicht auch so beschrieben werden, dass der Gesetzgeber die rechtlichen Rahmen der anzuwendenden finanziellen Vollstreckung festzulegen, bzw. zu erschaffen hat.[3]

1 Siehe Begründung des Gesetzes Nr. LIII aus dem Jahre 1994.
2 Nótári 2011. 128 ff.
3 Németh 1996. 278.

Schlüsselbegriffe: Vollstreckungsrecht, ungarisches Zivilprozessrecht, Wirtschaftskrise

Abstract. Undoubtedly, judicial foreclosure is one of the foundation stones of security in law since it is a generally known fact that a court decision is worth as much as it is complied with. Foreclosure itself is not a new institution, in a broad sense we can speak about some kind of law of foreclosure since the evolution of society, the appearance of property, private property. In a narrower sense, the law of foreclosure contains the rules of fulfilment of obligations that can be forced by coercion of the state. Pursuant to Section 1 of Act LIII of 1994 (Vht.): "the resolutions of courts and other bodies settling legal disputes and claims based on specific instruments shall be implemented through judicial foreclosure, in accordance with this Act". Therefore, it arises from the legal norm determined in Section 1 of the Vht. that judicial foreclosure in terms of economic considerations means that a claim or obligation has not been fulfilled, the party concerned in debtor's position has not performed and the obligee (the party who applies for foreclosure) intends to achieve performance through judicial intercession (or other intercession that can be considered equal to that with respect to foreclosure). The proceedings determined in this form is called judicial foreclosure proceedings, the institution itself is called judicial foreclosure and the law which regulates it is called law of foreclosure. Assertion of decisions related to legal disputes constitutes a kind of obligation to be fulfilled by the state. One of the forms of implementation of this obligation is the institution of judicial foreclosure itself. Judicial foreclosure is administration of justice realised in the field of private law.

Keywords: law of execution, Hungarian civil procedure, economic crisis

Die Vollstreckung in Zahlen

In den letzten Jahren sind in Ungarn zahlreiche Fälle in das Stadium der Vollstreckung gekommen, bzw. zeigt ihre Zahl eine von Jahr zu Jahr steigende Tendenz. Der Gesetzkommentar schrieb im Jahre 1994 von ungefähr 300.000 Fällen. Im Gegensatz zu diesem ist heute mit ungefähr 500.000 Fällen zu rechnen, was gewisse Tendenzen eindeutig machen kann. Im Verhältnis zur Gesamtbevölkerung Ungarns sehen die Zahlen – wenn wir annehmen, dass wir es je Fall mit einem Schuldner zu tun haben, der in einer vierköpfigen Familien lebt – folgendermaßen aus: bei jährlich 400.000 Fällen sind auf der Schuldnerseite 1.600.000 Menschen betroffen. Wenn wir zu dieser Zahl auch jene Gläubiger, die die gerichtliche Vollstreckung in Anspruch nehmen, hinzuzählen, haben wir es mit einer Zahl – ohne die anderen Betroffenen zu erwähnen – von 2.000.000 zu tun. Die so gewonnene Zahl zeigt, dass ungefähr ein Fünftel der Gesamtbevölkerung Ungarns mit dem Rechtsinstitut der gerichtlichen Vollstreckung in Berührung kommt. Es

steht uns zwar noch keine offizielle Statistik zur Verfügung, wir können aber – in Kenntnis der Praxis – davon ausgehen, dass die Zahl der Fälle auf ungefähr 500.000 gestiegen ist. Wenn wir daher von dieser Zahl ausgehen, ist die Zahl der von dem Vollstreckungsverfahren betroffenen 2.500.000, was das Viertel der ungarischen Gesamtbevölkerung ausmacht. Wenn wir von den Daten der Ungarischen Notarkammer für das Jahr 2011 ausgehen, lassen sich nur 13 Prozent der 156.028 Fälle (d. h. 20.250 Fälle) im selben Jahr abschließen. Aus den Daten geht hervor, dass die Zahl der laufenden, d. h. nicht abgeschlossenen Fälle von Jahr zu Jahr exponentiell steigt, und zwar im geraden Verhältnis mit der Zahl der neuen Fälle.

Neue Vollstreckungsfälle 2007–2001	
2007	194.482
2008	212.053
2009	255.822
2010	325.471
2011	434.037

Quelle: Ungarische Gerichtsvollzieherkammer

Notariell verordnete Vollstreckungsverfahren im ersten Halbjahr 2011	
Nach rechtskräftiger Zahlungsbeschluss verordnete Vollstreckungen	78.014
Aufgrund notariellen Beschlusses beendete Vollstreckungen	10.126
Unterschied der beiden	67.888

Quelle: Ungarische Notarkammer

Wenn wir den gerichtlichen Vollzug aus dem Aspekt der obigen Statistik untersuchen, steht die Aktualität der Frage außer Zweifel, bzw. gilt es als durchaus sicher, dass solange die globale wirtschaftliche Lage des Landes sich nicht wesentlich bessert, die Zahl der neuen Fälle sich nicht verringern wird, und die Meinungsunterschiede bezüglich des Rechtsinstitutes immer markanter werden.

Die gesetzlichen Änderungen

In Ungarn wurde nach der Wende das Gesetz von der gerichtlichen Vollstreckung im Jahre 1994 erbracht (LIII. Gesetz), das eine gänzlich neue Basis für den Vollzug schuf. Seit 1994 erfuhr das Gesetz ungefähr 90 – mehr oder minder wesentliche – Änderungen. Das Gesetz hat die an ihm geknüpften Hoffnungen nicht eingelöst, d. h. die Effektivität der Vollstreckung konnte nicht im erwarteten Maß steigern,

was tiefgreifende Änderungen nötig gemacht hat. Die erste dieser Änderungen wurde im Jahre 2000 (Gesetz Nr. CXXXVI), die zweite im Jahre 2008 (Gesetz Nr. XXXIX) und die dritte im Jahre 2011 (Gesetz Nr. CLXXX) vorgenommen. Die besagten Änderungen zielten darauf ab den Erfolg und die Effektivität der Vollstreckung zu steigern.

Die in 2012 in Kraft tretende Änderungen

Die Basis für die Änderungen wurde vom Gesetzesvorschlag Nr. T/4918 geschaffen, der vom Verwaltungs- und Justizminister dem ungarischen Parlament im November des Jahres 2011 unterbreitet wurde. Der Gesetzesvorschlag trug den Titel „Über die Änderung der gerichtlichen Vollstreckung und anderer Gesetzes des Justizwesens", und trat als Gesetz Nr. CLXXX des Jahres 2011 in Kraft. Die in diesem Gesetz beinhalteten Änderungen traten alle noch im Jahre 2011 in Kraft.

Um die Verfahrenstermine der gerichtlichen Vollstreckung zu verkürzen, wurde Abs. 12 des Gesetzes dadurch ergänzt, dass nach Eingang des Ersuches, bzw. im Falle der Mangelbeseitigung, nachdem diese stattfand, innerhalb von 15 Tagen über die Verordnung der gerichtlichen Vollstreckung entschieden werden soll.[4] Für die Übergabe, bzw. Aushändigung der Urkunde über die Vollstreckung hat das Gesetz ebenfalls eine Frist von 15 festgesetzt. Die Fristen für die Versteigerungen und die elektronischen Versteigerungen wurden ebenfalls festgesetzt. Für die Einreichung der Vollstreckungsbeschwerde wurde ebenfalls eine Frist von 15 festgesetzt (die Frist des Rechtsverlustes beträgt im Falle der Vollstreckungsbeschwerde 3 Monate). Der Gerichtsvollzieher hat die eingegangene Vollstreckungsbeschwerde an das Gericht innerhalb von 3 Werktagen weiterzuleiten, die vom Gericht innerhalb von 8 untersucht werden muss. Der Hauptregel nach muss das Gericht bei Fällen, bei denen Vollstreckungsbeschwerde eingereicht wurde, innerhalb von 45 Tagen eine Entscheidung treffen.

Die elektronische Zwangsversteigerung

Das Gesetz Nr. XXXIX (über die Änderung des Gesetzes vor der Vollstreckung und anderer verwandter Gesetze) aus dem Jahre 2008 hat die Anwendung der elektronischen Versteigerung im gerichtlichen Vollstreckungsverfahren möglich gemacht. Das elektronische Versteigerungssystem, das über das Internet ständig erreichbar ist, gehört zum Ungarischen Gerichtsvollzieherkammer (Magyar Bírósági Végrehajtói Kamara). Die Absätze 132/B-132/F des Gesetzes über den

4 Siehe im Gesetz Nr. CLXXX aus dem Jahre 2011 über die Änderung des Vollstreckungswesens und anderer Gesetze des Justitzwesens.

Gerichtsvollzug setzt die genauen Regeln für das System der elektronischen Versteigerung fest, und zwar sowohl für die elektronische Versteigerung von Mobilien, als auch für die von Immobilien. Zu den wichtigsten Änderungen des Gesetzes gehörte, dass die elektronische Versteigerung nunmehr im vollen Kreis angewandt werden kann. Hierdurch wurde die Möglichkeit der direkten, am Ort stattfindenden Versteigerungen im Falle von Immobilien aufgehoben, es wurden genaue Prozentsätze für die Senkung des Schätzpreises festgesetzt, und es wurden weitere neue Institute eingeführt.

Die Vorteile des elektronischen Versteigerungssystems werden – was Ungarn anbelangt – aus den Daten des Nationalen Steuer- und Zollamtes (Nemzeti Adó- és Vámhivatal) ersichtlich, da seit dem 30. Januar 2003, d. h. dem Inkrafttreten der Regierungsverordnung Nr. 12/2003 das elektronische Versteigerungssystem zum Aufgabenbereich des Nationalen Steuer- und Zollamtes gehört, und in den letzten zehn Jahren mehr als 27.000 Versteigerungen von Mobilien und mehr als 7.200 Versteigerungen von Immobilien durchgeführt wurden. In der Praxis des Nationales Steuer- und Zollamtes „spielten auch jene unerwünschte Fälle eine Rolle, die sich bei der einen oder anderen Versteigerung ereignet haben. Darunter sind auch jene Interessenten zu verstehen, die mit allen Mitteln versuchten, die Teilnahme anderer zu verhindern. Solche Vorfälle haben sich des Öfteren an Ort und Stelle ereignet. Mit der Einführung des Systems der elektronischen Versteigerung konnte dies vollkommen aufgehoben werden, und der Kreis der Teilnehmer hat sich auch wesentlich erweitert (bis zur jetzigen Zeit haben sich ungefähr 15-16.000 Personen in System registriert).“[5] Der Wert der Mobilien- und Immobilienversteigerungen belief sich im Jahre 2012 auf 1.860 Milliarden HUF, bzw. betrugen die aus Versteigerungen stammenden Steuereinnahmen 558 Millionen HUF.[6]

Den Termin der Versteigerung setzt der Gerichtsvollzieher in der Vollstreckungsankündigung fest. Dies muss auch im Register der elektronischen Versteigerungen bekanntgemacht werden, und zwar binnen der im Gesetz festgelegten Frist. Die Bedeutung der Bekanntmachung ist auch aus dem Gesetz ersichtlich, da das Gesetz die Gültigkeit der Ankündigung der Versteigerung von der Bekanntmachung im elektronischen Register abhängig macht.[7] Die Einhaltung der Vorschriften bezüglich der Bekanntmachung haben für die erfolgreiche Versteigerung weitgehende Folgen, da die Interessenten und die potenziellen Käufer von der Versteigerung, von ihrem Termin und des zur Versteigerung stehenden Objektes aus der Bekanntmachung Kenntnis nehmen können. Die von den Gerichtsvollziehern im Internet bekanntgemachten Ankündigungen sind auf der Homepage der Ungarischen Gerichtsvollzieherkammer auf einem

5 Die Daten wurden im November 2012 auf Antrag des Verfassers vom Nationalen Steuer- und Zollamt zur Verfügung gestellt.

6 http://mandiner.hu/cikk/20130130_336_ezer_ados_ellen_folyik_ado_vegrehajtas (25. 03. 2013).

7 122. § (6).

ständig aktuellen Stand zugänglich. Die Voraussetzung für die Teilnahme an der Versteigerung ist die gültige Registration, die in jedem Gerichtsvollzieherbüro durchgeführt werden kann. Die Registrierung erfolgt nach der Datenaufnahme der jeweiligen (natürlichen oder juristischen) Person, der Einzahlung von 6.000 HUF und der zur Kenntnisnahme der Versteigerungsregel. Die registrierten Verbraucher haben in alle elektronisch veröffentlichte Versteigerungsangebote vollen und detaillierten Einblick. Nach der Registration bekommt der Verbraucher einen Verbrauchernahmen und einen elektronischen Identifizierungscode, mit denen er die Homepage besuchen kann. An der Versteigerung können die Verbraucher teilnehmen, die – gemäß den Punkten b) und c) des Absatzes 132/F des Gesetzes – 10 Prozent des Ausrufpreises auf das Konto des versteigernden Gerichtsvollziehers überwiesen, bzw. ihm diese Summe bar überwiesen haben. Auf Antrag werden die zur Teilnahme an der Versteigerung nötigen Daten vom Gerichtsvollzieher, der die Versteigerung durchführt, aktiviert. Das Lizitregister ist jene grafische Fläche, auf der die aktuellen Ereignisse der Versteigerung vermerkt werden. Die Teilnehmer können auf dieser Fläche den aktuellen Stand und das Endergebnis der Versteigerung mitverfolgen, bzw. davon erfahren. Ein großer Vorteil des elektronischen Versteigerungssystems ist, dass die Interessenten die anderen Interessenten nicht persönlich treffen müssen, bzw. dass die Reinheit und die Transparenz der Versteigerung hierdurch gesichert werden können. Ein weiterer Vorteil dieses Systems ist, dass die Versteigerung online stattfindet, d. h. dass die Teilnahme nicht ort- und zeitgebunden ist. Zu den Vorteilen zählt ebenfalls, dass die Teilnehmer der Versteigerung einander nicht kennen, weil sie nur die verbrauchernahmen der anderen sehen, ihre anderen Daten ihnen aber unbekannt bleiben. Hierdurch wird die Möglichkeit ausgeschlossen, dass sich die Teilnehmer den Preis und die anderen Faktoren der Versteigerung vorher untereinander absprechen, bzw. diesbezüglich Vereinbarungen treffen. Mit der Einführung und Anwendung des elektronischen Versteigerungssystems kann die Alleinherrschaft der an Ort und Stelle präsenten unlauten Käufer Schritt für Schritt gebrochen werden. Mit der Errichtung und Betreibung dieses elektronischen Systems hat die Ungarische Gerichtsvollzieherkammer eine ausgesprochen schwere informatische und organisatorische Aufgabe gelöst, und zwar auf international anerkanntem, europäischem Niveau.[8] (Die Homepage ist erreichbar unter: www.mbvk.hu.) Das elektronische Versteigerungssystem mit entsprechender Datensicherheit und Datenbehandlung ist praktisch ständig online erreichbar. Es werden von diesem System zahlreiche Aufgaben automatisch verrichtet (so z. B. Abschluss des Lizits), und entspricht auch jener äußerst strengen gesetzlichen Vorschrift, dass „eine Versteigerung nicht

8 http://www.jogiforum.hu/hirek/27888?utm_source=jfhl&utm_medium=email&utm_campaign=201225 (Über den Abschlußkonferenz über die Europäische gerichtliche Vollstreckung).

als bekanntgemacht gelten kann, wenn das elektronische Versteigerungsregister während mehr als 10 Prozent der Bekanntmachungsfrist für die Verbraucher nicht erreichbar gewesen ist".[9]

„Von den Änderungen ist die Entwicklung der Versteigerung von Mobilien und Immobilien hervorzuheben, die dazu dienen, dass die Versteigerungen transparent und ohne Missbräuche verlaufen sollten, bzw. dass – wenn es keine andere Möglichkeit gibt die Forderung einzutreiben – bei der Versteigerung der allerbeste Höchstpreis erreicht werden kann. Das Endziel des Verfahrens ist nämlich nicht der Vermögensverlust der Schuldner, sondern die möglichst rasche Beendigung des Verfahrens. Der Vorschlag hat die elektronische Versteigerung von Mobilien im weiteren Kreis obligatorisch gemacht, und die von Immobilien kann sogar nur noch elektronisch verlaufen. Um die Käufer besser zu informieren, wird der Kreis der zu versteigernden Wertsachen betreffenden Daten erweitert, und im Vorschlag wird im Weiteren gegen die Missbräuche aufgetreten, und es sollten auch jene Berufungsverfahren abgekürzt werden, die die Beendigung der Versteigerungen hindert."[10]

Die elektronische Versteigerung von Mobilien

Der Verkauf von Mobilien findet der Hauptregel nach – im Falle der gerichtlichen Vollstreckung sprechen wir vom Zwangsverkauf – im Rahmen einer Versteigerung statt.[11] „Die Versteigerung ist die öffentliche und wettbewerbsartige Veräußerung von Mobilien und Immobilien, bei der das Eigentum des Gegenstandes jener erwirbt, der bei Lizit das Meiste bietet."[12] Die Erfahrung zeigt, dass im Falle von Objekten – insbesondere von Immobilien – von gleicher Qualität bei elektronischen Versteigerungen erheblich höhere Kaufpreise erreicht werden können, als bei Versteigerungen an Ort und Stelle. Bei der elektronischen Versteigerung von Mobilien haben sich auch negative Erfahrungen gezeigt. „Im Bezug auf die Effektivität der online Versteigerung von Mobilien stellt unserer Meinung nach jene Tatsache ein Hindernis dar, dass der Gerichtsvollzieher nur in jenem Fall eine elektronische Versteigerung einleiten kann, wenn bei Mobilien deren Wert über 100.000 HUF liegt, der Gläubiger, der die Vollstreckung beantragt hat, sich dafür entscheidet, bzw. die Lagerungs- und Transportkosten im Voraus zu zahlen bereit ist. Aus diesen Gründen kommt es leider nur in 5-10 Prozent der Fälle zur elektronischen Versteigerung von Immobilien, da ein Großteil der

9 Abs. 132/D. § (1) des Gesetzes Nr. LIII aus dem Jahre 1994.
10 Siehe im Gesetz Nr. CLXXX aus dem Jahre 2011 über die Änderung des Vollstreckungswesens und anderer Gesetze des Justitzwesens.
11 Pataki 2013. passim.
12 Kengyel 2012. 7 ff.

Beanträger der Vollstreckung sich darüber nicht im Klaren sind, dass ihnen das Gesetz diese Möglichkeit offenlässt, ein anderer Teil wiederum ist nicht bereit, die oben erwähnten zusätzlichen Kosten zu tragen."[13]

Die Bedeutung der elektronischen Versteigerung ist besonders im Falle von PKWs gestiegen. Der Hauptregel nach besteht die Möglichkeit der elektronischen Versteigerung von PKWs, wenn die im Gesetz festgelegten Voraussetzungen erfüllt sind, d. h. „wenn jener, der die Vollstreckung beantragt, bereit ist, die Lagerungs- und Transportkosten für das Objekt, dessen Wert über 100.000 HUF liegt, zu tragen".[14] Der PKW als Versteigerungsobjekt ist des Öfteren ein Streitausgangspunkt, und es beziehen sich hierauf mehrere gesetzliche Regelungen. Der PKW verfügt auch im wirtschaftlichen Sinne über spezielle Eigenschaften, einerseits wegen seines relativ hohen Marktwertes, andererseits wegen seiner – im Vergleich zu anderen Mobilien – Veräußerlichkeit. Die Zwangsveräußerung des PKWs kann gegebenenfalls die vollständige, bzw. eine hochgradige Befriedigung der Forderung sichern. Ein weiterer spezieller Zug ist es, dass es äußerst leicht ist PKWs zu beschädigen, bzw. dass der Schaden auch außerhalb des Interessenkreises des Eigentümers eintreten kann, und daher ihr Marktwert in kurzer Zeit erheblich sinken kann. Wenn dieser Fall eintritt, dann zeigen die Zahlen eine bemerkbare Deckungsentziehungstendenz während des Vollstreckungsverfahrens. Aus wirtschaftlicher Sicht ist der Zeitfaktor des Verfahrens überaus wichtig, da der Wert des PKWs auch mit der Zeit radikal sinken kann. Abs. 103 des Gesetzes legt die genauen Regeln der Versteigerung von PKWs fest. Aufgrund der Daten des Ungarischen Steuer- und Zollamtes fand in den letzten Jahren eine Verschiebung in die Richtung der Zwangsveräußerung des lagernden Mobilienvermögens statt.

Für den Zeitpunkt der Veräußerung von Mobilien sind die im Abs. 115 des Gesetzes festgelegten Regeln maßgebend. Das Gesetz legt den möglichen Zeitpunkt der Veräußerung von Mobilien fest, und zwar mit Berücksichtigung der Fristen, die für die Verfahren vor weiteren Instanzen, d. h. für die Berufungsverfahren zur Verfügung stehen. Das Gesetz ordnet an, dass innerhalb von 30 Tagen (im Falle von Immobilien innerhalb von 45 Tagen) nach der Pfändung der Gerichtsvollzieher für die Versteigerung in Form von einer Bekanntmachung Vorkehrungen zu treffen hat. Diese Frist kann sich auch ändern, und zwar in jenem Fall, wenn ein Anspruchsprozess läuft (seine rechtskräftige Beendigung muss abgewartet werden), oder wenn verderbliche Waren veräußert werden sollen (die Veräußerung muss unumgänglich erfolgen). Die niedrigste Summe des Ausrufpreises wurde ebenfalls erhöht, und zwar auf 35 Prozent. Die eingegangenen gültigen Kaufangebote werden vom elektronischen System automatisch gespeichert und gleichzeitig im Lizitkalender veröffentlicht. Die elektronischen Kaufangebote können nicht rückgängig gemacht werden. Gemäß Abs. 132/F (6) des Gesetzes dauert der

13 Polonkai 2011. 23 ff.

14 Abs. 132/B § a) des Gesetzes Nr. LIII aus dem Jahre 1994.

Hauptregel nach die Versteigerung bis zu einer Uhrzeit zwischen 8 und 20 Uhr des dreißigsten Tages nach der Veröffentlichung der Bekanntmachung, die vom Gerichtsvollzieher festgesetzt wird. Verläuft die Versteigerung erfolglos (es ist eventuell kein gültiges Angebot eingegangen, oder der Käufer hat den Kaufpreis nicht bezahlt), so ist unter Anwendung der Regeln für die erste Versteigerung eine zweite abzuhalten. Abs. 135 (1) des Gesetzes setzt für den Fall des erfolglosen Veräußerung neue Regel fest: „Konnten die Mobilien im Rahmen einer elektronischen Versteigerung nicht veräußert werden, und wurden sie von jene, der die Vollstreckung beantragt hat, nicht übernommen, kann der Gerichtsvollzieher im Falle der Mobilien, deren Lagerung gesichert ist – unter maximaler Herabsetzung des Ausrufpreises – eine neue elektronische Versteigerung halten. Im Falle anderer Mobilien, oder wenn die erneute elektronische Versteigerung ebenfalls erfolglos blieb, fordert der Gerichtsvollzieher den Schuldner auf die Mobilien innerhalb von 30 Tagen mitzunehmen."

Die elektronische Versteigerung von Immobilien

Gemäß dem Prinzip der stufenweise und angemessen verlaufenden Versteigerung werden die Immobilien nur in jenem Fall zwangsveräußert, wenn die zuvor vorgenommenen Versteigerungsmaßnahmen zu keinem zufriedenstellenden Ergebnis geführt haben. Gemäß Abs. 38. des Gesetzes CLXXX. aus dem Jahre 2011, bzw. der Verordnung Nr. 38/2012. (VIII. 23.) des Verwaltungs- und Justizministers können Immobilien ab dem 1. 08. 2012. nur auf elektronischem Weg versteigert werden, d. h. weitere Versteigerungen an Ort und Stelle sind untersagt worden. Für die Anwendung der als schwerste und strengste erachteten finanziellen Zwangsmaßnahme setzt Abs. 193 des Gesetzes[15] die minimale Frist fest, die vor der Anwendung der Maßnahmen verstreichen muss. Das Gesetz enthält weiter mehrere, für den Schutz der Schuldner nötige Maßnahmen, die die Möglichkeit der Zwangsveräußerung einschränken, und verfügt über die Möglichkeiten des Rechtsschutzes vor höheren Instanzen, d. h. für das Berufungsverfahren. Die Zwangsveräußerung von Immobilien ist im Vollstreckungsverfahren immer ein neuralgischer Akt. Das Gesetz macht dies zur Aufgabe des Gerichtsvollziehers, der Wert, bzw. der Schätzwert muss aufgrund des Steuer- und Wertzeugnisses, der nicht älter sein kann als 6 Monate und von der Selbstverwaltung jenen Ortes ausgestellt werden muss, wo die Immobilie liegt, bzw. aufgrund des gerichtlichen Immobiliensachverständigen festgestellt werden. Der Schätzwert wird vom Gerichtsvollzieher festgesetzt, und zwar gemäß der im Abs. 140 des Gesetzes festgelegten Grundsätzen und Parametern.[16] Der Gerichtsvollzieher hat

15 Vgl. Abs. 139. (1)–(2).

16 Abs 140. (1) des Gesetzes LIII. aus dem Jahre 1994.

nach Feststellung des Schätzwertes, bzw. nach dessen Rechtskraft den Aufruf binnen 30 Tagen elektronisch zu veröffentlichen. Das Gesetz legt den Inhalt des Aufrufes mit bindender Kraft fest (Abs. 143.), und enthält hinsichtlich des untersten Wertes des Lizits genaue Vorschriften.[17] Der Ausrufpreis des Lizits ist der Schätzwert der Immobilie. Die Versteigerung dauert der Hauptregel nach bis zu einer, vom Gerichtsvollzieher festgesetzten Uhrzeit zwischen 8 und 20 Uhr des 60. Tages nach der Veröffentlichung des Versteigerungsausrufes im elektronischen Register. Der Hauptregel nach ist ein Kaufangebot in dem Fall gültig, wenn der in ihm gebotene Preis die Hälfte des Ausrufpreises erreicht. Hiervon bildet die Wohnimmobilie eine Ausnahme, bei der der angebotene Preis 70 Prozent des Ausrufpreises erreichen muss, vorausgesetzt, dass der Schuldner Eigentümer dieser einzigen Wohnimmobilie ist, darin wohnt, und in den letzten sechs Monaten vor der Vollstreckungsverfahrens darin gelebt hat. Der Käufer hat den Kaufpreis innerhalb von 15 Tagen auf das Konto des Gerichtsvollziehers zu überweisen, bzw. innerhalb dieser Frist die Versteigerungsurkunde im Büro des Gerichtsvollziehers zu unterzeichnen, wobei er auch Antrag auf die Vertagung der Zahlungspflicht des Kaufpreises stellen kann. Hat die Versteigerung zu keinem Ergebnis geführt (es ist z. B. kein gültiger Angebot eingegangen, die Versteigerungsurkunde ist nicht unterzeichnet worden, der Kaufpreis ist nicht rechtzeitig überwiesen worden usw.), muss eine zweite Versteigerung innerhalb der nächsten 3 Monaten den Regeln der ersten gemäß vorgenommen werden.

Nach der zweiten erfolglosen Versteigerung kann der Beanträger der Versteigerung die Immobilie zu einem prozentuell bestimmten Preis erwerben, wenn er innerhalb von 15 Tagen diesbezüglich einen Kaufantrag stellt. Im Falle von mehreren Personen, die die Versteigerung beantragt haben, schreibt das Gesetz ein elektronisches Übernahmeverfahren vor, auf das die Regeln des Versteigerungsverfahrens anzuwenden sind. Für den Fall, dass der Beanträger des Vollstreckungsverfahrens die Immobilie nicht übernommen hat, wurde im Abs. 159 des Gesetzes das Institut der „ständigen Versteigerung“ eingeführt. Wenn der Termin für die Übernahmeangebote erfolglos verstreicht, veröffentlicht der Gerichtsvollzieher den Aufruf der ständigen Versteigerung innerhalb von 15 Tagen im elektronischen Register (in diesem Fall kann der Schätzpreis auch bei Wohnimmobilien bis zu 50 Prozent heruntergesetzt werden). In diesem Fall wird die Versteigerung aufgehoben bis die potenziellen Käufer die Aktivierung ihres Verbrauchernamens nicht beantragen, bzw. keinen Antrag um eine erneute Versteigerung stellen.

Wenn das neue Versteigerungssystem sich als erfolgreich erweist, können alle Vorteile der elektronischen Versteigerung auf dem Gebiete der Versteigerung von Immobilien angewandt werden.

17 Abs 143. j) des Gesetzes LIII. aus dem Jahre 1994.

Der Auszug aus der Immobilie

Den Termin des Auszuges aus der Immobilie setzt als Hauptquelle der Abs. 154/A des Gesetzes fest. Ab dem 1. September 2012 wurde vom Gesetzgeber – gleichsam um die Schuldner zur freiwilligen rechtsgemäßen Verhalten zu bewegen – als vollkommen neues Institut eingeführt (Abs. 154/B), dass wenn der Schuldner innerhalb der vorgeschriebenen Frist seiner Auszugspflicht freiwillig nachkommt, und dies beim Gerichtsvollzieher beantragt, ihm eine prozentuell bestimmte Summe des eingegangenen Kaufpreises ausgezahlt wird. Im Falle eines Kaufpreises, der unter 5 Millionen HUF liegt, beträgt diese Summe 1 Prozent des Kaufpreises. Wenn der Kaufpreis die 5 Millionen HUF übersteigt, beträgt die dem Schuldner auszuzahlende Summe 50.000 HUF und 0,5 Prozent jenes Teils des Kaufpreises, der über die 5 Millionen HUF liegt. Liegt der Kaufpreis über 10 Millionen HUF, beträgt die Summe, die dem Schuldner auszuzahlen ist, 75.000 HUF und 0,25 Prozent jenes Betrags, der über die 10 Millionen HUF liegt. Die jetzige Regelung bevorzugt die Veräußerung zu einem solchen Kaufpreis, der die Beziehbarkeit der Immobilie voraussetzt, und versucht logischerweise die Käufer in diese Richtung zu inspirieren. Da es sich hierbei um einen höheren Betrag handelt, steht zur Begleichung der bestehenden Forderungen eine größere Summe zur Verfügung, und sichert somit deren vollständige Begleichung. Die Veräußerung beziehbarer Immobilien erzielt eine eindeutigere finanzielle Situation nach der Veräußerung.

Weitere bedeutendere Änderungen

Als vollkommen neues Institut wurde vom Gesetz das sog. Vorlizitsrecht eingeführt, das eine direkte Korrelation zwischen der gerichtlichen Vollstreckung und den örtlichen Selbstverwaltungen darstellt. Der Gesetzgeber macht auch die Berechtigten des Vorkaufsrechts namhaft, und zwar in jener Form, dass den Berechtigten ein Vorlizitsrecht zur Verfügung steht. Im Falle von Mobilien werden die Regeln im Abs. 123/A des Gesetzes festgelegt.[18] Die Bedeutung dieses Instituts ist im Falle von Immobilien aus der Perspektive jener hervorzuheben, die in eine Hypothekenfalle geraten sind. Für die örtlichen Selbstverwaltungen bildet das Gesetz Nr. LXXVIII aus dem Jahre 1993 (von der Vermietung und Veräußerungen von Wohnungen) den Rahmen für die Ausübung des Vorkaufsrechts, das seit dem 21. August 2009 im Rahmen des Zwangsveräußerungssystems des Ungarischen Nationalen Steuer- und Zollamtes als Vorkaufsrecht praktikabel ist. Hinsichtlich der Zwangsveräußerung von Immobilien sind die neuen Verordnungen des Gesetzes Nr. LIII. aus dem Jahre 1994 am 1. September 2012 in Kraft getreten. Die Erfahrung zeigt, dass die örtlichen

18 Abs. 123/A des Gesetzes LIII. aus dem Jahre 1994.

Selbstverwaltungen relativ selten von ihrem Vorkaufsrecht Gebrauch machen. Es ist mit Sicherheit festzustellen, dass der Grund hierfür in erster Linie mangels der finanziellen Quellen zu suchen ist, da der bei der Zwangsveräußerung bestimmte Kaufpreis von der Selbstverwaltung in einer Summe zu zahlen wäre.

Es wurde die Anwendbarkeit des elektronischen Aushändigungssystems im Gesetz auch geregelt[19] (Abs. 35/A-35/D). Die Verpflichtung zum Gebrauch des elektronischen Systems diente eindeutig dazu, die Sachbearbeitungsfristen abzukürzen. Die Ungarische Gerichtsvollzieherkammer ist verpflichtet, die festgehaltenen Daten 30 Tage lang zu speichern (danach können sie gelöscht werden), im Falle der sog. Metadaten (z. B. elektronische Aushändigungsbescheine usw.) beträgt die Aufbewahrungs-, bzw. Speicherungsfrist 10 Jahre. Für den Gerichtsvollzieher wurde hiermit die Möglichkeit – bzw. in einigen, vom Gesetz vorgeschriebenen Fällen die Pflicht – der elektronischen Kontaktaufnahme eröffnet. Das elektronische Aushändigungssystem funktioniert unabhängig vom elektronischen Versteigerungssystem. Zum Gebrauch des elektronischen Aushändigungssystems bedarf es einer elektronischen Unterschrift mit erhöhter Sicherheitsgarantie.

Im Abs. 45 des Gesetzes wurde der Kreis des Widerstandes seitens des Schuldners neu definiert. Im Gesetz wird definiert, was als Widerstand gilt, und es obliegt dem Gerichtsvollzieher die Pflicht, jenen, der Widerstand leistet darüber zu belehren, bzw. zu informieren. Der Gesetzgeber hat für den Fall, dass der Gerichtsvollzieher polizeiliche Hilfe in Anspruch nehmen will, den Mindestinhalt des Protokolls, den er aufzunehmen hat, vorgeschrieben, bzw. hat über die Kosten der polizeilichen Mitwirkung und deren Nachweis Regelungen getroffen.

Als eine wichtige Änderung gilt es, dass – gemäß dem Gesetz (Abs. 47. [8]) – „sich der Gerichtsvollzieher vor der Aushändigung des Vollstreckungsverfahrens die zur Vollstreckung nötige, in diesem Paragrafen aufgelisteten Daten besorgen kann“. Diese Bestimmung hat aus der Perspektive des Schutzes der „privacy“, der Abkürzung der Sachbearbeitung und der Rechtmäßigkeit der Informationssammlung eine große Bedeutung.

Es wurden auch neue Bestimmungen bezüglich der Vollstreckung jener Beträge getroffen, die bei Banken und Kreditanstalten, die zur Schuldensicherung (die nur zu bestimmten Zwecken und im Zusammenhang mit aus bestimmten Rechtsgeschäften stammenden Forderungen zur Befriedigung von Schulden dienen können), bei den Kranken- und Rentenversicherungsanstalten (die ebenfalls nur in ganz bestimmten Fällen zur Vollstreckung freistehen) verwaltet werden. Im Falle von Banken und Sparkassen wurde die elektronische Kontaktaufnahme dem Gerichtsvollzieher als Pflicht auferlegt. Im Gesetz wurde auch die Regelung bezüglich der Überweisungsbeschlüsse neu definiert.

Am 15. März 2012 trat eine neue Regelung bezüglich des rechtswidrigen Vorgehens, bzw. seiner Versäumnisse in Kraft, insoweit wegen dieses Vorgehens,

19 Abs. 35/A des Gesetzes LIII. aus dem Jahre 1994.

bzw. Versäumnisses Einwand erhoben wird. Unter rechtswidrigem Vorgehen versteht das Gesetz jene Gesetzwidrigkeiten, die das Vollstreckungsverfahren wesentlich beeinflussen, bzw. beeinträchtigen. Der Gesetzgeber versuchte mit dieser Bestimmung auch die Gerichtsvollzieher zu einem schnelleren und rechtmäßigen Verfahren bewegen. Gemäß des Abs. 217/B des Gesetzes wird – wenn dem Einwand stattgegeben wird – der Gerichtsvollzieher vom Gericht verpflichtet 20 Prozent seines im gegebenen Fall anstehenden Arbeitslohnes, bzw. bei erneutem Einwand 50 Prozent seines anstehenden Arbeitslohnes als Busse einzuzahlen, die zur Ergänzung der im Fall erzielten Einnahme dient. Im Gesetz werden zwei Ausnahmefälle erwähnt, bei denen der Gerichtsvollzieher seiner Bußzahlungspflicht nicht nachkommen muss: erstens wenn die Feststellung des Marktwertes im Rahmen des Verfahrens wegen des Einwandes erfolgt, und zweitens wenn es zur Rechtswidrigkeit kein in der Interessensphäre des Gerichtsvollziehers liegender Grund geführt hat.

Bezüglich der Struktur des Gerichtsvollzugswesens wurde das Gesetz auch mit neuen Elementen bereichert. Im Abs. 226 wurden die Gründe für den Ausschluss des Gerichtsvollziehers aus dem Verfahren definiert und die Regeln des Ausschlussverfahrens festgelegt. Es wurden auch die Inkompatibilitätsgründe und die Datenschutzregel präzisiert. Der Gesetzgeber hat die Gerichtsvollzieherkammer dazu verpflichtet, ein elektronisches, auf den Daten, die der Gerichtsvollzieherkammer eingesandt wurden, basierendes Register zu errichten, um die fachrechte Kontrolle der Gerichtsvollzieher garantieren, die im Vollstreckungsverfahren einzutreibenden Forderungen nachweisen, die Rechte der betroffenen Personen sichern zu können.[20] Im Falle eines Antrags hat die Gerichtsvollzieherkammer von den erwähnten Daten eine Bescheinigung auszustellen. Zu den wichtigeren Änderungen gehört weiterhin, dass gemäß dem Gesetz Nr. CCXI. aus dem Jahre 2012 ab dem 1. Januar 2013 nur noch Juristen zu selbständigen Gerichtsvollziehern ernannt werden können.

Das Gesetz Nr. CLXXX aus dem Jahre 2011 hat für die Disziplinärregel der Gerichtvollzieher auch eine neue Grundlage erschaffen, bzw. hat das System der in solchen Fällen verfahrenden richterlichen Instanzen verändert. Gemäß dem Abs. 272. (1) des Gesetzes werden vom Richterrat für die erste Disziplinärinstanz 30, bzw. für die zweite Disziplinärinstanz 10 Richter für jeweils 4 Jahre ernannt. Der Vorsitzender und der Stellvertretende Vorsitzender des Diszplinärgerichts werden vom Richterrat ernannt. Durch diese Änderung ist auch jene Absicht des Gesetzgebers zum Ausdruck gekommen, den im Vollstreckungsverfahren betroffenen Personen größeren Schutz zu gewähren, da in Disziplinärfragen seitdem nicht ausschließlich von der Gerichtsvollzieherkammer delegierten Mitglieder zu entscheiden haben.

20 Abs. 253/E des Gesetzes LIII. aus dem Jahre 1994.

Konklusionen

Die vom Vollstreckungssystem versehene Funktionen stehen mit dem rechtlichen und wirtschaftlichen Tendenzen im engen Zusammenhang, daher gilt es, das Vollstreckungswesen durch klare, konsequente und voraussehbare Normen zu regulieren, und zwar dem Prinzip der Rechtssicherheit entsprechend. Von den anderen Funktionen gilt es in erster Linie die präventive Rolle des Vollstreckungswesens hervorzuheben. Interessanterweise kann an diesem Punkt von einem positiven Ergebnis jener negativen Werbung die Rede sein, die in den Medien und auf Homepages zu lesen und zu hören ist: es kommt hierdurch die präventive Funktion des Vollstreckungssystems immer mehr und immer besser zur Geltung. Die Erhöhung der Vollstreckungsfälle ist nicht auf den Mangel der präventiven Kraft, sondern auf die wirtschaftliche Dekonjunktur und die dadurch verursachte Wirtschaftslage zurückzuführen. Die negativen Tendenzen des Wirtschaftslebens stehen mit der Zahl der Vollstreckungsfälle und der öffentlichen Beurteilung des Vollstreckungswesens in umgekehrter Korrelation (d. h. je höher die Zahl der Fälle ist, desto negativer fällt die Beurteilung aus).

Im vorliegenden Aufsatz wurden die gesetzlichen Änderungen des Jahres 2012 unter die Lupe genommen, und zwar jene, die auf die Vollstreckungsverfahren eine bedeutendere Auswirkung haben. Es wurde auch die Rolle der elektronischen Systeme hervorgehoben, die im Vollstreckungsverfahren angewandt werden. Es wurden auch die vom Gesetzgeber neu eingeführten Institute, die eine Ansporn-, bzw. Schutzfunktion haben, analysiert. Die angeführten Zahlen sprechen für sich, und aus diesen wurde die überaus hohe Zahl der vom Vollstreckungsverfahren betroffenen Personen ersichtlich. Als Schlusswort lässt sich die Begründung der Änderungen, die auf dem Homepage der Regierung zu lesen ist, zitieren: „In den letzten Jahren ist die Zahl der Vollstreckungsfälle wegen der wirtschaftlichen und finanziellen Krise und der von Privatpersonen und Unternehmen aufgehäuften Schulden erheblich gestiegen. Das Ziel der Vollstreckungsverfahren ist es die Geldforderungen einzutreiben, bzw. den anderen durch Gerichtsbeschlüsse rechtskräftig gewordenen Ansprüchen Geltung zu verschaffen, insofern diesen freiwillig nicht genug getan werden wird. Es steht im Interesse aller am Vollstreckungsverfahren beteiligter Personen – d. h. den Beanträgern der Vollstreckung, der Schuldner und der am Verfahren beteiligten Instanzen –, dass die Vollstreckungsverfahren im möglichst vernünftigen Rahmen, kostengünstig und erfolgreich verkaufen.“[21]

21 http://www.kormany.hu/hu/kozigazgatasi-es-igazsagugyi-miniszterium/kormanyzati-kommunikacioert-felelos-allamtitkarsag/hirek/visszaszoritana-a-kormany-az-arveresselvalo-visszeleseket-egyszerusodnek-a-birosagi-vegrehajtasi-eljarasokra-vonatkozo-szabalyok (10. November 2011).

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Societas and its Management

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Abstract. The present paper analyses the rules of management of *societas* in Roman law. The first and basic situation is when the administration is operated jointly by all members. The agreement can also entrust the administration to one *socius* (or several partners). The main rule says that the *socius*-manager is acting in his own name (*societas* as internal relation). Special rules on this issue are applied in case of *societates publicanorum*, *societates argentarii*, *exercitores* and *venaliciarii*. In the second situation the management is entrusted to a *servus communis* on the basis of a so called *praepositio.* In that case the slave in co-ownership of partners becomes *institor* or *magister navis*. The third situation is when the administration is governed by a *servus communis* with *peculium.* Finally, the administration can be entrusted to a free man, who is not a *socius*, or to the slave of someone. The complexity of legal solutions leads to the conclusion that the weak points of the *societas* as internal relation were eliminated quite successfully.

Keywords: management of *societas*

Introduction

Societas is effectively a relationship involving management of business. In this respect it is akin to tutorship, mandate and *negotiorum gestio*. This is why the issue of management of business in a partnership is one of the most important issues of the legal system governing it.

Societas is joint entrepreneurship. It is considered to have been the first form of enterprise. Moreover, according to the prevalent opinion, *societas* was the only legal and organisational form of joint entrepreneurship and the nucleus of the enterprise as such.

At the same time, partnership is being criticised for its organisational inadequacy.[1] *Societas* does not have the feature of a legal entity, therefore it does not have any bodies either, or any specific property separate from that of the partners. Apart from that, *societas* lacked continuity. Its organisation is further destabilised by the

1 Porto 1984. 13 ff.; Arbatino–Dari-Mattiacci–Perotti 2011. 3 ff.

fact that it ceased to exist when one of the partners died or in the event of a change occurring in the legal or economic status of any of the partners.

Among the objections, the ones that are particularly serious are those referring to the management of business. *Socius* as the manager, in the formal and legal sense of the term, does not undertake any business in the name of the association as a whole, or in the name of the partners individually. There was no direct agency. That is why *societas* has an internal character. The *socius* who enters into an agreement does not bind the other partners in relation to third parties, and vice versa. Any right or obligation vis-à-vis third parties was imputed to the individual partner who contracted it, and had no direct consequences for the other partners individually conceived, nor for the company as a whole. Likewise, contracts between a partner and a third party could not have direct effects for other partners, even if concluded in the interest of the company. There are exceptions to this rule, and they will be mentioned later.

The legal limitations of *societas* were overcome by the phenomenon of business management by a jointly owned slave,[2] which was frequently encountered in practice. Apart from this case, management of business can be entrusted, in certain cases, even to another person's slave, as well as to free persons who are not partners.

The managing of business in collective entrepreneurship in Roman law can be reduced to the following forms:

1) Entrepreneurs are two or more partners who jointly carry on their business or who have entrusted the management of business to one of them.

2) Entrepreneurs are two or more partners who have entrusted the management of their business to their jointly owned slave on the basis of the so called *praepositio* with their jointly owned slave acting as the *institor* or *magister navis.*

3) Entrepreneurs are two or more partners who have entrusted the management of their business to their jointly owned slave who has *peculium.*

4) Entrepreneurs are two or more partners who have entrusted the management of their business to another person's slave or to a free person who is not a partner.

I. Partners as Managers

Partners were managing a business personally. They could do it all together or separately. As an example based on casuistics is well-known the text discussing cloth merchants *(sagaria negotiatio).*[3] One of the partners went to buy merchandise but he was attacked by robbers, who stole his money. His slaves were wounded, and he lost some of his own things. The text discusses the bearing of risk.

2 Porto 1984. 19 ff.; Arbatino–Dari-Mattiacci–Perotti 2011. 5; Nótári 2011. 325 f.

3 Ulp. D. 17, 2, 52, 4.

However, viewed from the aspect of management of business and agency, one of the partners acts as the manager in the partnership for the purpose of trading in fabrics. The manager partner neither binds the society as a whole, nor the partner individually. He acquires and assumes in his own name the obligations deriving from the business transactions he has negotiated with third parties. He shares the effects of such transactions, both the profit and the loss, with the other partner based on their internal relationship which is regulated by their partnership agreement. The following text explicitly discussed this point: D. 17, 2, 74. *(Paul. 62 ad edictum) Si quis societatem contraxerit, quod emit ipsius fit, non commune: sed societatis iudicio cogitur rem communicare.* (If somebody makes a contract of partnership, anything he buys becomes his own and is not shared; but he can be compelled to share it by an action on partnership.)[4]

There are also several important exceptions to this internal effect of a partnership, even though not all the details are absolutely clear and undisputable.[5]

The best known case is that of the government leaseholders *(societates publicanorum)* engaged in tax collection and public works. Evidence corroborating the specificity of the legal structure of a publican's company can be found prevalently in literary and epigraphic sources. The *manceps* and/or *redemptor* enter into a rental contract with the state. What is disputable is whether the *manceps* enters into the contract in his own name, thus not making it binding upon the partners, or whether this is a case of direct agency.[6] The first view is supported by the fact that the partners are responsible for the obligations assumed by the *manceps* that have an outward effect, however, in the capacity of sureties (*praedes*) and not as members of the partnership that the *manceps* has bound directly.

In the legal sources, there are numerous special rules pertaining to *argentarii*, and one of them is the liability *in solidum* of the partners in relation to third parties.[7]

Societas venaliciaria is under a question mark. Paulus' text discussing the edict referring to slave merchants and *actio redhibitoria* seems to allow liability *in solidum* on the part of merchant-partners, which is not possible within the framework of the regular *actio empti*.[8]

4 Translation edited by Alan Watson (Philadelphia, 1998). The following translations of fragments from the *Digest* are based on the same edition.

5 Serrao 1971. 743 ff.

6 Badian 1972. 67 ff.; Cimma 1981. 275.

7 *Rhet. ad Her.* 2, 3, 19; Paul. D. 2, 14, 27 pr.; Petrucci 1991. 5; Bürge 1987. 519.

8 Serrao 1971. 744; Paul. D. 21, 1, 44, 1. (*Paul. 2 ad ed. aedilium curulium*): *Proponitur actio ex hoc edicto in eum cuius maxima pars in venditione fuerit, quia plerumque venaliciarii ita societatem coeunt, ut quidquid agunt in commune videantur agere: aequum enim aedilibus visum est vel in unum ex his, cuius maior pars aut nulla parte minor esset, aedilicias actiones competere, ne cogeretur emptor cum multis litigare, quamvis actio ex empto cum singulis sit pro portione, qua socii fuerunt: nam id genus hominum ad lucrum potius vel turpiter faciendum pronius est.* (This edict proposes an action against the one who has the greatest part in the sale:

An interesting case is that of a partnership by maritime entrepreneurs (*societas exercitores*).[9] The partners, *exercitores* can appoint the captain (*magister navis*), who will be the manager of the vessel. The *magister navis* can be one of the partners, a free man outside the partnership, a jointly owned slave or even another person's slave. The basic rule set in the text by Ulpian specifies that where there are several ship-owners, in the event of a breach of contract by the captain (*magister navis*), whom they have jointly appointed, each one of them can be liable on the basis of *actio exercitoria, in solidum.*

In the case of a ship-owners' partnership, it is essential to establish whether the partners have appointed the captain based on joint agreement or not. If they have, then it is their joint and several liability based on *actio exercitoria.* [10]

This applies in the case where one partner has been appointed captain – *magister navis*: D. 14, 1, 4, 1. (Ulp. 29 ad ed.) *Sed si plures exerceant, unum autem de numero suo magistrum fecerint, huius nomine in solidum poterunt conveniri.* (If one of a number of ship-owners is appointed captain of a ship by the rest, they may each be sued for the full amount.) The rule shows that *societas,* though not directly, has an outward effect (*Aussenwirkung*).[11]

The same is true of the case where the vessel was managed by a jointly owned slave.[12] Another variant has been described in the text D. 14, 1, 4 pr. Here, several ship co-owners undertake to provide transport (*per se navem exerceant*). There was no appointed captain but the partners exercitores manage their maritime business directly. In this case, partners are not subject to joint and several liability but rather *pro parte* because they do not mutually consider themselves as captains but, rather, act in their own names and on their own behalves.[13] This solution is not in conformity with the general rules governing *societas.* Also, this special rule is not favourable to creditors.

for slave dealers generally so enter into partnership that whatever they do, they are deemed to do jointly. That who had a major or, anyhow, an equal share in the partnership so that the purchaser would not be obliged to litigate with a number of people, even though the action on purchase lies against each partner to the extent of his share in the partnership; for this class of persons is more concerned with making profit or with underhand dealing.)

9 Serrao 1971. 744 ff.; Meissel 2004. 176 ff.

10 Ulp. D. 14, 1, 1, 25. (Ulp. 28 ad ed.).

11 Meissel 2004. 178.

12 Paul. D. 14, 1, 6, 1.

13 Ulp. D. 14, 1, 4 pr (*Ulp. 29 ad ed.*): *Si tamen plures per se navem exerceant, pro portionibus exercitionis conveniuntur: neque enim invicem sui magistri videbuntur 'videntur'.* (But if a ship is being managed personally by several owners, they are liable in proportion to their shares in the management; for they are not treated as being each other's captain).

II. A Jointly Owned Slave as Institor or *magister navis*

The slave has been appointed manager of the business on land (*institor*)[14] or captain (*magister navis*). By making business deals within the limits of his authority (*prepositio*), the slave has bound his owner in relation to third parties on the basis of the praetorian *actio institoria* and *actio exercitoria.* The owner's responsibility was unlimited, forming the basis for an unlimited liability company.[15] The same rule applied also in the case when the slave was owned by several co-owners in unequal shares:[16] D. 14, 3, 13, 2. (Ulp. 28 ad ed.): *Si duo pluresve tabernam exerceant et servum, quem ex disparibus partibus habebant, institorem praeposuerint, utrum pro dominicis partibus teneantur an pro aequalibus an pro portione mercis an vero in solidum, Iulianus quaerit. Et verius esse ait exemplo exercitorum et de peculio actionis in solidum unumquemque conveniri posse, et quidquid is praestiterit qui conventus est, societatis iudicio vel communi dividundo consequetur, quam sententiam et supra probavimus.* (If two or more people have a shop and appoint as manager a common slave whom they own in unequal shares, should they be liable in proportion to their shares in the slave or in equal shares or in proportion to their shares in the business or should they be held liable in full? Julian, who raised the question, said that each may be sued for the full amount by analogy with the action against the ship-owner and the action on the *peculium*. The person sued can recover part of what he is made to pay by an action on the partnership or for the division of property. This view we have already endorsed above.)

As evident from the text, there are four theoretical possibilities of regulating the co-owner entrepreneurs' liability in relation to third parties; in proportion to their shares in the slave, into equal parts, in proportion to their shares in business or *in solidum.* The latter possibility suggested by Julian and adopted also by Ulpian – joint and several liability of entrepreneurs-partners – is the most favourable solution for third parties, ensuring the highest degree of security in business. With regard to internal relations among entrepreneurs-partners and resolving the issue of recourse among them, the available action was *actio pro socio* or *actio communi dividundo*.

In reference to transacting business via a slave who is under co-ownership, the question arises as to the manner of acquisition in favour of several owner-partners. The acquisition is direct in view of the fact that the slave, in this case, is considered as an extended arm of his owners. *Servus communis* in this case acquires *pro*

14 Aubert 1994. 520.

15 Paul. D. 14, 1, 6, 1. (Paul. 6 brevium): *Si communis servus voluntate dominorum exerceat navem, in singulos dari debebit in solidum actio.* (If a slave owned in common manages a ship with the consent of his masters, each of them may be sued in full).

16 Porto 1984. 63–65.

parte, therefore in accordance with the shares that each of the co-owners has in their jointly owned slave (*pro dominica portione*). This is also the case where *servus communis* acquires by using money belonging to one owner, with the possibility for such owner whose money has been used in the purchase to sue the other partners by *actio pro socio* or *actio communi dividundo*.[17] This principle of acquisition can be changed by means of the instrument called *nominatio*.[18]

A specific subjective presumption regarding the liability of co-owners, entrepreneurs, who do business by means of their jointly owned slave refers to the issue of whether all of them, or just some of them, have consented to the business *(voluntas)*, or whether they have allowed the transaction of the business without being explicitly opposed *(scientia)*, or whether they were ignorant of the business being performed *(ignorantia)*. Within the framework of this form of organisation of an unlimited company, *in solidum,* the sources raise this issue only in principle with regard to *actio exercitoria,* where the jointly owned slave has been appointed captain (*magister navis*).[19] However, there are no obstacles preventing this from being extended to include other business transacted on land.

III. A Jointly Owned Slave as the Manager with *peculium*

The third type of company organisation is entrusting the managing of business to a jointly owned slave who has *peculium.* This has created a collective company with limited liability, requiring a jointly owned slave and certain identified assets – *peculium*. Partners, co-owners of the slave are subject to limited liability, up to the amount of the *peculium*, on the basis of the *praetor*'s *actio de peculio*. This type of company has its simpler and more complex forms allowing for a large scope of business in terms of the territory and type of activity.[20] For instance, Mevius and Titius are partners. They have two slaves, Stychus and Pamphilus. Each one of them has a *peculium* and each one of them performs a different job. The more complex form is the one where Stychus, as the chief slave (*servus ordinarius*), has two vicarious slaves in his *peculium (servi vicarii)* Dama and Pamphilus, who have their *peculia*, which they perform different jobs with. In addition to this, a part of the *peculium* can be singled out as specific property for a specific activity, for instance, for the managing of a merchant ship. In such a case, the property has three separate parts; *res domini,* property owned and managed by the owner, *peculium*, property owned by the master,

17 Iul. D. 10, 3, 24 pr.; Gai. D. 41, 1, 45; Iul. D. 41, 1, 37, 2.

18 Gai. *Inst.* 3, 167–167a

19 Paul. D. 14, 1.6 pr (*Paul. 6 brevium*): *si servus non voluntate domini navem exercuerit, si sciente eo, quasi tributoria, si ignorante, de peculio actio dabitur. 1. Si communis servus voluntate dominorum exerceat navem, in singulos dari debebit in solidum actio.*

20 Porto 1984. 54 ff.; 207 ff.

which is managed by the slave independently and *merx peculiaris,* the part of property within the framework of the *peculium,* having a specific purpose, where creditors have the possibility of satisfaction only from that specific part on the basis of *actio tributoria.*

A specific presumption regarding liability is also the subjective relationship of the owner towards the management of the slave. All of these issues are complex and the best way to proceed is to get an insight into their general aspects on the basis of the texts:[21] D. 14, 1, 1, 22. (Ulp. 28 ad ed.) *Si tamen servus peculiaris volente filio familias in cuius peculio erat, vel servo vicarius eius navem exercuit, pater dominusve, qui voluntatem non accommodavit, dumtaxat de peculio tenebitur, sed filius ipse in solidum. Plane si voluntate domini vel patris exerceant, in solidum tenebuntur et praeterea et filius, si et ipse voluntatem accommodavit, in solidum erit obligatus.*

This text refers to maritime entrepreneurship. It is evident that the company concerned has 'two or more tiers'. *Filius familias* has a *peculium*, individual property managed by himself, including a slave. The *filius* has used the *peculium* he received from his father, for maritime business. If the *peculium* includes money in addition to the slave, it is possible to assume that he has chartered a ship, and perhaps even bought it. The *filius* now appears as an entrepreneur in maritime trade (*exercitor*). He has entrusted the activities of managing the ship and related activities to the slave, who is *magister navis*. However, it is evident from the text that the so called *servus peculiaris* can also have a *peculium* which includes a slave (*servus vicarius*) onto whom the managing of the business has been transferred. This is how a two-tier company is formed.

This text raises the issue as to the subjective relationship between the *filius familias* as an entrepreneur (*exercitor*), and his father, who is, ultimately, the owner of the entire property. Namely, where maritime business cases are concerned, the *exercitor* is subject to unlimited liability *in solidum* for the transactions contracted by the *magister navis*, on the basis of *actio exercitoria*. It is evident from the text that this requires the consent (*voluntas*) of the entrepreneur. This consent is expressed by means of *praepositio*, an act determining the scope of the business activity and the *magister*'s authority. As a result, the *filius* is subject to unlimited liability on the basis of *actio exercitoria*. Of course, such a solution is only theoretical because he does not have any property of his own. On the other hand, *pater familias,* who has not been involved in the business, his *voluntas* not existing, and who need not even know anything about the maritime business undertaken by his son to whom he has given the *peculium*, is subject to limited liability up to the level of the *peculium.* If he has also given approval to the slave for doing business with his son, then the owner, i.e. *pater familias,* will be subject to unlimited liability, *in solidum*, on the basis of *actio exercitoria*.

21 E.g. Ulp. D. 14, 4, 1, 3; 14, 4, 5, 1.

However, this text speaks about the individual entrepreneurship where the entrepreneur is one person, however, this rule is applicable mutatis mutandis also to joint enterprises, where internal relations among the entrepreneurs are regulated by a partnership agreement.

IV. *Extraneus* as the Manager

Partners can also appoint a free person as their manager, who is not a partner but *extraneus*. There is a contractual relationship between the partners and this free person, who is in the position of manager and agent. If he performs the managing of the business for free, what is concerned is a mandate, and if such services are provided for a fee, what is concerned most often is *locatio conductio*. On the other hand, in order for this relationship to produce outward effects, the manager, a free man, has to be appointed and authorised for the managing of the business. Therefore, there must be a *praepositio* based on which a free man may become an *institor* or *magister navis*. The deals that he makes are prosecutable based on *actio institoria* and *actio exercitoria* filed by the partners directly.[22] That is a large step towards direct agency and close to modern agency.[23] Still, this is not entirely so, for two reasons. One is that the third contractual party only has the praetorian action, and not the civil action available against the principal. On the other hand, the praetorian action system provides for an action only for the third contractual party who has entered into a contract with the agent, and not for the principal. Some lawyers, for instance, Paulus and Marcel,[24] have noticed this misbalance, being of the opinion that, in this case, the activity of the *praetor* in favour of the principal was necessary in order to protect the latter's rights.

Conclusions

Roman law developed, although in a radically different way compared to modern law, very efficient forms of business management; those were mainly different types of *negotiationes per servos communes* actionable by praetorian remedies. They come close to the functional equivalent of the modern corporate form.[25]

22 Gai. *Inst.* 4.71.
23 Watson 1984. 80.
24 Ulp. D. 14, 3, 1; Paul. D. 46, 5, 5.
25 Arbatino–Dari-Mattiacci–Perotti 2011. 6; ; Nótári 2009. 485.

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The Transfer of the Company Seat: The Freedom of Establishment and National Laws[1]

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Abstract. This paper intends to analyse how the interaction between EU law and national laws influence the possibility of the transfer of the company seat. After reviewing the provisions of the Treaty on the Functioning of the European Union and the 'classical' cases of the Court of Justice of the European Union on the freedom of establishment, one can conclude that many questions remained open concerning the cross-border transfer of the company seat. In absence of harmonisation and taking into consideration the uncertainties stemming from the case law of the Court of Justice of the European Union, the competence of the Member States is retained in many respects. This increases the significance of national laws and therefore it is worth scrutinising the different paths of development of the legislation and judiciary practice of the Member States in this field.

Keywords: transfer of the company seat; freedom of establishment; EU law and national laws

I. The Cross-Border Transfer of the Company Seat: the Interplay between EU Law and National Laws

The necessity of an EU-level regulation on the cross-border transfer of company seat is on the agenda of the European Union (the 'EU') for a long time, primarily in the form of the 14th Company Law Directive,[2] but no such legislation has been adopted so far. At the end of 2010, the European Commission formed an expert

1 This paper is based on the lecture held on 10 May 2012 at the conference 'Present and Future of the European Private Law' organised by the Sapientia Hungarian University of Transylvania.

2 Proposal for a Fourteenth European Parliament and Council Directive on the Transfer of the Registered Office or the De Facto Head Office of a Company from One Member State to Another. The text of the proposal is available in Rammeloo 2001. 296–300. On the proposal: Rammeloo 2001. 296–311; Roussous 2001. 17–22; Rohde 2002; Cerioni 2003. 132–137; von Bismarck 2005; Király 2005. 39–41; Vaccaro 2005. 1361–1363.

group to reflect on the current issues of EU company law and the report provided by the reflection group analyses in detail, among other aspects of EU company law, corporate mobility.[3] The report of 2011 finds that primarily due to the decisions of the Court of Justice of the European Union (the 'Court') there has been a significant step forward regarding the issue of the transfer of the company seat, but something more is needed than the Court's rulings.[4] The report points out that in respect of companies the freedom of establishment remains incomplete and in need of reform.[5] In accordance with the almost dominant view of the legal literature, the report concludes that the reform should take the form of an EU legislative act.[6]

Still, even in absence of such EU-level regulation the cross-border transfer of seats of companies is a reality in the Internal Market. Although it must be acknowledged that the Court played a significant role allowing more and more freedom to corporate mobility, the existing possibilities of the transfer of the company seat is to a large extent due to the particular legal solutions adopted in national laws, or more precisely due to the creative interaction between EU law and national laws. Albeit the attention of legal scholarship primarily turns to the layer consisting of the primary and secondary EU legal sources together with the Court's judgments, the national legal material touching upon the issue of the cross-border transfer of seat is not negligible, either.

The judgments on the mobility of companies decided by the Court (*Daily Mail*,[7] *Centros*,[8] *Überseering*,[9] *Inspire Art*,[10] *Sevic*[11] and *Cartesio*[12]) are well-known and widely discussed in the legal literature.[13] Nevertheless, national courts play an equally crucial role. In the majority of cases, the Court has to rule in relation to preliminary requests. But national courts have to 'implement' the Court's decision. It cannot be overlooked, however, that this process is many times not a simple implementation since the Court's statements are often quite abstract and require concretisation. There are, however, many cases where the national court does

3 Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011. <http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf> accessed 22 May 2012.

4 Report of the Reflection Group, 13.

5 Report of the Reflection Group, 17.

6 Report of the Reflection Group, 20.

7 Case 81/87 *R. v H.M. Treasury and Commissioners of Inland Revenue Treasury ex p Daily Mail* [1988] ECR 5483.

8 Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459.

9 Case C-208/00 *Überseering BV v Nordic Construction Baumanagement GmbH* [2002] ECR I-9919.

10 Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155.

11 Case C-411/03 *Sevic Systems AG* [2005] ECR I-10805.

12 Case C-210/06 *Cartesio Oktató és Szolgáltató Bt.* [2008] ECR I-9641.

13 From the Hungarian literature see: Burián-Kecskés-Vörös 2006. 158–160; Király 2010. 134–144; Vörös 2012. 76–78.

not refer the question to the Court where it finds that it can decide the question itself since it considers that the case is purely national or the application of EU law is clear. There are many cases not referred by national courts to the Court that remain in shadow. Moreover, the 'cases in shadow' decided by national courts autonomously constitute in fact the overwhelming majority.[14]

II. The Court's Case Law on the Freedom of Establishment

In light of Articles 49 and 54 of the Treaty on the Functioning of the European Union (the 'TFEU') and the Court's case law, the scope of action of Member States may be determined from a negative aspect ascertaining the precise content and scope of application of the freedom of establishment.[15] As it is a question affecting the Internal Market, the competence on the regulation of the cross-border transfer of seat is shared between the EU and the Member States. Therefore, first it is to be examined what kind of issues are settled by EU law. Issues not addressed by EU law remain in the competence of the Member States.

However, the scope of application of the freedom of establishment is in many respects uncertain. Articles 49 and 54 TFEU are open-textured: they provide only for a very broad framework. The Court's interpretation helps only in a limited way, too. The Court interpreted the current Articles 49 and 54 TFEU in several judgments concerning the free movement of companies. It is, however, somewhat surprising how briefly one can summarise those conclusions on which one can rely with certainty concerning a transfer of seat.

Thus, among others, (i) a company can transfer its real seat to another state (*Überseering*),[16] provided that the home state allows it by keeping to treat the company as constituted under the law of the home state (*Daily Mail*, *National Grid Indus*),[17] or set up a secondary establishment there (*Centros, Inspire Art*);[18] (ii) if the real seat is being transferred, the host state must take the company's legal capacity and the capacity to be party to legal proceedings into consideration in accordance with the law of incorporation (*Überseering*[19]) and treat the company in accordance with its status acquired in the state of origin, among others, in terms of minimum

14 Van Harten 2009. 136.

15 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C83.

16 See the Court's conclusions in *Überseering*.

17 *Daily Mail*, paras. 23–24; Case C-371/10 *National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam* [nyr] paras 27; 31–33.

18 *Centros*, para 20; *Inspire Art*, para 97.

19 See the Court's conclusions in *Überseering*.

capital requirement and directors' liability (*Inspire Art*[20]); (iii) if a company intends to transfer its real seat to another Member State with the maintenance of the governing law, the home Member State may impede it raising barriers related to the status of the company as constituted under the law of that state (*Daily Mail*, *National Grid Indus*);[21] (iv) if the company transfers its registered office together with its real seat and it intends to retain its status as a company under the law of the state of origin, this state can inhibit the emigration of the company and otherwise determine the preconditions for the maintenance of the legal status acquired under the law of that state (*Cartesio*);[22] (v) if the company wishes to convert itself into a company form of the host state with a change in the applicable law, the home state cannot hinder it to the extent that the host state permits it (*Cartesio*).[23]

III. Open Questions and National Laws

The Court did not discuss many possible scenarios and, even in relation to the cases decided by the Court, a lot of questions remained open. This is because the Court can rule only on cases referred to it. There are many situations not covered by the Court so far and even in cases decided by the Court there are many questions left open. Regarding these questions, gaps may be filled in by the future judiciary practice of the Court or by the legislation or court practice of the Member States. In the following, the emphasis will be put on this latter aspect demonstrating how Member States pioneered in issues not settled by EU law.

1. Companies from EEA states

Certain questions, such as the applicability of the freedom of establishment to companies from the non-EU members of the EEA may be easily answered.

In the absence of cases referred to it on this subject, a question left open by the Court is whether the freedom of establishment is applicable to companies from non-EU members of the EEA in the same manner as to companies from the EU. No decision was passed on this issue by the Court, but the question may be answered with great certainty in the affirmative.

The wording of Articles 31 and 34 of the EEA Agreement providing for the freedom of establishment is the same as that of the TFEU.[24] Presumably, the Court would require the identical treatment of companies from non-EU

20 *Inspire Art*, para 105.
21 *Daily Mail*, paras 23–24; *National Grid Indus*, para 27.
22 *Cartesio*, para 110.
23 *Cartesio*, para 112.
24 Agreement on the European Economic Area arts 31–35.

members of the EEA since according to its constant case law Articles 31 and 34 of the EEA Treaty are consistent with Articles 49 and 54 TFEU.[25] In addition, the EFTA Court takes into account the Court's decisions and it held that there is no reason to interpret the provisions on freedom of establishment contained in the EEA Agreement differently from the relevant provisions in the EC Treaty (and probably now the TFEU).[26]

In the absence of the Court's case law, national courts had to provide an answer. German courts treat companies from non-EU members of the EEA in the same way as companies from the EU. This may be illustrated by the decision of the OLG Frankfurt am Main adopted on 28 May 2003, by which the principles laid down in the *Überseering* decision were expressly extended by the national court to companies established in an EEA state. Consequently, the legal capacity and standing of a company incorporated in Liechtenstein was recognised by the national court.[27]

2. Compatibility of the real seat doctrine with the freedom of establishment

A much more debated topic has been the compatibility of the real seat doctrine with the freedom of establishment. In the private international laws of the Member States, the determination of the law applicable to companies takes place along two famous theories: the real seat theory and the incorporation doctrine.

Neither primary, nor secondary EU legal sources determine expressly the law applicable to companies. According to the dominant view, Articles 49 and 54 have neither an explicit, nor an implied conflict of laws contents that would make obligatory the application of the incorporation theory.[28] Articles 49 and 54 impose an obligation of result on the Member States and simply require them to keep in force national laws that respect the freedom of establishment as set out in the TFEU and the Court's case law. Member States are free to adopt any rules, but they cannot apply rules that lead to discrimination in terms of the freedom of establishment rights or render less attractive the exercise of the freedom of establishment.

The Court does not scrutinise private international law provisions of the Member States in themselves, but together with substantive provisions. This

25 Case C-471/04 *Finanzamt Offenbach am Main-Land v Keller Holding GmbH* [2006] ECR I-2107; Case C-522/04 *Commission of the European Communities v Kingdom of Belgium* [2007] ECR I-5701; Case C-345/05 *Commission of the European Communities v Portuguese Republic* [2006] ECR I-10633; Case C-104/06 *Commission of the European Communities v Kingdom of Sweden* [2007] ECR I-671. Bayer and Schmidt 2009. 735, 738; Braun 2010. 60–61.

26 Baudenbacher and Buschle 2004. 26–31.

27 OLG Frankfurt a. M. 28 Mai 2003 23 U 35/02; IPRax (2004) 56-59. Discussed by Baudenbacher and Buschle 2004. 26–31; Spahlinger and Wegen 2005. 54–55. Confirmed by the BGH, BGH 19.9.2005 Urteil – II ZR 372/03.

28 Rauscher 1999. 136; Eidenmüller and Rehm 2004. 164–166; Spahlinger and Wegen 2005. 45; Forsthoff 2006. 25–26; 53–59; Michalski and Funke 2010. 692–693.
Wymeersch 2003. 681.

implies that even Member States traditionally following the incorporation doctrine can provide for restrictions on the free movement of companies.[29] Consequently, Member States are free to apply either the real seat theory or the incorporation doctrine, but these must conform in their combined effect with substantive provisions to the freedom of establishment.

Nevertheless, legal development goes undoubtedly towards the acceptance of the incorporation doctrine even by those Member States that previously followed the real seat doctrine. In Austria, after the *Centros* judgment, the OGH declared that in spite of the express provision of the Austrian Code of Private International Law laying down the real seat principle the application of the real seat principle is contrary to the freedom of establishment – at least in the case of a secondary establishment – and the incorporation theory is to be applied.[30] In Germany, the amendment of the AktG[31] and the GmbHG[32] by the MoMiG enabled AGs and GmbHGs to transfer their real seat abroad.[33] Opposite examples may also be found. Thus, the Belgian Code on Private International Law of 2004 preserved the real seat principle,[34] albeit one must acknowledge that this is coupled with a quite flexible court practice not excluding the transfer of seats of companies.[35]

3. Company formation

A third question is whether the freedom of establishment covers a situation where the company has its real seat in a Member State other than the one in which it has its registered office already at the time of the formation.

From the perspective of the state of origin where the company has its registered office, the Court's case law leaves to that Member State the possibility to determine the required connecting factor and to require the coincidence of the registered office and real seat in the same Member State. In *Cartesio*, the Court stated that 'a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and

29 See the facts of Centros, Inspire Art and Centros where Denmark, the Netherlands and Hungary respectively followed the incorporation doctrine.

30 OGH 6Ob123/99b, 15.07.1999.

31 Aktiengesetz vom 6. September 1965 (BGBl. I S. 1089), das zuletzt durch Artikel 6 des Gesetzes vom 9. Dezember 2010 (BGBl. I S. 1900) geändert worden ist (AktG).

32 GmbH-Gesetz (Gesetz betreffend die Gesellschaften mit beschränkter Haftung) Gesetz vom 20.04.1892 (RGBl. I S. 477) zuletzt geändert durch Gesetz vom 31.07.2009 (BGBl. I S. 2509) m.W.v. 05.08.2009.

33 Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen vom 23. Oktober 2008 (BGBl. I S. 2026).

34 Loi du 16 juillet 2004 portant le Code de droit international privé BOB-FR, 27 juillet 2004, art 110.

35 See, for example, *Lamot*, Cass., 12 novembre 1965, *Pas.*, 1966, I, 36. RCDIP (1967) 506–509.

that required if the company is to be able subsequently to maintain that status'.[36] Member States can require companies to locate their registered office and real seat in the same Member State.[37] If the company wishes to be governed under the law of the state of origin, it must respect its provisions,[38] such as a requirement that the real seat and the registered office must be in the same country. The real seat doctrine may thus be applicable in such a scenario. The freedom of establishment provisions do not come into play here, since the company is not yet constituted under the law of the Member State concerned.[39]

The possibility of such a formation with a real seat in another Member State is much more debated from the aspect of the host state. A part of the literature is against the application of the freedom of establishment in a scenario where the real seat is already located abroad at the time of the formation of the company. The main argument is that there is no element of mobility present; consequently the freedom of establishment does not apply.[40]

Interestingly, if a citizen of Member State A would not incorporate the company in the same Member State, but in Member State B, and the real seat would be placed already at the time of formation in Member State C, it would probably be covered by the freedom of establishment, since the formation of a company in another Member State is clearly covered by the freedom of establishment. In addition, an international mobility element is clearly present here.

It is odd to treat an immediate formation with a foreign real seat and a formal transfer of the real seat immediately after the incorporation of the company in the state of origin differently.[41] Accordingly, it is irrelevant whether a company carries out economic activity in another Member State through a branch (*Centros, Inspire Art*) or the '*de facto*' transfer of its real seat (*Überseering*); the host state must accept the presence of the foreign entity on its territory independently of the fact whether the real seat of the company was (re)located to that Member State at the time of the establishment of the company or later.[42] In addition, the Court applied the freedom of establishment provisions in the *Centros* and *Inspire Art* cases, although the letter-box companies had their real seat (although in the form of a secondary establishment) already at the time of the formation in another Member State.[43] It may be suggested that this interpretation could be extended to real seats located in another Member State from the outset, even if they do not have the form of a subsidiary, branch or agency.

36 *Cartesio*, para 110.
37 Lagarde 2003. 534; Diego 2004. 99–100; Frobenius 2009. 491; Heymann 2009. 561–563.
38 Klinke 2005. 290.
39 Lagarde 2003. 534.
40 Wöhlert 2009. 161–162; Kindler 2010. para 427.
41 Spahlinger and Wegen 2005. 47–48.
42 Behrens 2000. 385-386.
43 Weller 2004. 43.

The Court did not have to decide on such a case and therefore national courts had to address this issue without any help on the part of the Court. The judgment of the OLG Frankfurt am Main of 28 May 2003 confirmed an earlier decision of the OLG Zweibrücken and applied the principle of recognition in accordance with the constitution in the home state even where the foreign company already had its real seat in the host Member State at the time of foundation. In this way the freedom of establishment could be said by German courts to cover situations where there was no seat transfer or other type of movement at all.[44] In its judgment, the OLG Frankfurt found that it was insignificant whether the company's real seat was in another Member State at the outset or transferred it there later.[45]

4. International conversion

According to the *Cartesio* case, a company may convert itself into a company form provided for by the state of destination with an attendant change in the applicable law. The home state cannot restrict this to the extent that the host state permits it. In *Cartesio*, if both the registered office and the real seat of the company had been transferred and if this had taken place with an attendant change of law and the adaptation to the law of the host state, that would have clearly constituted an international transformation covered by the freedom of establishment. It is, however, not clear how it would be judged if only the registered office was transferred retaining the real seat in the Member State of origin.[46] A part of the laws of the Member States, such as German[47] or English law,[48] exclude the possibility of the transfer of the registered office of companies.

Eckert argues that the isolated transfer of the registered office from a real seat state while leaving the real seat in that country does not fall within the scope

44 OLG Zweibrücken 26.03.2003, 3 W 21/03. Leible 2006. 381; Bayer and Schmidt 2009. 747–748.

45 OLG Frankfurt a. M. Urteil 28.05.2003 - 23 U 35/02.

46 Gerner-Beuerle and Schillig interpret Cartesio as covering also the simple transfer of registered office. Gerner-Beuerle and Schillig 2010. 314–316; 320–321.

47 Excluding the possibility of the transfer of the registered office from Germany to abroad: OLG München Beschluss 04.10.2007 - 31 Wx 36/07; BayObLG Beschluss 11.02.2004 - 3Z BR 175/03; OLG Brandenburg Beschluss 30.11.2004 - 6 Wx 4/04; OLG Düsseldorf Beschluss 26.03.2001 - 3 Wx 88/01; OLG Hamm Beschluss 1.2.2001 - 15 W 390/00. For associations (Verein): OLG Zweibrücken Beschluss 27.09.2005 - 3 W 170/05.

48 *Bateman v Service* [1881] App Cas 386; *Saccharin Corp Ltd v Chemische Fabrik Von Heyden AG* [1911] 2 K.B. 516 CA; *Gasque v Inland Revenue Commissioners* [1940] 2 KB 80 (KBD); *Kuenigl v Donnersmarck* [1955] 1 Q.B. 515 (QBD); *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1970] Ch. 506 Chancery Division; *Tayside Floorcloth Co. Ltd.* [1923] SC 590; *Re Baby Moon (UK) Ltd* [1985] PCC 103. Smart 1990. 126; Lewis 1995. 295; Cheffins 1998. 427; North and Fawcett 1999. 175; Rammeloo, Corporations in Private International Law 2001. 148–149; Lewis 2002. 38; Prentice 2003. 633; Birds, Boyle, MacNail, McCormack, Twigg-Flesner, Villiers 2004. 99; Mayson, French and Ryan 2005. 90; Collins 2006. 1336; Mößle. 2006. 46–47.

of the freedom of establishment. In his view, the simple choice of applicable law in itself is not the subject of the freedom of establishment, therefore the home Member State can inhibit the transfer of the registered office and make it conditional upon the transfer of the real seat.[49] He adds that the company can locate its real seat to the state of origin again if this is permitted by the host Member State.[50]

Metzinger argues that, by virtue of the definition of establishment in EU law, it may seem that the simple transfer of the registered office as a formal seat is not covered by the freedom of establishment.[51] Pursuant to the case law, establishment means the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.[52] The requirement of establishment is not complied with where the registered office as a simple formal address of the company would be relocated to another Member State.

This approach can find a justification in the Court's statements in the *Cadbury Schweppes* judgment. One can argue that the transfer of the registered office is only an artificial arrangement that does not reflect economic reality and aims only at the circumvention of national legislation.[53]

A further question is what kind of rights are enjoyed by the host state in relation to a cross-border conversion. In *Cartesio*, the Court ruled that the Member State of origin cannot prevent a 'company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so'.[54] However, the interpretation of the phrase 'to the extent that it is permitted under that law to do so' may be questionable.

In the case of an international conversion (as opposed to the simple transfer of the real seat), the host state can impose requirements on the company as a precondition for acquiring a new status and being considered as existent under the law of the host Member State. A host state has the right to restrict the conversion, determining those conditions that are required to link the company to the host state.[55] Real seat states could thus require the simultaneous location of the registered office and real seat in their territory following the pattern of the *Cartesio* case. Hence, the host Member State appears to be entitled to prohibit a conversion if the immigrating company does not fulfil its attachment criteria. Moreover, the host state can require the adaptation to its company law rules

49 Similarly, Däubler and Heuschmid 2009. 494.

50 Eckert 2010. 559–560.

51 Metzinger, Nemessányi and Osztovits 2009. 138.

52 Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905, para 20; Case C-196/04 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue* [2006] ECR I-7995 para 54; Metzinger, Nemessányi and Osztovits 2009. 129, 138.

53 *Cadbury Schweppes*, paras 51 and 55.

54 *Cartesio*, para 112.

55 Martin and Poracchia 2010. 392; Eckert 2010. 560–563.

(company structure, requirements on minimum capital and capital maintenance) applied also to companies originally established in that country.[56]

Others refer to the *Sevic* decision, by virtue of which the freedom of establishment also embraces (although not defined more closely in the judgment) international transformations.[57] If the host state provides for the conversion of domestic companies, it also has to permit an international conversion. This follows from the *Sevic* judgment that prohibits discrimination between domestic and international situations.[58]

The question to what extent host Member States are free to allow or prohibit the cross-border conversion of companies from other Member States has not yet been answered by the Court. In this respect, the pending *VALE* case may be to a certain extent helpful.[59] The case raises the question whether the host Member State, in the given case Hungary, can impede the re-establishment of an Italian company as a Hungarian company and what kind of rights the host Member States have in relation to this transaction. The Court has not yet ruled on the question referred to it, but AG Nilo Jääskinen has already delivered his opinion. The case raises the question whether the host Member State, in the given case Hungary, can impede the re-establishment of an Italian company as a Hungarian company and what kind of rights the host Member States have in relation to this transaction. However, as the AG points out, the case is to be distinguished from the previous cases, including Cartesio that it is not only about a cross-border conversion, but a cross-border re-formation. The Italian company had been deleted from the Italian registries several months earlier, when the entry into the Hungarian company register was requested. Due to this, the Advocate General found that, although the freedom of establishment is applicable and, generally speaking, the law of the host state has to permit the company to let it be known that it is the successor of another company, under the circumstances of the case the Hungarian authorities are not obliged to recognise that the Italian VALE Srl. was the predecessor of the Hungarian VALE Kft. Otherwise, in accordance with the *Sevic* case, the host Member State can require the company to comply with the requirements of Hungarian law applicable to similar situations, but it cannot prohibit the cross-border re-formation only on the basis that the domestic law does not provide for such a cross-border transaction.

56 Eckert 2010. 563.

57 *Sevic*, para 19.

58 Mörsdorf 2009. 100, 102; Bayer and Schmidt 2009. 760; Frobenius 2009. 490; Wisniewski and Opalski 2009. 614–617; Teichmann and Ptak 2010. 819.

59 Opinion of Advocate General Nilo Jääskinen in Case C-378/10 *VALE* (15 December 2011).

5. Exceptions and justifications

Where no secondary EU law exists, restrictions on the freedom of establishment cannot be maintained unless they are justified. Restricting national measures may be justified on the basis of the express exceptions provided for by Article 52 TFEU or overriding requirements relating to the general interest if they comply with the *Gebhard* criteria, namely that they are not discriminatory; they are justified by imperative requirements in the general interest; they are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.[60] These criteria are also taken up by the Court's judgments on the freedom of establishment of companies.[61]

Article 52 allows national regulations or administrative actions providing for special treatment of foreign nationals on the grounds of public policy, public security or public health. The possibility of Member States to make recourse to these exceptions is quite limited.[62] There is no example in the case law on the freedom of establishment of companies where the Court would have accepted such an assertion.

In its case law, the Court recognised the protection of the interests of employees, minority shareholders and creditors as a reason justifying a restriction on the freedom of establishment of companies. However, the reliance on any of these exceptions was rejected by the Court in its judgments.[63] It is, therefore, questionable to what extent one can rely on these exceptions and this is particularly true for the abuse of law exception.

In *Centros* and *Inspire Art*, the Court opined that restricting national measures may be justified on the grounds of preventing fraud and abuse. Nevertheless, in *Centros* and *Inspire Art* the Court interpreted the possibility of an assertion of an abuse of law restrictively. The recourse to this means is quite limited pursuant to the Court's case law. In principle, availing of a more favourable legal environment or tax advantages does not constitue an abuse.[64] The avoidance of the minimum capital requirements through the establishment of a letter-box company that pursues economic activity exclusively in another state did not qualify as an abuse. In order to be justified, a national measure must be proportionate. Moreover, the prevention of abuse can justify a restriction on the freedom of establishment

60 Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 37.

61 *Centros*, para 34; *Inspire Art*, para 133.

62 Sandrock 2003. 2589; Forsthoff 2006. 75–77.

63 *Überseering*, paras 87–93; *Sevic*, paras 24–31.

64 *Centros*, para 27 and 29; *Inspire Art*, para 96; Case C-364/01 *The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* [2003] ECR I-15013, para 71.

only in an individual case.[65] General rules for prevention of fraud and abuse are therefore not allowed.[66] Taking into account the above requirements and the Court's practice, it is questionable what kind of national measure could conform to the above criteria.

There are, however, situations where abuse could be raised eventually with more success to justify restriction. In *Cadbury Schweppes*, it was held that a national measure restricting the freedom of establishment may be justified on the ground of prevention of abusive practices where it specifically relates to wholly artificial arrangements, which do not reflect economic reality, aimed at circumventing the application of the legislation of the Member States concerned.[67]

In its decision of 7 May 2007, the BGH had to answer the question whether the registration of a branch of a UK private limited company may be refused if a prohibition to exercise a profession was imposed on its director by German authorities.[68] The BGH found that the rejection of the registration of the branch is in conformity with the freedom of establishment for two grounds. First, it argued that the reliance on the freedom of establishment is excluded in the event of an abuse of law, such as in the given case. Secondly, the BGH stated that, even if the freedom of establishment could be applied, the restriction would meet the *Gebhard* test and considered the rejection as justified on the grounds of the protection of the creditors and the safeguarding of the unity of domestic legal order.

IV. Conclusion

There is no doubt that nowadays, primarily due to the crisis, scepticism towards the institutions and the indisputable achievements of the legal development of the EU is increasing. As professor *Mario Monti*, who became in the meantime prime minister of Italy, put 'The single market today is less popular than ever, while Europe needs it more than ever.'[69] In my view, this statement is not true for the transfer of the company seat. It seems that the regulation on the cross-border transfer of the company seat is not only necessary, but what is more, there is a demand for a regulation that reflects reality. These demands for the regulation on the cross-border transfer of seat of companies are articulated unequivocally on the part of business players.

At this moment, it cannot be foreseen whether the EU intends to settle the issue of the cross-border transfer of the company seat in the near future and if

65 Centros, para 38.
66 Looijestijn-Clearie 2004. 410.
67 *Cadbury Schweppes*, para 51.
68 BGH Beschluss 7.5.2007 - II ZB 7/06. See also OLG Dresden: Beschluss 07.02.2006 - Ss (OWi) 955/05.
69 Monti 2010. 6, 20.

yes, in what way. The Court laid down indeed crucial principles in its case law on the freedom of establishment. However, the fragmented nature of the Court's judiciary practice increases the significance of national rules on the transfer of seat. The inherent uncertainties related to the Court's judgments give an impetus to the development of national laws. Due to the absence of a detailed EU-level regulation, national laws adopt innovative solutions that shape the possibility of the transfer of seats of companies in a creative interaction with the freedom of establishment provisions of the TFEU and the Court's case law. This is illustrated by the legal solutions rooted in national laws that were presented above in the fields left untouched by the Court's judiciary practice.

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Is There a Future for Digital Rights Management?

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Abstract. Although Digital Rights Management (hereinafter: 'DRM') does not have a legal definition in Hungarian law, it is undoubtedly part of the complex regulating system including not only legal, but also business, political and cultural elements. DRM seems to impose restrictions on the users of copyright works well exceeding those provided by 'traditional' copyright law. There has been surprisingly little debate in Hungary regarding the manner and extent of implementing the relevant international and European provisions. It still seems to be an open question whether DRM is a solution to the underlying issues and whether or not the advantages of DRM (for its beneficiaries) outweighs the hindrances caused to the users and to the original aim of copyright.
At the same time, the world (of Intellectual Property) is flooded by the arguments for and against DRM. The various stakeholders wish to be heard and fiercely battle each other. Much can be learned from them in order to fine-tune the local system.
This paper attempts to give an overview of the Hungarian legal provisions regarding DRM and their environment. It also wishes to show the advantages and disadvantages of the DRM-system based on the arguments of various parties. Furthermore, it looks at the current alternatives offered beside DRM, as well as the potential directions of development.

Keywords: Digital Rights Management, copyright law, intellectual property

I. DRM is not a Sole Regulator

DRM, as a technical measure, is just one element of a complex regulating system, the so-called 'trusted system'.[1] This system also includes legal, business, political and cultural elements. Clearly, the business interest of corporate right-holders (e.g. the media-industry) is to maintain the profitability of their investment in creating copyright works also in the digital era. It is the politicians' right and duty

1 Gillespie 2007. 8.

to determine the cultural policy, which also includes a balancing act between the public good (e.g. the freedom of expression) and the monopoly provided to copyright holders.[2] Further, it is not disputable that the computer and the Internet are essential instruments of participation in culture.[3]

This trusted system constitutes a sociotechnical ensemble that achieves the aimed effects through the joint impact of its elements. If any of these elements falls out, the whole system loses its effectiveness. Gillespie calls this a 'regime of alignment'.[4] According to him, the law does not create this regime, but rather it is a means of achieving certain political, social and business goals.

Apparently, these general statements are valid also in respect of Hungary. The legal protection of DRM was introduced by the Hungarian Copyright Act[5] already at its adoption, and has been amended having an effect from Hungary's accession to the EU.[6] The author is not aware of any public consultation prior to the introduction or to the amendment of the Hungarian Copyright Act and, in particular, whether the users were asked.

Clearly, the relevant Hungarian legal regulation was introduced in accordance with Hungary's international undertakings[7] (Articles 11 and 12 of the WIPO Copyright Treaty[8]) and European Community obligations (the implementation of the InfoSoc Directive[9]). However, no one seems to have debated about why Hungary undertook these obligations in the first place. Irrespectively of the reasons, the result is that the Hungarian legal regime regarding DRM fits perfectly into the international and the European system.

II. DRM under Hungarian Law

Similarly to the InfoSoc Directive, the Hungarian Copyright Act provides for no single definition of DRM. Instead, the protection provided to DRM devices is based

2 Gillespie 2007. 27.
3 Gillespie 2007. 10.
4 Gillespie 2007. 100.
5 Act LXXVI of 1999 on copyright protection ('Hungarian Copyright Act'). On the historical background of this act see Nótári 2010. passim.
6 Section 106 (1) of Act CII of 2003 on the amendment of some acts on industrial property and copyright. The accession date was 1 May 2004.
7 Samuelson 1999. Samuelson argues that the WIPO Copyright Treaty adopted only a general norm on circumvention, allowing the member states to implement it in their own way. Based on this, no obligations seem to have arisen from the treaty for Hungary to formulate its anti-circumvention provisions in the manner it did.
8 Adopted in Geneva on 20 December 1996 and entered into force in respect of Hungary on 6 March 2002.
9 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ('InfoSoc Directive').

on the function of the device.[10] While Section 95 of the Hungarian Copyright Act protects effective technological measures ('ETMs'; e.g.: encryption standards),[11] Section 96 protects rights management information ('RMI'; e.g.: Rights Expression Languages).[12] The regulation of ETMs and RMI differs in so far as the protection of ETMs is independent from the infringer's knowledge of copyright infringement, while the protection of RMI is connected with it. Further, the protection of ETMs includes 'anti-device' and 'anti-service' provisions, declaring that the trafficking in devices and provision of services having as the main purpose the enabling or facilitating the circumvention is illegal.[13]

Unsurprisingly, the Hungarian Copyright Act prohibits the circumvention of DRM in accordance with the InfoSoc Directive. The Hungarian Copyright Act complies with the 'appropriate legal protection' requirement of the InfoSoc Directive[14] by declaring that the consequences of copyright infringement shall be applied in case of the circumvention of DRM measures.[15]

III. DRM versus 'Traditional' Copyright Law

Both the legal protection of DRM and traditional copyright protection are based on the presumption that copyright and business incentive are necessary for creativity, even though this presumption has been debated.[16] Considering the common grounds with copyright, what novelties did DRM and its legal protection introduce?

Some[17] reckon that DRM is one of the solutions to the challenges to copyright posed by the digital age. They argue that new possibilities arose to infringe one's copyright in the digital world that render collective rights management insufficient. Consequently, they are of the view that DRM fulfills a need for protection.

10 See Mazziotti 2008. 180 as to lack of single definition in the InfoSoc Directive.
11 See also Article 6(3) of the InfoSoc Directive.
12 See also Article 7(2) of the InfoSoc Directive.
13 References to DRM herein include both ETMs and RMI.
14 Articles 6 (1) and 7 (1) of the InfoSoc Directive.
15 Sections 95 (1) and 96 (1) of the Hungarian Copyright Act.
16 Gibson 2007. 127. Gibson argues that the western idea of genuine author and the paradigm of copyright being the motor of creativity are used to turn the collaborative development of innovation into the creative accountability of individuals. In respect of software, this transformation may be achieved by naming corporate identities as creators through branding. As a result of such 'individual' efforts, software becomes 'valuable' and, therefore, marketable. She claims that open source and free software reveal that the corporate models of creativity in respect of software development are artificially construed. She seems to state that the idea of individual copyright is based on an economic model while the essence of open source and free software communities is to develop knowledge for the community, under community governance.
17 Cserba–Munkácsi 2008. 155.

Notwithstanding this, it is hereby submitted that DRM came to existence due to an opportunity to protect copyright works in a digital manner.[18] The rightholders have always committed everything to protect their copyrights as much as they could. One may assume that the rightholders would have used DRM also earlier, in the analogue era, if they had had the opportunity to do so. They did not use DRM because they did not have the relevant technical means. In this sense, DRM is an electronic fence around the garden of copyright.

Further, while copyright law provides for a pure legal protection, DRM includes both a technological control and, on a legal level, an anti-circumvention regulation.

In contrast with copyright law's ex post protection, DRM provides for an ex ante regulation.[19] This means that DRM-measures foreclose any illegal use of the protected copyright work, while a judge has the opportunity to consider the illegal nature of use under copyright law only after the actual use, if the rightholder turns to the court at all.

Furthermore, some are of the view that DRM may replace collective administration of rights, as a traditional copyright management tool, in the digital age. This is because the co-existence of the collective administration of rights and DRM may force users to pay royalties for the same content twice.[20] According to a document prepared by the BBC,[21] 'there are indications that implementation of DRM may also usher in a move from collective to individual administration of rights' and, in order to avoid this, the BBC suggested key principles to the implementation of DRM. This change seems less threatening to Cserba and Munkácsi,[22] who observed that DRM may replace the collective administration of rights if (i) all works are provided with DRM; (ii) the permeability among the various technical solutions is ensured; and (iii) end users can acquire these works at a price not exceeding that of the royalty to be paid for the work's use.[23] They also envisaged that collective societies may include DRM services into their fields of activity.

18 MacQueen 2009. 216.

19 Mazziotti 2008. 181. Notwithstanding this, Mazziotti notes that the InfoSoc Directive blurs the common law (open ended list of exceptions, ex post assessment) and the continental droit d'auteur (strict, ex ante list of exceptions) by introducing a three step test in Article 5 (5) and, at the same time, providing for a strict, ex ante list of exceptions in Article 5 (1)-(4). This is also true of the Hungarian Copyright Act (Chapter 4).

20 As part of the price of the blank carrier or medium (e.g. photocopier, CD) and for the content protected by DRM. This is not true if no blank media levy is to be paid (e.g. computers in Hungary).
It is assumed that 'royalty' here means the royalty to be paid to the collective society.

21 BBC 2004.

22 Cserba–Munkácsi 2008. 160.

23 It is assumed that 'royalty' here means the royalty to be paid to the collective society.

IV. The Advantages and Disadvantages of the DRM-System

IV.1. DRM has advantages both for the rightholder and the user.

Through using DRM, the rightholder may retain influence over the work even after marketing it, because it is easy to bar any illegal use.[24] Further, the rightholder can control the use of the work by determining the territory, duration, scope and extent of use. Furthermore, the rightholder may develop various contract terms for various users. DRM also helps the rightholder to reduce the transaction cost of content distribution and increases the cost of illegal use.[25]

These advantages allow the rightholder to make business in a more flexible manner, adjusting the terms of use and the prices to the laws in the various countries, as well as to any individual need of the users. Thereby, the rightholder may avoid any illegal use. If someone illegally breaks the DRM code, the rightholder may still turn to the anti-circumvention provisions referred to above.

Theoretically, it is a development for both the rightholders and the users that it is easier to conclude and fulfil license contracts due to the digital environment and the opportunity to communicate swiftly. DRM also allows for new forms of marketing and business models (e.g. pay-per-download services, online lending, interactive TV services).[26]

The question remains whether or not the rightholders wish to negotiate the various contract terms with individual users and, if not, what negotiating power the users have regarding these terms.

IV.2. Notwithstanding the above, it seems that the disadvantages caused to the legitimate users of DRM works might outweigh the above-specified advantages.

DRM systems do not respect the traditional copyright exceptions and limitations.[27] DRM limits or excludes the possibility to fair use (e.g. private copying). According to Tian, the prerequisite of free use is legal access.[28] He refers to the Universal City Studios v Corley case in the USA,[29] in which the court held that the circumvented DRM device provided access control, and not copy control. He claims that the implication of the decision is that free use cannot be applied without 'free access'. Further, if a legitimate user may access a work by circumventing a DRM device,

24 Cserba–Munkácsi 2008. 161.
25 Barczewski 2007. XI.
26 Cserba–Munkácsi 2008. 156-157.
27 Barczewski 2007. XII.
28 Tian 2009. 230.
29 273 F.3d 429 (2d Cir. 2001) – a Norwegian teenager broke the CSS code used on DVDs (by using DeCSS programme) and Corley published this programme on the website of his newspaper.

this is not possible in practice, unless the user has sufficient knowledge to break the encryption code. This is because the anti-circumvention laws forbid trafficking in devices capable of circumventing DRM devices.[30]

Thanks to DRM, the transformative uses of copyright works become subject to licensing.[31] This is because the user needs the rightholder's consent to use the DRM protected work, even if the use is legitimate and serves productive, and not mere entertainment purposes. Assuming that private copying stimulates the production of new works (inspiration in both private study and scientific research), it is unambiguous that DRM restricts or preempts the creation of such works. DRM may constitute a bar to creative free use, even though traditional copyright law would allow for this.

The narrow exceptions provided by anti-circumvention regulation result in an overbroad protection not sought by traditional copyright law. As already mentioned above, the circumvention of DRM is a per se tort. As a consequence of this, users are barred not only from the use of copyright works, but also from the use of non-copyrightable material (e.g.: facts, data, information, functionalities). Further, DRM protects works even if the copyright protection has expired.[32] Preposterously, even copyright holders may breach DRM regulations if they circumvent the code in order to ascertain that their rights have been infringed.[33]

Tian refers to anti-circumvention regulation as 'para-copyright' because these are independent from traditional copyright.[34] He argues that, in the United States, this separation allowed also for actors outside the copyright industry to claim DRM-breach (e.g. in connection with a garage-door opener software). According to him, this carries within the danger of abuse of anti-circumvention provisions and may even be contrary to competition law. It is hereby submitted that copyright and anti-circumvention regulation do not apply to the copyright industry, but rather to copyright works. Therefore, the abuse of DRM should be evaluated irrespective of the industry. Nevertheless, it would be clearly abusive if the rightholder used DRM in order to maintain its monopoly for information other than copyright works.

30 Mazziotti 2008. 201. Mazziotti refers to the French Mulholland Drive case (the plaintiff could not copy a film for private use from DVD to VHS due to the DRM device used on the DVD), where the Paris Court of Appeal held that there is no subjective right to make a private copy of a protected work, but rather the private copying exception is a mere defense against infringement claims. However, the court established that this exception prevails over the DRM measure applied by the rightholder in order to protect his copyright. The French Supreme Court overturned this decision in its own. Mazziotti argued that the latter court's decision was unclear. This case became less relevant because French law has changed afterwards. Private copying was defined as an enforceable use against technical devices.

31 Mazziotti 2008. 217.

32 MacQueen 2009. 217.

33 Tian 2009. 232.

34 Tian 2009. 234.

Mazziotti observed that the possible lack of interoperability between two DRM-systems may result in the user not being able to use a DRM-protected work on a medium using another DRM system – despite acquiring both lawfully.[35] There is no single standard for DRM. However, according to him, it is crucial to avoid that any of the market stakeholders forces upon the others the use of its DRM system, thereby creating a de facto standard.[36] The Commission of the European Communities also held the interoperability of DRM systems of major importance for the internal market.[37] The Commission set up the aims that a global and interoperable DRM infrastructure be established through the supporting of open standards of communication and encoding simultaneously with the enforcement of copyright exceptions.[38]

A further argument against DRM is that it might rob judges of their ex post freedom to evaluate and opportunity to decide. As the circumvention of DRM measures is a per se tort, judges may not be in a position to consider whether or not the user breached copyright, but rather they may have to automatically establish that the anti-circumvention provisions have been breached. Therefore, the rightholders, as private actors, can determine the actual scope of the users' use rights prior to the use of the work.[39]

The use of DRM allows for the monitoring of the user's conduct and habits. However, this may injure the user's right to privacy. In connection with this, Mazziotti refers to Lessig and claims that DRM does not automatically cause the injury of the right to privacy, only if the user's identity and habits cannot be hidden from the rightholders.[40] Consequently, the protection of privacy greatly depends on the set-up and the management of the DRM system. Unless the legislators require the providers of DRM technology to create their devices in a manner that protects privacy, this threat remains.

V. Possible Future Developments, Suggestions

Theoretically, one may envisage the future of DRM on a wide scale from total DRM-control to a pirates' paradise, where DRM measures have no dissuasive power whatsoever. However, it is more likely that such 'end of history for IP' will

35 Mazziotti 2008. 189.

36 Mazziotti 2008. 187.

37 Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, The Management of Copyright and Related Rights in the Internal Market, COM/2004/0261 final, §1.2.5 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0261:EN:NOT)

38 The author is not aware of any European level legislation in connection with these aims.

39 Mazziotti 2008. 181.

40 Mazziotti 2008. 34.

not come to existence. There are various suggestions for solving the issues raised by DRM and specified above. However, none of these offers a perfect solution.

V.1. As to the duration of DRM protection, MacQueen suggests that laws should prescribe that DRM control shall cease upon the expiry of the subsisting copyright.[41] Nevertheless, the expiry date may be hardly specified in case of authors who are still alive.

V.2. In order to deal with the potential threat that DRM causes to privacy, the law should forbid DRM protection that extends to monitoring personal conduct.[42]

V.3. There are numerous suggestions concerned with the extent of DRM-control.

V.3.1. One of these is to connect the protection of ETMs to copyright infringement (similarly to the protection of RMIs). However, it is not clear how DRM systems could distinguish based on user's intent (e.g. based on user's own declaration).[43] Further, DRM technology may be useful only for the purpose of accommodating the simplest transformative uses (e.g. quotation), but not more complex uses (e.g. parody).[44]

V.3.2. Samuelson suggested that all legitimate purposes should be exempted from the anti-circumvention provisions.[45]

Similarly, Tian put forward that the scope of exceptions should be broadened based on the so-called fair circumvention doctrine[46]. According to this doctrine, users should be allowed to circumvent the technical measures serving not only rights control but also access control aims. In connection with this, the manufacturing and marketing of devices used for circumvention should also be exempted in order to involve also those users who do not have the necessary technical skills.[47] These exemptions should only be applied if certain requirements were met (e.g. the copyright holder does not publish how the users can use the DRM protected content without additional costs and effort).

Tian also proposed that the rights of rightholders and users should be balanced through the following means.[48] First, judges should be provided with a right to

41 MacQueen 2009. 219.
42 Mazziotti 2008. 34. Mazziotti concludes that the InfoSoc Directive is not capable of achieving this.
43 MacQueen 2009. 219.
44 Mazziotti 2008. 217.
45 Samuelson 1999.
46 Tian 2009. 238.
47 Tian 2009. 243.
48 Tian 2009. 241.

deliberate as to the righteousness of the applied DRM system in light of copyright and its limitations and exceptions. Secondly, specific legal mechanisms should be used to enforce such right. For example, independent bodies should be established that (i) control the technical measures; (ii) assist users in exercising their fair circumvention right; (iii) avoid any abuses of the fair circumvention exception by users; and (iv) assists courts in issues regarding technical measures. Thirdly, the involvement of users and the working of market mechanisms should be strengthened. For example, rightholders should be obliged to display on their products if they applied any DRM system. This would allow users to choose between similar products based on whether or not DRM is applied or to choose between products offered under different DRM terms.

However, these proposals seem to render DRM protection superfluous, because the infringers could acquire information and devices to break encryption codes from the market. The only difference to traditional copyright protection would, therefore, be that infringers would also be liable for breaching the anti-circumvention provisions. This way, DRM would not ensure a stronger protection or easier enforceability to traditional copyright law. Neither is it clear how the independence of the 'independent bodies' could be ensured.

V.3.3. According to Cohen,[49] users should have a right of self-help based on which they may lawfully circumvent DRM protection as far as it restricts fair use. This is based on the US Constitution's intellectual property clause, which specifies an originality requirement in respect of copyright and on the US Constitution's First Amendment, which establishes a right to free speech. According to Cohen, the contractual terms contrary to the US Constitution and DRM systems that implement such contracts should be invalid. Consequently, users may always claim that they legally circumvented a DRM measure if the measure was over-restrictive.[50]

Nevertheless, Cohen's argumentation may only be applied in countries where the constitution recognises the limited nature of copyright protection. For example, there is no such requirement at the constitutional level in Hungary; and the parties to an agreement may generally contract out of the Hungarian Copyright Act.

V.3.4. Mazziotti considers, as an optional solution, the provision of a narrow exception from anti-circumvention.[51] He suggests that distinction should be made between productive (e.g. scientific works) and unproductive uses (mere entertainment) of copyright works. He suggests the creation of an independent, external decision maker (e.g. a public agency) to ascertain the identity of the user

49 Cohen 1998. 1089.
50 See also Mazziotti 2008. 220.
51 Mazziotti 2008. 224.

and the purpose of the request. Further, this authority would provide the user (in person or electronically) with a personal cryptographic key or code in order to enable access to a technically unrestricted copy of the requested works.

The weakness of this solution seems to be that the introduction of the third party authority slows down the process of acquiring the work. If the user sought to exercise his free use right in respect of more DRM protected works, the delay may be multiplied. This method would, therefore, not dissolve the chilling effect of DRM on transformative uses. Further, the independence and trustworthiness of the independent third party would be a prerequisite of a working system.

V.3.5. Theoretically, it would be possible, to use alternative compensation systems, where the payment would be paid as a part of, for example, the Internet subscription fee, price of software and/or hardware, tax or blank media levy.[52] This would mean a return to collective administration of rights.[53]

However, it would be hard in this case to (i) follow the downloading of works without monitoring users' conduct and, thereby breaching the users' right to privacy; (ii) ascertain rate of royalties; (iii) ensure that the rightholders receive a proper percentage of the collected royalties; and to (iv) distinguish users who do not download copyright works.

Conclusions

Although DRM protection may have advantages for both rightholders and for users, it has the potential of disabling the limitations and exceptions available in traditional copyright law and exceptions of traditional copyright law, in particular of trespassing on traditionally legitimate private uses. Anti-circumvention laws were created because DRM codes proved to be ineffective once they have been decrypted. These laws protect DRM measures irrespectively of the underlying copyright, if any. Therefore, anti-circumvention provisions are not legitimised by the need to protect copyright.

It is submitted that anti-circumvention laws are not adding to traditional copyright law protection. The author is not aware of any reasons why additional legal protection should be provided to DRM measures, where these are broader than traditional copyright law would allow for. Nor, in the author's opinion, is additional legal protection necessary where DRM protection and traditional copyright law overlap with each other.

Notwithstanding the above, it seems that there is no perfect solution for the synchronising of DRM control with the exercising of copyright exceptions, such

52 Cserba–Munkácsi 2008. 163-165.

53 E.g. 'Ernesto' 2010.

as private copying or even transformative uses, and information not protected by copyright. The proposed solutions often do not allow for unrestricted legitimate private use of copyright works and information not protected by copyright. Alternatively, the solutions render the DRM protection complex but easily circumventable and, therefore, superfluous. None of these proposals considered that it could lead to society declining the whole system if it is harder to respect the law than to break it. If it generally takes legitimate users more time and effort to exercise their free use right than to find grey market alternatives, users will not be incentivised to obey the trusted system.

In view of the above, one may argue that there is no need for DRM at all and that, therefore, legislators should remove the anti-circumvention provisions (e.g. from the Hungarian Copyright Act). However, the business interest of corporate copyright holders is to protect their valuables in every possible way. The legislators seem to support this crusade or, at least, they do not seem to be eager to restrain DRM to the scope of traditional copyright law.

Consequently, DRM might remain a long-lasting element of the trusted system and of the struggle to safeguard power and profit from the pirates (all users?) of the digital age. One can only hope that the DRM paradox will be solved through the introduction of new business models that fit the new economy better.

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Book Reviews

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Nótári, Tamás, *Law, Religion and Rhetoric in Cicero's Pro Murena.*

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It is quite interesting to have already met the author that one reviews. In a way, one expects to recognise the man behind the text. With professor Nótári's book, this was exactly the case. It is an elegantly written work, full of witty remarks. This seems very appropriate for the subject because the author analyses one of Cicero's particularly ingenious speeches, his defence of Lucius Licinius Murena against the accusations of electoral fraud made by the jurist Servius Sulpicius Rufus.

The action occurs in 63 BC, when the tumbling Republic was on the edge of a new civil war, thanks to Lucius Sergius Catilina. Four candidates presented themselves to the elections for consulship for the year 62 BC, Catiline, Servius Sulpicius, Decimus Silanus Junius (brother-in-law of Young Cato) and, of course, Lucius Licinius Murena. The winners of the elections were Silanus and Murena, leaving on the way both Catiline, the revolutionary, and Servius, the jurist. This latter, in an incredible act of irresponsibility, put in risk the result of the elections accusing Murena of the electoral crime of *ambitu*. This would have reopened a chance for Catiline to accede to consulate. Probably this was the determining factor that convinced Cicero of the necessity of assuming Murena's defence against Servius's attack.

Professor Nótári's work is an interesting approach to Pro Murena. It is an historical, philological and legal analysis of Cicero's speech in defence of Murena's cause. After Gábor Hamza's prologue, the book begins by giving the historical context in which the action develops.

The author, in a skilful manner, dates the speech using the circumstances that surround the event. He can very accurately establish that it took place in November 63 BC, that is to say, in the heat of Catiline's crisis. Done, he analyses the structure of the *oratio* and the nature of the *quaestio de ambitu* promoted against Murena.

The author draws a brief description on the origins of *quaestiones perpetuae* and its development between the Gracchi and Sulla. Regarding *ambitu* (pp. 23 ff.), he accomplishes a detailed history of this electoral crime. The original prohibition seems to prohibit wandering among the possible voters looking for support. With time, the crime developed to comprehend electoral bribe. The author's treatment of the matter is pleasant, especially for its smooth cynicism while studying the Late Republican electoral system.

In the following pages, the author studies the role of *collegia* in the elections, specifying its nature and function. His analysis seems remarkably interesting, especially when he treats the relations between the *patronus* and his clients, distinguishing the *ingenui* from the *libertini*. His conclusion is that the liberalisation of the obligations between the freed men and their old masters by the end of the Republic, forced the candidates to induce *ingenui* to become their clients by adopting a speech that represented the ideas and feelings of the lower classes.[1]

Somehow, this allowed the opinion of the lower classes to penetrate the more elevated circle of the upper classes to which the candidates belonged.

Some pages ahead (pp. 31 ff.), the author analyses both Murena's and Servius's careers. This seems quite useful because it gives a context to the speech and also explains the reasons for the jurist's electoral defeat. Apparently, instead of campaigning for the position, Servius prepared the accusation against his rival.

The fifth chapter treats the problem of 'perfect orator' in the *Corpus Ciceronianum* (pp. 43 & ff.) and the education a rhetorician should follow to master such an *ars*. Particularly assuming is the section dedicated to humor and other rhetorical weapons in Cicero's arsenal. There, the author explains Cicero's attitude towards Servius in *Pro Murena*. The rhetorician knows that humor is a powerful weapon, so he uses it with moderation, avoiding cutting too deep in an adversary whom he respects. In fact, he does not mock the man, but instead he uses irony against Jurisprudence and its extreme formalism. The main juridical interest of Pro Murena is, in fact, the valuable information Cicero gives through his mockery on the nature of some institutions of the *ius Quiritium*.

From page 63 onwards, the central part of the book begins. The following pages are focused on the analysis of the legal figures that one can find in the chapters 26 and 27 of Cicero's Pro Murena.

The analysis begins with the study of the syntagma *manum conserere*, present in the *legis actio sacramento*. The expression designates the physical apprehension of the object under dispute, and the ritualised fight that the plaintiff and the defendant simulate. The analysis begins with the study of ritualisation of violence.[2] Then it points out the problems that emerge when performing the ritual *in iure*, before the magistrate, when the vindication concerns non portable goods, like real estate.

1 See Nótári 2010b 35 ff.

2 See Nótári 2006. 133 ff.; Nótári 2007. 231 ff.

In such a case, the magistrate would go himself to the place where the object is. Nevertheless, when Roman territorial growth made this translocation too difficult or even impossible (maybe around 426 BC after the taking of Fidenas), there was a change in the procedure. The litigants would start going to the place where the disputed object was, they would take a piece of it in order to represent it and simulate the fight, transforming the ceremony into an *ex iure manum consertum vocare*.

The author continues his analysis focusing on verbalism, as an element of Archaic Law and its connection with *ius sacrum*. In a very similar line of work as Castresana's,[3] he relates the formal singularity of words, as an entity capable of legal creation, with magical power. Words can create realities in the magical-religious world of Archaic Rome. The author studies *fatum*, as a divine verbal expression of the goddess Fata.

The sacred value of archaic legal wording is evident. A simple error on the pronunciation is enough to lose a lawsuit, the same way a fault in the wording of a magical formula denatures the rite. To illustrate the matter, the author brings a curious example, the dedication of the temple to *Ops Opifera*. Its *inauguratio* was postponed several times because of the incapacity of a stutterer Pontifex Maximus to pronounce the name of the goddess.

The author continues analysing the prodigies and the magical value of words, to finalise with the study of the *carmen* and its legal consequences on the XII Tables, especially the prohibition of *malum carmen incantare* reported by Pliny.[4] It is significant that the words pronounced by the litigants in the *legis actio sacramento* are expressly called *carmen* in *Pro Murena*. This enlightens the magical nature of the *legis actiones*, and the neurotic Roman obsession with words becomes perfectly cogent.[5]

On the same *legis actio sacramento*, from page 80 onwards, the author analyses the *festuca* and the *hasta*, as symbols of property in Ancient Roman Law.

The *hasta*, the spear, is the traditional weapon to obtain booty. Also, it is a symbol of power and military command. In a way, it can be linked to *imperium*. The author states that *imperium* would have a magical and religious dimension. It would be a mystical force that summons the forces needed to execute an order.

The *hasta*, as a symbol of booty, would have not only a connection with *imperium*, but also with property, playing a significant role at the tribunal of the *centumviri*.

In connection with the *hasta*, the author analyses the role of the *augures' litus*. It was a type of scepter full of magical virtues, which was used, among other things, to divide the skies and draw the limits of different things. He compares it with the *skeptrov* used by Hellenistic kings.

3 See Castresana 2007. 19 ff.

4 Gaius Plinius Secundus, *Naturalis Historia* 28, 18, 2.

5 See Nótári 2008b 203 ff.; Nótári 2009. 2 ff.

By the comparison of the magical function of the *hasta* and the *litus*, the author calls attention to the connection that would exist between these instruments and some Roman superior deities. An example is Mars, whose spear was kept at his Temple, or Quirinus, whose name comes from the sabine voice *quiris*/*curis*, equivalent to spear. In fact, the city of Rome called itself the city of the *quirites*, that is to say, the spearmen, and therefore its traditional Law is the *ius quiritium*. There is a clear connection between the inherent magical power of the spear and the *numen* of Mars and Quirinus. On the replacement of the *hasta* by the *festuca*, a simple rod, on the *legis actio sacramento*, the author, in concordance with Gaius,[6] attributes it to the limitation of the use of arms within the *pomerium*, bordering the *hastae* to the most essential rites.

Returning to *imperium*, the author comments a certain particularity that is usually overlooked by the critic. Both the Flamen Dialis and the Vestals are provided with *lictores*, just like the magistrates *cum imperio*. He relates the magical dimension of *imperium* to the presence of *lictores* and the taboos that both priests and the magistrates would share.

We would like to add, that the *lictores*, like the rest of the symbols of *imperium*, were introduced in Rome during the regime of Tarquin the Elder,[7] specifically from Vetulonia[8], where, in addition, was discovered a tomb of a *lictor* from the 6th century BC We also know that during the Etruscan period,[9] specifically during the regime of Tarquin the Elder, there was some kind of reform to the Vestals's *collegia*. From that reform the number of vestals was fixed in six, two for each tribe.[10] Therefore, it is possible that the provision of *lictores* happened at this same time.

A little further (pp. 98 ff.), the author explores the possibility of understanding *legis actio sacramento* as a sort of sacred duel. He makes a parallel between *ius fetiale* and *ius privatum*, specifically in reference to the *legis actio sacramento*. In both we find the same rigid and formal declaration of pretensions, made through the pronunciation of a specific wording accompanied by specific acts. Words and acts must agree to acquire a significant lawful meaning. According to the author, the main difference between the two procedures is the acceptance of a trial by a

6 See Gai. *Inst.* 4, 16. *festuca autem utebantur quasi hastae loco, signo quodam iusti dominio.*

7 See Dion. 3, 61–62; Lucius Ampelius, *Mem.* 17, 1. *Priscus Tarquinius qui insignibus magistratus adornavit.* Flor. *Epit.* 1, 1, 150. *Duodecim namque Tusciae populos frequentibus armis subegit. Inde fasces, trabeae, curules, anuli, phalerae, paludamenta, praetextae, inde quod aureo curru, quattuor equis triumphatur, togae pictae tunicaeque palmatae, omnia denique decora et insignia, quibus imperii dignitas eminet.*

8 Silus Italicus, *Pun.* 8, 484. *Maeoniaeque decus quondam Vetulonia gentis. Bissenos haec prima dedit praecedere fasces et iunxit totidem tacito terrore securis. Haec altas eboris decorauit honore curulis et princeps Tyrio uestem praetexuit ostro. Haec eadem pugnas accendere protulit aere.*

9 Dion. 3, 67, 2.

10 Festus 344, 54. *Sex Vestae sacerdotes constitutae sunt, ut populus pro sua quaque parte haberet ministram sacrorum; quia civitas Romana in sex est distributa partis: in primos secundosque Titienses, Ramnes, Luceres.*

judge, in the *actio sacramento*, whereas *ius fetiale* leaves the decision of the matter to the divine powers summoned to witness the oaths pronounced. They will favour in war the one who has the just cause and who has performed the suitable rites.

In both cases, the rituals performed are destined to obtain the restitution of whatever was unrightfully taken. In the *actio sacramento*, the litigants must state that the vindicated things belonged to them, as the *fetiales* also demand their restitutions in their own process. Both processes intend to avoid war and anarchy, submitting the conflict to a superior authority, being that a judge or the gods.

Next, the author shows the connection between the *legis actio sacramento* and the duels and ordeals. In order to accomplish it, he compares the *legis actio* with an odd scene taken from Casina, one of Plautus's comedies.[11] It is a very interesting scene[12] where a husband (Olympio) and his spitfire wife (Cleostrata) gamble the destiny of one of their slaves in dispute (Casina).[13] The procedure is called *oraculum*, and it is similar to a duel, followed by a bet taken by their slaves (Lysidamus for Olympio and Chalinus for Cleostrata).

The episode includes the pronunciation of oaths, a ritual fight between the salves and, only in the end, the draw of lots, as a procedure to settle the conflict. The author infers from the scene the existence of an archaic *vindicatio* that would involve physical violence, the pronunciation of oaths and a bet. This idea is a little bold, and it should be considered seriously and in detail before accepting or refuting it. We might come back to it in the future, in a different and specialised work.

Once he has finished his analysis on *legis actio sacramento*, the author considers the relations between *manus* and *matrimonium*, through the analysis of chapter 27 of Pro Murena (pp. 109 ff.).

He starts his study by the engagement. In the Archaic period, it was performed through the *sponsio*. It was traditionally carried out by the *patres familiarum* of the groom and bride, for they had the *patria potestas* over them.[14]

Next, from the references made by Cicero in his speech, the author enters into the problem of *conventio in manum*. He believes that the traditional forms of *conventio in manum* were in disuse by the time of Gaius, because the jurist starts

11 On the problem, we have also referred to the episode in Amunátegui Perelló 2009. 248 ff.

12 Plautus, Cas., v. 352 ff.

13 The author believes that the husband can rightfully dispose of his wife's property (pp. 104–105), interpreting the dialogue between Mirrina and Cleostrata (v. 191 & ff.) in this sense. Although he does not explicitly state so, we understand he qualifies Cleostrata's marriage as *cum manu*, for only then could the husband dispose of her goods at will. This idea, elaborated by Watson (1984. 29 ff.) has been successfully rebutted by Dees 1988. 107 ff.
We also disagree with the author, essentially because we do not think that Cleostrata and Mirria's dialogue can be decisive in any sense. The problem seems to be more social than juridical. See Amunátegui Perelló 2009. 248.

14 We believe that there was also a social problem. It was probably unsuitable for a woman to directly participate in a marriage negotiation. We can find an example in Plautus' *Trinummus*. There, the *sponsalia* is carried out by the *pater* of the groom and the brother of the bride, although this last has no power over her. See on the problem Amunátegui Perelló 2006. 421 ff.

his narration on the problem using the word *olim*.[15] Anyway, we think the use of *olim* is not conclusive enough. Gaius is describing the three traditional forms to enter *manus* and he uses a past tense (imperfect) only to refer to *usus*, but he speaks of *coemptio* and *confarreatio* with a present tense, as if they were still used at his age. We also know that *coemptio* had a significant presence by the time of Gaius, although for scopes not necessarily connected with marriage, as to avoid *tutela legitima* or to make a will. The use of *confarreatio* also continued, although it did not produce the legal effects of *manus* any longer.[16] To be married with *manus* obtained by *confarreatio* it was needed to access certain priesthoods like *flamen dialis* and *rex sacrorum*.

The author's position on *confarreatio* is extremely interesting.[17] He analyses separately each source that makes reference to it and accomplishes an accurate picture of its elements and function. Nevertheless, we think that the author goes a little too far, at least in two problems. One is the Etruscan origin, which the author claims for *confarreatio*. He ties it with Etruria for its sacred nature and the egalitarian position between the spouses in the rites. They are both seated in identical chairs and make the same oaths.

We think that the origins of *confarreatio* are too obscure for anyone to determine. It may have Indo-European origins, especially for the existence of a parallel ceremony in Ancient India called *samskara*, but little more can be said.[18]

The author is also too daring, believing that *confarreatio* was an exclusively patrician ceremony, and therefore, not accessible for plebeians. We have expressed our doubts on this point elsewhere[19], so we will not come back to it.

The study of *usus* and *coemptio* that follow are interesting, as is the detailed description of the rites that accompany marriage.

Another aspect where we disagree with the author is on the legal status that he believes *manus* grants to the wife (p. 123 ff.). He refutes that the wife who has performed *conventio in manum* is an *adgnata* of her husband. He arguments that she only is a *heres quasi sui*, but she would not have the real quality of *adgnatio*.

15 Gai. *Inst.* 1, 110. *Olim itaque tribus modis in manum conueniebant: usu, farreo, coemptione.*

16 Tac. 4, 16 *Sub idem tempus de flamine Diali in locum Servi Maluginensis defuncti legendo, simul roganda nova lege disseruit Caesar. Nam patricios confarreatis parentibus genitos tres simul nominari, ex quis unus legeretur, vetusto more; neque adesse, ut olim, eam copiam, omissa confarreandi adsuetudine aut inter paucos retenta (pluresque eius rei causas adferebat, potissimam penes incuriam virorum feminarumque; accedere ipsius caerimoniae difficultates quae consulto vitarentur) et quoniam exiret e iure patrio qui id flamonium apisceretur quaeque in manum flaminis conveniret. Ita medendum senatus decreto aut lege, sicut Augustus quaedam ex horrida illa antiquitate ad praesentem usum flexisset. Igitur tractatis religionibus placitum instituto flaminum nihil demutari: sed lata lex qua flaminica Dialis sacrorum causa in potestate viri, cetera promisco feminarum iure ageret.*

17 See also Nótári 2010a 14 ff; 2008a 319 ff.

18 On the problem see Banerjee 1923; Mazzarella 1950. 434 ff.; Duncan–Derrett 1968. 94 ff.; Hanard 1989. 265 ff.

19 See Amunátegui Perelló 2009. 207 ff.

We think that this thesis introduces unnecessary complications to family relations, especially for the Archaic period, when *manus* would have been at its highest point. If the *loco filiae* quality that *manus* grants is not enough to consider her an *adgnata*, then who would have the *tutela* when the husband *cum manu* died? According to the XII Tables, the trusteeship corresponds to the *adgnati*, but, according to Nótári's interpretation, there would be no *adgnati* on the husband's side. *Manus* cuts all bonds with the woman's original family, so she would neither have any *adgnati* on that side. Then, who would exert the trusteeship? Nobody? If this was the case, then *tutoris optio* would have no sense at all. By *tutoris optio*, the husband with *manus* granted by testament to his wife the faculty of choosing a tutor. The faculty of choosing a tutor is relevant only to escape the trusteeship of the *adgnati*. If she had no *adgnati*, then the faculty would be senseless.

Next, the author studies *iudicium domesticum* (pp. 125 ff.).[20] Here, he sustains that the husband *cum manu* would have *ius vitae necisque* on his wife. This faculty would only be moderated by the *iudicium domesticum*, following Düll's[21] traditional thesis. We have already expressed our disagreement with this thesis,[22] for we do not believe that *manus* grants personal powers over the wife equivalent to the ones *patria potestas* grants. In every case where the capacity of killing a wife appears, the possibility does not seem to be connected neither to a discretional right, as in *patria potestas*, nor to *manus*. It is always on an adultery or wine drinking context, and it looks more like a legal excuse for manslaughter than a faculty.

The chapter finishes with a reference to divorce and *repudium*. It is particularly significant the reference to the possibility of transferring fertile women to other men for reproductive scopes. The author agrees with the traditional thesis that binds this faculty with *manus*, by means of *mancipatio* and *nuncupatio*, followed by a *remancipatio* after the birth of children. We think this thesis is wrong,[23] especially for the only historical case we know of, Young Cato's cession of his wife Marcia, is a succession of divorce and marriage. In fact we do not see any trace of *mancipatio* or *remancipatio*.

The final chapter of this fascinating work studies the proverb *summum ius, summa iniuria* in the *Corpus Ciceronianum*. He begins by analysing the concept of *interpretatio*. Then, he focuses on the proverb itself and its influence on the concept of *aequitas*.

After exposing his conclusions, the author offers a beautiful summary of the whole work in perfect Latin. We think this book is an elegant work, very well written and beautifully finished. Although we differ with some of the author's opinions, we thank him for this pleasant voyage through Cicero's Pro Murena.

20 Nótári 2011. 28 ff.
21 Düll 1946. 54 ff.
22 Amunátegui Perelló 2009. 260 ff.
23 Amunátegui Perelló 2009. 317 ff.

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The Complete Oral Pleadings of Marcus Tullius Cicero.

Translated, Notes Supplied and Introduction Written by Tamás Nótári.
Szeged, Lectum, 2010. 1276 pp.

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Marcus Tullius Cicero is undoubtedly the peak of Roman prose. Up to the present day his speeches have served as example, syllabus for rising generations of orators and jurists. It is the first time that we can take the complete oral pleadings of the great orator in Hungarian into our hands owing to Tamás Nótári's translator's work. Below we say a few words about the legal significance of these oral pleadings.

The volume is built up as follows. After the preface presenting the method of translation and the translator's intention (pp 7–12), Nótári outlines Cicero's life, works and the criminal procedure of his age to the reader (pp 13–48) since without that it would not be possible to understand the speeches. This is followed by an introductory study in the chronological order of the speeches on the historical, legal and literary background of each *oratio* (pp 49–150). After the translations (pp 151–1074), one can read the related notes (pp 1075–1236). At the end of the volume, one finds the list of abbreviations (pp 1237–1240), the index of names occurring in the speeches (pp 1241–1270) and the bibliography (pp 1271–1275).

What speeches are contained in the volume? The line is very long: *Pro Quinctio*, *Pro Roscio Amerino*, *Pro Roscio comoedo*, *Divinatio in Caecilium*, *In Verrem I.*, *In Verrem II, 1–5.*, *Pro Tullio*, *Pro Fonteio*, *Pro Caecina*, *Pro Cluentio*, *Pro Rabirio perduellionis*, *Pro Murena*, *Pro Sulla*, *Pro Archia poeta*, *Pro Flacco*, *In Vatinium testem*, *Pro Sestio*, *Pro Caelio*, *Pro Balbo*, *Pro Scauro*, *Pro Plancio*, *Pro Rabirio Postumo*, *Pro Milone*, *Pro Marcello*, *Pro Ligario*, *Pro rege Deiotaro*. First, let us survey the character of the speeches included in the volume. In his preface Nótári makes it clear that, as a matter of fact, sometimes it can be disputed which speeches are to be classified as oral pleadings, i.e., orations delivered in legal, private and criminal proceedings. The volume contains thirty speeches and most

of them are 'real' oral pleadings. The next group of speeches are those where it can arise as a question whether they should be ranked among oral pleadings or political speeches – it should be noted that the translator provides substantial reasons for ranking them among the former speeches.

The *Second speech against Verres*, which is a considerable material itself since it contains five books, was never delivered before court of justice because Caius Verres, former *propraetor* of Sicily charged with *crimen repetundarum* deemed that his case was losing and for this reason before the proceedings were completed he left Rome, in other words, he exercised *ius exulandi,* the right of going into voluntary exile to avoid death penalty the citizens of Rome were entitled to. Cicero published his prepared work in writing as a fictitious speech, in which he explored the findings of the investigation carried out in the province. Nevertheless, it is reasonable to consider this *oratio* an oral pleading as well since it would have constituted an integral part of the demonstration of a case significant also in political terms if the lawsuit had been concluded by judgment and not by the voluntary exile of the accused. Nótári does not take stand regarding the issue whether the *Speech against Vatinius* was widely read by the public as a pamphlet in Rome or was actually delivered in the lawsuit against Sestius, however, he publishes them one after the other since these two speeches belong together in terms of their subject.

Titus Annius Milo was defended by Cicero indeed, and the speech made in his defence was actually delivered. It is certain, however, that the speech left to us is not completely identical with the one that Cicero delivered before the court of justice. Before publishing it, Cicero reworked the speech put down in shorthand by his secretary, Tiro; yet, modifications in *Pro Milone* far exceeded the usual rate. This can be explained by the fact that Milo's case was one of the few lawsuits that Cicero lost, and presumably he did not see any sense in publishing a speech which did not teach a lesson to the students of rhetoric – he published a version instead that should have been delivered in order to (possibly) win the action at law. In the last phase of his career, Cicero made three speeches before Caesar as 'judge': from among these three speeches regarding *the speech made in defence of Ligarius* and *Deiotarus* it can be disputed to what extent these proceedings can be considered legitimate; however, *the speech made in the interests of Marcellus* is clearly a speech made before the *senatus* 'dressed in the form of oral pleading', i.e., a political speech. The translator gave the following reason for including this in the volume containing oral pleadings: it would have been senseless to separate it from the other two *orationes Caesariana*, and owing to historical causes this reasoning stands its ground.

Consequently, the above listed speeches do not meet the requirements of rhetoric of oral pleadings in every respect in terms of genre, however, they – especially the speech made against Verres and the speech made for Milo – discuss legally significant issues that place them *pleno iure* among oral pleadings.

It was only once in the course of his career that Cicero acted as prosecutor, in all other cases he provided defence before the court of justice. This was a more rewarding, paying position that could be used as political capital and perhaps it suited his spiritual disposition much more. Now let us give a brief summary of the function of the prosecution and the defence in the criminal proceedings of the last century of the Republic of Rome – since only four of the thirty speeches cover issues of private law (*Pro Quinctio*, *Pro Roscio comoedo*, *Pro Tullio* and *Pro Caecina*), all the rest were made in criminal cases.

During the more than one thousand years' existence of Rome, various forms of procedure of penal adjudication evolved; two of them were of decisive significance. They are the *questio* (jury) proceedings and *extra ordinaria cognitio*. The former was the main form of adjudication basically from the 3rd century BC to the 2nd century AD, while the latter was almost the only form of procedure from the late 2nd century AD to the end of the period of the Empire. The following significant difference can be demonstrated between the two kinds of procedure. *Quaestio* operated as a jury, there was no formal accusation ex officio, the charge was represented by somebody from the people. The procedure was controlled by the prosecutor and the counsel for the defence. The jurors adopted decision regarding the question of guilt only, the punishment was proclaimed by the law. In the beginning it was not possible to lodge an appeal against the judgment. The prosecutor had three clearly separable tasks. To put forward the motion for the charge, which was legitimised by the *magistratus*; after that to present the charge. Secondly, to control production of evidence, and finally, to deliver the statement of the prosecution. The preferral of charge and the legal status of the representative of the prosecution were regulated in the widest scope in Rome. In the age of the Republic, trials on political subjects served, to some extent, to entertain the people.

The prosecutor was in the lime-light since a successful charge could provide basis for his political career; that is why it was necessary to regulate the operation of the prosecutor in details. In trial by jury, as the proceedings could be commenced only by bringing a charge, the person acting as the accuser had to present the act that infringed public interest and his application for acting as the prosecutor *(postulatio).* The very first question was to declare whether the person acting as accuser could bring a charge and if anything else prevented formal accusation or not. Laws regulated this issue by determining the scope of those who were not allowed to bring a charge.

When nothing prevented formal accusation, then formal delivery of the indictment was carried out *(nominis delatio)*. The indictment had to be submitted in writing. It was obligatory to indicate the date, the authority it was submitted to, to detail the exact state of facts, to describe the crime the accused had committed under what law as well as to name the person charged with committing the

specified act. If the submission did not comply with statutory requirements, the proceedings had to be terminated and it was not possible to modify the charge during the trial.

During the production of evidence the duty of the representative of the prosecution was to present the bill of indictment orally and to disclose evidence. We know it from Cicero that in the action brought against Verres the prosecutor was provided by the court with a longer period of time for collecting evidence (*Verr.* 1, 30). First, the witnesses of the prosecution and after that the witnesses of the defence were heard.

In Rome the highlight of the criminal proceedings was the statement of the prosecution and the statement of the defence, especially in trial by jury, where efforts were made to convince hesitating jurors of the guilt or innocence of the accused. At this point, the representative of the prosecution was put at a disadvantage by the fact that the counsel(s) for defence of the accused had one and a half times more time available for making their statement of defence than the representatives of the prosecution. The oral pleading was first delivered by the prosecutor and he was followed by the counsels for defence who could dwell on (answer back to) the prosecutor's arguments. It is primarily from the works of Cicero and Quintilianus that we can know the monologues of the representatives of the lawsuit abounding in reasoning. Cicero was especially a master of how to expound his standpoint on the side of either the prosecution or the defence in the hope of safe success setting out from the same state of facts (*Flacc.* 82; *Verr.* 3, 129; *Quinct.* 29; *Cluent.* 116).

Time was measured by a water clock and as in Roman *quaestio* proceedings highly important matters of political significance were decided, the jurors were usually pleased to listen to statements of the prosecution and the defence sometimes giving the impression of a theatre performance. During the statements of the prosecution and the defence evidence was presented, witnesses were heard and testimonies were read out. This is clearly shown by Cicero's speeches in which it was quite often recorded where the orator interrupted the speech in order to put forward specific evidence. Both the prosecution and the defence were allowed to talk long about the career, morals, etc. of the accused (*laudatio* and *reprehensio*), which was of great account. The authority of the prosecutor and the counsel for defence often bore as much significance as the case or the act of the accused since quite often it was owing to this that the jurors exempted or condemned the accused.

What are the elements of the facts of a case that help to group Cicero's speeches delivered in criminal cases? The most important ones are as follows: *perduellio (Pro Rabirio perduellionis)*, *ambitus (Pro Murena, Pro Plancio)*, *crimen repetundarum (In Verrem, Pro Fonetio, Pro Flacco, Pro Scauro, Pro Rabirio Postumo)*, *parricidium*, *homicidium* and *veneficium (Pro Roscio Amerino, Pro*

Cluentio), *vis (Pro Sulla, Pro Sestio, Pro Caelio, Pro Milone)* and simulation of civil law *(Pro Archias poeta, Pro Balbo)*. Quite clearly, Cicero's speeches cover almost all significant groups of facts of the criminal law of the late period of the Republic. It is an indisputable fact that with respect to this period Cicero's speeches are highly important (often the only) sources for obtaining information about both the substantive law of criminal proceedings and the law of criminal procedure. To translate them, one must be a philologist, on the one hand, since Latin literary language in its full blossom and beauty appears in Cicero's works. And, on the other hand, the translator must be an expert of Roman law because the translation of oral pleadings calls for a jurist/philologist whereas Cicero's philosophical works can be translated by a humanities specialist as well. Tamás Nótári has completely fulfilled this task and now this treasury of Roman law is available in Hungarian as well.

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Citation guidelines

In footnotes

(Mommsen 1899), if page number is indicated (Mommsen 1899, 58)

In the list of references

Journal articles:

Fuhrmann, M. 1960. "Cum dignitate otium – Politisches Programm und Staatstheorie bei Cicero." Gymnasium 67: 481–500.

Books:

Mommsen, Th. 1899. Römisches Strafrecht. Leipzig.

Articles from books:

Ankum, H. 2005. "Consequences of a Pledge Extinguished by Merger in Classical Roman Law." In Ex iusta causa traditum. Essays in honour of Eric H. Pool. Pretoria: 3–20.