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The Classification of Actions Running Counter to the Statutory Definition of Harassment and the Questions Related to Providing Evidence

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Abstract. The statutory definition of harassment can be deemed a novel crime in modern legislation. The primary reason for this is that the level of the threat of this crime to society is lower than general, while the weight of the subject of law protected by the statutory definition seems to be lighter as compared to the other values protected by criminal law (e.g. the right to life or property). Basically, it is the social interest of the right to privacy that can be defined as the legal subject of harassment. Of course, this right can also be regarded as a 'piece' of the fundamental rights, as the Fundamental Law of Hungary itself also contains provisions on such values which can be related to this subject of law (e.g. it is stipulated by Section (1), Article VI of the Fundamental Law of Hungary that everyone is entitled to have respect for their privacy and family life, home, as well as relationships, from others). In their joint study, Warren and Brandeis urged that the right to privacy be acknowledged as an independent fundamental right in the countries following the system of common law, as early as in the late 19th century.[1] This fundamental right gained importance in Hungary with a slight delay, to which the effective contributions of the Constitutional Court were also required. In its decision of 1994, the latter body declared that:

> [T]he right to privacy is not defined by the Constitution as a specific, subjective fundamental right, but the right to the freedom of privacy is without doubt such a fundamental right aimed at protecting the autonomy of the individual, which arises from the inherent dignity of a human being, of which the general personality right, the right to human dignity, is the subsidiary fundamental right {…}. The right to privacy is the right to personal fulfilment, and the free fulfilment of one's personality and the protection of autonomy require that {…} the state respect the fundamental rights of a human being, which are inviolable and inalienable.[2]

1 Warren–Brandeis 1890 (qtd by Simon 2005. 33, Tóth 2014. 99).
2 Point II, Constitutional Court Decision No 56/1994 (XI. 10.).

It was in the above spirit that the statutory definition of harassment was incorporated into the previous Hungarian Penal Code (hereinafter referred to as: Penal Code, Act IV of 1978) with effect of January 1, 2008.[3] The statutory definition was supplemented by Act LXXIX of 2008 by including harassment appearing as the occurrence of a life-threatening event, while the aggravated cases of the same action were established by Act XCII of 2008 on the Criminal Code and Other Acts Amendment and Act CLXI of 2010 on the Criminal Code and Other Acts Amendment. The criteria for the criminal act remained unchanged in the new Hungarian Penal Code (Act C of 2012).

Keywords: harassment, cumulative issues, criticism of restraining, providing evidence

I. Theoretical Pre-Questions

1. It is primarily the phenomena found in the European trends that can be indicated as the contributing factors to 'elevating' harassment to a crime. In the opinion of Berkes, it became clear that in the majority of the EU member states the behaviours included in the concept of harassment are intended to be sanctioned by the tools of criminal law.[4] The questions inevitably asked by legislators were, however, complex and unclear: how can actions that qualify as harassment be formulated on the level of the law, in general terms?; whether threats should be a conceptual element of the basic definition of the crime (in the case of violence, obviously, another crime should be established)?; whether the crime can even be established by a one-time action, according to the type of the offending behaviour or whether a permanent infringement should be definitely assumed?; whether it is only a direct intention or also an eventual intention that can be defined as the form of conviction of the delinquency?

What is certain is that harassment belongs to those crimes which have a lower gravity, which are 'attached to a person', i.e. those which can be punished as a consequence of private motions. This is why it comes up as a justified question how such crimes can be handled if the report is made by a person other than the one entitled to file a private motion. The answer to this question can be found in the rules set out in the Criminal Procedures Act, which clearly points out that such reports should be rejected by the authority.[5] If, however, it is disputed whether the report has been made by the person entitled to do so, then the report should be supplemented.

3 I would like to note that the term 'harassment' already came up in Act CXXV of 2003 as an act that can be deemed the violation of the requirement of equal treatment. Based on the Act, harassment is a conduct violating human dignity of a sexual or other nature, with the purpose or effect of creating an intimidating, hostile, degrading, humiliating, or offensive environment around a particular person.

4 Berkes 2008. 16, Tóth 2014. 103.

5 Turn of phrase I, Section 174(1) (e).

If the report is turned down, the decision on such rejection should also be delivered to the offended party pursuant to the provisions set out in the Criminal Procedure Code.[6] In such a decision, the attention of the offended party should be called to the fact that the filing of a private motion is the condition to launching a criminal procedure or to the calling of the perpetrator to account. This information should also include that 1) the private motion will qualify as legally effective if the entitled party is not aware of the identity of the perpetrator, but the former expresses their will to punish the perpetrator for the facts explained in the report within the statutory deadline, and 2) if the entitled party files the private motion with delay, they will be entitled to certify such delay.

2. Pursuant to Section 222(1) of the Penal Code, any person who engages in a conduct intended to intimidate another person, to disturb the privacy of or to upset or cause emotional distress to another person arbitrarily or who is engaged in the pestering of another person on a regular basis commits the crime of harassment. The basic definition is subsidiary, i.e. it can only be established if no graver crime is committed. The legislator has indicated disturbance as the offending behaviour of Section (1). This basically encompasses all such activities which are suitable for making the everyday life and routine of the passive subject difficult, i.e. influencing it in a negative direction. This may be accomplished both verbally and by action; the point is to challenge the already existing poise and to destroy the personal equilibrium (judicial decision No 2014. 169).

I would like to note that disturbance may even be accomplished in the capacity of an indirect perpetrator. In one of the cases presented by the summary report on the review of prosecutor's practices related to harassment (hereinafter referred to as: the Report):

> … among others, the accused party also disturbed the offended party by having displayed an advertisement on an Internet page, according to which the offended party would like to sell their car at a price substantially lower than its market value. The accused party displayed the actual data of the offended party in this advertisement, including their phone number, emphasizing that this number could be called at any time. As consequence of the behaviour of the accused party, the persons who thought that the advert was real kept calling the offended party continuously from the time of displaying the advert to the cancellation thereof.[7]

The possibility of the infringements affecting other persons as well cannot be excluded either despite the intention of the perpetrator to only harass one or perhaps more persons. Such cases, for example, when the harassing phone

6 Section 169(4).

7 http://ugyeszseg.hu/repository/mkudok7747.pdf.

calls are taken by the relatives of the target person rather than the victim or the disturbing messages come in to an e-mail address jointly used by the family members, and this is consciously done by the perpetrator, can be listed in this group. As a general rule of principle, in the judicial practice, it is only the relationship between the perpetrator and the target person that is considered since in the case of a criminal act it is exclusively the *dolus directus* that is accepted as a possible form of conviction. In my opinion, however, with regard to the legal subject of the criminal action, it would be justified to consider the extension of the contents of Section (1) to the level of *dolus eventualis*. In the case of infringements, the situation is that such a regular or long-term contact between the perpetrator and the persons other than the target persons may also be established whose subject is the regular offending or simple threatening of the passive subject, etc.; however, the minute that the relative or partner becomes aware of such acts through direct communication, they will inevitably become the passive subjects of this harassment. In my view, this latter circumstance should also be considered, which is why Section 222(1) should be regarded as one that is in line with the statutory definition in such cases too.[8]

Harassment will only fulfil the statutory definition if it is regular or permanent. Thus, the Penal Code does not include occasional infringements under the objective effect of the crime, which I regard as an absolutely logical solution. Berkes thinks that by regularity we should understand a behaviour that is demonstrated over shorter periods of time, one that is repeated, while permanence should mean a longer period of time.[9] Based on this, for example, the following repeated behaviours can be listed in the scope of the crime: phone calls (irrespective of the time of the day), offending and abusive messages (e.g. on an answering machine, via e-mail, in text messages, in letters, etc.), the observation or stalking of the passive subject, etc.

In order for the criminal action to be considered completed, it is not required that the victim receive the repeated phone calls or read the messages (judicial decision No 2011. 302), but only those behaviours will qualify as ones fulfilling the statutory definition which the victim is aware of. It is irrelevant whether the tone of the perpetrator's behaviour is positive or negative or whether the passive subject himself/herself gets in contact with the perpetrator (e.g. out of necessity).[10]

Being found guilty is not excluded by such circumstances either that the accused and the victim mutually establish contact with each other or if the victim used to be the earlier perpetrator (judicial decision No 2014. 169). Based

8 'However, it will involve a different judgement if the victim puts the speaker on during their telephone conversation with the accused who is making threats and the accused also threatens the life of the other person who is present, being aware of the fact that they are on the speaker. In such cases, the action will qualify as a harassment of two counts.' Monori 2016. 224.

9 Berkes 2008. 17, Tóth 2014. 106.

10 Based on its ruling No Bfv. III. 818/2010/5, the Curia does not exclude the establishment of harassment if the passive subject receives the calls and maintains the conversation.

on the Report, the following questions should be examined in such cases: who initiates contact more often; at what time the contact tends to be established (e.g. night-time or daytime hours); whether it can be concluded that the reason for the victim's getting in contact with the accused is exclusively to communicate the intention to break contact with the accused; whether it can be concluded that the victim only gets in contact with the perpetrator on account of the fulfilment of some obligation to the perpetrator (e.g. child maintenance payments) – however, the perpetrator's attempts to take up contact point beyond this, etc.[11]

The Debrecen High Court of Appeal established the criminal liability of an accused party who regularly appeared in front of the victim's apartment or workplace.[12] However, the motions filed by the defence emphasized that staying in a public area cannot be the subject of a crime in itself. At the same time, the view of the third-instance court was that these actions fulfilled the content criteria of harassment.

According to Section (1), the compliance of an offending behaviour with the criteria of the statutory definition requires a separate investigation in those cases when the perpetrator wishes to enforce a right that is realistic or assumed or wishes to fulfil an obligation. According to the Report, it is primarily after the dissolution of a marriage or the termination of a domestic partnership that it is experienced that:

> [O]ne of the parties tries to establish regular contact with the other party with a justification that is also acknowledged by law. Such reason may be e.g. the visitation of a common child, the availability of joint property, or the enforcement of a financial claim against the other party. In these cases, the victim may not refrain from the keeping of contact without justification, and the accused cannot be expected to break all relations with the other party either. Thus, if the establishment of the contact–however objectionable it is considered by the other party–happens in order to exercise the statutory rights of the perpetrator, or to fulfil his obligations, to a justified extent, no crime is committed.[13]

In the Report, those cases in which the crime can be established despite the fact that the perpetrator wishes to exercise their (assumed) statutory rights are brought up as counter-examples. The Curia classified as harassment the action committed by a biological father who interfered with the life of the child and the mother voluntarily, purely by making a reference to their being relatives. The highest judicial forum explained that:

11 http://ugyeszseg.hu/repository/mkudok7747.pdf.
12 Debrecen High Court of Appeal, judicial decision No II. 201/2013/5, in: A. Tóth: i. m. p. 107.
13 http://ugyeszseg.hu/repository/mkudok7747.pdf.

> [T]he voluntary nature of the behaviour of the accused can be established irrespective of whether the reasons quoted as the basis for his behaviour are realistic or not. It holds no relevance whether or not the accused is in fact the biological father of the victim's child. Their relationship is settled by the rules of family law, the authorizations of the affected parties with regard to the definition of the child's family law status and the possibility to challenge the latter are defined by law.[14]

Further questions of legal interpretation are brought up by whether the effect of the private motion extends only to infringements of the past or also to those of the future. According to the everyday legal approach, the actions included in the scope of the term of harassment in Section (1) can be considered a natural unit in the case of the same offended party, and, accordingly, at the time of filing the private motion, the offended party presumably thinks that no further private motions should be filed with regard to the further partial actions of harassment. However, in the Report, the reader's attention is called to the objectionable practice in which in such cases the investigative authority usually does not warn the offended party any more that new private motions should be filed in the case of new infringements. This practice seems to be rather improper mainly because in the judicial practice those principles which are related to the handling of crimes punishable on the basis of private motions of such a nature are already known. Among others, it is also pointed out in judicial decision No 2014. 169 that when a private motion is filed the criminal claim only becomes enforced with regard to the actionable conduct indicated therein, which means that the criminal claim should be repeatedly enforced for any further repeated behaviours of the same kind. The situation is that for any new partial actions that have been committed after the filing of the private motion a new private motion should be obtained (decision No ÍH2014.87).

3. Pursuant to Section 222(2) of the Pencal Code, any person who, for the purpose of intimidation, conveys the threat of force or public endangerment intended to inflict harm upon another person, or upon a relative of this person/ Point (a)/ or gives the impression that any threat to the life, physical integrity, or health of another person is imminent /Point (b)/, is guilty of harassment.

Contrary to what is defined by Section (1), the offending behaviors regulated here can be committed by (a) one (phase) action as well. However, as long as the perpetrator demonstrates the same conduct as set out in Points a) or b) several times against the same victim, with a single intention of will, in short intervals, then continual offending behavior can be established. In the latter case, it is only the factual cases touched upon in the private motion that can be included in the statutory unit of continuality (judicial decision No 2002. 252), and the victim is

14 http://ugyeszseg.hu/repository/mkudok7747.pdf.

entitled to file a private motion for each action committed against them (judicial decision No 1988. 348).

The threat defined in Point a), by taking the interpretative provisions of the Penal Code into account, is defined as envisaging such a grave disadvantage which is suitable for generating strong fear in the person who is threatened. The compliance of this turn of phrase with the statutory definition, however, also depends on the content of the threat: a crime can only be established if the threat specifically forecasts the prospect of committing a violent action against a person[15] or of committing an action causing public endangerment. This is why the existence of the situation described in Point a) cannot be established in the case of generally formulated statements (e.g. 'You will get in trouble!')[16]; if the threat in question is aimed at channelling the anger accumulated during the assault rather than at intimidation (in such cases, another crime should be established – judicial decision No 2011.303); if the perpetrator makes their statements in lack of a serious intention, in order to channel their momentary anger or perhaps as part of their usual vulgarity[17]; if the perpetrator seriously threatens another person with disclosing a fact that is suitable for staining the honour of the threatened person or their relatives to the wide public, with the purpose of intimidation (this is the act under the statutory definition of dangerous threat listed in Section 173 of the Minor Offences Act).[18]

The use of expressions like 'I will kill you', 'I will cut your throat', 'I will beat you to a pulp', etc. meet the requirements of the statutory definition based on the grammatical interpretation of the Penal Code, but I have doubts as to whether the law enforcement practice which establishes the accomplishment of the action defined in Section (2) purely based on such a statement is right. What is more, in some opinions, 'a threat realized purely by implied conduct, non-verbal signs, physical hints, gestures, and body language can also meet the criteria of the statutory definition. Such cases include, for example, situations where the perpetrator indicates to the victim what awaits them by pulling their hand in

15 Homicide, kidnapping, sexual violence, robbery, act of terrorism, etc.

16 However, the Curia thinks that verbal threats that envisage the killing or cutting the throat of the victim can be suitable for establishing harassment – judicial decision No BH+ 2013.5.186 (Curia decision No Bfv. III. 726/2012).

17 http://ugyeszseg.hu/repository/mkudok7747.pdf.

18 'The form of an infringement is basically the preparation for defamation committed in front of a wide public. The offended party may experience well-founded fear if someone who is in possession of discrediting information about them threatens to disclose this to the wide public. However, it is important that on the subjective side the intention may not extend beyond intimidation as, for example, if it is coupled with the purpose of gaining benefits, then the act may qualify as attempted blackmail, which also holds true for the statutory definition of harassment. The level of reality of the fact is indifferent here; however, the seriousness of the threat is relevant, which may be suggested by an earlier threat or, potentially, by a conflict reaching the level of an assault besides the obligation to examine the general meaning of the statements as well as the form and content of the threat.' Bisztriczki–Kantás 2014. 469.

front of their throat or by shaping their hand as a pistol'.[19] Neither Monori nor myself agree with this viewpoint; in my view, it is only compliance with Section (1) that can be established in such cases at most.

Monori thinks that 'the prosecutor's office, presumably in order to find evidence more easily {…}, frequently quotes that the statements or communications arising from emotions generally do not reach the limits of the crime of harassment, their level of being realistic can be objectively questioned, they are not suitable for intimidating people'.[20] However, in the author's opinion:

> [T]he intent of the action cannot be excluded by building our opinion on the lack of suitability for intimidation {…}, such an argumentation by the prosecutor's office and the reason for examining suitability presumably arise from the general definition of threats as it is an element of the general statutory definition of threats that the disadvantage envisaged by the threat should be suitable for intimidation. However, such suitability is irrelevant from the aspect of the intent of intimidation, and in the scope of analysing threats as an offending behaviour it should be mentioned on what basis the general term of threat cannot be applied in the consideration of harassments committed with dangerous threats.[21]

In the case of Point b), committing such an action will meet the statutory definition not only in the case of action against the offended party, or the relative of the latter, but also in the case of any other person the danger envisaged should be imminent, which means that the passive subject should count on the occurrence of the disadvantage in question within a short period of time. Belovics thinks that an act in the context of which the perpetrator delivers an envelope with the label 'anthrax', which actually contains talcum powder, to the victim, is typically such an act.[22] As per Section 222(3) of the Penal Code, the above actions will qualify as graver offences if they are committed by the perpetrator against a spouse or former spouse or against a domestic partner or former domestic partner /Point (a)/; against a person under the perpetrator's care, custody, supervision or treatment /Point (b)/ or if abuse is made of a recognized position of trust, authority, or influence over the victim /Point (c)/.

With regard to points a) and b), we are basically talking about the criminological aspects of 'domestic violence'.[23] An attempt at including this term in the scope of statutory definitions was made as early as in 2004 in the form of a bill prepared

19 Monori 2016. 227.
20 Monori 2016. 221.
21 Monori 2016. 221.
22 Belovics–Molnár–Sinku 2015. 280.
23 I would like to note that in Point a) I am missing the references to registered partner relationships, which is an independent legal status today.

by the Ministry of Justice (IM).[24] It was in this draft that the very phenomenon was defined for the first time, but its manifestation on the statutory level has not even happened to date. What I think the main reason for this is, in agreement with Andrea Tóth,[25] is that the term 'domestic violence' may also include such actions in the case of which using the tools of criminal law may seem to be a disproportionate solution. I would hereby like to note that among the cases examined by the Report the aggravated cases of harassment almost always included actions committed against the (former) spouse or the (former) domestic partner.[26]

In a classical case, Point c) includes improprieties that are manifested in the framework of an employment relationship or another legal agreement to work. I would like to note that the quality of being an employer is not, in itself, a sufficient criterion for establishing compliance with Point c). There is an interesting dogmatic reasoning on this question in one of the comments on the Penal Code:

> If an employee gives their mobile phone number to their boss based on their own decision, on which number the latter regularly calls them after work hours, then the basic definition of harassment will be fulfilled. If, however, the offended party did not give their phone number to their boss, and the accused party became familiar with this phone number through their access to employees' data, and this is how they kept calling the victim, this will meet the definition of the aggravated case under Section (3).[27]

Pursuant to Section 173(3) of the Code of Criminal Procedure, the private motion should be filed within thirty days from the day on which the party entitled to file a private motion becomes aware of the identity of the perpetrator. There are two possible options regarding aggravated cases: 1. the victim knows from the very start who commits the harassment; 2. the victim is not aware of the identity of the perpetrator. If the victim files the private motion before the identity of the perpetrator becomes known, but the identity of the perpetrator later becomes familiar, then, according to the position taken by the Report, the offended party does not have to give yet another statement on whether or not they would like to uphold the motion. I cannot identify with this viewpoint as it is not certain that after learning about the familial relatedness the victim would still like the procedure to be conducted. On the other hand, the nature of the crimes punishable as a result of a private motion justifies that the acting authority should only make the launching or the termination of the procedure dependent on the victim's decision or any other eligible party defined by the Penal Code.

24 Bill No T/9837 on restraining applicable for domestic violence, April 2004.
25 Tóth 2015. 87.
26 http://ugyeszseg.hu/repository/mkudok7747.pdf.
27 Tóth 2014.108.

II. Cumulative Issues

1. The number of instances of harassment is adjusted to the number of passive subjects. In the opinion of Andrea Tóth, in the case of common contact details (e.g. common correspondence addresses/phone numbers), it should always be checked which person the harassing intention of the accused was directed against.[28] I can only identify with this standpoint to the extent that the examination is aimed at making a distinction between *dolus directus* and *dolus eventualis*. In other respects, in my opinion, both actions may fall under the effect of Section (1) as long as the perpetrator is aware of that another person; besides, the target person (e.g. a relative) may also become aware of their establishing contact as well as of the content of such contact.

2. Harassment under Section (1) creates a natural unit since the individual partial actions result in the regular or permanent harassment of the victim not by themselves but in their totality. However, the Report suggests that the substantive cumulation of Sections (1) and (2) is not excluded either as long as the multiple statements of the perpetrator concerning the same victim qualify as ones under Section (1) at one time, while under Section (2) at another time.[29] It is on this basis that the Szeged District Prosecutor's Office qualified the conduct of the accused 'as the cumulation of disturbing harassment and continual dangerous threatening (against his former domestic partner) when he tried to establish contact with the victim on a total of 238 occasions in a period of 20 days (he started 177 calls and sent 61 short text messages), and he provenly visited the offended party in her home on two occasions when in a drunken state he threatened to kill her'.[30]

I do not necessarily agree with the above practice as Section (2) incorporates the actions defined in Section (1) anyway, and from the aspect of the passive subject it is mostly the threat running counter to the latter turn of phrase that is suitable for generating well-founded fear or a condition similar to the latter. In such cases, I think that it is unnecessary to conduct the entire evidence procedure with regard to the actions running counter to Section (1).

In such cases, the establishment of continual offending behaviour under Section (2) seems to be more realistic. In one case:

> [T]he former husband kept going back to the former common real estate property several times a week for several months, and he kept shouting

28 Tóth 2014. 109.

29 'One of the district-level prosecutor's offices also deemed that the cumulation of harassment as defined in Sections (1) and (2) can be established in the case when the accused party tried to get in contact with the victim on a regular basis against the latter's will in order to voluntarily intrude on their privacy, then the accused also threatened the victim with battery on the last occasion.' http://ugyeszseg.hu/repository/mkudok7747.pdf.

30 Monori 2016. 225.

> to his ex-wife still living in the house from the street in a drunken state, he was swearing, shouting curse words, and on one occasion he also threatened his ex-wife with violence and killing, to which the neighbours were ear-witnesses. There was no one to witness what was said on the occasion of the earlier personal harassments, but the court accepted what was presented in the report, and they concluded from the continual nature of the action and the embittered relationship of the spouses that such and similar threatening statements must have been communicated earlier too; so, this conduct was qualified as continual.[31]

However, in Monori's opinion, this tendency of law enforcement is highly disputable as in such cases the cumulation of sections (1) and (2) should be established, and, also, one (proven) threat cannot serve as the basis for establishing continual offending behaviour.[32]

3. Related to the cumulative assessment of harassment, I would like to refer back to that an offending behaviour qualifying under Section (1) can only be established if no graver crime is committed. Therefore, if e.g. the accused intruded the privacy of the victim on several occasions, and these incorporated such partial actions which qualify as disturbance of peace, harassment in a formal type under Section (1) cannot be established due to its subsidiary nature.[33]

Coercion, as it is an alternative crime, cannot be cumulative with harassment either. Furthermore, I would also like to note that in the case of coercion we are not talking about 'aggravated threats', what is more, in the case of harassment, the perpetrator does not intend to make the passive subject do, not do, or endure something.

'It was qualified by the prosecutor's office as the cumulation of harassment committed by threats and the deprivation of liberty when after a family gathering the accused party rampaged in the apartment in a drunken state; then, he did not let his mother-in-law out of the living room for almost half an hour; he threatened to kill her, and in the victim's presence the accused called his own father on the phone saying that 'I am keeping my mother-in-law as a hostage, please, bring some people who will kill her.'[34] In agreement with Monori and Gellér,[35] however, I think that this act runs counter to the statutory definition of the deprivation of liberty committed by mortifying the victim. This means that it is not possible to establish the statutory definition set out in Section (2) because this would therefore run counter to the prohibition of double consideration.

31 Monori 2016. 225.
32 Monori 2016. 225.
33 http://ugyeszseg.hu/repository/mkudok7747.pdf.
34 Monori 2016. 227.
35 Gellér 2016. 601.

Related to the distinction from threatening with public endangerment, we should examine whether the statements made by the perpetrator contained real threats and whether all this proved to be suitable for disturbing public peace. Thus, e.g. a statement 'I am going to light the house on you!' uttered in a family row in the staircase of a prefabricated building in principle makes the appearance of danger; however, in my view, it is not suitable for establishing the statutory definition of threatening with public endangerment even if there is a higher number of persons present when the threat is made. Thus, in such cases, the turn of phrase under Section 222(2) of the Penal Code should be established.

> In another case, on the other hand, the Szeged District Court established the cumulation of harassment committed by continual dangerous threatening and threats of public endangerment when the accused intimidated his own mother, with whom he shared a household, for several years by having verbally abused her and threatened her with physical abuse on a daily basis {…}, and he threatened several times in front of the neighbours too that he would open the gas tap and would explode the whole condominium. The agreeing position of the Szeged District Court and the prosecutor's office was that these threatening statements of the accused party were made in order to intimidate the offended party, but these were heard by several tenants in the staircase of the condominium, and several others also became aware of these threats; so, this action of the accused party was suitable for disturbing public peace. The reason for this cumulative standpoint was presumably the difference in the legal subjects and the assessment of the intention to generate fear.[36]

If the enforcement of a financial claim also appears as one of the intentions of the act, it may come up as a practical problem how harassment and vigilantism as well as blackmailing can be distinguished from each other. In the case when the accused party threatened the offended party, who was in a hostile relationship with him because of a settlement dispute arising from an earlier car sale, by saying that 'by the time you come home, you should have the money or you will die', a procedure was launched on account of an action under Section 222(2) of the Penal Code, but later the case was redefined by the prosecutor's office as an attempt at vigilantism. Also, the report for harassment was rejected because of attempted vigilantism in a case when the accused party told the victim on the phone, related to the latter's debt, that 'someone will go to your place and collect my money from you.' In the latter case, the criminal procedure was terminated by the prosecutor's office because in their opinion a threat should be concrete in the case of vigilantism, and abstract, distant, and ambiguous statements do not meet

36 Monori 2016. 230.

this requirement. However, in my view, the statutory definition of harassment should have been established in this case.

Also, the prosecutor's office classified a case as attempted vigilantism when the accused party picked a fight with the victim because of an earlier debt; then, he threatened him that he would 'do away with him, that he would settle the accounts.' When the criminal procedure was launched, the prosecutor's office defined this act as a case under Point b), Section 222(2), but according to their subsequent position these statements did not fulfil the statutory definition of harassment; so, eventually, the procedure was terminated with reference to the lack of evidence after changing the classification.[37]

As compared to the statutory definition of Section (2), the definitions of grave bodily injury, breach of domicile, forced interrogation, assault on a public official, and robbery also qualify as aggravated cases. According to the Report, however, as it is a substantive cumulation, the fulfilment of the statutory definition under Section (2) should be established if the threat is made directly after the basic action has been committed, with a view to the future.[38] I cannot identify with this standpoint as in my opinion any subsequent statements should be regarded as unpunished post-actions.

In my view, the basis for distinguishing between an assault on a public official or one fulfilling a public duty, as well as the definition in Section 222(2) of the Penal Code, is the time of committing the action as well as the outcome thereof. If the threat of committing a violent action against a person or a punishable action involving public endangerment is made at the time of the procedure conducted by the public official or one fulfilling a public duty and the outcome of such action is the hindering of the procedure or compelling the passive subject to take action, then the action will run counter to the statutory definition of assault on a public official or one fulfilling a public duty. If, however, this conduct of the perpetrator is demonstrated after or because the measures by the above-mentioned passive subjects have been taken, the action will qualify as harassment.

III. The Difficulties of Providing Evidence. The Criticism of Restraining

1. The most common forms of manifestation of the criminal act include those cases where the perpetrator harasses the victim by using an electronic telecommunications device. Phone calls, text messages, Skype messages, Facebook messages, e-mail messages, as well as establishing contact through other mobile phone applications should be specifically highlighted. To be able

37 Monori 2016. 231.

38 http://ugyeszseg.hu/repository/mkudok7747.pdf.

to prove the facts of the matter, all these communications and messages should be documented, which may not cause any problem in the case of Internet-based infringements. In the case of instances of disturbance on the phone, however, it causes some difficulty if the passive subject is not in the position to record the conversations in some form or another. In such cases, the acting authorities are not statutorily authorized either to intercept the conversations since the criteria for obtaining secret data do not exist.

In my opinion, if the conversation is not recorded, the presentation of the call history before the court cannot qualify as sufficient evidence, not even if the quantity and times of the calls, e.g. several night-time calls, suggest that the statutory definition can be fulfilled. The court has to be fully convinced of what the purpose of the conversations between the parties was (would have been), but in order to be able to do so a minimum-level knowledge of the content or direction of the conversations would be necessary.[39]

It is also a realistic phenomenon when the passive subject requests police support because of the harassing behaviour demonstrated by the accused party. In such cases, a police report on this should be obtained, and, if necessary, it is justified to hear the acting policemen as witnesses (judicial decision No 1983. 272). Also, evidence should be taken if it is doubtful whether the cohabitation of the accused and the offended parties qualifies as a domestic partnership.

2. The reason for acquittals due to lack of evidence is frequently the fact that the victim, who is related to the accused party, does not wish the accused to be punished after the indictment has been submitted; so, using their right of exemption, they do not testify. As the key to the solution, Andrea Tóth outlines the possibility of the acting authorities' taking the earlier witness testimonies into account in such cases (see the analogy of the rules for the testimonies to be given by the accused party). However, the author adds that by using this method 'the court would obtain such extra items of evidence which would actually be obtained by evading or disregarding the obstacles of giving a testimony'. I have already explained above that due to the 'private motion nature' of the crime I do not think that any similar amendment of the Criminal Procedure would be acceptable.

In one of the cases of a district-level prosecutor's office discussed in the Report, 'the accused regularly harassed her husband's parents in order to voluntarily

39 In the other case examined in the Report, 'the accused party threatened the victim, who had launched a labour law procedure against them, with killing on the phone. There was no ear witness to this threat. From the call log obtained in the course of the investigation, the phone conversations between the accused party and the victim could be certified and, also, it could be confirmed that the victim called the emergency number 112 on several occasions after the threat had been made; however, no other items of evidence had surfaced. The court did not find the victim's testimony and the data found in the call log sufficient against the denial of the accused, so they acquitted the accused due to lack of evidence.' http://ugyeszseg.hu/repository/mkudok7747.pdf.

intrude on their privacy. The fact that the accused party was guilty was proven by the call log certifying the number and times of establishing contact as well as the testimonies given by the victims. After the indictment, the relationship between the accused party and the offended parties was settled, and by using their right of exemption with regard to the familial relatedness they had already refused to give testimony in the court procedure. The list of phone calls, especially in a relationship between relatives, was not sufficient to establish the statutory definition of harassment; so, the prosecutor was right when he filed a motion for the acquittal of the accused party due to lack of evidence.'[40]

I find it an unfortunate practice that despite the rightful refusal to give a testimony on the offended party's part the documents of the text messages, e-mail messages, the correspondence on the Internet social media attached by the offended party and containing the threats made by the accused party can still be used as evidence, along with the testimonies given by those witnesses with whom the victim shared what had happened. However, the police report containing the statement made by the offended party cannot be used in the case of the rightful refusal to give a testimony, and the police officer who acted in the on-site investigation or who conducted the hearing of the witness cannot be questioned as a witness with regard to the statement given by the offended party (judicial decision No 1999. 241). However, the legal effect of the private motion is not affected by any such circumstance in which the party filing the motion gives no testimony later, using their right of exemption (judicial decision No 2014. 2).

3. In the cases that were launched exclusively for harassment, court-ordered supervision is usually not used in the investigation phase. In the cases that can be mentioned as exceptions, it is usually only due to the victim's motion that restraining is ordered against the accused party.

The recent period has seen the emergence of serious doubts about the suitability of such court-ordered supervision:

> [I]n the opinion of the civil societies involved in the protection of victims, the situation has only become worse as the long-awaited institution of restraining orders had been integrated but the operation thereof had proven to be unsatisfactory. One of the key deficiencies manifesting themselves in practice is that this institution did not provide prompt and efficient assistance to the victims of abuse since in order to be able to issue such a restraining order a criminal procedure in progress as well as the communication of the suspicion, are the required criteria, which are mostly distant in time from the underlying abuse.[41]

40 http://ugyeszseg.hu/repository/mkudok7747.pdf.
41 Tóth 2015. 85.

The above evaluation seems to be right according to the current rules set out in the Code of Criminal Procedure. The first problem lies in the set of criteria of the Code of Criminal Procedure, which requires that it is necessary for the issuance of a restraining order that 1) the criminal procedure should be in progress and 2) the well-grounded suspicion should be communicated to the accused party. However, a longer period of time elapses before these criteria are met, during which the victim has no legal assistance available whatsoever. In the cases examined by Andrea Tóth, 'in approx. one-quarter of the cases, the motion for issuing a restraining order was rejected by the investigative judge because the person against whom such a motion was filed was not in the position of the accused party at the time of the hearing; this is why the motion qualified as unsubstantiated due to its premature nature, and it had to be rejected'.[42] The primary reason for the dysfunctionality of court-ordered supervision becomes obvious from the wording of the Criminal Procedure, based on which it is used primarily in order to ensure the success of providing evidence rather than to protect the rights of the offended party.

The European Court of Human Rights also pointed out the deficiencies of the functioning of the institution of criminal restraining orders when they condemned Hungary for a measure taken in relation to a restraining order. The judicial forum emphasized the necessity of decision-making without delay, and they found it concerning that the law does not set a specific deadline for decision-making.[43]

In order to remedy the above deficiencies, Act LXXII of 2009 on Restraining Applicable in Case of Violence among Relatives was adopted by the National Assembly, based on Section 1(1), according to which 'any action or failure committed by the abuser against the abused party, which seriously and directly jeopardizes dignity, life, the right to sexual self-determination, as well as mental and physical health, will qualify as violence among relatives'. Basically, the law introduces the possibility of issuing a so-called preventive or temporary restraining order, the point of which is that the obligor is obliged to keep away from the abused party, from the real estate property where the abused party habitually lives, as well as from another person indicated in the temporary preventive restraining order or in the preventive restraining order during the effect of the restraining order; furthermore, they will be obliged to refrain from establishing contact with the abused party either directly or indirectly.[44]

42 Research project conducted at the Buda Central District Court in 60 cases closed with a binding effect in 2013 and September 2014. Tóth 2015. 90.

43 European Court of Human Rights, Kalucza v Hungary, case No 57693/10, Section 64, date of decision: 24 July 2012.
http://www.coe.int/t/dghl/standardsetting/convention-violence/caselaw/CASE%20OF%20KALUCZA%20v.%20HUNGARY.pdf.
Tamási–Bolyky 2014. 52.

44 Section 5(2).

It is the competent local court based on the abused party's habitual residence that decides on issuing a preventive restraining order in a non-litigious procedure. The procedure is launched ex officio at the initiative of the police or at the request of the abused party or a close relative of the abused party. Preventive restraining orders can be ordered for a maximum of 30 days. During the effect of such a restraining order, the abuser will be obliged to keep away from the abused party, from the real estate property where the abused party habitually lives, as well as from another person indicated in the order; furthermore, they will be obliged to refrain from establishing contact with the abused party either directly or indirectly.

While preventive restraining orders are issued in the framework of an administrative procedure, and it takes the provisions set out in the Hungarian Civil Code as a basis for defining the term 'relative', the issuance of criminal law restraining orders depends on the launching of a criminal procedure, and the relatedness between the victim and the perpetrator is not examined. The criteria of issuing a restraining order are different in the two types of procedure also by the legal title of the use of the real estate property where the abuser lives. No preventive restraining orders can be issued if the victim is a courtesy user of the apartment, and there is no child under legal age, common with the abuser, in the household. However, criminal law restraining orders can be issued by the court irrespective of the legal title of the use of the real estate property.[45]

The possibility to issue a temporary preventive restraining order assigned to the competence of the police is the 'entrance gate' to the issuance of a preventive restraining order, which is also regulated by the rules of official administrative procedures. The point of this lies in that in order to prevent a more serious abuse, the police officer could immediately take measures to remove the abuser from the site and should make a decision on keeping the abuser away from the victim for at most 72 hours. A temporary preventive restraining order can be issued ex officio or based on a report. Simultaneously, the police initiate the issuance of a preventive restraining order at the competent local court. The detailed rules of temporary preventive restraining orders are set out in IRM (Ministry of Justice and Law Enforcement) decree No 52/2009 (IX. 30), which helps the police arriving on the site make the right conclusions from the circumstances that can be experienced on the site and apply the right measure for the treatment and prevention of domestic violence.[46]

4. The possibility of using an intermediation procedure may provide considerable benefits to both parties, and the enforcement of the principle of opportunity is expressly justified in the case of actions which run counter to the statutory definition of harassment, on the basis of exclusivity. The process may

45 Tamási–Bolyki 2014. 54.
46 Tamási–Bolyki 2014. 56.

be especially highly justified in the case of infringements between relatives. Among the cases examined by the Report, it happened very rarely that an intermediation procedure was conducted unlawfully despite a reason for exclusion set out in the Penal Code.

> Related to the ordering of an intermediation process, one of the district prosecutor's offices summoned the victim as a witness and made them give a statement on whether they would give their consent to conducting an intermediation procedure. In lack of consent from the victim, conducting the intermediation process became aimless; so, an indictment was submitted. The district court held a preparatory hearing on this case, where they heard the accused party and the offended party, who then both gave their consent to conducting the intermediation process, and the prosecutor also proposed the same. This is why the district court suspended the criminal procedure for six months and ordered that an intermediation process be conducted, which, however, was not successful. In fact, however, the carrying out of an intermediation process was excluded by the law. The situation was that according to the indictment submitted by the district prosecutor's office, the accused party harassed their ex-partner continuously, from the termination of their life as a couple on 1 June 2012 up until 31 July 2013. The personal part of the indictment also contains that the accused party was put on probation for one year in a judgment that took binding effect on 19 April 2013. Thus, the accused party committed some of his acts during the effect of probation; this is why the carrying out of an intermediation process is excluded by Point d), Section 29(3) of the Penal Code.[47]

5. The Report suggests that it was only in 9 cases that a second-instance procedure was conducted in the case of convicted persons accused exclusively with harassment, i.e. in 85% of the cases the sentence or measure imposed by the first-instance court was acknowledged by both the prosecutor and the defence lawyer. In the case of accused parties convicted exclusively for harassment, the most commonly applied sanction is putting on probation (36.3%), imposing fines, and community work (23.4–23.4% respectively). 3.6% of the accused were reprimanded, 11% of them were sentenced to suspended detention, while 1.8% of the accused were imposed executable custodial sentences.[48]

47 http://ugyeszseg.hu/repository/mkudok7747.pdf.

48 'The court sentenced a Szeged man, who harassed his acquaintance living in Békéscsaba in the social media, in letters, on the phone, and in person too, to executabe detention in jail. The man said that he was in love with the offended party. According to the data of the investigation, the accused had been trying to get the victim's phone number in a social media site ever since June 2015; this is why he kept writing to the woman's friends. As he had not managed to get the woman's phone number, first he kept sending letters to her by post; then he personally dropped his letters

IV. Conclusions

1. Related to the analysis of the criminal act that was discussed above, I touched not only upon substantive but also on procedural law issues. The analysis of the procedural law was primarily related to the circumstances of filing a private motion. It was not by coincidence as, in my opinion, the current practice is unlawful in several aspects. First of all, it should be pointed out that harassment is, in most cases, a 'process crime', i.e. the offended party should be asked to inform the authorities on a regular basis in the case of all the infringements and that they should use the possibility of filing a private motion in each and every case. The situation is that the effect of the private motion filed for the first time only extends to the unlawful actions committed before this point in time.

2. In the case of Section 222(1) of the Penal Code, the regular nature of the action does not in itself substantiate criminal liability. In such cases, the authorities should also investigate into what the intention of the perpetrator was. If the actions are neither of an intimidating nature nor are they aimed at voluntarily intruding privacy, then the offending behaviour cannot be regarded as one that fulfils the criteria of the statutory definition. In this scope, the direction and mutuality of and the reasons for establishing contact should be examined along with the events directly preceding the infringement. 'The mutuality of contact between the victim and the accused does not exclude in itself the establishment of the crime of harassment, but extra attention should be paid to what exactly the communication on the part of the victim and the accused is aimed at.'[49]

Such actions are most frequently committed by electronic telecommunication devices, of which disturbing behaviour through e-mail and Facebook messages stands out. In such cases, it is an indispensable condition to providing evidence that the victim should have the printed copy of the message in question at their disposal or that the latter should be able to show such statements to the staff members of the investigation authority directly through entering their personal pages.

3. Finally, I think that the statutory definition of the behaviour in Section (2) should be supplemented with a subsidiarity or alternativity clause as this turn of phrase is often concurrent with other crimes (e.g. deprivation of liberty by mortifying the victim). Thus, in order to avoid the establishment of actions of

in the woman's postbox. His attempts were not successful in this way either; this is why he started sending messages to the phone number of the woman's father, and he kept waiting in front of the lady's house. When they met in person, the offended party told him that she did not want to get into any kind of contact with him, and she asked him to leave her alone; then she made a report to the police. The Investigation Unit of the Békéscsaba Police Headquarters ordered an investigation, in the course of which Csaba G. was heard as a suspect for the well-founded suspicion of having committed the infringement of harassment.'
http://www.police.hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/birosag-ele-allitas-zaklatas-miatt-foghazbuntetes.

49 http://ugyeszseg.hu/repository/mkudok7747.pdf.

several counts, it would be desirable to have such a legislator's wording that would only allow the establishment of 'harassment committed with dangerous threats' if no graver or other crime is committed.

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Recovery in Criminal Proceedings[1]

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> '... if the final decision includes substantive justice, there is no doubt that res judicata should not be questioned; however, if those two are in conflict, the rule should be broken, and retrial should be allowed in order to demonstrate the emergence of substantial justice.'[2]

Abstract. Retrial is an extraordinary legal remedy which allows for the review of a final decision when pursuing the truth – under strict legal conditions – and may precede the requirements of legal certainty appearing as legal force. After a final court decision, retrial is a frequently used method in criminal proceedings; so, in my research, the objective is to examine retrial cases. This required the complete review of all 147 cases related to retrials and completed in 2005 at the Court of Appeal of Debrecen as well as the review of 174 retrial cases in 2014 from various aspects. According to the summary, a final decision is rarely changed in a retrial process; however, the fact is that if error is eliminated just in one single case, it is an indication that retrial is a necessary legal institution.

Keywords: legally binding, extraordinary remedy, retrial, criminal proceedings

I. Introduction

Retrial is an extraordinary remedy, which may result in the retrial of final decisions in case of the presence of certain exhaustive reasons listed by the Act on Criminal Procedures.

In my study, I have examined the retrial cases conducted at the Court of Appeal of Debrecen in the first and last year of the period of 10 years of its operation

1 Based on the comparison of retrial cases in 2005 and 2014 at the Court of Appeal of Debrecen. The research was authorized by Lajos Balla, President of the Court of Appeal of Debrecen.

2 Balogh–Edvi–Vargha 1898. 179.

(2005–2014); I have revised and compared the data of the cases in question according to different criteria. I reviewed a total of 321 files on the retrials. Legal background was essentially the same for the cases in 2005 and in 2014.[3]

For the research, I set up the following hypotheses:

Retrial is a necessary legal institution, a method of legal remedy often used by convicts. In order to eliminate factual errors, the remedy of overruling the final decisions is necessary; however, the requirements of legal certainty require it to be subject to strict conditions. Due to the fact that the entire criminal proceeding is based on the principle of striving to achieve substantive justice, after a final decision, the enforcement of substantive justice may, where appropriate, precede the interests embodied by the legally binding decision related to legal certainty. However, as a result of predictability requirements and the aspiration to keep final legal relationships intact, only a small portion of the submitted motions for retrial is successful.

The structure of my study follows various review aspects; data are displayed in diagrams and tables.

II. Presentation of the Research Results

1. Total Number of Received Cases

Since the Court of Appeal of Debrecen was established in 2005, 1,419 motions for retrial were submitted until November 2014; the total number of cases received was 7,395. Cases submitted in connection with retrial accounted for 19% of all the cases received.

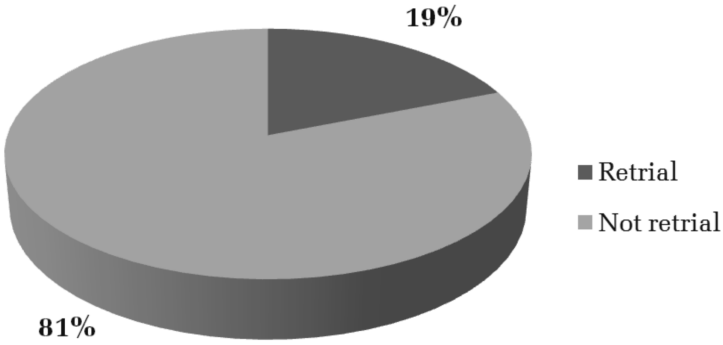

Figure 1. *The percentage of cases affected by retrial in relation to the total number of cases received in 2005–2014, Court of Appeal of Debrecen*

3 In 2005, it was regulated by Section 393, subsection (403), while in 2014 it was regulated by Section 408, subsection (415) of the Act on Criminal Procedures.

This is considered a very high number, indicating that this kind of legal remedy is frequently resorted to, in a relatively high number of cases; the same can be observed in the following figure.

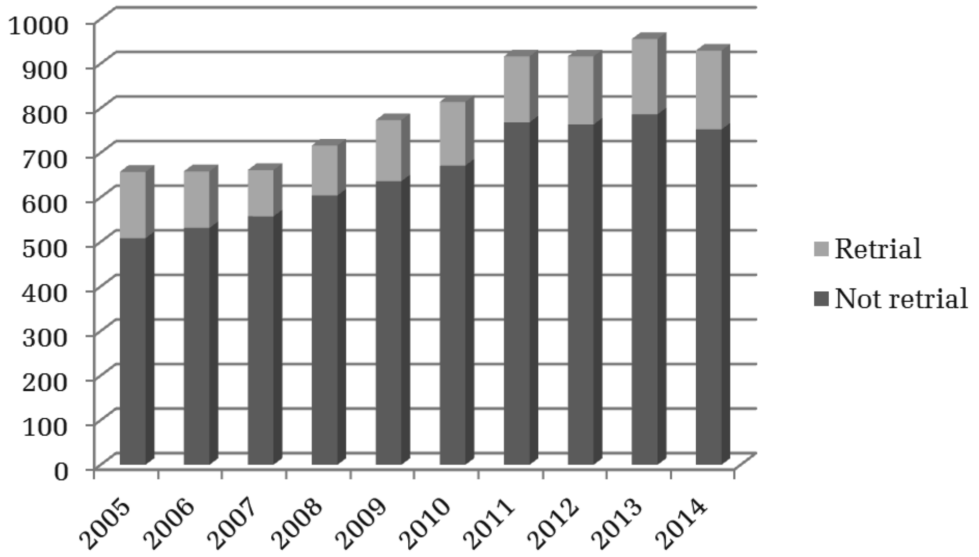

Figure 2. *The number of cases affected by retrial in relation to the total number of cases received in 2005–2014, Court of Appeal of Debrecen*

2. Dividing Cases Affected by Retrial

In the question of admissibility, the decision is made by the Tribunal (formerly county court) if it was the District Court involved in the main proceedings at first instance and by the Court of Appeal if it was the tribunal making the decision at first instance. Consequently, the Court of Appeal will examine the appeals for retrials and will act at first instance in the revision of the retrial motions.

The area of responsibility of the Court of Appeal of Debrecen in 2005 included Hajdú-Bihar County, Jász-Nagykun-Szolnok County, Borsod-Abaúj-Zemplén County, and Szabolcs-Szatmár-Bereg County; in 2014, Jász-Nagykun-Szolnok County was replaced by Heves County.

Data

In 2005, the Court of Appeal of Debrecen received 41 motions for retrial from Szabolcs-Szatmár-Bereg County, 33 from Hajdú-Bihar County, 28 from Borsod-Abaúj-Zemplén County, and 25 from Jász-Nagykun-Szolnok County for *second-instance* judgement.

In 2014, the Court of Appeal of Debrecen received 41 motions for retrial from the Tribunal Court of Nyíregyháza, 34 from the Tribunal Court of Debrecen, 39 from the Tribunal Court of Miskolc, and 18 from the Tribunal Court of Eger for *second-instance* judgment.

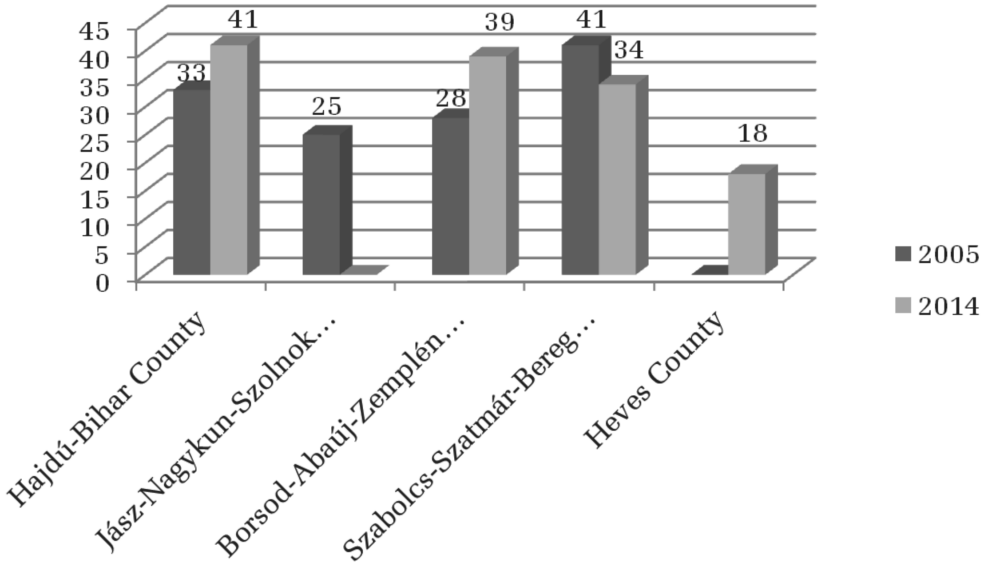

Figure 3. *Appealed retrial, Debrecen Court of Appeal*

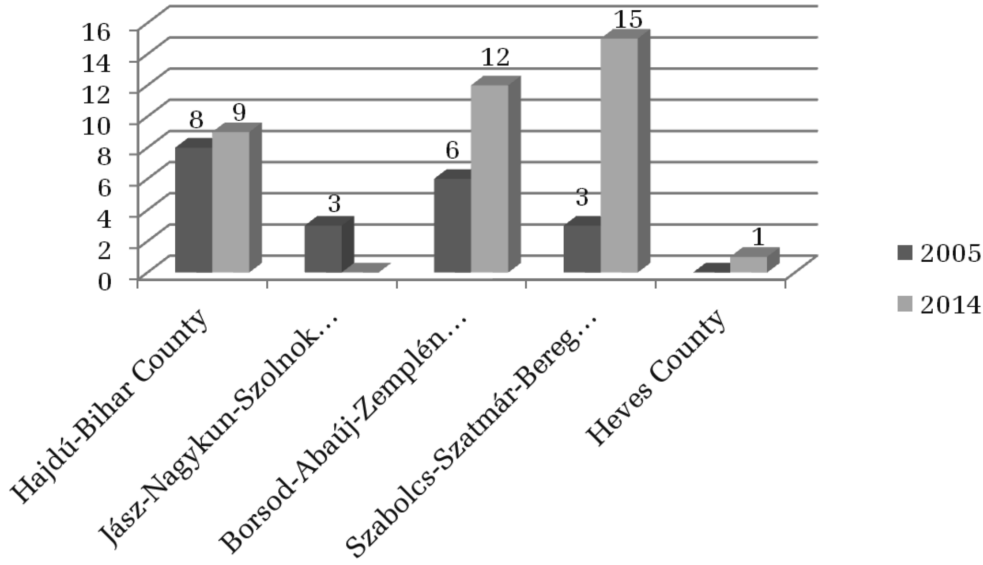

Figure 4. *Retrials at first instance, Court of Appeal of Debrecen*

In 2014, the Court of Appeal of Debrecen received a total of 40 motions for retrial: 15 from the Tribunal Court of Nyíregyháza, 12 from the Tribunal Court of Miskolc, 9 from the Tribunal Court of Debrecen, and 1 from the Tribunal Court of Eger for *first-instance* judgment.

In 2005, the 21 cases received for first-instance judgment were divided as follows: 8 cases were received from Hajdú-Bihar County, 3 from Jász-Nagykun-Szolnok County, 6 from Borsod-Abaúj-Zemplén County, and 3 from Szabolcs-Szatmár-Bereg County.

Conclusions

The number of offenders was the highest in 1998 (140 thousand), showing a decline since then; however, 100,000 offenders were registered in 2012.[4] An area's situation in terms of crimes is very well indicated by the registered number of crimes committed in the area; and where there are more crimes committed and more criminal cases closed, there is a greater probability to receive more motions for retrial.[5] The figures show that in both years a higher number of appeals were received from the jurisdiction of the Tribunal Court of Nyíregyháza and Miskolc.

When examining the period between 1990 and 2007, the rate of offenders was the highest in the two northern regions, in the Northern Great Plain and the Northern Hungary region; such numbers are the highest in the case of violent and disorderly offences per 100 thousand inhabitants.[6] Due to the unfavourable socio-economic conditions in the eastern and north-eastern regions (Northern Hungary, Northern Great Plain), committing crimes is characteristic of these regions where the number of adult offenders is higher than the national average. If the number of adult offenders sentenced by final decision is examined, the number of crimes in relation to the population is the highest in the Northern Great Plain, while the number of crimes against property is the highest in Northern Hungary.

Regarding the number of crimes nationwide, Nyíregyháza ranks fifth among cities with county rights.[7] The number of crimes registered in police procedures was reduced by 1.3% (to 19,564) in Borsod-Abaúj-Zemplén County in 2015, which is 7.3% of the nationwide number (267,628).[8]

4 Hungary in numbers: Crime statistics. http://szamvarazs.blogspot.hu/2013/02/bunugyi-statisztikak.html.

5 Pursuant to Section 17, subsection (1) of the Act on Criminal Procedures, unless otherwise provided by this Act, the court competent to perform the proceedings is the court of jurisdiction where the crime was committed.

6 Papp 2009. 37–46.

7 Report on the public security situation of Nyíregyháza city with county rights, and on the measures taken to ensure public safety in the year 2014. http://adat.nyiregyhaza.hu/eloterjesztes/2015/0326/150319_kozgyi_eloterj_06.pdf.

8 Report on the public security situation of Borsod-Abaúj-Zemplén County and the measures taken to ensure public safety as well as on the related tasks, on the situation of border security

When examining these areas in terms of crimes, it can be concluded that factors influencing environmental motivation and poor economic conditions may be a reason for the high number of crimes. Unemployment, poverty, and adverse social conditions, low level of education, living in depressed villages, hopeless life situation, and alcoholism are all factors affecting criminal activities.

People in the periphery of society are greatly affected by the pressure for deviance.[9]

All the above may explain the high number of motions for retrial received from these two counties.

3. Based on the Subject Matter, the Motions for Retrial Were Submitted in Connection with the Following Criminal Offences

The examined appeal for retrial cases were mostly submitted for sentences imposed for crime against property.

Data

Appealed cases in 2005 included: 22 cases of robbery, 20 cases of theft, 14 cases of theft as misdemeanour, 12 cases of fraud, followed by 14 cases of assault causing grievous bodily injury. In 2014: 20 cases of robbery, 22 cases of theft, 19 cases of theft as misdemeanour, 14 cases of fraud, and 16 cases of assault.

In essence, the two years provided similar figures.

In 2005, retrials *in the first instance* included: 11 cases of assault causing bodily injury and 9 cases of murder, while these numbers in 2014 were as follows:

7 cases of assault causing danger of death, 22 cases of murder.

It can be concluded that there were remarkably more motions for retrial submitted for cases of murder in 2014.

Conclusions

Substantive weight has a significant role since the higher the penalty for criminal offences, the more offenders take advantage of the possibility of retrial. On the other hand, the number of violent crimes against property has increased, which was 55% of all crimes committed in 2012. The number of violent crimes against persons was 27,000 in 2012, which, although only 6%, means that their number

and border crossings in Borsod-Abaúj-Zemplén County in 2015. www.baz.hu/content/2016_aprilis/1604_02_rendorseg_besz.pdf.

9 Gönczöl: www.fszek.hu/szociologia/szszda/gonczol_hatranyos.pdf.

has doubled since 1990.[10] In 2014, 329,303 crimes were registered. This data was 447,186 in 2010 and 472,236 in 2012. In 2014, the number of registered offenders was 108,389 – slightly less than the number of 109,876 in 2013. Within crimes against property, which make up the majority of crimes, the most common ones are thefts: in 2014, 141,469 cases were registered, while 167,657 cases in 2013. The number of traffic offences significantly increased in 2013, from 14,804 to 17,639.[11]

It can be concluded that if first-instance final decisions are primarily made in cases related to the crimes above – as these are the most frequently committed ones –, the frequency of motions for retrial related to these crimes is explained.

In the case of defendants sentenced to life imprisonment, there was an outstanding number of submitting motions for retrial in 2014.

In 2005, life imprisonment, as a legal instrument, was not applied at the Court of Appeal of Debrecen, and there was no case referred to the Court of Appeal of Debrecen where such sentence was applied at first instance. However, from 2009 on, the number of defendants sentenced to life in prison started to increase. According to Dr Lajos Balla, this is due to the restrictive legal institutions, as in 2009–2014 a total of 26 defendants were sentenced to life in prison.[12] This is the reason why defendants who were imposed such sentence take advantage of the possibility of this legal remedy in such a high number.

4. Data Related to the Defendants

Personal data of defendants submitting motions for retrial may be examined according to their place of residence, age, and gender distribution.

a) According to Their Place of Residence

Most of the defendants were permanent residents of Borsod-Abaúj-Zemplén County, Hajdú-Bihar County, and Szabolcs-Szatmár-Bereg County.

The examination of the place of residence of convicts indicates a strong correlation of the frequency of imprisonment with the place of residence. There is a high proportion of convicts compared to the low number of population in certain outskirts of the city and in rural or industrial areas. In these cases, however, the situation is not that these areas are inhabited by a high percentage of criminals but that it shows the typical metropolitan residential concentration of poverty. This concentration of poverty is characterized by low-status families living in

10 Hungary in numbers: Crime statistics. http://szamvarazs.blogspot.hu/2013/02/bunugyi-statisztikak.html.

11 http://mno.hu/belfold/ogy-ugyeszsegi-beszamolo-jelentosen-csokkent-a-bunozes-1287118.

12 Balla 2014. 53.

clusters in the outer regions of the town, usually under very bad circumstances, and the rate of crimes committed by them is proportionately high.[13]

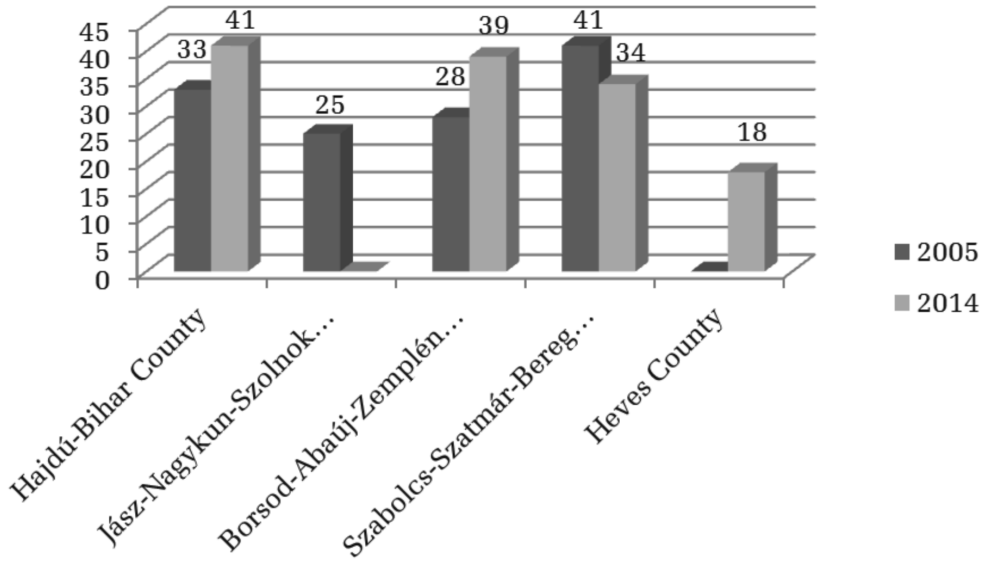

Figure 5. *Distribution of defendants on the basis of place of residence (country), Court of Appeal of Debrecen*

b) According to Their Age

Criminal statistics data also indicate that the frequency of committing crimes – and their rate among the convicts, accordingly – is not only determined by gender but by age as well.[14]

Conclusions

The number of adult offenders has been between 100,000 and 110,000 since 2006, while the number of young offenders has been around 10,000–11,000.[15] In Hungary, in the period following the year 2000, over four-tenth of adults convicted in public prosecution proceedings had a criminal record; the rate of convicts sentenced for crimes against property was the highest (53%), including robbery (72%) and theft (595).[16]

13 Ladányi. http://beszelo.c3.hu/cikkek/hol-laknak-a-bunozok.
14 Vavró. www.tarki.hu/adatbank-h/kutjel/pdf/a577.pdf.
15 Hungary in numbers: Crime statistics. http://szamvarazs.blogspot.hu/2013/02/bunugyi-statisztikak.html.
16 www.ksh.hu/docs/hun/xftp/idoszaki/regiok/orsz/ismert.hu.

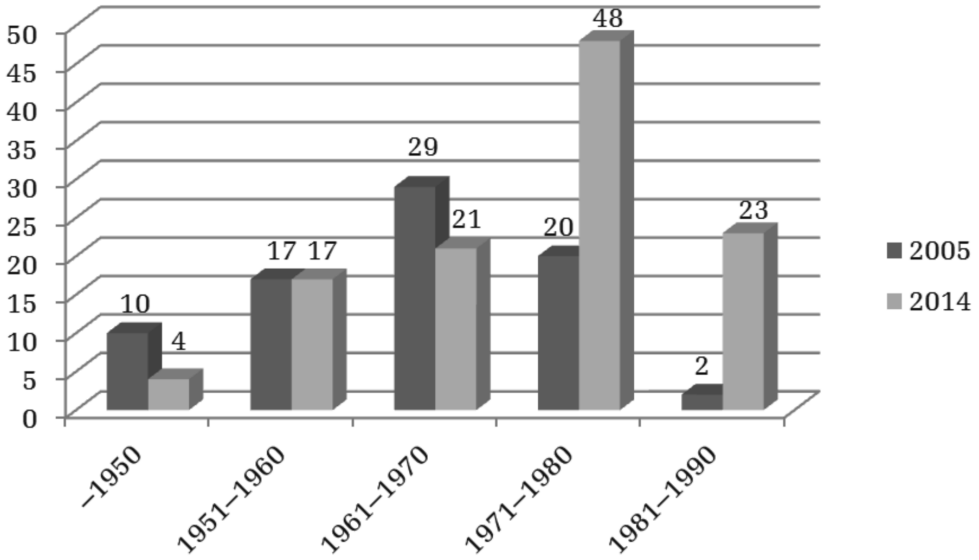

Figure 6. *Distribution of defendants on the basis of age (date of birth), Court of Appeal of Debrecen*

In 2005, the vast majority of defendants submitting retrial motions were born between 1951 and 1970, including a significant number of those born between 1961 and 1970. However, in 2014, there was a sudden increase in the age-group born after 1971, submitting retrial motions.

It can be concluded that the structure of traditional criminal behaviour is formed at a young age. Although with age there can be some changes detected, it is particularly apparent in the various frequency of certain categories of violent crimes.[17]

c) According to Their Gender

Data

In the case of appealed cases and cases at first instance, the proportion of crimes committed by men is much higher, which shows that offenders are typically males.

17 Vavró. www.tarki.hu/adatbank-h/kutjel/pdf/a577.pdf.

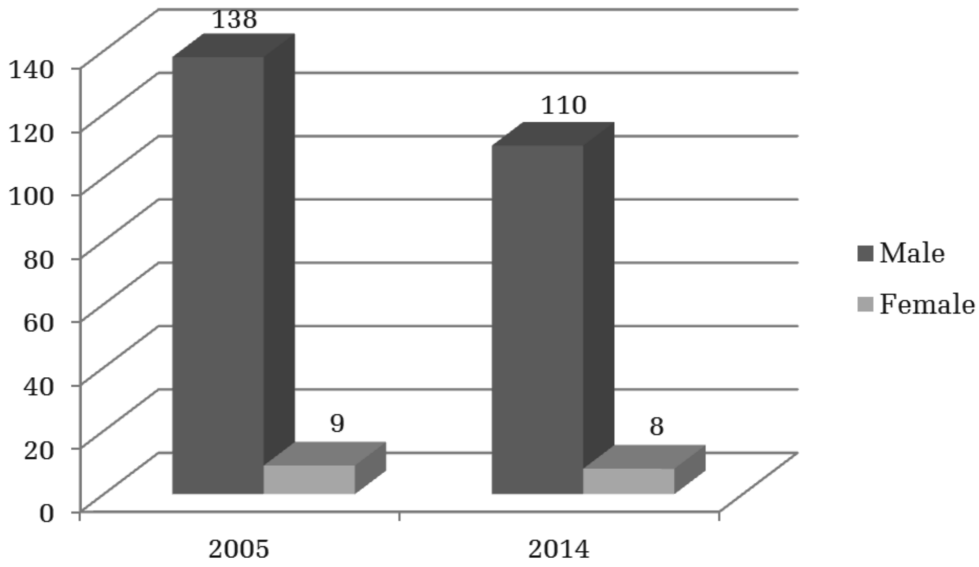

Figure 7. *Distribution of defendants on the basis of gender, Court of Appeal of Debrecen*

Conclusions

In Hungary, the rate of women participating in the total number of crimes is permanently under 15%. Among offenders committing violent crimes against persons, the proportion of women is negligible. Homicides, attempts of homicides, or life-threatening bodily insults by women are committed either as a result of emotional and passionate conflicts in matrimonial partnerships or in the form of homicides committed against new-borns. In the background of criminal acts committed against a relative, there are offences and conflicts suffered during marital or non-marital cohabitation. Very often, the tension of years of heated debates, the alcohol problems, or the violent, quarrelsome, and rude behaviour of the partner accumulate, and the silently tolerant victim suddenly and unexpectedly becomes aggressive. The victim responds to the regular, provocative behaviour by an impulsive act. Therefore, in these cases, the victim of the prolonged abuse becomes the offender. When temper faces temper and violence faces violence, the roles are easily reversed.[18]

When compared to the crime statistics related to female offenders, it can be concluded that the vast majority of female convicts are more inclined to 'accept their crimes' and take the penalty imposed rather than take undue advantage from submitting a motion for retrial.

18 Fehér. www.tarki.hu/adatbank-h/nok/szerepvalt/Feherlenke-97.html.

5. Persons Submitting a Motion for Retrial

The Act contains an itemized list of persons entitled to submit a motion for retrial to the benefit or to the detriment of the defendant. To the benefit of the defendant: the prosecutor, the defendant, the defence counsel in their own right unless this was prohibited by the defendant; the legal representative of a juvenile offender – against an order for involuntary treatment in a mental institution; spouse and relative of the defendant; after the death of the defendant – if more than 50 years have passed –, a relative of the defendant in direct line. To the detriment of the defendant: the prosecutor and the substitute private accuser.

Data

In 2005, defendants submitted an independent motion for retrial without legal representation in 105 cases, in 28 cases, by way of a defence counsel, in 12 cases, by way of a defence counsel in their own right, and in 2 cases by way of a substitute private accuser.

In 2014, defendants submitted an independent motion for retrial without legal representation in 144 cases, in 3 cases, by way of a defence counsel, in 22 cases, by way of a defence counsel in their own right, and in 3 cases by way of a substitute private accuser. In 2014, the prosecutor also submitted a motion for retrial to the detriment of the defendant.

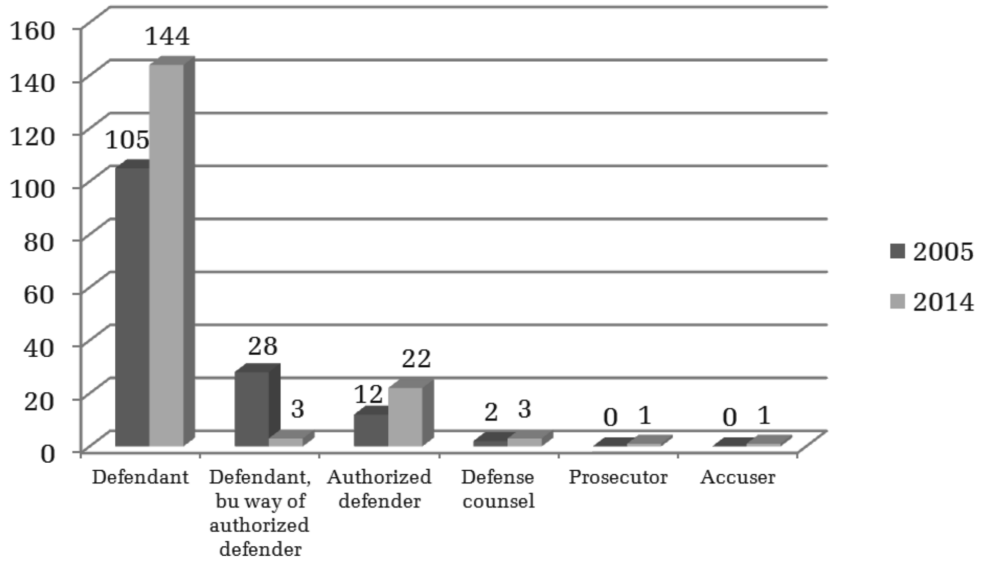

Figure 8. *Submitting motions for retrials, Court of Appeal of Debrecen*

Conclusions

If the figures are examined, it can be concluded that in both years, most commonly, motions are submitted by the defendants without legal representatives. The reason for this must be the fact that revision is not negatively affected by the inaccurate indication of the reason for retrial, and the motion for retrial can be submitted by the defendant at any time and without limits provided that in case the motion for retrial is submitted with the same content as before the Court shall be entitled to neglect making the refusing decision. This is followed by a smaller number of motions submitted by way of a defence counsel in their own right (it occurred several times in 2014) or by representing the defendant. During the overview of the cases, I have observed that lawyers – considering that they are aware of the exhaustive reasons and the procedure of the retrial – mainly submitted a motion for retrial if an expert opinion was available to be attached. A new fact contained in the expert opinion – for example, if the defendant was unfit to stand trial at the time of committing the crime – or new facts related to drug abuse would result in ordering a retrial investigation.

6. Submitting a Motion to the Benefit or to the Detriment of the Defendant

Data

In 2014, out of all cases, in 169 cases, the motion for retrial was submitted to the benefit of the defendant, in 4 cases, to the detriment of the defendant, while in 2005 – except for two cases – the motion was submitted in all cases to the benefit of the defendant.

Conclusions

The reason for this is in connection with accusation and results, i.e. the accused persons are usually condemned later.

In 2014, the Court imposed punishments or fines on a total number of 83,861 defendants, 27 of them were sentenced to life imprisonment, 29,300 received a custodial sentence with 35 percent to be effectively executed and 65 percent suspended. 22.8 percent of the defendants were sentenced to community service, while 32.6 were imposed fines. Last year, accusation results were 96.6 percent compared to 96.4 one year earlier.[19] Obviously, it is also related to the fact that this

19 Péter Polt Attorney General's report for the Parliament. http://mno.hu/belfold/ogy-ugyeszsegi-beszamolo-jelentosen-csokkent-a-bunozes-1287118.

remedy is applied by a higher number of defendants. In addition, prohibition of increasing a sentence also applies to retrials, i.e. as a result of a retrial submitted for the benefit of the defendant the Court in the main proceedings imposes a more severe penalty in addition to breaching the rules of the retrial; it also breaches the prohibition of increasing a sentence.[20]

7. Reasons for Retrial

The reasons for retrial in the examined cases:

– new fact or evidence,
– res judicata,
– false or falsified evidence,
– misconduct of the authority,
– absence.

In accordance with the Act on Criminal Proceedings effective in 2014, a decision made by the President of the Republic on terminating the criminal proceedings against the defendant is a further reason for retrial.[21] However, there was absolutely no reference to this cause.

One motion for retrial may include several reasons for retrial; however, both in 2005 and in 2014, the reference to a new item was most often featured in the motions.

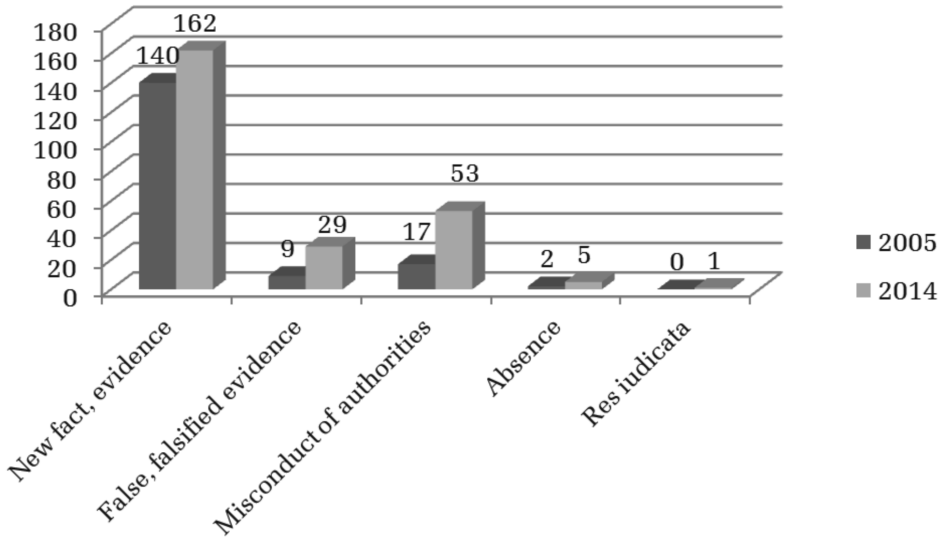

Figure 9. *Reasons contained in the motions for retrials, Court of Appeal of Debrecen*

20 Criminal Decision in Principal No 11/2014.
21 According to Section 408, subsection (1), point f) of the Act on Criminal Procedures.

Conclusions

Despite reference to the new item, the defendants did not actually indicate new evidence, but in most cases they challenged court of evidence evaluation activities, as for example: why did the Court take into account a certain testimony instead of another one? However, according to judicial practice, retrial may not be directed against the evidence evaluation activities of a court at first instance.[22] If a witness is indicated who refused to testify citing the right of exemption in the main proceedings, then the testimony should be considered new evidence, but then retrial may only be ordered if the purpose of the retrial is likely to be met.[23] In the case of false or falsified evidence and misconduct of authorities, retrial may only be allowed where the offence indicated as reason for the retrial was determined by a legally binding decision and such offence affected the decision of the court. The reason for refusal in the case of such reasons was that there were no final decisions made for any such cases even when investigations were started against a member of the authority, and it was terminated, and so any reference to this could not be upheld. In cases when the final decision was made in the absence of the defendant, it was obligatory to order a retrial. Reference to a sentence item occurred in one case in 2014, when the defendant stated that he/she was convicted in two cases for an offence committed in violation of the same victim. However, in this case, it was concluded that although the victim is the same person the dates of the offences committed against the victim are different; so, a cause for retrial cannot be established.[24] In order for a retrial to be allowed, it is not the means of evidence but the evidence that must be new regarding the fact incurred or not incurred in the main proceedings, and with the assessment of the evidence a potentially different factual finding may arise, which suggests that a major issue of the judgment made in the main proceedings must be changed significantly.[25]

8. The Occurrence of Review as the Other Extraordinary Remedy for Cases Affected by Retrial

When examining retrial cases, I found data on the fact that the defendants also took advantage of the legal institution of review, although less frequently. The lower number is due to the stringent conditions of review, as it may be submitted only once and can only relate to questions of law. It even occurred that the decision regarding the review pointed out that the reasons submitted

22 BH2001. 163.
23 According to Section 408, subsection (4) of the Act on Criminal Procedures.
24 Court of Appeal of Debrecen. Bpkf. II. 826/2014/2.
25 BH2015. 123.

in the review should actually be examined in a retrial, and so the retrial motion was submitted automatically. In respect of the relationship of the two legal institutions, I find it important to emphasize: considering that the decision made on the admissibility of the retrial is not decisive, and so review is not possible, it is still possible against the final decision of the retrial overruling the decision made at first instance.[26]

9. Frequency of Submitting Motions for Retrial

Data

Table 1. Cases affected by retrial investigation, according to the decision, Court of Appeal of Debrecen

2005				2014			
Appealed retrial case		**Retrial case at first instance**		**Appealed retrial case**		**Retrial case at first instance**	
First	repeated	first	repeated	first	repeated	first	repeated
101	26	18	2	118	15	23	15

Conclusions

Compared to the number of cases at first instance, a greater number of motions were re-submitted in 2014, meaning that the defendants submitted the motion over and over again. The reason for this is partly the fact that these cases are of substantive weight, and the defendants find it hard to accept more severe penalties. The defendants are likely to submit the motions even if they were rejected before.[27]

10. Retrial Investigation

Pursuant to Act XIX of 1998 on Criminal Procedures, a retrial investigation may be ordered by the prosecutor or the Court as well. The prosecutor is entitled to this power before the motion for retrial is sent to the Court, while the Court may order an investigation to find evidence indicated by the petitioner.

26 BH2006. 352.

27 For example, there is a case when the defendant submitted 31 motions for retrial related to the same conviction (manslaughter) although in the meantime the sentence was completed.

Data

A few more – but not much higher in percentage – of the cases examined[28] include retrial investigations ordered by the prosecutor's office. The obvious reason for this is that prosecution orders an investigation regarding the admissibility of the retrial to investigate the well-foundedness of the subject of the submission. However, the Court ordered retrial investigations in a similar proportion. In my opinion, the background to this is that the Court considers finding the material truth a priority in spite of the existing and legally binding decision. The diagram below shows this distribution.

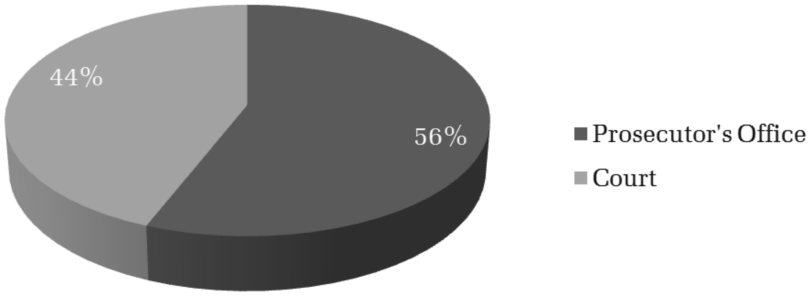

Figure 10. The frequency of submitting motions for retrial

Table 2. Cases affected by retrial investigations by subject

Subject of the case	Number of cases
Robbery crime	7
Fraud crime	6
Fraud misdemeanour	1
Theft misdemeanour	3
Theft crime	6
Drug abuse crime	1
Affray misdemeanour	2
Affray crime	3
Vandalism misdemeanour	2
Depredation crime	1
Violence causing death	1
Assault causing danger of death	1
Aggravated assault crime	4

28 The range of data from cases in 2005–2015 at the Court of Appeals of Debrecen.

Subject of the case	Number of cases
Murder committed for profit	5
Murder of a minor, under the age of 14	
	1
Murder attempt	1
Murder committed with particular cruelty	1
False accusation	2
Corruption	1
Bribery	1
Illegal use of non-cash means of payment	1
Fraudulent bankruptcy	1
Tax evasion	3
Forgery of private documents	3
Road traffic accident resulting from careless driving	5
DUI vehicular manslaughter	1
Dangerous driving	1
Public endangerment	1
Animal cruelty	1
Misuse of firearms	3
Offence concerning professional conduct	1
Acquisition of stolen property	1

Conclusions

Retrial investigations were mostly ordered in the case of the following crimes: crime against property or life, attacks upon the physical integrity of a person, or road traffic offence. The reason for this may be that in the case of these crimes there are frequent references made to new expert opinion.

11. Decision Made on Retrial Admissibility

The first phase of the retrial is making a decision on admissibility. In this phase, the Court orders the retrial – if the motion for retrial was considered well-founded – and forwards the case to the Court which conducted the main proceedings as well as to the Court having the jurisdiction to conduct the retrial. However, in case the motion for retrial was unfounded, it must be rejected.

In this way, at first stage, the Court may order a retrial, reject the motion, or order a retrial investigation.

In case the motion for retrial is well-founded, the actual phase of retrial begins, but that still does not mean that the decision made at first instance will be changed as even after the retrial the decision made in the main proceedings may remain in effect.

Data

In 2005, out of the examined 147 cases, retrials were ordered for 10 cases, while in 2014, out of the examined 174 cases, retrials were ordered for 2 cases.

Conclusions

The above data show that retrials were ordered in an extremely small number, which means that motions for a retrial are groundless in a very high percentage.

III. Summary

In my opinion, my hypothesis has been proved to be correct. Examining the period of 10 years of the operation of the Court of Appeal of Debrecen, it can be stated that retrial as an extraordinary legal remedy is constantly present for clients, mostly used by defendants to mitigate their punishment or achieve dismissal. In case of a rejection, they keep trying to prove their right within the framework of this legal institution by providing new items. During this time, the regulatory environment and the judicial practice could also be regarded relatively stable in respect of retrial conditions. It can be stated that at the beginning and at the end of the 10-year interval retrials were ordered in an extremely small number. It is shown that res judicata is well 'entrenched' for the interests of legal certainty. However, the small number of successful retrial cases still proves that res judicata is not identical with judicial infallibility and may not be considered a symbol of it, and for the avoidance of doubt it is necessary to maintain legal remedies to overrule it.

The draft of the new criminal procedure code does not change the scope of reasons for retrial; it neither expands nor reduces them. Apparently, the reason for this is the recognition that expansion would cause a number of uncertainty factors, while reduction would violate the principles of guarantee. According to the draft, the main difference is that it has to be regulated in different points if several final judgments were made for the defendant regarding the same offence or if the defendant was not sentenced under his/her real

name;[29] furthermore, absence as reason for retrial is placed in a separate section, and this section no longer includes that it is obligatory to order the retrial.[30] The success of retrials can be attributed to expert opinions, attached by the defendants by way of their defenders. However, according to the new law, if the private expert opinion will not be a means of proof, then it may result in even fewer retrials, where appropriate.

It can be stated that both the text of the law and judicial practice leaves little room for res judicata, and this arises from the principle that the court's judgment must be considered true.

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29 This provision is regulated according to Section 408, subsection (1), point b) of the Act on Criminal Procedures.

30 Pursuant to Section 409, subsection (3) of the Act on Criminal Procedures and Section 408, subsection (1), point e), a motion for retrial may be submitted only in case the defendant may be cited from his/her place of residence. In that event, conducting the retrial is obligatory.

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Do the Math! – Copyright Infringements and Damages[1]

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Abstract. Copyright law seems to have been centred around the concept of wrongfulness in the past few decades mainly because the rapid development of technologies attached to the information society have made infringes easy and relatively cheap for the users. The study analyses theories, doctrines, and concepts formed around the question on how to award damages for copyright infringes to the copyright holder in the European Union. To conclude some recommendations and changes in the practice of awarding and calculating damages in copyright infringement cases, the article systemizes and criticizes various approaches of judicial practice in EU member states in relation to two core problems: assessing and calculating lost profits of the copyright holder and awarding moral damages for the infringement of the author's moral rights. The study is not a case analysis; instead, it confronts different ideas and theoretical bases on the preconditions of awarding damages and some common techniques on the calculation of the actual loss. While the EU is far from achieving harmonization in tort law, cases of copyright infringements are typically international in the 21st century; therefore, national laws should at least agree on similar frameworks when reinterpreting and restructuring old tort law lemmas and institutions. The article attempts to provide a starting point to support this work.

Keywords: damages, tort law, copyright law

I. Torts and Copyrights – General Remarks

Enforcing certain rights is always a challenge to the entitled person even if a given jurisdiction orders the application of diverse sanctions to choose from. Copyright law seems to be centred around the concept of wrongfulness in the past few decades. The rapid development of the information society increased the debate over the infringements of copyrights in a digital environment. This phenomenon

1 The study was supported by Bolyai János Research Scholarship of the Hungarian Academy of Sciences.

resulted in neglecting another, potentially equally important question that leads us to the problem of awarding damages to the copyright holder. While proving wrongfulness in a copyright-centred lawsuit may depend on the moral attitude of the society in which the forum delivers a verdict, awarding damages for the wrongful act shows a very fragmented system worldwide. National laws are from being unified or even harmonized when it comes to the preconditions and methods on awarding damages. Tort law is rooted deep in the national culture and even in the European Union very few attempts proved to be successful covering tiny bits of approximation in tort law. Private international law generally orders the copyright holder to use the legal system in which the protection is requested; therefore, not only the substantive and somewhat harmonized rules of copyright law but the technical provisions of domestic tort law shall govern the case.

Tort law is probably one of the most diverse areas of private law that often lies in the borderline of private and criminal law. The distinction between the two otherwise remarkably different cores of the legal system may seem obvious, but a slight overlap is still often experienced when the same act may lead to criminal and tort law consequences at the same time. The two-faced nature of copyrights transform the claims of the copyright holder into moral and monetary questions at the same time. The infringement against moral rights lands us right in close proximity of the questions on moral or immaterial damages, while infringing the copyright holder's pecuniary rights results in a natural claim for monetary damages. Proving and calculating damages are rarely determined by the special rules of copyright laws. In contrary, the general umbrella of the law of damages or tort law aims to protect the copyright holder and grants him compensation or satisfaction. The study attempts to highlight some notable differences in the laws of certain EU member states in relation to awarding damages for copyright infringements to prove that the lack of approximation in this field may prove to be a real obstacle in enforcing copyright laws. Without aiming to draw a complex picture on awarding damages for copyright infringements, we took the liberty to pick a few core questions that, as we assume, can seriously block the copyright holder from getting compensation or satisfaction for the loss he has suffered as consequence of the infringement.

II. Functions of Tort Law and the Concept of Awarding Damages

Debates on the nature of tort law and the practice that private law grants damages for the loss the aggrieved or injured person suffers have been ongoing for centuries. There is no doubt that the concept of monetary compensation for civil wrongs came from the idea of providing complex protection to the

citizens and connecting private law and criminal law to function as a gapless umbrella mechanism in cases of infringements. Private law has long admitted the greedy concept of businesses: money can restore all harms, and money can buy everything. In fact, the reason why tort law and the law of damages grant monetary compensation or satisfaction to the aggrieved party is to place the aggrieved party into the centre of the adjudication. While criminal law focuses on the perpetrator and sees the events from his perspective, private law rushes to restore the ideal pre-infringement status quo in assisting the aggrieved, injured party. No restriction on the tort feasor's and wrongdoer's freedom should be applied in private law as consequences may not grant satisfaction or compensation to the aggrieved person. Providing monetary damages to him, however, may ease the urge for revenge and the likeliness to cure the negative consequences of the infringement. Civil law legal systems advertise that tort law, or the law of non-contractual obligations exists to provide compensation for the loss suffered in relation to the infringement. Placing the copyright holder into the position he originally was as if the infringement had not happened is the flagship purpose that verifies the existence and importance of tort law in these legal regimes. Prevention or deterrence may only come in the second place. On the other hand, we cannot deny that the discouragement of repeat and would-be infringers are also important to tort law. Torts shall not pay, says the classic beacon principle of common law legal systems.[2] Deterrence is a function that teaches the actual infringer and the society in avoiding infringing situations; otherwise, damages must be paid. A recent trend in the debates over tort law's regulatory functions suggests that risk allocation should serve as a primary goal in awarding damages for wrongful acts.[3] The concept of risk allocation is a business-friendly interpretation of compensation as it avoids emphasizing the questions of liability; instead, it decides the problem following a simple solution: who could have prevented the risks more economically. Risk allocation theory thinks of the future and surpasses imposing liability against a party; therefore, it is most likely that business relations survive the incident.

In copyright infringement cases, the function of awarding damages for the loss suffered does not necessarily need fundamental reinterpretation. We may look at copyrights as a set of substantive statutory rights that may also be subjects to infringements; therefore, the same protective, restitutive mechanism shall apply as to the violation of other rights. National laws, on the other hand, often prove a clear pragmatism, emphasizing the importance of one function over the others. Statutory law or judicial practice may come forward with this obvious decision on whether the compensatory or the deterrence function should prevail. This decision might lead to serious consequences in relation to the success ratio of

2 Van Dam 2014. 38.
3 Oliphant 2012. 152.

the copyright holder's claim for damages. Systems following the compensation theory tend to be less sensitive in awarding damages for infringements against moral rights. Legal systems touching grounds on the idea of deterrence may evaluate factors independent from the entitled party's scope and nature of loss when calculating the amount of damages as they are more concerned about the infringer than the claimant. Another obvious dividing line between the two systems is how they rank the importance of the preconditions needed to award damages. In general, loss, wrongfulness, causation between the two, and fault on the wrongdoer's side are needed to be entitled to damages. The compensation theory suggests that no profit should be earned on the tort; therefore, evidence of the suffered loss is vital to support the claim. Also, the theory of causation tends to be more restrictive in such systems ordering judges to provide damages only if the loss is a direct and close consequence of the infringement. The deterrence theory, on the other hand, makes fault a material element to award damages rather than a concept of defence available for the infringer.

III. Shortcomings of National Laws in the EU

The European Union Directive on the Civil Enforcement of Intellectual Property Rights[4] (hereinafter: the IPRED) states an obligation that 'Member States must ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right-holder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement'.[5] This obligation does not intervene to set grounds for a harmonized tort law in the member states for copyright infringements; instead, it calls for effective solutions that may be very different from each other. The IPRED acknowledges that both moral and pecuniary rights of the copyright holder shall be respected not only in a declarative way but in providing effective remedies that may cure the loss the copyright holder suffered as a consequence of the breach. We may agree that infringing activities in the words of the IPRED are always non-contractual in nature since licensing agreements authorize the user to use the copyright-protected property accordingly. Breach of such agreements may result in overreaching that is non-contractual in nature. This argumentation leads us to the conclusion that the IPRED calls for effective remedies in tort law that manifest in the form of awarding damages to the right-holder. Still, in national laws of the member states, courts face difficulties in

4 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (IPRED), Official Journal of the European Union L 157.

5 Article 13 of the IPRED.

awarding damages in copyright tort cases. Courts, in many cases, face difficulties in calculating and awarding damages comprehensively. Infringements against the moral rights of the copyright holder often result in the application of objective and restorative sanctions (e.g. ordering the infringer to discontinue the infringing activity) rather than granting damages. As the loss arisen from the infringement of moral rights is non-calculable due to the non-monetary nature of these rights, nominal or symbolic damages are often awarded that do not serve the purposes of compensation and satisfaction or even deterrence.[6] Even in cases when pecuniary rights of the copyright holder are in the centre of the claim, awarding compensation for negative economic consequences (excluding lost profits) proves to be a challenge. The core problem in such cases is the lack of causation or the distant connection to the actual infringement that both form obstacles in awarding damages for economic loss.[7] Another common shortcoming in national laws is that moral or immaterial harms are not compensated properly. Either because the national tort system does not support compensation for non-visible harms,[8] or judges do not see a compensable loss in these cases.[9] Either way, moral and immaterial harm may often be associated with the infringement of pecuniary rights (e.g. the novel is unlawfully translated into a foreign language resulting an inconsistent text full of typos that ruin the reputation of the author in those countries). It may be a general problem in European tort law that costs of disclosing the infringement, the costs of taking legal actions, or the costs of rectifying the infringement are also not properly compensated in some member states.[10] It may be because the national law, in general, imposes a cap on the reimbursement of such costs or the courts extend the obligation to mitigate over these losses as well. Copyright infringement cases are highly exposed to this shortcoming, as disclosing and rectifying such infringements may result in much higher costs than in cases of infringements of other rights. All these shortcomings support the infringer's position, who may retain some profit even if his liability for the infringement is recognized by the courts.

IV. Proving and Discounting Lost Profits

Lost profits should, in theory, be part of the loss to be compensated under classic tort law principals. The real question concerning lost profits, however, is how a connection can be established between the wrongful act, the infringement against copyrights, and the profit the right-holder would otherwise gain in the absence of the

6 European Observatory on Counterfeiting and Piracy 2009.
7 Van Dam 2014. 78.
8 Greece.
9 Hungary.
10 Van Dam 2014. 93.

infringement. Causation theories in tort law may seriously limit the availability of the reimbursement of lost profits. As in criminal law, private law also has 'would-be' causation doctrines. These doctrines usually require evidence to show that at least a probable and reasonable connection can be established between the infringement and the lost profits stated in the claim. In reality, especially in cases of file sharing in a digital environment, it is extremely difficult to convince the court that the wrongful users who could get access to the copyright-protected work for free could have paid for it if it were not available on the torrent site for free. Some courts, however, developed progressive solutions – also based on speculative rules – on how to get over with this obstacle. In Sweden, for example, courts count with a 1:3 original to counterfeit ratio to rule out the 'if it had not been available for free, I would not have paid for it' problem. Also, it is almost always necessary to provide a rough estimation on how much the copyright holder truly lost on the infringement, as providing evidence on the exact number of illegal users is near to impossible. Therefore, some may look at the reimbursement of lost profit in copyright infringement cases as a ground for mere speculation, and some courts certainly treat it this way. *Ex aequo et bono* evaluations still seem to be a more favourable approach to copyright holders, while in some jurisdictions in the European Union (e.g. Italy) the right-holders must choose whether they ask for a reimbursement of the infringer's profits or their own lost profits, whichever is greater. Courts tend to take multiple factors into account when evaluating and calculating lost profits. A common approach is that the net profit is reimbursable, while in case the infringement results in physical pirated copies, damages are awarded per product. A possible solution to the problem would be to award estimated lump sums per each counterfeited product. In reality, the deterrence function of tort law may be traced in the calculation of lost profits. For example, some courts thoroughly analyse the magnitude and the nature of the infringer's business if the reimbursement of lost profits require estimation. While the actual profit the infringer made on the infringement cannot be calculated, the profit the infringer made in general in a given period may also serve as a base to decide on the magnitude of profits the copyright holder has lost.[11] Also, tort law's deterrence function is spotted when the courts move toward a punitive direction awarding double or triple awards to the right-holder. Some criticize this concept since in many cases the infringers distribute the counterfeited works under very different circumstances than the right-holder would do so through legal channels.[12] This makes it difficult to value the true damage the counterfeit products caused to the copyright holder compared to the would-be value of the legal sales. This may be the primary reason why courts rarely break the amount of damages into categories, and the reasoning of the decision does not allow a deep insight on how the judge assessed lost profits.

11 European Observatory on Counterfeiting and Piracy 2009.
12 Blum–Maunder 2015.

A classic problem is to identify that thin dividing line between lost profits and reasonable royalty. EU member states, in general, offer damages in the form of a reasonable royalty. This amount is calculated from the amount of legal royalties the copyright holder would earn if the infringer had obtained a licence from the right-holder. This concept simplifies the calculation of lost profit in sectors where the licence royalty is easy to determine; however, this brings us to the next core question as to whether reasonable royalty truly covers the lost profits of the copyright holder. The concept that equals reasonable royalty to lost profits does not calculate factors like the so-called 'bestseller clause' and certainly does not pay attention to the magnitude of the infringer's business and the true market potential of the channels through which the infringer distributed the counterfeit products.[13] In case the court awards lump sum damages based on royalties, there may be two options for the courts. They either award lump sum damages only when no other methods on calculating and assessing damages can be applied or they offer lump sum damages as an alternative to other forms and types of damages. In the latter case, we may state that the court grants an exoneration under the burden of proof. If the right-holder decides not to get engaged in a lengthy and probably very costly evidence procedure to prove the actual amount of the lost profit and the causal link between this loss and the infringement, he/she may favour the estimation based on reasonable royalties. Spain, on the other hand, makes it even simpler. The copyright holder may claim 1% of the infringer's gross business turnover as damages instead of providing any evidence to the loss he/she suffered as consequence of the infringement.[14] The concept of awarding reasonable royalty may also result that the court applies it even if fault on the infringer's side cannot be proved. In such cases, the right to reasonable royalty calculated from the regular licensing fees is an objective or almost unconditional right to the right-holder independently from the existence of fault as an otherwise conclusive factor in tort law. This approach practically denies that reasonable royalty is a type of damages; instead, the royalty is a direct consequence of the infringement that is enforceable against factual infringers too.[15] Walking on this path may get us to another problem on discounting lost profits. Mitigating damages is always a requirement in tort law, and it also serves as a defence to discount damages. If the right-holder fails to mitigate the loss, the infringer may ask for a deduction, a discount from the amount of damages he is liable for. While the old concept of 'not to earn money on torts' claims for universal application in all tort cases, measuring the actual amount arisen from neglecting this duty is often a challenge to the courts. A classic question is whether the right-holder has invested the same amount as the infringer has. It is always a speculation on some potential behaviour under like circumstances. Also, in copyright infringement

13 European Observatory on Counterfeiting and Piracy 2009.
14 Ibid.
15 Plijter 2012.

cases, the infringement may require costly investments (e.g. publishing a book and distributing it) that the copyright holder might not have taken if using the intended channels to distribute his/her work (e.g. the author wanted to share the artistic property through digital channels). Also, if the sanction to cover lost profit or to pay reasonable royalty to the copyright holder is applied independently from the infringer's fault (e.g. the court considers it a case of unjust enrichment), no damages can be awarded; therefore, mitigation duty is not even a requirement.

V. Reputational Damages and Moral Prejudice

Moral rights under copyright laws certainly mix a special character into the assessment of damages and the evaluation of the infringement. First and foremost, almost all cases of infringement involve some harm caused in the moral rights of the copyright holder. While most see the problem from an entirely monetary perspective, the infringement may easily undermine the reputation of the copyright holder in every aspect. A scandal can easily evolve once the infringement gets publicity, resulting that the copyright-protected work gets to the public in a way not intended by the copyright holder. The scandal may undermine the value of the work and can even distort the message the copyright holder wanted to share with the public. Compensation for moral rights is a difficult question anyway since an infringement against moral rights cannot fully be restored or compensated. Some legal systems provide moral satisfaction to the copyright holder, including an order against the infringer to apologize. In Poland, for example, an infringement against the author's moral rights does not result in awarding monetary damages, making apology the sole sanction of the infringement.[16] The loss-centred concept of tort law in civil law legal systems usually requires evidence that the copyright holder suffered reputational damage, emotional distress, or any visible and tangible loss. This concept results that damages courts award for the infringement of moral rights are usually very low, especially when the claim is justified by both monetary and moral consequences of the infringement. Damages for moral prejudice may be almost nominal and symbolic. The human factor also makes a significant impact on the amount of damages awarded for moral prejudice. While most courts tend to hide it in the reasoning, a trend can be observed that courts are either reluctant or very reserved when awarding damages based on moral prejudice to legal entities as right-holders. In such cases, courts typically only identify monetary loss and no moral loss, while for private individual right-holders, even if nominal, moral damages may also be awarded.[17]

16 European Observatory on Counterfeiting and Piracy 2009.
17 Ben-Shahar 2010. 50.

To filter claims based on infringements against moral rights of the copyright holder, courts use different tactics and concepts. In Finland, for example, courts moved very close to the general concept of common law legal systems in torts. Moral damages are only awarded in cases when the infringer acted with intention or with gross negligence.[18] The basic concept of torts in common law is that for non-visible harms and emotional distress damages are only available if the infringer's fault was excessive (intentional, reckless, or grossly negligent), and judges decide whether the claim is well-grounded based on the infringer's fault.[19] This approach clearly shows some punitive character associated with damages, as compensation cannot be a guide if the availability of damages merely depends on the infringer's attitude.

The amount of reputational damages is determined by various factors. The infringement may ruin the reputation of first-book authors as the public associates the author's first appearance with the infringement scandal. Famous authors may also claim that reputational damages should be high in their cases since the infringement placed them into the spotlight, where they did not want to be under normal circumstances. Usually, the circumstances of the infringement make a huge impact on the amount of reputational damages. If the infringement generated a huge scandal as the infringer was not willing to admit the infringement and defended himself publicly and vigorously, the copyright holder's reputation may also suffer serious damages. A recent trend also considers the subjective attitude of the copyright holder, who never wanted to share his/her work through certain channels. In case the copyright holder publically despised streaming services in the past and communicated this attitude loudly in the media, an infringement that used this communication channel might probably cause confusion and misunderstanding, which is a factor courts measure when calculating reputational damages.[20]

Moral damages have always been a trivia to private law. While moral damages are categorized as damages, and therefore tort law institutions are extended to cover this area too, the lack of value of the protected rights and interests make the calculation uncertain and subjective. Since copyright law recognizes moral rights to the author, these rights should be protected under the same regime as for pecuniary rights. The law of damages, on the other hand, requires evidence from the aggrieved party to prove that he/she suffered some loss and the extent (amount) of it. Proving the infringement against the author's moral rights that constituted any loss may be a difficult process. First and foremost, the nature of moral rights makes it impossible to associate them with any material value and, therefore, material loss or harm. In such cases when only moral rights of the author were infringed, awarding damages is certainly a challenge to the court.

18 European Observatory on Counterfeiting and Piracy 2009.
19 Calame-Sterpi 2015. 85.
20 Renda–Simonelli–Mazziotti–Bolognini–Luchetta 2015. 98.

There may be two theories that make attempts to filter the claims. While the compensation theory recognizes the need for protection of such right, it only provides the availability of damages if the claimant can successfully prove some negative changes in his/her life, reputation, and circumstances. This theory filters claims based on the consequences of the infringement rather than the nature of the infringement. The competing theory aims to provide satisfaction for the copyright holder, and it also teaches a lesson to the infringer and, preferably, to the society. This latter concept makes damages available even if the claimant cannot prove an undesired change in his/her circumstances. The satisfaction theory, however, still filters claims to rule petty claims out of protection. This filter may be very subjective and highly determined by the attitude of national laws. One solution to the problem may be to thoroughly explore the conduct of the infringer, and, as it is the case in most common law legal systems, award damages in case the infringer acted intentionally, recklessly, or with gross negligence. This model clearly replaces the core emphasis in tort law, switching attention from the claimant to the tort-feasor. Some member states (e.g. Hungary) in the European Union do not grant damages at all if the infringement was titled an 'innocent' infringement (e.g. the infringer was not aware of the infringement such as when publishing companies contract with the wilful infringer to publish a book that is the subject of the infringement). In these cases, however, the 'innocent' infringer may still be obliged to reimburse the unfair profits he gained through the infringement he had not been aware of.[21]

Another potential solution to filter petty claims is to deduct to potential inner harms (moral harms) from the nature and circumstances of the infringement. If these circumstances support the claim, making it reasonable to believe that the author might have suffered negative inner consequences (not necessarily medically proved emotional distress), damages are granted. The automatic application of moral damages would probably be a mistake in any given jurisdiction as it could ruin the basic concept that supports tort law in general: restoring the balance. A selective approach to the protection of moral rights, however, lacks any unification or harmonization in Europe. The only common core in this debate might be the systematic denial of punitive damages. It is important to stress that the so-called double, multiple, lump sum, or pre-determined fees (often labelled as damages) applied by the collective rights management societies cannot be categorized as damages. These pre-determined fees that apply to certain cases of copyright infringements lack the thorough examination of the tort law preconditions. Even in cases when these collecting societies double the royalties for intentional infringements (e.g. in Austria), we cannot label this practice as if the given jurisdiction applied punitive damages. Still, even in some member states of the European Union, traces of exemplary damages can be identified. An

21 Johnson 2013. 304.

interesting practice in Poland dictates the court to order the infringer to pay a fee into the Fund to Promote Creativity. The amount of this fee cannot be less than double the probable profit the infringer might have gained.[22] We believe that such statutory dictates erode the function of tort law, and, in fact, they fall outside the scope of tort law protection. These are exemplary 'damages' that stretch well beyond the relationship of the parties (in this case, the copyright holder and the infringer) and serve as punishments that provide benefit to a broader audience (e.g. urge creative people to create more artistic works). In fact, the punitive character of damages in copyright law cases was explicitly ruled out in a decision of the Belgium Supreme Court, in which the court decided that punitive damages cannot be justified by the fight against counterfeiting and the dissuasive effect as private law cannot provide and grant damages that exceed that real prejudice the copyright holder suffered.[23] As national tort laws typically refuse to award punitive damages at all, copyright law cannot be an exception under this rule just because it has a special agenda, and infringements in the digital environment started to become massive and the fight against them is often inefficient.

VI. Concluding Remarks

Copyright infringements often bear the consequence of damages. In the European Union, the regime that makes awarding damages to the copyright holder, however, does not have special rules; instead, it relies on the classic system of damages. While courts generally make attempts to apply the same principles and legal institutions in copyright infringement cases, the same way they do in other tort-related disputes, the calculation of damages often gets complicated and leads to unfair outcomes. The two most complicated questions related to damages in copyright infringement cases is the assessment and adjudication of lost profit and moral damages. Claims for lost profits often fail on the grounds that causation theories do not support would-be, or hypothetical, speculative connections between the loss and the wrongful act, while claims for moral damages should struggle with the dual nature of copyrights that seems to emphasize monetary interests more than moral ones. Various models in the European Union offer diverse approaches to these problems, either limiting or extending the options for damages to the copyright holder. In the past few decades, there seems to be a tendency that judicial practice in almost every European jurisdiction marches toward a fragmented, sector-specific approach on the law of damages. The liability of professionals (e.g. medial service providers, attorneys, accountants, etc.) already differs from the regular concept of civil liability, mostly in terms of

22 Article 79(2) of Act of 4 February 1994 on Copyright and Related Rights (Poland).
23 European Observatory on Counterfeiting and Piracy 2009.

the interpretation of causality and fault. Copyright infringement cases may not require reinterpretation related to these lemmas; however, we urge a different approach in the calculation and assessment of the amount of damages. We suggest that the dual nature of copyright law should be respected in copyright infringement cases when the claimant requests damages for the infringement that attacked his/her moral and pecuniary rights. While total separation of the two sets of rights in awarding damages would be problematic, the assessment should cover both sets of rights and potential losses the copyright holder might have suffered as consequence of the infringement. Moral damages should be awarded merely to react to the wrongful act that targeted the moral rights of the author. We do not suggest an automatic application of damages for infringements against moral rights but a selective approach that deducts to some potential, reasonable inner harm and/or reputational harm based on the circumstances and the nature of the infringement. The amount of moral damages should not be nominal and symbolic. In fact, where the court believes there is no inner harm or reputational loss suffered by the right-holder, the claim for moral damages should be rejected. Awarding nominal damages in like situations would serve more punitive than compensatory functions, which is not supported by tort law doctrines in the continent. In cases where the copyright holder requests damages for lost profit, burden of proof should not be taken rigorously, and the courts should allow the claimants to support his/her claim with proving a high probability that he/she could also have gained profit by communicating the work through legal channels. When calculating the amount of lost profits, courts should consider various factors that are special attributes to each case. One of these factors is to determine a reasonable royalty. In case this royalty can be calculated and the infringer is obliged to pay that, excessive damages should not be awarded unless special circumstances (e.g. bestseller clause, exclusivity in the licensing agreement, etc.) certainly verify it. We believe the punitive fees applied by the collective rights management associations should be calculated accordingly in the amount of court-awarded damages and considered as deductibles only in case the fee is paid to the copyright holder. While the IPRED in the European Union calls for effective remedies to protect copyrights in all member states, the actual types of remedies may significantly differ from each other. A unification in this area is probably not realistic due to the culturally diverse tort laws in the member states. The recommendations described above could sustain the framework of tort law in each member state, only some technical rules of adjudication and the concept on evidence require a slight reinterpretation and adjustment to the special nature of copyright infringement cases.

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For the 10th Anniversary of the European Order for Payment Procedure

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Abstract. On the 12th of December 2006, the European Parliament and the Council adopted a Regulation creating the European Order for Payment procedure. Member states would start applying this single European procedure only after two years' time, starting on the 12th of December 2008. This study attempts to explore the rules of this Regulation from two perspectives: first, in the light of the proposal of the Commission regarding the amendment to it (and the adopted amending Regulation) and secondly through the case-law of the Court of Justice of the European Union. Through the analysis of the legislative process, we can conclude that following the Amendment Regulation the possible ways of continuing the European Order for Payment procedures as an ordinary civil proceeding have been broadened. In addition to the national ordinary civil proceedings, the claimant may now also opt in the first place for the European Small Claims procedure. The Regulation's revised version does not include any changes to its essential non-contentious procedural features. The European Court of Justice has explicitly dealt with the rules of the Regulation, creating a European Order for Payment procedure during the adjudication of six cases. The Court solved the problems which emerged based on the application for a preliminary ruling.

Keywords: European Order for Payment procedure, legislative process, case-law of the Court of Justice, European legal proceedings

I. Introductory Thoughts

On 12 December 2006, the European Parliament and the Council adopted the Regulation creating a European Order for Payment procedure. This unified European procedure was to be applied after two years, starting on the 12th of December 2008.[1]

1 Regulation (EC) 1896/2006. For a brief history of the adoption of the Regulation, see: Storskrubb 2008. 205. sqq.

As stated in Article 32 of the Regulation, the Commission set as its objective to examine the operation of the European Order for Payment procedure and to present a report about the results of such an examination, ensuring the review of the procedure by the 12th of December 2013.

First, the Commission presented a proposal to the Parliament and the Council (on the 13th of November 2013) regarding the amendment to the Regulation; then, a report about the application of the Regulation was made public (on the 13th of October 2015).[2] Concluding the legislative process, the Parliament and the Council adopted the Regulation amending the procedure on the 16th of December 2015.[3] The amended rules are to be applied to the European Order for Payment procedure as of the 14th of July 2017.[4]

This study aims to explore the rules set forth by the Regulation concerning the European Order for Payment procedure from two perspectives: first, in the light of the proposal of the Commission regarding the amendment and the adopted amendment Regulation itself as mentioned in the introductory thoughts and secondly through the case-law of the Court of Justice of the European Union. As far as the first aspect of the analysis is concerned, the purpose is to evaluate the results of the legislative process, while that of the second aspect is to explore the rules of the Regulation regarding the difficulties of interpretation and application that the subjects of the procedure face. On the basis of the results of both aspects, it can be shown how legislation and law enforcement by the Court reflect upon each other regarding the procedure.

II. The Legislative Process and its Results

1. The Amendment Proposal of the Commission and the Report

In accordance with Article 32 of the Regulation, the Commission undertook to present a detailed report to the European Parliament, the Council, and the European Economic and Social Committee about the experience of the 5 years of operation of the European Order for Payment procedure by the 12th of December 2013.[5] Firstly, the Commission submitted a proposal of amendment (dated the 13th of December 2013) to the European Parliament and Council.[6] Subsequently, a report about the application of the Regulation creating a European Order for Payment procedure was submitted on the 13th of October 2015.[7]

2 For the common root of the two European procedures, see: COM (2002) 746 final.
3 Regulation (EU) 2015/2421.
4 Regulation (EU) 2015/2421. Article 3.
5 Regulation (EC) 1896/2006. Article 32.
6 COM (2013) 794 final.
7 COM (2015) 495 final.

The amendment proposal dealt more extensively with the European Small Claims procedure, while the amendment regarding the European Order for Payment procedure was formulated in just a single article (Article 17). Whereas the Commission specified the amendments to the Regulation on the European Small Claims procedure and the reasons as a basis thereof,[8] as far as the European Order for Payment procedure was concerned, their purpose was to confirm the necessity of such an amendment summarily and specifically, and so they stated: 'Therefore, it should be clarified in Regulation (EC) No 1896/2006 that where a dispute falls within the scope of the European Small Claims procedure, this procedure should also be available to a party in a European Order for Payment procedure who has lodged a statement of opposition to a European order for payment.'[9] Thus, the Commission touched upon the European Order for Payment procedure only in an incidental manner with the special purpose of ensuring the applicability of the European Small Claims procedure.[10]

The report proper, relating to the application of the specific procedure, published later, confirmed the interest in leaving unchanged the areas and issues left untouched by the amendment proposal, as it stated that on the basis of the studies conducted, and consultations undertaken, no major legal or practical problems seem to have appeared in the course of using the procedure.[11] The operation of the Regulation was assessed to be adequate, and it was not deemed necessary to modify the essential parameters of the procedure.[12]

2. The Amendment Regulation. Articles that Have Been Modified

Compared to the proposal, the amendment Regulation broadens the range of the articles that have been modified. In addition to Article 17, it contains changes to Articles 7 and 25. As a starting point regarding the Regulation, however, similarly to the proposal, it is also marked by additionality, as Section (22) of the Preamble continues to state the purpose of the amendment of the Regulation as being to clarify the availability of the European Small Claims procedure to the parties of the order for payment procedure.

As far as the articles to be modified are concerned, we can see that the amendment of Article 17 can be considered as essential for the objective to be achieved concerning the European Small Claims procedure, whereas Articles 7 and 25 clarify the correlations of the change to be achieved with the procedure.

8 COM (2013) 794 final. 3.1.
9 COM (2013) 794 final. 1.3.
10 On the topic of the 'Effects of the lodging of a statement of opposition', see: Molnár 2014. 623. sqq. For further proposals, see: Varga 2009. 37–48; Harsági 2012a. 4–26, 2012b. 15–23.
11 COM (2015) 495 final. 4.
12 COM (2015) 495 final. 12.

2.1 Changes to Article 17

Section (1) of Article 17 in the Regulation currently in force provides as follows: 'the proceedings shall continue before the competent courts of the Member State of origin in accordance with the rules of ordinary civil procedure unless the claimant has explicitly requested that the proceedings be terminated in that event.'

In accordance with the proposal, the parts of Section (1) of the new Article 17 that have been changed provide as follows: 'The proceedings shall continue before the competent courts of the Member State, (…) The proceedings shall continue in accordance with the rules of: (a) any applicable simplified procedure, in particular, the procedure laid down in Regulation (EC) No 861/2007; or (b) the ordinary civil procedure.'

As stated in Section (1) of Article 17 of the Amendment Regulation to be applied from the 14th of July 2017: 'the proceedings shall continue before the competent courts of the Member State (…) The proceedings shall continue in accordance with the rules of: (a) the European Small Claims procedure laid down in Regulation (EC) No 861/2007, if applicable; or (b) any appropriate national civil procedure.'

As is evident, the proposal made by the Commission extends the procedural rules to be applied in case of a transfer to court proceedings. Subsequent to an opposition, the European Order for Payment procedure may also be continued, in addition to the civil trial, as a simplified procedure provided by the law of the specific member state, but it may also – explicitly – take the form of a European Small Claims procedure. The extended procedural scope provided by the proposal can be much criticized as it would permit procedures to be transferred to court proceedings that are incompatible with the positions of legal literature.[13]

The amendment Regulation defines a more limited procedural scope for the transfer to court proceedings, and it explicitly emphasizes the justification of the European Small Claims procedure in addition to the trial under civil procedure on the condition that the claim which is to be enforced falls under the scope of the Regulation on small claims.

In connection to this, the Amendment Regulation also extends the rules of Article 17 with a new Section (2). The purpose of this new section is obviously to set rules regarding the relationship between the national civil procedure (trial) and the small claims procedure in the phase after being transferred to court. It can be stated that it is definitely not a relationship between two procedures on an equal footing, and that fact is demonstrated by Section (2) of the Amendment Regulation:

13 Kormann 2007. 150, Gruber 2010. 348. Regarding the member states' simplified procedures, see: Varga 2010. 428–435, Nyilas 2012. 137–209, https://e-justice.europa.eu/content_small_claims-42-hu.do (05.05.2016).

> Where the claimant has not indicated which of the procedures listed in points (a) and (b) of paragraph 1 he requests to be applied to his claim in the proceedings that ensue in the event of a statement of opposition or where the claimant has requested that the European Small Claims procedure as laid down in Regulation (EC) No 861/2007 be applied to a claim that does not fall within the scope of that Regulation, the proceedings shall be transferred to the appropriate national civil procedure unless the claimant has explicitly requested that such transfer not be made.

Primarily, the European Small Claims procedure shall be therefore utilized in case of the transfer of a European Order for Payment procedure to court proceedings upon the claimant's request. In the absence of such a request or, if on the basis of the request, the procedure is rendered unavailable, the national civil procedure shall be applied as a possibility to continue the procedure.

The recognition by the legislator that the European Small Claims procedure is subject to a request, apparent in the rules of the Amendment Regulation, can be considered certainly as a development, as stated in the respective Regulation,[14] and therefore the connective rule in this respect should also be integrated into the rules of the order for payment procedure. Previously, the transfer of the procedure to a European Small Claims procedure was specified in Section (1) of Article 17 of the proposal without any transitional provisions.[15]

However, the amended rules provided for in Section (1) and (2) of Article 17 themselves cannot solve the problem that is constituted by the content of Section (4), left unchanged: the transfer to ordinary civil proceedings shall be governed by the law of the member state of origin. However, the member states often give different solutions for the transfer between non-contentious and court proceedings. The two main directions are as follows: automatism and subject to application (or request).[16]

2.2 Change in Section (4) of Article 7

The amendment to Section (4) of article 7 can solve the problem which we have indicated in connection with Article 17 as it results in a substantial change concerning the application for a European order for payment and its Appendices.

Pursuant to Section (4) of Article 7, in effect, the claimant can indicate upon the submission of the application, in a special appendix, if he does not request the transfer of the procedure to ordinary civil proceedings to result from a statement of

14 Regulation (EC) 861/2007. Article 4.1.

15 For a critique, see: Molnár 2014. 623–624.

16 Helmreich 1995. 143, Beltz 1992. 538, Balbi 2001. 186, Freitas 2001. 231, Delcasso 2001. 246.

opposition.[17] Section (4), as amended, provides two possibilities for the claimant to issue a statement: 1° if the defendant lodges a statement of opposition, the claimant can indicate to the court the procedure by which the enforcement of his claim shall be pursued (by means of a European Small Claims procedure or by the applicable national ordinary civil proceedings)[18]; 2° the provision of the currently valid Section (4) that the claimant can make a statement saying he does not request the transfer to either procedure is also maintained in force. Thus, the Amendment Regulation takes a real step towards the applicability of the European Small Claims procedure subsequent to a European Order for Payment procedure.

2.3 Change in Section (1) of Article 25

Section (1) of Article 25 – the third rule to be changed – merely responds to the change concerning the issue of fees when the European Order for Payment procedure can be transferred to a European Small Claims procedure or to national ordinary civil proceedings. As far as the fee is concerned, it maintains without change that the total court fees cannot exceed the court fees of the national ordinary civil proceedings that should be paid without the European Order for Payment.

3. Concluding Thoughts

In the analysis of the legislative process, we can conclude that following the Amendment Regulation the ways by which it is possible to continue the European Order for Payment procedures in the form of ordinary civil proceedings have been broadened. In addition to the national ordinary civil proceedings, and with priority as compared to these, the claimant can also opt for the European Small Claims procedure even in the first place.

This process started with the amendment proposal of the Commission issued in 2013 within the scope of the continuation of the order for payment procedures before the court, and it is to be concluded by the modified and new provisions of the Amendment Regulation. The European Small Claims procedure was still integrated into Section (1) of Article 17 insufficiently and without due consideration, and its actual interface (the application) was not included. In case of a transfer of the procedure to court proceedings, the priority of the European Small Claims procedure and the auxiliary nature of the national ordinary civil proceedings, are provided for jointly by the provisions specified in the Amendment Regulation, thus in Section (2) of Article 17 and Section (4) of Article 7.

Evaluating the experience relating to the application of the Regulation, the report of the Commission has emphasized that during the application of the Regulation

17 Gruber 2010. 318–319.

18 Regulation (EU) 2015/2421. Article 7.4.

legal or practical problems have not emerged, and therefore the Regulation can be applied from mid-2017, and its revised version does not include any changes to its essential non-contentious procedural features. In respect of the transfer of the procedure to court proceedings, there is an amendment the explicit purpose of which is to ensure the use of the European Small Claims procedure.

This change is welcome in the regard that the claimant is not involved in a national civil procedure of the member state, which is unknown to him, in case of a statement of opposition, but instead in European legal proceedings the rules of which are integrated into the respective Regulation in each member state in a predictable and uniform way. This change can have a positive impact on the statements adverse to the transfer of the European Order for Payment procedure to court proceedings, and the number of appendices to the applications for issuing an order for payment, which include a content categorically refusing court proceedings, can be reduced.

The European Order for Payment procedure and the European Small Claims procedure can be considered as two ways of enforcing the same claim.[19] Their common feature is that they provide the enforcement of claims within the scope of a simple and quick procedure, and for that reason they can be jointly valid alternatives for the cross-border enforcement of claims.[20] However, regarding their procedural features, their consecutive application fails to provide the appropriate legal safeguards for the parties involved in the procedure. Varga stated – relating to the European Small Claims procedure – that they abandoned a series of procedural safeguards for the implementation of a quick procedure. It is a formalized and written procedure, and an oral hearing involving both parties is only exceptionally held. In general, the procedure lacks oral hearings and direct measures, and the court decides on the basis of court records alone.[21]

Thus, the advantage of the new possibility of continuing the case within the scope of civil proceedings is definitely the result of more coherent elements of regulation compared to the regulation on the level of member states. However, we must not forget to consider that even this regulation 'does not save' us from applying the 'unknown' civil procedural law of a member state, as in issues not laid down in the Regulation the relevant civil procedural law rules of the member state where the place of the procedure is situated continue to be applied.[22]

19 Nyilas 2012. 262, Storme 2005. 87–100, Varga 2009. 37–48.

20 ECC-Net European Small Claims Procedure Report 2012.

21 Varga 2010. 438–439.

22 Regulation (EC) 861/2007. Article 19. Regarding small claims procedures in the member states, see: Varga 2010. 428–435. https://e-justice.europa.eu/content_small_claims-42-hu.do (05.05.2016).

III. European Order for Payment Procedure before the European Court of Justice

The decisions of the European Court of Justice hold particular sway in the special environment where the European procedures are regulated. The Regulation creating the European Order for Payment procedure includes the rules of a community-level uniform (full) procedure, which is, in effect, conducted alongside the order for payment procedures, in accordance with the procedural rules of the member states. However, both these procedures do not simply 'exist' in parallel with each other but intersect: the Regulation includes provisions for the whole procedure, but in many cases it determines the broad outlines of the procedure only. The procedural rules of the European Union are completed by the rules of the national legal order on issues not covered in the Regulation.[23] This kind of legislative solution, however, can cause problems. National order for payment procedures have similar main features, but there are significant differences in their formation and operation.[24]

The cases presented in this study and the decisions of the European Court of Justice regarding such cases also focus on the issue of the applicability of the Regulation rules or the national law. The European Court of Justice has explicitly dealt with the rules of the Regulation creating a European Order for Payment procedure in six cases. Based on the substantive part and direction of the court's decisions, the cases subject to investigation can be divided into three groups: 1° the decisions declaring/confirming the priority of the rules of the Regulation, 2° the decisions clarifying or restricting the applicability of the rules of the Regulation, and 3° the decisions relying on national law.

Next, let us have a look at which cases these kinds of decisions were brought in.

1. Absolute Nature of the Rules Laid Down in the Regulation

1.1. *In case C-215/11 Iwona Szirocka v SiGer Technologie GmbH*,[25] the Court examined the substantive parts of the application for issuing a European Order for Payment and their relation to the national procedural law rules. In the case examined, the Polish court to which the claimant submitted the application observed that the application did not comply with the requirements laid down by Polish procedural law (the claimant specified the value of the claim in Euros, not in Polish currency). Moreover, the claimant claimed interest from a specified date until the date of payment of the principal claim.[26]

23 Regulation (EC) 1896/2006. Article 26.
24 Harsági 2012c. 1–11.
25 C-215/11.
26 C-215/11. 22.

The domestic court submitted an application to the European Court of Justice for a preliminary ruling. The questions referred to the Court concerned whether Article 7 of the Regulation exhaustively established all the requirements to be met by an application for the European Order for Payment or whether it only established the minimum requirements for the application and whether domestic law should be applied in the issues not regulated by the former requirements.

In its reply, the European Court of Justice made clear that although domestic law appears in several points regarding the issues not established by the Regulation, that does not affect the contents of the application. The contents of the application are therefore exhaustively established by the Regulation at Article 7.[27] Within the scope of the application, the presence of national rules of law would be contrary to the major objectives of the Regulation, which are simplification, hastening cross-border disputes, and reduction in the costs of such disputes. A further objective is to establish a uniform tool that provides equal opportunities for both creditors and debtors in the whole area of the European Union.[28]

1.2. In *joined cases C-119/13 and C-120/13*,[29] the Court examined the breach of the rules of service of procedure. It concluded that service to the defendants of the order for payment had been performed without the application of the minimum requirements laid down in the Regulation.[30] The court of the member state informed the defendants about the possibility of the revision of the order for payment. The applications sent by the defendants in this regard were received.[31] Afterwards, the court of the member state requested the opinion of the European Court of Justice referring to a question about the applicability of the extraordinary remedy pursuant to Article 20 of the Regulation.[32]

The European Court of Justice stated that if the order for payment had not been served within the scope of the procedure pursuant to articles 13–15 of the Regulation (minimum rules) further procedural measures cannot be applied (opposition pursuant to articles 16–20 and their legal effects, enforceability, declaration of enforceability, and review).[33] As in these cases, in case of breach of the service rules, no opposition is lodged, and the procedural irregularity is only revealed after the declaration of enforceability; so, for that reason the possibility to contest such an irregularity and that of the cancellation of the declaration of enforceability are to be provided to the defendant. Regarding this case, the Court confirmed the absolute effect of the rules of service laid down in the Regulation and set duly affected service as a condition to the applicability of further procedural measures.

27 C-215/11. 28.
28 C-215/11. 30.
29 C-119/13 and C-120/13.
30 C-119/13 and C-120/13. 19. 24–26.
31 C-119/13 and C-120/13. 21–29.
32 C-119/13 and C-120/13. 30.
33 C-119/13 and C-120/13. 41.

1.3. In *case C-144/12 Golbet Sportwetten GmbH v Massimo Sperindeo*,[34] the Court examined the legal effects of the opposition lodged to the European Order for Payment. In his statement of opposition, the defendant referred to the fact that the claimant's claim was unfounded and the sum claimed was not payable. Due to the opposition, the procedure was transferred to court proceedings in Austria, and the defendant pleaded the lack of jurisdiction of the Austrian court. The claimant responded that the defendant had not referred to lack of jurisdiction in his opposition to the order for payment, and by submitting his opposition he implicitly accepted Austrian jurisdiction. The domestic court referred a question to the European Court of Justice on whether the opposition to the European Order for Payment not disputing the jurisdiction of the court in the member state of origin was deemed as *entering an appearance* pursuant to Article 24 of Council Regulation (EC) No 44/2001 and whether the fact that the defendant had made a statement on the merits of the case within the scope of the opposition lodged by him was relevant.[35]

The Court stated that the order for payment that had been served to the defendant provided two possibilities pursuant to Section (3) of Article 12 of the Regulation as follows: he pays the sum indicated in the order for payment or he can lodge an opposition in the member state of origin.[36] In accordance with Section (1) of Article 17, the consequence of the opposition is that the legal dispute continues automatically in the form of civil proceedings. If the opposition, which failed to dispute jurisdiction, had the consequence that the defendant enters an appearance, it would extend the legal effects of the opposition compared to the rules of the Regulation.[37] In addition, on the opposition form, no reference is made to any requirement that the defendant must dispute the jurisdiction of the member state; it is simply a statement about the opposition to the order for payment.[38] For that reason, the opposition to the European Order for Payment, in which the defendant does not dispute the jurisdiction of the member state of origin, cannot be deemed as a statement of entering appearance pursuant to Article 24 of Council Regulation (EC) No 44/2001 and thus establishing jurisdiction.[39] Afterwards, the Court examined whether the merits of the opposition have an impact on the consideration of the above question. Based on this, it stated that the primary objective of the institution of the opposition established in the Regulation is to provide a possibility of disputing the claim, and therefore it cannot be deemed as a

34 C-144/12.
35 C-144/12. 23.
36 C-144/12. 29.
37 C-144/12. 32.
38 C-144/12. 33, Gruber 2010. 343.
39 C-144/12. 34.

statement on the merits of the case.[40] Thus, the fact that the defendant made a statement on the merits of the case in his opposition does not equate to entering an appearance pursuant to Article 24 of Council Regulation (EC) No 44/2001.[41]

The Court emphasized in this case that the objective relating to the opposition to the order for payment is set forth to provide an opportunity for disputing the claim and bringing proceedings to court in this respect. The actual content of the opposition does not have any impact on the scope of the legal effects, and it can result in court proceedings regarding disputing the claim only, and further legal effects provided for by the member state's procedural laws cannot be applied.

2. Clarifying and Restricting the Applicability of the Rules of the Regulation

2.1. In *case C-245/14 Thomas Cook Belgium NV v Thurner Hotel GmbH*,[42] the Court examined the applicability of the review provided in Article 20 of the Regulation.

It stated that in this case the defendant had failed to lodge an opposition to the European Order for Payment validly served within the time limit; however, he requested the review of the order for payment after the expiry of the time limit available for lodging an opposition referring to the fact that the court had no jurisdiction to issue the order for payment.[43] The European Court interpreted the provisions of Article 20, Section (2) in the sense that behaviour, such as that displayed by the debtor, who, subsequent to valid service of the order for, payment failed to lodge an opposition, while referring later, during revision, to the fact that based on the data provided by the claimant the court had no right to issue the order, cannot be encouraged based on the circumstances of the first procedure. It is clear from the wording in Section (2) that the cumulative conditions of a revision are the omission of the time limit provided for lodging an opposition and the incorrect issue of an order for payment in view of the requirements established in the Regulation or any other special circumstances.[44] The legislation of the European Union wished to restrict the review procedure to special situations only; so, the provision in this respect is to be construed strictly.[45]

The European Court of Justice concluded that – on the basis of the circumstances of the initial procedure – the defendant should have acted within the time limit available for lodging an opposition if he had wished to invoke the lack of jurisdiction of the court and referred to the fact that the data provided by

40 C-144/12. 40.
41 C-144/12. 41.
42 C-245/14.
43 C-245/14. 18–23.
44 C-245/14. 30.
45 C-245/14. 31.

the claimant in the application concerning the jurisdiction was incorrect.[46] It emphasized that the possibility of a review of the order for payment could not give a second opportunity to the defendant to lodge an opposition to the claim not even if the court of a member state acted in lack of jurisdiction in consideration of all information available in the case.[47]

2.2. In *case C-324/12 Novontech-Zala Kft. v Logicdata Electronic &Software Entwicklungs GmbH*,[48] the Court interpreted Article 20 of the Regulation where the defendant's lawyer had lodged the opposition to the order for payment duly served beyond the time limit.[49] The defendant requested the review of the order for payment by a new lawyer on the basis of Article 20 of the Regulation, which was dismissed by the court of the member state.[50] The court of the member state referred the question to the European Court of Justice as to whether the failure made by the defendant's lawyer constitutes a fault on the part of the defendant pursuant to Section (1) (b) of Article 20 of the Regulation or it is not to be regarded as a fault on the part of the defendant himself, and the failure is instead to be regarded as an extraordinary circumstance within the meaning of Section (2) of Article 20 of the Regulation.[51]

The Court stated that in this case the failure is due to a lack of diligence by the defendant's representative, and it does not constitute extraordinary or exceptional circumstances within the meaning of the review.[52]

3. Presence of the Law of a Member State

3.1. In *case C-94/14 Flight Refund Ltd. v Deutsche Lufthansa AG*,[53] the Court examined the issue of transfer of the order for payment procedure to civil proceedings and the issue of jurisdiction.

An authority of a member state issued a European Order for Payment without clarifying the jurisdiction concerning the case. The defendant lodged an opposition and the procedure was transferred to court proceedings. However, the authority issuing the order for payment could not identify the competent national court for the civil proceedings; so, it submitted the case documents to the Supreme Court applying to designate the competent court. This Supreme Court referred the case to the European Court of Justice concerning the interpretation of the rules regarding jurisdiction and explicitly asked the question as to whether

46 C-245/14. 39.
47 C-245/14. 48, Regulation (EC) 1896/2006. Article 25.
48 C-324/12.
49 C-324/12. 10.
50 C-324/12. 11–13.
51 C-324/12. 14.
52 C-324/12. 21.
53 C-94/14.

a European Payment Order which has been issued by an authority that does not have jurisdiction could be subjected to an *ex officio* review.[54]

The European Court of Justice clearly excluded the *ex officio* review for a European Order for Payment pursuant to Article 20,[55] and, regarding the circumstances of this case, it referred to the respective rules of the national law to remedy the situation due to the lack of jurisdiction, as on the basis of the opposition the procedure was still on-going, and the enforceability of the order for payment could not be decided.[56]

By its decision concerning the case, the European Court of Justice made it clear that the European payment orders issued in lack of jurisdiction are to be settled in court proceedings held in the member state and in case of opposition by the defendant pursuant to the rules of the national civil procedural law, while the review provided by the Regulation cannot be applied *ex officio* or on request. The rules of the national procedural law have to provide the examination of jurisdiction on the basis of Regulation (EC) No 44/2001, and the proper decision depending on its result, and accordingly, is to be terminated in lack of jurisdiction.

3.2 In *joined cases C-119/13 and C- 120/13*,[57] the Court examined the breach of the rules of the Regulation about service, and, in addition to the above (1.2), it faced the issue of whether in such a case the remedy concerning the breach of rule of law has to be provided to the defendant on the basis of the Regulation or by the provisions of the national procedural law. The Court indicated clearly the national law as a base for the remedy.[58]

Here, however, it should be noted that Gruber emphasized in the comprehensive comment to the Regulation that the Regulation does not provide a possibility of remedy in case of a defective service that is in breach of minimum requirements laid down in articles 13–15. In Article 18, the court of the member state of origin is challenged to check the time limit for lodging an opposition only when a decision is made on the issue of enforceability. If the time limit expires and no opposition is lodged, the examination does not cover the control of the service rules.[59] Gruber clearly took the position in the commentary published in 2010 that the defendant can request the review of the payment order served in breach of the service rules and consequently declared enforceable pursuant to Sections (1) and (2) of Article 20 of the Regulation.[60] As we can see, with its judgment delivered in 2013, the European Court of Justice excludes the applicability of the rule referred to and any further procedural measures. On the basis of the Regulation, however, it cannot

54 C-94/14. 38.
55 C-215/14. 47. sqq.
56 C-94/14. 72. Regarding similar cases, see: Harsági 2014. 209.
57 C-119/13 and C-120/13.
58 C-119/13 and C-120/13. 46. sqq.
59 Gruber 2010. 339.
60 Gruber 2010. 340.

highlight a rule in the Regulation provided as a remedy for the problem, and for that reason it refers the issue for eliminating the consequences of the defective service to the applicable provisions of the national law.

4. Closing Thoughts

Related to the Regulation, the European Court of Justice examined and interpreted the substantive parts of the application, the service rules, the opportunity of review provided by the Regulation, the content of the opposition, and the issue of the transfer to civil proceedings.

It could be noted that the Court avoided taking the peculiarities of the national civil procedures into consideration concerning the content of the application, and it defined the form attached to the Regulation and its parts as a community-level uniform application. The position of the Court concerning the subject matter of the opposition provided an interpretation excluding the legal effects of the national civil proceedings. Thereby, the Court established a legal effect of the opposition that is uniform in the area of the European Union (effect of transfer to civil proceedings). As far as the observance of the service rules is concerned, the Court indicated a clear choice concerning the validity of the minimum standards laid down in the Regulation, and in this regard it excluded the applicability of the procedural measures after service.

In this latter case, the Court emphasized another kind of conclusion referring to the elimination of the legal effects due to a defective service according to the national law. Also, the Court referred to the national law when a remedy is to be provided after the issue of a European Order for Payment in lack of jurisdiction; however, the procedure was transferred to civil proceedings due to the opposition of the defendant. Within this scope, it should be highlighted that the Court clearly excluded the opportunity of an *ex officio* review provided by the Regulation as a possibility of eliminating a fault.

The Court has examined the possibility of a review several times, and it has interpreted the terms and conditions concerning the review. It emphasized that in cases when no opposition is lodged and the defendant submits a remark within the scope of a review against the order for payment issued, even if it is an opposition concerning jurisdiction, no review can be approved. Opposition has priority, and the purpose of a review is not to provide a second opportunity for lodging an opposition.

IV. Conclusions – Legislation and Judicial Application of Law

The European Order for Payment procedure has been available for almost 8 years for the enforcement of cross-border claims for a specific amount that has fallen due.[61] It will be available for claimants and enforcement bodies with amended rules concerning the transfer to civil proceedings as of the 14th of July 2017.

The number of cases examined by the European Court of Justice and the scope of the issues concerned can support the statement included in the Commission Report that during the utilization of the procedure no major legal or practical problems emerged.[62] The Court solved the problems which had emerged based on the application for preliminary ruling.

To what extent did the legislative standpoint and the opinions of the Court overlap? The report of the Commission covering the experience concerning the application of the Regulation explicitly referred back to three court cases and revealed the responses of the legislation provided to the problems detected.[63]

One of these emerged due to a judgment examining the issue of the subject matter of the application and the interest payment[64] when the Commission reports about the amendment to the content of the form referring to the actual case.[65] Accordingly, the defendant is informed in the table in form 'E' that, based on the national law, there can be an obligation of interest payment until the date of the enforcement of the payment order, and in such a case the amount payable is increased by this sum. However, the Commission takes the position that form 'E' does not appropriately elaborate on this as it does not include the proper description of the interest payable.[66]

In the second case,[67] it was stated that in case of the breach of rules of service laid down in the Regulation, the Regulation itself does not provide any reference of remedy. In response to that, the Commission also revealed this problem in its report. As a solution, the Commission proposed the clarification of the conditions of the review provided by the Regulation on the basis of the pertinent provisions of the Regulation on the European Maintenance and Small Claims Procedure.[68] However, the current Amendment Regulation does not include any changes to such an effect or any other solution.[69]

61 COM (2015) 495 final. 13–15.
62 COM (2015) 495 final. 4.
63 C-215/11, C-324/12, C-119/13, and C-120/13.
64 C-215/11.
65 Regulation (EU) 936/2012.
66 COM (2015) 495 final. 5–6.
67 C-119/13 and C-120/13.
68 COM (2015) 495 final. 10.
69 Regulation (EU) 2015/2421. Article 2.

Concerning the third case referred to,[70] the Commission recalled the applicability of the consequences covering the defendant due to the fault of a legal representative, relating to the legal effects of an opposition and the failure to lodge such an opposition.

In the Amendment Regulation, the second problem mentioned by the Commission could have been solved in addition to the changes concerning the transfer to civil proceedings. Whereas the first problem had been solved by the time the Amendment Regulation was made, and no amendment to the Regulation was needed for the third one, the second problem concerning the scope of tools of remedy to be used in case breach of the rules of service has not been solved in the Regulation amended despite the fact that it is of the utmost importance. Within the scope of the European Order for Payment procedure, there is still lack of legislation despite the elaboration of the Amendment Regulation.

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Some Remarks on the History of the Legal Protection of Intellectual Property in Europe with Special View to the Regulation in Hungary

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Abstract. Hungarian regulation of the field of law of intellectual works, basic codices go back to the 19th century. Given the peculiarities of historical development, modern codification efforts evolved with a delay in the Age of Reforms; with respect to copyright, the Bills related to Bertalan Szemere are worth mentioning. After the suppression of the 1848–49 War of Independence and the 1867 Compromise, basically, Austrian laws were applied. Around the middle of the 19th c., however, literary, scientific, and political life in our country flourished, strongly helped by reproduction, by which Hungarian thoughts could be delivered to more and more people desiring changes. Simultaneously with progress, complaints were received on abuses of author's rights. Increasing needs of life and enhancing circulation of intellectual goods as well as politics aimed at liberating the press brought along a more independent development of authors' rights. In Hungary, in the beginning, as a result of state–law relation, the development of authors' rights was similar to the process in Austria, and then, upon termination of this connection, it went through an independent progress. The consequences of the Second World War, the evolution of the centrally controlled socialist economic/social system emphasized this requirement all the more. Even at that time, this branch of law preserved its main traditional features, owing, not least, to several decades' long memberships in international agreements. The field of law of intellectual works shows permanent progress – without injury to essential principles. Just as in the phase of its evolution, in the appearance of tendencies of modern development, changes in economic circumstances and technical conditions represent the key driving force. General features of historical development are reflected by the progress made in this field of law in Hungary too.

Keywords: copyright law, intellectual property, Hungarian legal history

I. Copyright Law in the National Codifications of the Modern Age

Although as early as in Roman law there were contracts that were entered into between the author and booksellers on multiplication of literary works and under which publisher's rights were protected by the trader's business habits, these transactions were not provided with legal protection because legal sources do not mention the right of multiplying authors' works, and there was no action at law by which a possible claim could have been enforced.[1] The privileges provided by rulers or other superior authorities for merely certain individuals appeared as the first legal sources, which 'were granted to the author or the publisher and in earlier times exclusively and usually to the publisher only'.[2] As we can see, action could be taken against reprints, impressions through privileges granted solely in individual cases: the point of these privileges was that the publisher – for example, subject to the prince's right of supervision – obtained right to printing and publishing of books under 'monopoly'. For lack of rule of law, it was determined in charters what works the privilege applied to, what the content of the legal relation between the publisher and the author was, and what its limitations in time were. Two great types of patents can be distinguished. One of them ensured printing of books in general for the person obtaining charter and simultaneously barred everybody else from this activity, whereas the other type made it possible to print particular books while excluding everybody else. In this respect, Hungary was not lagging behind considerably since, for example, in 1584, the College of Nagyszombat obtained the exclusive right of publishing *Corpus Iuris Hungarici*, being aware of the clause set out in the charter that impression and unauthorized sale by other persons shall be punished by ten golden marks.[3] In the Middle Ages, guild rules provided some collective protection with respect to product markings on the grounds of charters; from the 15th c., more and more privileges were issued, primarily in England, Switzerland, and city-states of North Italy. This regulation aimed at the legal protection of the user, i.e. printer-publisher, rather than that of the author, although privileges granted to the author can be also found in records.

Privileges were replaced by regulation at the level of law effective for the entire country rather slowly in Western Europe too.[4] First, such a statute was adopted in England in 1709; the real wave of enacting laws started from the end of the 18th century only. Laws were usually determined by aspects of prevailing state and

1 Visky 1977. 5, Lendvai 2008. 57–79.
2 Knorr 1890. V.
3 Senkei-Kis 2007. 322–331.
4 On Romanian copyright law, see, among others, Bodoaşcă 2006, Dănilă 2005, Eminescu 1994, Macovei 2005, and Roş 2001.

economy policy and definitely showed the traces of the system of privileges. After several Austrian decrees and Hungarian attempts at making laws in the late 18th c., the Hungarian national assembly passed a law on this subject in 1884 only.

The 1709 statute of Ann Stuart (1702–1714) and the judicial practice that evolved from it can be considered a scheme that broke through the feudal model and arrived at the concept of copyright law in the modern sense.[5] It can be established that codification with regard to intellectual properties reached consistent solutions that suited the capitalist economic system in countries where social/political transformation was also radical; so happened in France and the United States of America, which can be considered the model of consistent bourgeois revolution.

During the 19th c. in Europe, codification of copyright and patent law in the modern sense evolved, consistently enforcing civil law approach and development of exclusive rights to intellectual property. The capitalist legal system consistently acknowledged the authors' rights, protection of works; this protection, however, as a result of the principle of formal equality before the law, continued to leave authors economically exposed to users in stronger economic position. In copyright law, guarantee rules protecting the weaker contracting party, i.e. the author, had developed only by the 60s and 70s in the 20th c.

The ancestor of every copyright law is the *Copyright Act of 1709* of the Protestant Ann Stuart (*Statute of Ann*), which ended the monopoly of the *Stationers Company* and provided for exercise of censorship. It set forth that on the copies of a work published for the first time subject to entering it into proper register exclusive right would be created in favour of the author or the person to whom he transferred this right. After fourteen years had elapsed, the transferred right reverted to the author, who could transfer it to another person for fourteen years again. After a total of twenty-eight years had passed, the *copyright* terminated. When Bertalan Szemere started to prepare his bill, as we shall see, a regulation adopted in England in 1842 extended this protection merely to the expiry of seven years following the author's death and to forty-two years (i.e. three times fourteen years) from the date the book was published.

The twice fourteen-year term of protection included in the pan-federal copyright law passed in 1790 in the United States of America following Ann Stuart's lead was raised in 1831 to twice twenty-eight years from the first edition, making renewal for the second period subject to compliance with determined scope of persons and new registration.[6] In the United States, as early as in the beginning of the 19th c., under pain of forfeiture of right, it was required that each reproduced copy should contain a 'copyright' mark showing the year of the first edition; this made it possible to calculate the duration of the term of

5 Lontai 1994. 9ff.

6 Senkei-Kis 2007. 326, Petkó 2002. 23–27.

protection everybody was expected to meet and substituted publication in the official *Gazette* read by only a few people. It was not long ago that this generally known requirement terminated, more specifically after the accession of the US to the Berne Union in 1989.

In France, revolutionary decrees on theatre performances adopted in 1791 and on ownership rights of authors, composers, painters, and draughtsmen in 1793 provided for the exclusive and transferable 'most sacred author's ownership' for five and ten years respectively following the author's death, and it was the users and not the authors of relevant works who benefited from it. In 1810, the term of protection was extended to twenty years from the author's death.

On German territories, in the shadow of Roman law, authors' and publishers' rights were interpreted theoretically. In 1734, Böhmer asserted that by purchasing the manuscript its ownership would devolve to the publisher 'cum omni iure' – including the right of publishing. In 1785, Kant stated that the author was entitled to an inalienable and most personal right (*ius personalissimum*) on his work, and he could be addressed even in the form of publishing only with his permit.[7] In 1793, Fichte distinguished between the thoughts communicated in the work, casting these thoughts into an expounded work and the book embodying the work: the thoughts constitute public domain, the work is the author's inalienable property, and the publisher is entitled to rights on reproduced copies. The ownership concept was reinforced at the beginning of the 19th c. by Schopenhauer and Hegel. In his lectures published in 1820, Schopenhauer expounded that actual property is that which can be taken away from a person only unlawfully, and the property that he can protect ultimately can be what he had worked on. Hegel made it clear that the person who obtains a copy of a work will be its unrestricted owner; however, the author of the writing will remain the owner of the right to reproduce the intellectual property.

Against the backdrop of such theoretical arguments and on the basis of increasingly prevailing natural law, the makers of the Prussian *Allgemeines Landrecht* of 1794 deemed it unnecessary to establish copyright; instead, they set out publisher's right in section 996 of the Code, stipulating that as a general rule a bookseller shall obtain publishing rights only on the grounds of written contract entered into with the author. Given this concept, the issue of protection did not even emerge. In Prussia, copyright law was created only on 11 June 1837: it was at that time when with the assistance of Savigny they made law on the protection of rights on scientific works and works of art against reprints and remaking. This law provided for protection of author's property for thirty years from the author's death.

In the same year, the *Deutscher Bund* quite modestly resolved that member states should acknowledge the author's right, at least for ten years, that a work

7 Senkei-Kis 2007. 323, Petkó 2002. 24.

published by a publisher indicated in it should not be reprinted without their permit. What we have here is mostly a rule of protecting publishers. In 1830, Russian legislation stipulated that the term of protection was twenty-five years. It is worth adding that when Szemere's proposal was completed in 1844, Bavaria, for example, had not had a copyright law yet; it was made in 1865 only. However, at that time, no copyright law was in force in Switzerland either, where the Contract Law Act regulated publisher's transactions in 1881 only; a pan-federal copyright law was first made in 1883. Even in Austria, the copyright patent entered into force only on 19 October 1846; since 1775, an imperial decree against reprints had been in force merely for the eternal provinces. So, the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811 regulated copyright only *filius ante patrem*.

The third step was constituted by international agreements and treaties once it had been realized that necessity of protection crosses borders. The signatories of such bilateral or multilateral international agreements developed their internal regulations so that they should comply with the content of the agreement as much as possible. Hungary entered into such an agreement first with the Austrians in 1887, which provided for mutual protection of authors' rights in literary and artistic works. Furthermore, in the 19th century, similar state agreements were entered into with Italy (1890), Great Britain (1893), and Germany (1899). From among multilateral international agreements, the Berne Union Convention should be highlighted, which was entered into in 1886; however, Hungary became its member only in 1922 – for that matter, this fact also contributed to making Act LIV of 1921, that is, the second copyright law.

Looking at these three forms, it should be seen that they move from the individual to the general. Privileges were issued by rulers, yet to single persons only, to print books – usually one –, simultaneously barring everybody else from this activity.[8] Subsequently, this could provide opportunity to enforce claims only against those who belonged to the jurisdiction of cities (city-states). Later on, laws focused on authors and, as part of that, provided every author with protection of rights and threatened with penalty everybody else who committed abuse on the territory of the country. International agreements determined the frameworks of copyright protection in the most general terms under which foreign works were also protected; however, actual substantive and procedural rules were contained always in national legislations. With respect to the subject of copyright protection, i.e. protected works, it can be stated that – albeit in the beginning they prohibited reprints of writers works – as technology developed protection of performances and works of art followed it at an increasing speed.

8 Senkei-Kis 2007. 324, Petkó 2002. 25f.

II. The First International Copyright Treaties

As international copyright laws applied to the territory of the issuing country only, they did not provide protection for foreign authors. Fundamental principles of mutuality between countries were set out first by the Berne Convention in 1886. Contrary to that, Emil Szalai writes that mutuality is not contained even at the level of reference in the text of the Convention.[9] The document clarified basic principles of copyright and summed up the principles of settlement of disputed international issues; however, it left the specification of details to the laws of the countries of the Union. This basic document inspired several international requirements, agreements made later. Three types of these international agreements can be distinguished: universal, regional, and bilateral agreements.

The highest level acknowledgement of copyright is set forth in Section 27 (2) of the United Nations General Assembly Declaration on Human Rights of 1948, which determines copyright as 'a fundamental right'. This tacit statement, however, is sufficient for this entitlement to be respected practically by all the states of the world. Universal agreements are more practical than that and determine basic institutions of copyright usually as a framework rule. Agreements are mostly aimed at ensuring that the author should get at least basic-level protection in each country, from which specific ratifying countries can deviate maximum within the frameworks determined by the agreement. One of these basic rules is, for example, term of protection, which was determined at fifty years from the death of the right owner.

The first copyright meeting was held in 1858 in Brussels; the international regulation of copyright was discussed here for the first time. Chaired by Victor Hugo, the *Association Littéraire Internationale* was founded in 1878 already, which provided framework for consultations of writers, artists, and publishers in every second year until the First World War. From among them, the Rome meeting in 1882 is an outstanding event, where on the proposal of Paul Schmidt (secretary general of *Börsenverein der deutschen Buchhändler*) an international meeting was convened in Berne to set up a copyright law union, and the Federal Council of Switzerland was requested to provide administration of the process.[10] The meeting was held in September 1883; in the following year, the subject was discussed already at a diplomatic conference where Hungary represented itself officially – for the first and last time. After the 1885 conference, the year 1886 saw the founding of the Union: nine countries – England, Belgium, France, Germany, Spain, Switzerland, Sweden, Tunisia, and Haiti – signed the first Union document together with the supplementary article and final protocol of Berne, all of which entered into force on 5 December 1887. The Convention provided for

9 Szalai 1922. 8f.
10 Kohler 1907.

further meetings too, of which it is necessary to mention the 1896 meeting in Paris ('additional document of Paris' and its supplementary statement) and the 1906 Berlin meeting, where codification of the right of the Union was formulated as a goal. As a result of that, 'the modified Berne Convention for the Protection of Literary and Artistic Works' was created – this is the *corpus iuris* of the Union, together with the 20 March 1914 supplement. Hungary (together with fourteen countries) acceded to both of them without reservations. Member states of the Union in 1922 were as follows: Austria, Belgium, Bulgaria, Czechoslovakia, Denmark (including the Faroe Islands), France (Algeria and colonies), Greece, Haiti, Japan, Poland, Liberia, Luxembourg, Hungary, Morocco (except for the Spanish zone), Monaco, Great Britain (including its colonies and several protectorates), the Netherlands (including Dutch India, Dutch Antilles/Curacao and Suriname), Germany (including its protectorates), Norway, Italy, Spain (with its colonies), Portugal (with its colonies), Switzerland, Sweden, and Tunisia.[11]

Although the text of the Convention adopted in Berlin is authoritative, contrary to the principle of *lex posterior derogat legi priori*, member states may proceed against each other, against countries outside the Union and newly accessing countries against the rest of the countries on the grounds of earlier provisions. It should be added that acceding countries are obliged to accept the Berlin modifications, while specifying parts of earlier documents intended to be applied. Deviation from the Berlin Convention is allowed with respect to term of protection, protection of works of applied arts, etc.; consequently, the Union did not have a uniform legal source.

The Convention is divided into three parts: the organization of the Union, substantive law of the Union (relation of the members of the Union to each other and cogent copyright rules within the frameworks of the Union), and the administration of the Union. Its coercive force and system of sanctions, mutuality are not even mentioned in it. Based on that, we can declare that the Convention is *lex imperfecta*, its application is based on solidarity, that is, each member state presumes that in the event that it complies with the provisions of the Convention the rest of the countries will also do so.

Hungary was obliged by Section 222 of Act XXXIII of 1922 (on ratifying the Trianon Peace Treaty) to accede to the Berne Union within twelve months, which had been *defacto* in progress since 1913. The relevant bill was made, but the outbreak of the First World War prevented the law from being enacted; what is more, the chaotic inland and international conditions after the world war made it definitely impossible to submit the bill to legislature. Eventually, the bill was submitted to the legislature in 1921, approved by the National Assembly on 23 December 1921, and sanctioned on 25 February 1922 (after Hungary had acceded to the Union). Hungary announced accession to the government of the Swiss

11 Szalai 1922. 14ff.

Confederation on 14 February 1922. In our country, the law providing for the above was published in the 4 February 1922 issue of the National Statute Book under the title Act XIII of 1922 'on Accession of Hungary to the International Berne Union Founded for Protection of Literary and Artistic Works'.

The Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works set forth some fundamental principles (minimum standards of protection) that efficiently help universal protection of authors' works.[12] These fundamental principles are as follows: a) principle of national treatment under which a country extends the same protection to foreigners that it accords to its own authors, b) principle of automatic protection without any required formalities, and c) principle of independent protection (a foreign artist will be provided with protection complying with domestic rules of law even if his work is not under protection in the country of origin). It sets forth the concept of work, definition of the copyright owner, the author's minimum moral and economic rights. The Convention was originally signed by ten countries – today, more than one hundred and fifty countries have adopted it. It has been revised on seven occasions: in Paris (1896), Berlin (1908), Berne (1914), Rome (1928), Brussels (1948), Stockholm (1967), and Paris (1971). Hungary acceded to the Berne Convention in 1922. Hungarian legislature included the text of the Convention revised on 24 July 1971 in Paris into Hungarian legal order by Decree-Law No 4 of 1975.

The Universal Copyright Convention signed on 6 September 1952 was made under the auspices of the UN; its necessity was justified by political reasons. Its essence is the protection of copyright without any required formalities for foreigners. Promulgation of its text revised on 24 July 1971 in Paris was provided in our country by Decree-Law No 3 of 1975.

The 1961 Rome Convention is for the protection of performers, producers of phonograms, and broadcasting organizations. In Hungary, it was implemented by Act XLIV of 1998. The Geneva Convention made on 29 October 1971 – for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms – was promulgated in Hungary by Law-Decree No 18 of 1975. The *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, constituting Annex 'I. C' of the Marrakech Treaty, which set up the World Trade Organization, promulgated by Act IX of 1998, provided for enforcement of rights based on reciprocity of form and the greatest allowance and for settlement of disputes between states.

They are differentiated from universal treaties by the number and geographical location of the ratifying countries. The most important ones for Hungarian legislature are the Treaty of Rome founding the European Economic Community and the directives affecting copyright adopted by the European Union recently. Directive 91/250/EEC on the legal protection of computer programs by copyright

12 Szalai op. cit. 34f.

determines the concept of software, the right owners, their economic rights, and special limitations of rights. Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property creates a 'rental and lending right' as part of copyright protection and sets out minimum standards of protection for the related rights of performers, phonogram, and film producers and broadcasting organizations. Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights ensures that there is a single duration for copyright and related rights across the entire European Union, increases the duration of protection, and provides for protection of works from the death of the author. Directive 96/9/EC concerns the legal protection of databases and their special limitations.

As part of the European Union integration process, one of the tasks of Hungarian legislation is to develop proper legal environment for the Union law, paying special regard to Union directives. Based on that, it can be declared that these directives are present as a quasi-norm in Hungarian law, although they do not have direct effect; therefore, they bind the lawmaker but do not bind law enforcers.

In Article 65 of the Europe Agreement promulgated by Act I of 1994, Hungary assumes obligation to provide protection of an extent similar to the protection that prevails in the Community, within five years from signing the Agreement, which Hungary has completed, among others, by making the new copyright law. Regarding the European Union, it needs to be added that drafts, proposals, and other preparatory documents, which constitute parts of the Union law-making process but have no binding force, represent important guidance for Hungarian legislation. They include, for example, the White Paper, whose annex deals with copyright protection or the Green Paper published by the European Commission in June 1995 entitled 'Copyright and Related Rights in the Information Society'. The most recent directive is the EU directive on copyright adopted by the European Parliament on 14 February 2001.

Although universal and regional agreements profoundly regulate copyright, the framework regulation is to be filled and specific procedural issues are to be regulated mostly by the legislature of specific states. So, bilateral agreements do not play a significant part, they have political or diplomatic significance; see, for example, the international agreement 26/1993 ('Agreement between the Government of the Republic of Hungary and the Government of the United States of America on Intellectual Property'). In harmony with its title, Article II of the Agreement extensively deals with protection of copyright and related rights; however, the greatest emphasis is given to protection of phonograms and computer programs, which obliges Hungary to implement legal harmonization.

Operation, harmonization, and organization frameworks of international conventions on copyright have been provided primarily by the World Intellectual

Property Organization (WIPO) of the UN since 1970 in co-operation with the UNESCO. Its task is, in addition to administration, to advance creative intellectual activity and further transfer of technologies to underdeveloped countries. The World Trade Organization, as the entity to manage the TRIPS Agreements, co-operates with WIPO in certain implementation issues.

III. Attempts at Creating and Reforming Legal Protection of Intellectual Property in Hungarian Jurisprudence

Given the peculiarities of historical development, modern codification efforts evolved with a delay in the Age of Reforms in the eighteen-thirties; with respect to copyright, the Bills related to Ferenc Toldy[13] and Bertalan Szemere are worth mentioning.[14] After the suppression of the War of Independence (1849) and the Compromise (1867), basically, Austrian laws were applied.

In the Central-Eastern European countries after the Second World War, intellectual property rights bore certain traces of central economic administration, foreign exchange management, income regulation, and censorship. To different extent and for different reasons from country to country, this branch of law nevertheless preserved its main traditional features owing, not least, to several decades' long membership in international agreements. The legal field of intellectual property shows continuous progress without injuring essential principles. Just as in the phase of its evolution, in the appearance of modern development tendencies, economic circumstances and technological conditions constitute the key driving forces. General features of historical development are reflected by the progress made in this legal field in Hungary too.

Centuries long traditions of Hungarian copyright law, experience of domestic legal development cannot be ignored in working out the new regulation. Enforcement of international legal unification and European legal harmonization requirements do not exclude respecting domestic copyright law traditions at all – they make it definitely necessary to organically integrate regulation harmonized with international conventions and European Community directives into Hungarian legal system and legal development; therefore, we must not put aside the assets of our copyright law in order to fulfil our legal harmonization obligations. What Hungarian copyright law needs is reforms: renewal that maintains continuity of domestic regulation by exceeding former regulation while preserving the values achieved so far.

13 Toldy 1838. 705–717, Toldy 1840. 157–237.
14 Balogh 1991. 149–172, Boytha 1994. 42–58.

The history of Hungarian copyright law is characterized both by successful and unsuccessful attempts at codification, although aborted bills failed due to changes in historical circumstances rather than the standard of proposals.

The Bill submitted by Bertalan Szemere to the National Assembly in 1844 was not enacted for lack of royal sanctioning. Following the age of imperial patents and decrees, after the Compromise (1867), the Society of Hungarian Writers and Artists put forth again an unsuccessful motion for regulation; however, the Commercial Code, Act XXXVII of 1875 devoted a separate chapter to the regulation of publishing transactions.

The first Hungarian copyright law, Act XVI of 1884, was made following László Arany's initiative,[15] upon István Apáthy's motion. The Act implemented modern codification adjusted to bourgeois conditions, setting out from theoretical bases of intellectual property not superseded ever since.[16]

Later re-codification of Hungarian copyright law was required by the need to create internal legal conditions of the accession to the Berne Union Convention. Act LIV of 1921 harmonized our copyright law with the current text of the Convention and adjusted our regulation to the results of technological development.[17]

The development of copyright law of the bourgeois epoch was dominated by the concept of intellectual property, qualifying copyright as proprietary (economic) right similar to property, which was in line with the requirements and needs of market economy and trade. Gradual acknowledgement of authors' moral rights also began; however, protection of these rights did not become the central element of copyright law approach either in theory or in practice. Paradoxically, as a special impact produced by the current ideology, this happened only during the period of planned economy and one-party system.

Our Copyright Act III of 1969 – which is the third one following Act XVI of 1884 and Act LIV of 1921 – was and has remained a noteworthy codification achievement in spite of the fact that it bore the traits of the age when it was made. Due to the economic policy trend prevailing in that period, there was no need to break away from fundamental principles and traditions of copyright; regulation eventually did not distance copyright from its social and economic function. (Fortunately, it was only theory rather than regulation that was imbued with the dogmatic approach arising also from ideological deliberations that worked against the enforcement of the authors' proprietary (economic) interests by overemphasizing the elements of copyright related to personality (moral rights).) Perhaps it was owing to this that Act III of 1969, albeit with several amendments, could keep up for a long while with international legal development and new

15 Arany 1876. 225–257.

16 Kelemen 1869. 305–317, Kenedi 1908, Kováts 1879.

17 Szladits 1906.

achievements of technological progress just as with fundamentally changing political and economic circumstances.

Hungarian copyright law in the late 1970s and early 1980s was in the vanguard of world-wide and European legal development: as one of the first legal systems, our copyright law acknowledged the protection of copyright to computer programs, provided for royalty to be paid on empty cassettes, and settled copyright issues related to so-called cable television operations. Regulation of right to follow (subsequent right) and paying public domain was a huge progress too.[18]

After coming to a sudden standstill, temporarily, in the second half of the 1980s, new significant changes were brought by the period between 1993 and 1998. In terms of actions taken against violation of law, amendment to the Criminal Code of 1993 was of great significance, which qualified the infringement of copyright and related rights a crime (see Section 329/A of the Criminal Code (Btk.) set forth by Section 72 of Act XVII of 1993). Act VII of 1994 on the Amendments to Certain Laws of Industrial Property and Copyright, in accordance with international and legal harmonization requirements, provided for overall re-regulation of the protection of related rights of copyright – i.e. rights that performers, producers of phonograms, and radio and television organizations were entitled to. Furthermore, the Act extended the duration of the protection of author's economic rights from fifty to seventy years from the author's death and the duration of protection of related rights from twenty to fifty years. In addition to that, the Act withdrew the rental and lending of computer programs, copies of motion picture works, and phonogram works from the scope of free use; and it required, in addition to the author's consent, the approval of the producer of phonograms and performers for rental and lending of marketed copies of phonograms. It was also an important progress that the 1994 Amendment to the Copyright Act terminated the statutory licence granted to radio and television for broadcasting works already made public in unchanged form and broadcasting public performances and thereby modernized rules on broadcasting contracts. Act LXXII of 1994 implemented a partial modification of the Act.

Following Constitutional Court resolution 14/1994 (II. 10) AB, instead of a decree in a statute, it regulated the legal institutions of 'right to follow' (*droit de suite*) and 'paying public domain' (*domaine public payant*) – important in terms of fine arts and applied arts. Act I of 1996 on Radio and Television Broadcasting also modified the Copyright Act; furthermore, it contains provisions important in terms of copyright. Govt. Decree Number 146/1996 (IX. 19) as amended on collective copyright and related rights management provided for overall and modern regulation of collective management of copyright and related rights that cannot be exercised individually and determined the transitory provisions related to termination and legal succession of the Copyright Protection Office as central budgetary agency, aimed at maintaining continuity of law enforcement.

18 See also Petrik 1990.

Decree Number 5/1997 (II. 12) MKM on rules of register of societies that perform collective copyright and related rights management was made to implement the Govt. Decree. Decree Number A 19/1996 (XII. 26) MKM raised the maximum duration of publisher contracts to eight years. The amendments implemented by Act XI of 1997 on Protecting Trademarks and Geographical Product Markings and entered into force on 1 July 1997 affected legal consequences that may be applied due to infringement of copyright and measures that may be applied in lawsuits brought due to such violations of law. And, on the grounds of the authorization granted in the new Trademark Act, Govt. Decree Number 128/1997 (VII. 24) on measures that may be applied in customs administration proceedings against infringement of intellectual property rights was adopted. Accelerated legal development in recent years could become complete through overall re-regulation of copyright and related rights.

Act LXXVI of 1999 satisfies these demands while it builds on recently achieved results. The Act is based on several years of preparatory work. The Minister of Justice set up an expert team in 1994 to work out the concept of the new regulation; furthermore, the Minister of Justice invited the World Intellectual Property Organization (WIPO) of the UN to assist in preparing the new copyright act; also, on several occasions, it was possible to have consultations with the experts of the European Commission. Taking the proposals of the expert team into account, by June 1997, the concept of the overall revision of our copyright law had been completed, which was approved by the Government by Govt. Resolution Number 1100/1997 (IX. 30). In accordance with Section 4 of this Government Resolution, the Minister of Justice set up a codification committee to develop the new copyright regulation from the representatives of ministries and bodies with national powers concerned, courts, joint law administration organizations as well as interest representation organizations of right owners, users, and other copyright experts. The draft Bill has been discussed by the Committee both in details and on the whole on several occasions; the content of the proposal reflects the consensus reached in the Committee in every respect.

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Changing Views on the Information Duty of the Judge Concerning Evidence – Walking on Narrow Paths

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Abstract. The object of this article is to shed light on the importance of the information duty of the judge concerning evidence. According to the Hungarian Civil Procedural Code, the judge has the duty to inform the parties before their motions for evidence on the facts that need evidence, on which party bears the burden of proof, and on the consequences of failure to provide evidence. There have been various initiatives in Hungary to completely abolish this duty of the judge or at least to narrow its scope of application in civil procedures (e.g. it should not be applicable when the party has a legal counsel). One may perceive various motives behind this abolition. However, the author of this article makes an argument for the importance of the duty in order to give adequate information to the parties. The article analyses three aspects of its significance, namely, timeliness, the scope of the dispute, and procedural rights. The Hungarian Supreme Court (Kúria) has established in multiple decisions the importance and the various aspects of this duty. The scope and limits of the information duty are examined in this article through the judicial practice and the decisions of the Kúria. Examples of good practice in civil procedures from various European countries are presented as a comparison.

Keywords: civil procedure, evidence, burden of proof, Hungarian judicial practice

1. Legal Background

The object of this article is to shed light on the importance of the information duty of the judge concerning evidence. There have been various initiatives in Hungary to completely abolish this duty of the judge or at least to narrow its scope of application in civil procedures (e.g. it should not be applicable when the party has a legal counsel).

In Hungary, the objective of the civil procedure was completely reinterpreted in 1999, and the responsibilities of the parties were clarified. Taking evidence on the court's own motion was excluded from 1995 onwards, and the principles of party control and party disposition were understood in a broad sense.[1] Operating in this conceptual framework, the judge had no tools to establish the facts of the case and to promote its completion. According to the lawmakers, ascertaining the truth and establishing the actual facts became an obsolete objective. Instead, the purpose of the court proceedings is to ensure and guarantee the impartial resolution of disputes in a timely manner.[2]

Article 164 § (1) of the civil procedural code (*Pp*) states that the burden of proof, the consequences of a failure to prove, and late motions must all be borne by the party who has to prove the case. In the field of evidence, the court must inform the parties – whether they act with or without a legal representative – on which facts need evidence, who carries the burden of proof, and on the consequences of a failure to prove a fact. The judge must inform the parties that the court may not take evidence on its own motion except where permitted by law. He/she must warn the parties that they must make their motions for evidence at a stage of the procedure that corresponds to a person acting diligently and which promotes the successful completion of the procedure (Article 141 (2) §). Finally, the court warns the parties that they must exclude evidence if the motion was presented late through the party's own fault. The information provided on the consequences of failure to prove also states that facts left unproved must not be accepted as valid and that therefore the existence of relevant facts cannot be determined. The absence of a fact that underlies a right which is claimed results in the party's inability to establish this right and consequently in the dismissal of the claim on its merits. The parties must be warned that lack of evidence cannot be remedied in the appeal proceedings because new evidence can only be presented in exceptional cases prescribed by law.

In a 2011 modification, the category of 'Cases with important value' was added to the Hungarian civil procedural code with a set of specific provisions for these procedures. It is applied in monetary claims where the amount of the claim exceeds 400 million HUF. One of the new rules (Article 386/J.§) states that in these cases the judge does not have to inform the parties on the facts to be proven, the burden of proof, or the consequence of a failure to prove a certain fact. Besides, legal counsel is obligatory in these cases.

One can understand that the reason behind this abolition is that legal counsel should be able to find out the relevant facts and the burden of proof from the case itself, and he/she should also be acquainted with the consequences of failure. It might seem an appropriate solution to speed up the procedure by burdening the judge with fewer tasks; however, it may equally well have adverse effects.

1 Éless–Farkas 2010. 1–12.
2 Kengyel 2005. 674–680.

The legislator may have thought it unnecessary to inform legal counsel on what facts need evidence and who bears the consequence of any failure to prove a certain fact. However, it is all the more important in these large-scale disputes, some of which are complex in terms of evidence, that these questions be clarified during the first hearing. Abolishing the duty to give this information may add to more frequent postponements of hearings and/or to irrelevant and unnecessary motions for evidence; it therefore constitutes several steps backward in effectiveness, rather than a step forward.

2. Information Duty in General and Special Procedures

When examining other special procedures, such as in small claims cases, one finds that the information duty of the judge is even wider than according to the general rules of procedure. In Article 388.§ (1) of the code, it is stated that the judge shall inform the parties in the summons that the case will be judged in a small claims procedure and that the parties have the duty to appear at the hearing and to make their statements. Finally, information must be given on the consequences of a failure to observe the time limits for making motions for evidence, changing the claim, or filing a counterclaim. It also adds to the information duty that in the judgment, according to Article 391/D.§, the parties must be informed regarding the mandatory content of appeals and the consequences arising if this content is absent.

Consequently, the wider information duty is due to the fact that legal representation is not obligatory in small claims procedures. However, this does not mean that obligatory legal representation can entirely exempt the judge from the duty to give certain information to the parties, and the law should provide for this. This article claims that information given regarding evidence prescribed in the general rules of procedure is a guarantee of fundamental rights and cannot be abolished in a quest for timeliness. These rights include the right to a fair trial and the right of both parties to be heard in a lawsuit. These rights are expressed in Article 3.§ (6), according to which the judge shall ensure that the parties receive all statements, motions, and documents that were submitted to the court in the procedure and that they have the opportunity to examine and respond to them in due time. Due time is specified by the judge, depending on the circumstances of the case.

In terms of party autonomy and party control, and because the judge is bound by the claims of the parties, the law makes it the parties' task and duty to present all facts and evidence to the judge.[3] However, in terms of managing the case, it is the task of the judge to prohibit delaying tactics, in particular, by presenting irrelevant or superfluous facts or evidence. He/she is able to fulfil this task by giving adequate information to the parties.

3 Kormos–Nagy–Wopera 2016.

As to the general rules of civil procedure, for a party to prove his/her case successfully, he/she needs to be informed regarding certain duties in providing evidence, i.e.:

– which facts need to be proven by evidence,

– who bears the burden of proof for which facts,

– what is the consequence of a failure to prove a certain fact, especially if the case may be judged on the merits of this fact.

This information should be given by the judge at the beginning of the evidence process and also during the process when new facts are brought up by a party or when the claim is modified. In one of its rulings, the *Kúria* underlined that any consequences of a failure to provide evidence can only ensue if the information given on the facts that require evidence followed changes in the parties' statements during the course of the procedure.[4]

It is no coincidence that general rules of procedure prescribe this duty of the judge even when the party has legal counsel, whereas other duties – such as information regarding a party's procedural rights and duties or ordering that an incomplete claim form be corrected – are not applicable in this case.

3. Significance of the Information Duty

In the following section, the article will highlight the significance of the information duty from three perspectives. Firstly, it is important to give this information because in this way the course of the procedure can be planned, the judge can foresee the timing and number of continuous hearings and the type of evidence presented at each hearing. It is crucial for a fast and efficient handling of the case that both the judge and the parties are aware of the subject matter of the dispute, which facts are relevant and need proof, and how to prepare for the next hearing. This is the time factor.

Another aspect is that the contents of the lawsuit are clarified by giving this information; namely, it becomes clear which facts are relevant to the case according to the judge. If the existing law contained detailed provisions – which it does not –, they would provide grounds to reject new statements of facts and modifications of the claim raised later at some subsequent hearing. This is the scope factor. In the absence of the scope factor, so-called 'surprise' judgments can be made, when the party only realizes from the judgment that the judge considered a certain fact to be important. As one author pointed out, the claimant is already at a disadvantage because he/she bears the burden of proof for the alleged facts without knowing what conception(s) guide the judge, i.e. how the judge will sort out this 'heap' of facts and evidence, what he/she will consider as an important

4 BH2015. 107.

fact and sufficient evidence and what not. Thus, there must be an information duty to a certain extent, without falling into a prejudication of the facts.[5]

Thirdly, the information duty is a guarantee of the parties' procedural rights. It ensures that their points are taken into consideration by the judge and that they are able to contradict each other's statements. As such, the information must be given even if the party has legal counsel. This is the rights factor. In case BH2007. 123,[6] the court emphasized that the duty to give information on the relevant facts of the case ensures the party's right to legal remedy by clarifying what needs to be proven to fulfil the burden of proof. In the given case, the judge only provided general and formal information regarding the burden of proof and the duty of the parties to provide evidence, and the information was not given with regard to the specific circumstances and facts of the case. The judge did not mention that expert evidence was needed to assess certain facts. Therefore, the court violated the duty to give proper information on evidence. The general duty to provide information laid down in the code must be fulfilled in a case by giving information individually and specifically in the light of the legal cause of action and the subject matter of the case.

The principle of a fair trial implies that the information is not a mere recitation of procedural rules but that it connects the facts presented by the parties with the relevant rule of material law. A party cannot be kept in uncertainty about what is regarded as relevant by the judge in deciding the case. Without this information, the party is not in a position to fulfil his/her duty to provide evidence.[7]

However, there is also a contradictory approach, argued by Haupt (2014), according to which there is no need to maintain the duty to inform the parties concerning evidence.[8] Haupt's opinion is based on the principle of party autonomy and control. He maintains that the claimant should clearly state in the claim form the facts of the case, the evidence relating to them, and the remedy sought. The scope of facts to be proven by the claimant will then be determined by the claim form itself, and there is no need for the judge to give additional information on what needs to be proven. He further believes there is no need to inform the party about the consequences of failure as these are expressly stated in the law. His opinion is that the information duty should be entirely abolished. His reason mainly lies in the assumption that before filing the claim the claimant should see clearly what evidence he/she will put forward. Collecting evidence and preparing it for the litigation should be done before filing the claim.

This opinion is justified in asserting that parties should come to the first hearing well prepared, which is unfortunately not the practice in Hungarian courts. But

5 Ádám 1999. 430–442.

6 All the court cases mentioned in the article can be found in the official journal of the *Kúria* – Kúriai Döntések –, also available online at: http://kuriaidontesek.hu/hu_HU/kezdolap.

7 Molnár 2009. 129–140.

8 Haupt 2014. 699–705.

a thorough preparation cannot be obtained by abolishing the information duty of the judge. At present, the code of civil procedure does not provide appropriate instruments for the parties or their legal counsel (as occurs with disclosure in English civil procedure). Also, this view does not take into account the free evaluation of evidence, which can lead to 'surprise' judgments if there is no information concerning the relevant facts or whether the evidence is sufficient. Haupt wants to lay all responsibility for the evidence process on the parties and their legal counsel. The judge would then receive the case 'ready to decide'. On the contrary, the litigation itself should be the process that serves the purpose of getting the case ready for judgment.

4. Information Duty in Other European Jurisdictions

Given the differences in legal traditions, it is helpful to consider French, English, German, and Austrian civil procedural rules. Through this comparison, one can observe the common presence of some kind of information duty on the part of the judge, but we can also gain an insight into the differences in the scope and application of that duty.

In the French Code of Civil Procedure (NCPC), the facts upon which the resolution of the dispute depends may be subjected to any measures to establish evidence admissible by law, either on request of the parties or *ex officio*.[9] The judge must limit the measures of evidence to what is sufficient in order to decide the case and has to choose the measure that is least expensive and burdensome.[10] Evidence measures can be ordered if the judge has no sufficient information to decide the case.[11] In fact, he/she may order *ex officio* any measure to establish the facts. When ordering evidence, the French law provides that the parties are required to prove the facts necessary for the success of the claimant or of the defence. The judge may not order a measure on his/her own motion (*measured instruction*) unless the alleging party cannot prove it by any means, and the measure must not replace the default duty of the party to submit evidence.[12] However, the law also states that the judge may order any action on his/her own motion (to establish the facts) at all times if there is insufficient information to decide the case.

It is the task of each party to prove the facts necessary according to the law to ensure the success of their claim.[13] The NCPC provides that parties are obliged

9 NCPC Article 143.
10 NCPC Article 147.
11 NCPC Article 144.
12 Cadiet 2000.
13 NCPC Article 9.

to give the necessary facts to support their claim. The claimant must state the subject of litigation as well as the factual and legal grounds. He/she should state the facts and provide the documents in all cases. The parties are responsible for presenting the facts, and the burden of failure to prove them falls on them. This also means that they provide the court with the case material as well as the facts and evidence with which the court will establish the judgment. Thus, it is ultimately the judge who has to establish the facts of the case whether the parties have provided the necessary information or not.[14]

The judge has the power to order *ex officio* all measures of evidence which are legally admissible.[15] He/she may take into account all the relevant facts, even if the parties have not relied on them[16] and may order the production of evidence and order preparatory measures if the statutory conditions are met.

In the English CPR, the claim form includes details of the court, the party's name and address, a brief summary of the claim, the remedy sought, and, if it is a pecuniary claim, the amount must be indicated. The claim form must:

(a) contain a concise statement of the nature of the claim;
(b) specify the remedy which the claimant seeks;
(c) where the claimant is making a claim for money, contain a statement of value in accordance with rule 16.3;
(cc) where the claimant's only claim is for a specified sum, the form must contain a statement of the interest accrued from that sum;
(d) contain such other matters as may be set out in a practice direction (PD).

The claim form must be accompanied by a statement of truth in which the applicant declares that he/she believes the facts alleged are true. The applicant's claim must include factual allegations from which the claim arises. Evidence does not need to be included at this stage and need not contain the legal assessment that the party draws from them. A claim form contains, *inter alia*, the claimant and the defendant's name, the claim accurately and comprehensively, and the decision sought, namely the decision the claimant wants from the court.

Although it is the judge who establishes the facts, the parties need to provide them to the court. Ideally, the judge can only rely on the information that the parties have brought before him/her. Obviously, the parties will present information that conforms to their interest. Therefore, the judge is, in principle, bound to the parties' selection as regards the establishment of the facts. A statement of the case should contain all the facts which the parties claim to be true. Both sides will state a set of facts, and both these two sets will be available to the judge. He/she cannot undertake any research to compile a possible third set of facts. This picture, however, has become more subtle over time. The case

14 Jolowicz 2003. 281–296.
15 NCPC Art. 10.
16 NCPC Article 7.

management idea has also introduced an increased role for the judge in the field of fact-finding. This ensures that parties 'reveal their cards' as soon as possible, in the early stages of proceedings, and today this stretches even to the pre-trial phase. In many disputes, pre-action protocols govern the steps to be taken prior to a lawsuit, which are conditions for starting the litigation.[17]

The court may not prescribe to the parties what evidence should be presented. Evidence from expert witnesses cannot be ordered at the hearing if the parties have not previously requested this from the court. The court may not order that a party provide expert opinion if the party does not wish to use an expert in the proceedings. There is an option for the court to appoint an independent expert on any fact or opinion which does not involve a point of law or legal interpretation, although this may be used only with the consent of both parties. However, there is a tool whereby the judge can indicate to a party that if the party fails to call a witness or does not question the other party's witness in order to prove a disputed fact, the claim will most likely fail. The court in both common and civil law systems may use its own knowledge or well-known facts, for which no proof is needed. On matters of law, the English judge is free to base his/her ruling on legal grounds that the parties have not previously called for.[18]

Among a variety of measures, CPR Section 1.4 contains the active judge's case management obligations concerning evidence – an early clarification of the nature of the dispute, deciding which issues require disclosure and evidence and providing guidance to the parties so that the matter is dealt with in a rapid and efficient way. In fast and multi-track procedures, the judge has the management task of setting relevance and priority; this includes definition of the issues falling within the case, determining the order in which the issues are discussed, deciding which issues require a hearing on the merits and which may be addressed in a simplified way.

The CPR provides that the judge directs the process of proof-taking by determining what facts need evidence, what evidence is needed, and how it should be presented to the court by a party. What remains in the hands of the parties in the fact-finding process is the scope of their factual statements. Case management also involves a certain restriction on the parties' freedom to make their statements on the case as they choose.[19] An example is the explicit power of the judge in evidence-taking to decide which issues need to be proven, the method of proof he/she requires to decide these issues, and how this evidence should be presented before the court. The judge may exclude evidence that would otherwise be permitted.[20] This is a power, which, if used by the judges

17 Nyilas 2011. 60.
18 Graef 1996. 46.
19 Jolowicz 2000. 386.
20 CPR Rule 32.1.

extensively, may greatly limit the parties' right of disposition considering the merits of the lawsuit.[21]

In German civil procedure, the court's obligations, specifically ZPO 139§, were affected by the 2001 Amendment, which extended the court's recording and information tasks. Under this section, the court must discuss the factual and legal sides of the case with the parties, ask the relevant questions, and order the party to complete his/her statement if it is incomplete or erroneous. The party must make the necessary statements and provide the corresponding evidence. The facts that are not disputed between the parties must not be further explored or proved. The judge must indicate those legal aspects of the case which the parties apparently have not noticed or have thought irrelevant. Often, it becomes apparent while discussing the legal aspects which facts are relevant or incomplete. In addition, the judge cannot base his or her decision on a legal basis that the parties have not considered previously and could not refer to during their statements.[22] On the duty to give information, the limits are not strict, but the information cannot serve one party's interest. It should cover the appropriate statements or amendments thereto; for example, if it is the interest of both parties to avoid another lawsuit. However, the judge may not propose a legal option which the party was not even considering. This influence, thus, does not restrict the freedom of the parties. If a party fails to comply with the court's proposal and does not complete or does not specify the statement, the court will be bound by the initially stated facts. According to ZPO 139(2)§, the judge must inform the parties if he/she intends to base his/her judgment on a fact or law the parties have apparently ignored or considered insignificant. He/she is also required to inform the parties on his/her position on a question of fact or law if it differs from the position of both parties. Finally, the court must allow the parties to comment on those facts or points of law which they have ignored, considered insignificant, or interpreted differently from the court. Critics say the practical effect is small, as in case-law there has already been an established practice which operated in accordance with the new regulations, and the court's duty in the direction and the course of the process has already been well defined.[23] What occurred was a reflection of this practice in the rules, rather than any new obligations.[24] The amended 139§ 'Material case management' summarized the tasks of the judge, including the cornerstone of the reform, the *Hinwirkungs und Hinweispflicht*. Accordingly, the court must contribute actively so that the parties submit all significant facts in a timely and comprehensive manner and, in particular, supplement their incomplete factual allegations, indicate their evidence,

21 *Evaluation of Civil Procedure Reforms* (August 2002); available at: http://www.dca.gov.uk/civil/reform/ffreform.htm and *Emerging Findings: an Early Evaluation of the Civil Justice Reforms, March 2001*; available at: www.dca.gov.uk/civil/emerge/emerge.htm (10 November 2010).

22 Walter 2005. 74–75.

23 Schellhammer 2001. 1081–1085.

24 Rühl 2005. 909–942.

and make their motions to promote the case. In order to avoid 'surprise' judgments, the parties should be warned of aspects overlooked or considered unimportant and of circumstances which can be considered *ex officio*. The guidance should be given as early as possible and must be recorded. Failure to give this guidance is a breach of procedural rules, and the first instance judgment will be repealed. The disposal principle and the party control principle continue to apply, as a party is free to decide whether to follow the judge's instructions or not. Nowadays, it is widely accepted that the primary responsibility of a judge is to ensure a fair and efficient management of the case, to ensure that the parties have access to justice and that the right to be heard prevails.[25] The duty of the court to give guidance does not mean it can divert from the requirement of impartiality, and it may not assist a party in winning.[26] The facts that need evidence are those that are relevant to deciding the dispute, which are otherwise not yet proven, and that are disputed. Although presentation of the facts and relating evidence is the responsibility of the parties, the process of evidence itself is conducted by the court *ex officio*.

Similar rules apply in Austria, where, to minimize the loss of time caused by taking evidence relating to facts that later turn out to be irrelevant, the court and the parties discuss the factual and legal aspects of the case in the early stage of the procedure. The judge should not express his/her personal views and evaluation but should caution the parties regarding any possible legal implications of the case in order to avoid any surprise in the legal reasoning of the court judgment.[27]

Article 183§ AZPO allows the taking of evidence *ex officio* if there are reasonable grounds on the basis of the claim or the conduct of the procedure that this evidence will help to clarify the relevant facts. Documentary evidence is only allowed if one of the parties has referred to that particular document. Witness and documentary evidence is not allowed if both parties are against it. Otherwise, taking evidence *ex officio* is rare in practice.[28]

5. Judicial Practice in Hungarian Courts

As regards the case-law of the Hungarian Supreme Court (*Kúria*), it has established in multiple cases that giving incorrect or incomplete information on these aspects of evidence or omitting to give information results in serious violations of procedural law, and therefore the judgment must be set aside. In a recent case,[29] the court ruled that the judge must state *ex officio* that the contract in dispute

25 Murray–Stürner 2004. 156–163.
26 Karst 2003. 239–269.
27 Bajons 2005. 121.
28 Oberhammer–Domej 2005. 103.
29 BH2013. 123.

is a consumer contract and must inform the parties on the reversed burden of proof. Similarly, in a dispute between neighbours, the court ruled that the judge must give appropriate information to the parties on the specific burden of proof. Failing this, a judgment on the merits based on insufficient evidence provided by the party is unlawful and must be set aside.[30]

As is declared in BDT 2001. 426, providing false or improper information about the burden of proof or placing the burden on the wrong party is a serious breach of procedural rules, which cannot be rectified in appellate proceedings and has an effect on the merits of the case. Thus, the judgment must be set aside, and the first instance court is ordered to rehear the case.[31]

Case BDT 2011. 2410 also draws attention to the aim of the information duty. It does not exist for its own sake but ensures that the parties fulfil their duty to make their statements and motions in good faith and in due time, as they are obliged to do. If the party was aware of which facts need evidence and who bears the burden of proof, the information duty could be a formal one. There would be no breach of fair trial, and it would not be a serious breach of procedural rules. However, in this particular case, the claimant claimed that the judge, despite having based the dismissive judgment on the merits on failure to provide evidence, failed to inform the claimant about which facts needed evidence. Furthermore, the judge rejected the claimant's motion to amend the expert opinion; therefore, the claimant concluded that the judge had found the existing evidence sufficient. Thus, the failure to give information here resulted in especially harmful consequences for the claimant. In a prior case, it had been established that the judge may only conclude that the party failed to provide evidence when the information given to the parties had been complete and appropriate to the case.[32] In another case,[33] the court ruled that there was no breach of the information duty when the information had been given individually and completely, according to the facts of the case and the statements of the parties.

As well as defining the scope of application of the duty to give information, there are some cases that define the limits of this duty. No 1/2009 PK Opinion of the *Kúria* set certain limits when declaring that it was a minimal requirement that the party – regardless of whether he/she has legal counsel or not – be informed about which of the alleged facts needed evidence. The information must be given according to the particulars of the claim and defence, based on the relevant facts in terms of the material legal rules. The information also needs to be given during the course of the procedure when a party changes his/her claim or alleges new facts. The decision BH 2005/74 dealt with the link between material rules of law and the

30 BH2015. 6.
31 BDT 2007. 1694 – also contains similar conclusions.
32 BH2006. 298.
33 BH2011. 312.

duty to inform the parties about evidence. It highlighted that during the duty to inform the judge must not inform the parties about the material legal rules but must indicate the facts which he/she considers relevant. Of course, the scope of relevant facts depends on the material rule of law that the judge considers applicable to the case; however, the judge still has no duty – and not even a possibility – to inform the party about his/her material rights. Nor is there a duty for the judge to draw the attention of the party to a possible or necessary modification of the claim. This would go beyond the duty to provide information, and it would represent prejudice, which is prohibited. The judge must never give legal advice to the party on his/her material rights. Only in a case in which a party acts without legal counsel can the judge inform the party on his/her procedural rights to file a counterclaim or to alter the claim but only if the party makes a statement about certain relevant facts.

We should re-evaluate the ruling (also included in the 2009 Opinion) that information given by the judge must not detail what type of evidence is needed – except for the need for expert opinion. Even this ruling states that it is recommended to refer to the type of evidence when the party cannot fulfil the duty to provide evidence without that specific type of evidence. Nevertheless, a party without legal counsel must be informed about the various types of evidence. This rule makes an entirely unnecessary difference in the scope of the information given between parties with and parties without counsel.

It can be concluded from the above how narrow the line is between adequate information and prejudice when considering the 1/2009. PK Opinion. It declares that it is not prohibited (although nor is it required) to call on the parties for further motions for evidence if the judge finds that insufficient evidence had been provided on a certain fact; but, in any case, he/she should not inform the party about whether the evidence provided is adequate or not. Evidence can only be evaluated in the judgment.

This problem could be eliminated and the boundaries could be clarified if the code contained a provision that the judge must call for further motions or evidence if he/she finds it insufficient and inform the party about the consequences of failure to provide further evidence. After being informed of this, if the party does not make a motion for evidence, even if he/she was given the opportunity, then the claim can be rejected on its merits on the basis of insufficient evidence.

One may find an example where the judge can decide what type of evidence is admissible: in the European Small Claims procedure, not only must the judge inform parties about procedural rules if necessary but he/she also has certain duties concerning evidence. The court or tribunal shall determine the means by which evidence is taken and the extent of the evidence necessary for its judgment under the rules applicable to the admissibility of evidence.[34] As the Regulation is

34 Article 9, Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing a European Small Claims Procedure.

drawn from the legal systems of the member states, it can be assumed that other legislations also highlight the importance of giving information about evidence to the parties. Here, as we have seen, the Regulation contradicts Hungarian legal practice where it is not necessary to give information about the means of evidence.

6. Conclusions

It is the task of the judge to plan the course of the procedure, but it has to be planned in cooperation with the parties. This cooperation duty can be required by law if the parties are adequately informed about their procedural duties and the consequences of non-compliance, especially if these depend on the discretion of the judge and therefore cannot be foreseen; for instance, if there is a possibility of ignoring the late statements and motions of the parties. Thus, in a future code, it should be stated that the court and the parties cooperate in determining the scope of evidence as soon as possible, preferably at the first hearing. If the judge finds that the scope of evidence needs correction or modification later, at least he/she should inform the parties of this, without giving actual legal advice.

However, the information duty is not adequately emphasized in the Hungarian code at present. In terms of evidence, the main rule regarding the judge is the principle of the free evaluation of evidence, which is interpreted widely in judicial practice. The judge may or may not consider evidence presented by a party. The reasons for evaluation must be given in the reasoning part of the judgment. However, the only limit to free evaluation is that evidence must not be contrary to the facts established and that every fact must be validated by some evidence or at least ascertained by the statements of the parties.[35] The extremes of free evaluation can be seen in the following case. In BH 2001/6/301, it was declared that the court may establish the facts of the case by evaluating the evidence in such a way that the evidence is not in accordance with the facts but is not illogical in the light of other materials in the lawsuit.

If we regard the judge's duty to provide adequate information as a guarantee of a fair trial, we can conclude that this duty can only be excluded or limited to a very limited extent without violating the principle of a fair trial. The cases and analyses presented in this article highlight the dangers of departing from the meaning of the information duty established by judicial practice.

The principle of the duty of the judge to give information concerning evidence is crucial to the effectiveness of civil procedures. Therefore, its scope of application, its particular contents and its limits should be carefully established in the new procedural code along with the consequences resulting from any breach of this duty. The principle is, and should be, alive and well, and it continues to be much needed in every civil procedural system.

35 On facts that need no evidence, see also Pribula 2012. 288–297.

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Direct Democracy in Hungary (1989–2016): from Popular Sovereignty to Popular Illusion

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Abstract. Since 1989, there have been organized seven national referenda related to thirteen questions in Hungary. Based on the content of the questions raised, one can draw *a line of evolution* in the history of the institution: the symbolic political *issues of the transition and democracy-building* were followed by *the country's main strategic aims*. Later, national referenda functioned as *instruments of outsourced daily political debate* between government and opposition, while at present – based on practice – national referendum can be considered as a typical instrument of *plebiscitarian direct democracy*. Moreover, during this period, sixteen questions were set on the National Assembly's agenda based on successful *popular initiatives*.
Since 2010, the legislative and the executive power's approach to direct democracy has radically transformed. The Government started to use frequently the so-called *national consultation* in important legislative issues – a misleading communication tool which has no legal background. Besides, based on the new Fundamental Law of Hungary (2011) and the new Act on Electoral Procedure (2013), the possibility of a successful national referendum has been greatly restricted: there is prescribed as a *necessary condition for a valid* result that the majority of the voters should cast a valid vote. This condition was barely reached twice in the preceding period. Furthermore, the institution of *popular initiative is not part of the legal system* anymore.
These trends are demonstrating that the classic tools of direct democracy are losing their relevance, while populist instruments are used more frequently in practice. The purpose of this paper is to contribute to the contemporary debate related to this challenge.

Keywords: national referendum, national consultation, minority direct democracy, plebiscitarian direct democracy

I. The Way We Should Think about Direct Democracy

Why are questions related to direct democracy relevant? One can assume that the usual tools of direct democracy do have weak influence on politics in parliamentary democracies. In modern societies – which are divided by different experiences, preferences, and opinions of their members –, there is no better option to reach a decision which represents the presumed interest of the community than a majoritarian decision-making of representative bodies. If parliaments are formed based on free and fair elections, then the majoritarian decisions of these – from the formal point of view – can be considered legitimate without any doubt. Moreover, the open debate in parliament can deliberate alternative opinions in complex social issues and therefore offers a useful framework to control the actions of the government.

However, the support of the majority of the elected representatives is not the only requirement related to decision-making in modern democratic societies. The famous phrase about the 'tyranny of the majority'[1] demonstrates that the interests of the actual majority in some cases can counter the rights or interests of minorities in a way which is not acceptable. This is the case when fundamental rights are limited, other constitutional values are infringed, or certain minorities simply do not have the chance to raise their voice. Rules which function as safeguards and techniques related to the decision-making process can also effectively prevent such situations. In the case of parliaments, the veto power of the head of the state, the judicial review of the legislative decisions, and also the tools of direct democracy are traditional *external limits of majoritarian power*. The open debate in parliament which can deliberate alternative opinions, as well as supermajority requirements, can be considered as *internal limits of the majority*.

Direct democracy has special relevance in other aspects as well. It is not only an external limit of the majoritarian power but rather it is a tool which is in close connection with the principle of people's sovereignty. When people have a right to participate directly in the most important decisions of the community, their position is similarly strong as in the case when they authorize the elected representatives to act in their names. One can state that referenda and other tools of direct democracy are not necessary preconditions of constitutional states. One can also add that in many countries with remarkable constitutional history and practice this institution is not available to the citizens.[2] However, in case a constitution opens these modalities of exercising power for the members of the political community, these should be taken seriously. The right to participate at a referendum is a political right which calls for sufficient procedural safeguards.

1 For the classic approaches, see Madison (1787) and Tocqueville (1835).

2 According to the database of the International Institute for Democracy and Electoral Assistance (IDEA), 57% of 188 countries use mandatory referenda, while 64% use optional referenda at the national level.

II. Trends Related to the Practice of Direct Democracy in Hungary (1989–2011)

The classic tools of direct democracy are relatively new institutions in Hungary, introduced right after the fall of the 'state-socialist' regime in 1989. The most relevant tools used at the national level were *referenda* and the institution of *people's initiative*.

In the preceding period, citizens participated six times at *referenda* to express their opinion in altogether twelve questions. At the end of 1989, in the so-called 'four yeses' referendum, the questions raised were related to the following topics: (a) the timing of the election of the president of the republic (the head of the state), (b) the dissolution of the party militia, (c) the prohibition of party organizations at workplaces, and (d) the report on the state-socialist party's property. Right after the 'four yeses' referendum, in 1990, there was organized a referendum on the modality of electing the president (directly or by the parliament). The 1997 referendum concerned the North Atlantic Treaty Organization (NATO) membership, while the 2003 referendum the accession to the European Union. In 2004, citizens could vote for two issues: (a) the citizenship of native Hungarians living outside the country and (b) the privatization of hospitals. The 2008 referendum concerned three questions closely related to social policies (the so-called 'social referenda'): (a) daily inpatient fee in hospitals, (b) outpatient medical consultation fee, and (c) university tuition fee.

It seems appropriate to assess these referenda from a broader perspective – that of the position of the political community.

In 1989 and in 1990, the questions were closely related to the important political *issues of the transition and democracy-building*. In 1989 – in the absence of a freely elected parliament –, some of the then opposition parties intended to put symbolic questions on the political agenda in order to build up political support for their organizations.

The referenda on the NATO (1997) and EU membership (2003) form the second stage in this line of evolution. These questions concerned the *country's main strategic aims* – therefore, the referenda were to some extent solemn declarations of the will of the political community.

The referendum has become an *outsourced instrument of the daily political debate* between government and opposition since 2004. All the questions raised in 2004 and 2008 were initiated with the *s*upport of the then opposition parties. One can also note that the 2008 'social referenda' were obviously successful from the point of view of the initiators as they resulted in the symbolic political defeat of the prime minister and the governing parties. This period could be considered as the third stage in the history of national referenda.

The issues set on the agenda of the National Assembly by the *people's initiative* show a variety of the topics based on the actual interests of the initiators. The National Assembly dealt with altogether 16 questions based on people's initiatives in the preceding period, in four cases deciding in accordance with the original proposal of the initiators.

At this point, it is worth mentioning the way the Constitutional Court assessed the function of direct democracy in the constitutional system of Hungary based on the previous Constitution (1989) and the legal background. In the early years, the Constitutional Court stated that 'in the constitutional order of Hungary the primary form of exercising popular sovereignty is representation'.[3] The statement had special relevance, as the relation between direct and representative democracy was not stipulated in the text of the Constitution at that time. Four years later, the Court declared that 'the direct exercise of power is an exceptional form of exercising popular sovereignty, but in exceptional cases when it is actually realized it stands above the exercise of power through representatives'.[4] The assessment is to some extent controversial as it can be interpreted as a clarification of the principle explained in the previous decision, while at the same time as well as a new principle which contradicts the former. It is also important to note that the Constitutional Court interpreted the relationship between direct democracy and the constitution-amending power as well, declaring that 'the Constitution cannot be amended – on the basis of a voter imitative – through a referendum'.[5] One can add that the Constitution did not contain a restriction in this respect.

III. Regulation after 2011

The Fundamental Law of Hungary (2011) in many aspects sustained the institutions of direct democracy used since 1989. The text of the Fundamental Law repeats the former ascertainments (including the possible implicit contradictions) of the Constitutional Court on the relationship between representative and direct democracy.[6] On the other hand, the Fundamental Law modified the way direct democracy can be exercised in important aspects.

Based on the former regulation, a national referendum has to be ordered *mandatory* by the National Assembly based on the imitation of at least 200,000 citizens eligible to vote, while a national referendum could be ordered by the *discretionary resolution* of the Parliament based on the imitation of (a) at least 100,000 citizens eligible to vote, (b) the President of the Republic, (c) the

3 Decision 2/1993. (I. 22.) CC.
4 Decision 52/1997. (X. 14.) CC.
5 Decision 25/1999. (VII. 7.) CC.
6 See Article B Section (4) of the Fundamental Law.

Government, and (d) at least one third of the elected MPs. The Fundamental Law sustained the regulation in this respect, except the imitation of the MPs – therefore, *the sphere of action of parliamentary minorities is weakened* in this regard.

A national referendum can be initiated exclusively in a question which falls within the competence of the National Assembly, as the parliament is the addressee of the question raised. The Fundamental Law contains a detailed list on the topics in which no referendum may be organized.[7] The most of these topics are 'classic', well-known in other country regulations and the former Hungarian Constitution as well (e.g. central budget, international treaties, declaration of state of war, etc.). However, the new list of the 'excluded topics' of the Fundamental Law contains two new elements: (a) matters aimed at the amendment to the Fundamental Law (a ban earlier declared by the Constitutional Court) and (b) the content of the Acts on the elections. One can note that based on the new regulation the *members of the political community have less sphere of action to influence the way they elect their representatives*.

Based on the former constitution, there was no validity requirement related to the turnout: a referendum was conclusive if at least one quarter of the total number of citizens had given identical answer to the question concerned. However, the Fundamental Law prescribes a rigid validity requirement: a national referendum shall be valid if more than half of all voters participate at the referendum and cast valid votes. One can note that *the new validity requirement is not easy to comply with*: citizens participated at referenda in such proportion only twice in the previous period.[8]

According to the Fundamental Law, the outcome of the valid referendum is always binding on the Parliament for a three-year period, while based on the former regulation *consultative referenda* (referenda with no binding effect) also existed. This modification demonstrates that *the effects of national referenda are stronger*.

It is also an important new element of the Fundamental Law in this regard that *the people's initiative is no longer part of direct democracy* in Hungary. It is remarkable that this institution was a balanced tool to influence politics[9] in a way which was suitable to overcome the classic conflict between representative and direct democracy.

7 See Article 8 Section (3) of the Fundamental Law.

8 The voter turnouts were the following: 1989: 58.03%, 1990: 14.01%, 1997: 49.25%, 2003: 45.62%, 2004: 37.49%, 2008: 50.51%, 2016: 41.32%.

9 See Article 28/D of the 1989 Constitution: *At least 50,000 voting citizens are required for a national popular initiative. A national popular initiative may be for the purpose of forcing the Parliament to place a subject under its jurisdiction on the agenda. The Parliament shall debate the subject defined by the national popular initiative.*

IV. Trends Related to the Practice of Direct Democracy in Hungary after 2011

During the heated debates related to the drafting process of the Fundamental Law (2010–2011), it has been suggested that the new constitution of the country needs stronger legitimacy than that of the MPs of the governing coalition (Fidesz[10] and KDNP[11]), which maintained two-thirds of the parliamentary seats in the parliamentary term of 2010–2014. However, the governing parties maintaining the exclusive supermajority power expressed that they have no intention to confirm the Fundamental Law by a national referendum – a possibility opened based on the 1989 Constitution,[12] which was in force at that time. It is well-known that the unilateral constitution-making process was intensively criticized by opposition parties, scholars,[13] NGO-s, and international organizations.[14]

On the contrary, the Government started to use *national consultations* in order to ask for the opinion of the voters in daily policy issues – for the second time on questions related to the Fundamental Law. Before passing the Fundamental Law, every citizen received a simplified questionnaire, which contained 12 questions. Questions about complex constitutional issues and fundamental rights were formulated in a very simple way and even suggested the expected answers. The unilateral consultation, which lacked any professional or ethical standards, was not suitable for any 'in-merit consultation' even if approximately 10 percent of the citizens returned their answers to the Government. It is also doubtful whether these answers had any effect on the drafting process of the Fundamental Law. One can add that since 2010 altogether five national consultations have been organized in Hungary, and the sixth one takes place in 2017.

It is important to note that *Hungarian national consultations are clearly different from the complex methods with similar name* and known from comparative constitutional law. The recommendation of the UN High Commissioner for Human Rights for post-conflict states in matters of transitional justice[15] or the constitutional practice of some Latin American states[16] can be mentioned in this respect. The Hungarian national consultation *has neither constitutional foundations nor any special function in the decision-making processes of*

10 Alliance of Young Democrats.
11 Christian Democratic People's Party.
12 See Article 26. Section (6) of the 1989 Constitution.
13 For detailed analysis on the question of legitimacy, see Sonnevend–Jakab–Csink 2015. 33–109.
14 In its Opinion on the new constitution of Hungary (Venice, 17–18 June 2011), the Venice Commission stated the following: 'it is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by a lack of transparency, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe'.
15 See: http://www.ohchr.org/documents/Publications/NationalConsultationsTJ_EN.pdf.
16 See Barczak 2001. 37–60.

the political community. Even though it seems like a similar technique to the national referendum, in practice, it is quite different. The questions raised, and even the possible answers, are formulated exclusively by the Government, there are no constitutional safeguards related to the procedure (including judicial review), and the legal consequences are uncertain. As a result, the use of national consultations – as communication tools – can be considered as the *illusion of direct democracy*.

The *fifth national consultation on immigration and terrorism* was held in the summer of 2015 aiming at building up public support for the restricting immigration policy of the Government. In the following period, extremely restrictive legal measures took place in Hungary as a reaction to the European refugee crisis. The measures taken were intensively criticized by the international community.[17]

As a symbolic element of this immigration policy, on 16 February 2016, the Government initiated a national referendum on the following question: 'Do you want to allow the European Union to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?' The National Election Committee authenticated the question,[18] and later its decision was approved by the Curia[19] (the Supreme Court of Hungary). Both decisions generated *intensive critiques*,[20] as they did not take into account that (a) the addressee of the question was not the National Assembly but the European Union, (b) the issue of the referendum (the possible constraints of the European Union) was an 'excluded topic' as it is regulated in an international (European) treaty, and (c) the question was not worded in a manner that allows a straightforward response. At the referendum organized on the 2nd of October 2016, only 41.32% of the voters cast valid votes; therefore, the validity requirement prescribed in the Fundamental Law was not met. However, later, the Government initiated an amendment to the Fundamental Law related to this topic, which was eventually not supported by the National Assembly.[21]

As a consequence, the national referendum functioned as an *instrument of populist majoritarian politics* in 2016 as the newest stage in the line of evolution of the institution in Hungary.

17 See also the detailed analysis of the United Nations Refugee Agency (UNHCR).
18 See Decision 14/2016 of the National Election Committee.
19 See the Decision Knk. IV.37.222/2016/9 of the Curia.
20 Halmai 2016, Pozsár-Szentmiklósy 2016. 77–84.
21 On the analysis of the proposed Seventh Amendment to the Fundamental Law, see Uitz 2016.

V. The Way We Should Use Direct Democracy

From a broader perspective, there are many arguments supporting direct democracy as well as convincing counter-arguments.

Direct democracy can effectively influence legislation in many cases. Moreover, it can function as *counterbalance of the parliamentary majority*: as a result of a national referendum, political actors are under greater pressure to meet minority demands. This phenomenon can lead to a consensus-orientated decision-making process.[22] A national referendum can also function as a very spectacular way to express the political opinion of the active members of the political community.

On the other hand, strong arguments are demonstrating that direct democracy has more disadvantages. In many cases, *initiatives directly target minority interests* by supporting the preferences of the actual majority.[23] Due to the fact that the tools of direct democracy do not offer a deliberate process, 'people often vote about initiatives without really understanding what they're about'.[24] It is also a strong argument that 'while the principle of separation of powers offers a structural protection for the most important constitutional values by effecting a diffusion of powers among the different branches of the government, in the case of direct democracy, checks and balances do not function'.[25]

Both approaches face a 'collective dilemma' on relying on median voters on matters of collective deliberation and restraining at the same time the median voter on issues related to individual rights.[26] For the possible solution of the dilemma, it seems useful to distinguish between the main types of direct democracy on a *functional basis*. Silvano Moeckli differentiates between *minority direct democracy*, where 'a minority of qualified voters or members of parliament can bring an issue before the electorate against the will of the political majority', and *plebiscitary direct democracy*, where 'a political majority holds a referendum on an issue that it could decide on its own'.[27] In this sense, minority direct democracy can bear the possible advantages of direct democracy, while plebiscitary direct democracy has probably more disadvantages.[28]

22 Moeckli 2006. 107–124 (especially 118.).
23 See Chemerinsky 2007. 293–306 (especially 297.).
24 See Chemerinsky 2007. 299.
25 See Chemerinsky 2007. 296.
26 See Epstein 2011. 819–826 (especially 823.). The author also emphasizes that 'no constitutional democracy can afford to neglect either part of the two-step game'. See Epstein 2011. 823.
27 See Moeckli 2006. 107.
28 The influence on the legislation, counterbalancing parliamentary absolutism, and the protection of minority interests can be mentioned as the possible benefits of direct democracy, while populist campaigns, avoiding compromise solutions, and the exclusiveness of the majority opinion as typical weaknesses. See Morel 2012. 501–528, 502–507.

In the Hungarian legal order, both functional types of direct democracy are present. Many of the elements of the new regulation (excluding the initiation of a national referendum by the parliamentary minority, extension of the 'excluded topics', prescribing a higher turnout requirement, excluding the consultative referenda and the people's initiative) are *weakening the sphere of action for minority direct democracy*, while worrying tendencies (the frequent use of national consultations, initiating a national referendum by the Government in a question which is already decided, questionable decisions of the National Election Committee and the Curia) are *strengthening the effects of plebiscitary direct democracy*.

It is high time to shift to focusing to the *genuine exercise of political rights* related to direct democracy.

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The New Hungarian Private International Law Act – a Wind of Change

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Abstract. On 4 April 2017, the Hungarian Parliament adopted the new Hungarian Private International Law Act. The present study focuses on the following topics: the reasons for the revision of the previous legislative decree on Hungarian private international law, the appearance of new theoretical conceptions in the Hungarian private international law of the XXI century, the almost two-year procedure of the creation of the new Hungarian Private International Law Act, the structure of the Act, and the major changes compared to the previous codex.

Keywords: codification, the new Hungarian Private International Law Act, conflict-of-laws rules, connecting factors

I. Introduction

Until the middle of the 20th century, the sources of the Hungarian Private International Law were scattered in different laws, which were complemented by judicial practice in case it was necessary in solving a case. This was also complemented by international commercial conventions and bilateral conventions on mutual legal assistance. The hardships due to the lack of a unified source inspired the first draft of the Hungarian Private International Law in 1948.

However, the draft of legal scholar István Szászy[1] was not adopted due to the political atmosphere of the time. The next attempts were in 1968 and 1970, when

1 István Szászy (1899–1976) was an internationally respected legal scholar, university professor, and judge. His work is significant in several fields: private law, international private law, international procedural law, and international law. He was a full member of the Institut de Droit International, a visiting lecturer of the Academie de Droit International in Hague multiple times, and the creator of the first Hungarian international private law draft. He participated in the drafting of the Egyptian civil code and also was the director of the first Private Law Department of Pázmány Péter University of Budapest.

the second and third drafts were proposed respectively, but still without any result. After almost a ten-year hiatus, the fourth draft was prepared based on the concept of Ferenc Mádl[2] in 1978, which was adopted (by the Presidential Committee of the Hungarian People's Republic) and published as Law-Decree No 13 of 1979 on International Private Law.[3]

This law regulated the private international relations and international procedural questions in a unified, comprehensive manner; therefore, the expression 'Private International Law Codex' (hereinafter referred to as: Codex) became commonly used. Following the entry into force, the Codex consisted of the following chapters: I. General Rules, II. Personal Law, III. Law of Intellectual Property, IV. Property Law, V. Law of Obligations, VI. Law of Succession, VII. Family Law, VIII. Labour Law, IX. Rules of Jurisdiction, X. Rules of Procedures, and XI. Recognition and Enforcement of Foreign Judgments.

II. The Reasons for the Revision of Law-Decree No 13 of 1979 on Private International Law

Even though the Codex was created and adopted in the socialist era, the first substantial amendment was only made in 2000 mainly due to European legal harmonization. This clearly shows the future proof and modern nature of the Codex. The rich case-law also shows the effectiveness of the Codex, as it was widely used in cases of international family and succession law and also in cases of damages arising from accidents.[4]

In 2000, the chapters on the rules of jurisdiction and on the recognition and enforcement of foreign decisions were amended, harmonized with the European law. On 1 May 2004, Hungary joined the European Union (hereinafter referred to as: EU) as a full member, which is regarded as a milestone considering the later amendments. As the EU's regulations on private international law are regulating the EU's private international law relations with priority, this affected the subsequent amendments of the Codex. The aim of these amendments is mostly technical, by emphasizing in the chapters concerned that besides the regulations the rules of the Law-Decree are only applicable in a limited scope.

2 Ferenc Mádl (1931–2011) was a Hungarian scholar, head of department, university professor, respected scholar of European law, international private law, international commercial law, and comparative private law, full member of the Hungarian Academy of Sciences, member of the governing board of UNIDROIT, arbitrator of ICSID, President of the Republic of Hungary (2000–2005).

3 On the evolution of Hungarian private international law, see Mádl–Vékás 2015. 83–87, Burián 2014. 109–112.

4 Mádl–Vékás 2015. 85.

With changes in society and economic relations, the traffic of persons and assets increased, which also caused the sudden, significant growth in the number of private international law cases. The following intensive legislation resulted in numerous secondary laws (regulations) in the EU, which now govern most private international law relations.[5] These regulations integrated in the structure of the Codex, forcing its integrity apart, occasionally generating conflicts between national and European rules. For example, in EU regulations, the principle of a person's habitual residence is the main connecting factor in family law cases; meanwhile, the Codex applies nationality as a main principle and only uses the residence (or, if not applicable, a person's habitual residence) as an auxiliary rule. The diverging rules of the regulations and the Codex made the application of laws difficult.

Many international conventions were adopted at the Hague Conference on Private International Law (hereinafter referred to as: HCCH), of which Hungary was a founding member from the beginning, and Hungary joined most of them.[6] Therefore, the priority of the international conventions increased in the legal source's hierarchy, making it more and more difficult to find which law shall be applied in this structure of three: whether the national (Hungarian) regulation

5 Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility repealing Regulation (EC) No 1347/2000 (Brussels II bis), OJ L 338, 1–29;
Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, 40–49;
Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, 6–16;
Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition, and enforcement of decisions and cooperation in matters relating to maintenance obligations ('Maintenance Regulation'), OJ L 7, 10.1.2009, 1–79;
Council Regulation (EU) No 1259/2010 of 29 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (so-called 'Rome III'), OJ L 343, 29.12.2010;
Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions, acceptance and enforcement of authentic instruments in matters of succession, and on the creation of a European Certificate of Succession ('Succession Regulation'), OJ L 201 of 27.7.2012, 107;
Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ('Brussels I Recast'), OJ L 351, 20.12.2012, 1.

6 Convention of 1 March 1954 on Civil Procedure; Convention of 15 April 1958 concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations towards Children; Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents; Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children.

or the international convention or maybe the EU's regulation. In certain cases, 3–4 different sources could all be relevant, which creates uncertainty in the application of law.

Besides the EU and international legal effects reforming the private international law, substantive and procedural changes in private international law also have to be taken into consideration. In recent years, the whole Hungarian private law structure was renewed: the new Civil Code[7] and the new Civil Procedure[8] was adopted. With regard to the renewal of civil law, it became necessary for private international law to change in order to unify the regime of notions between all substantial codices.

Last but not least, it should be highlighted that in recent years the comprehensive reform of private international law started in several Middle Eastern European (ex-socialist) states, in Bulgaria,[9] Poland,[10] Romania,[11] and the Czech Republic,[12] which acts also inspired Hungarian legislation.

III. Legislative Procedure

After Hungary had joined the EU, several studies were written in the field of Hungarian private international law about how secondary EU regulations rearrange and facilitate the fragmentation of the Hungarian conflict-of-laws rules.[13] As newer and newer EU regulations were adopted, the idea of the comprehensive renewal of the Hungarian private international law was born. By the end of 2014, the Hungarian government was planning the codification of a new codex. The next step of this process was a national conference on the topic in February 2015, where the relevant scholars agreed that it was about time to re-codify the Hungarian private international law.[14]

Government Decree No 1337/2015. (V. 27.) on the codification of the new Hungarian private international law and on the foundation of the Private International Law Codification Committee was published in the Hungarian

7 Act V of 2013 on the Civil Code.
8 Act CXXX of 2016 on the civil procedure.
9 Bulgarian Private International Law Code 2005. Available at: http://www.ifrc.org/Docs/idrl/868EN.pdf.
10 Act of 4 February 2011, Private International Law.
11 CARTEA VII – Dispoziții de drept internațional privat. Codul Civil. Noul Cod Civil republicat, 2011. Legea 287/2009 privind Codul civil.
12 91[/2012] Act as of 25 January 2012 on Private International Law.
13 Burián 2011, Vékás 2015.
14 Eötvös Lóránd University, Faculty of Law: 9th National Conference of Private International Law Professors, 'The National and European Perspectives on the Codification of Private International Law' 2015.02.06, Budapest.

Journal on 27 May 2015[15] (hereinafter referred to as: Decree). The Decree required the commencing of the renewal process of Law-Decree No 13 of 1979 on Private International Law. The aim was to create a new, up-to-date private international law regulation in concordance with the European and international sources of private international law. The Private International Law Codification Committee was established in the framework of this process, with members invited by the Minister of Justice, academic professionals of the field, lawyers, judges, and government officials.

The Decree laid out a schedule for the construction of the new private international law regulation as follows:

– the deadline for the concept of the regulation: 30 November 2015;

– the deadline for professional and social debate on the concept: 31 January 2016;

– the deadline for the preparation of the text: 30 November 2016.

The first meeting of the Codification Committee was held in June 2015, where – besides the schedule of legislation – an agreement was made on the necessity of background studies as bases for the draft regulation. After the preparation and debate of these studies, the concept of the private international law act was ready by the end of November. The main issues were discussed in workgroups formed of the members of the Codification Committee. The workgroups – in personal law, property and obligation law, family law, jurisdiction, recognition and enforcement, procedure and liquidation – formed expert opinions, which were discussed in front of the Codification Committee. After the professional and social debate, the Minister of Justice filed Draft Regulation No T/14237 on the private international law, which was adopted by the Parliament as the Act XXVII of 2017 on the Private International Law (hereinafter referred to as: Act). This new law, in accordance with the new Act CXXX of 2016 on Civil Procedure, is entering into force on 1 January 2018.

IV. The Structure of the New Private International Law Act

Multiple ideas were discussed regarding the structure of the new Act in the Codification Committee. According to one alternative solution, the structure of the law should reflect the process of application; therefore, the rules of jurisdiction shall be placed immediately after the introductory chapter; after these, the general and special parts, and finally the rules of procedures, recognition, and enforcement. Another solution suggested that every chapter should have a part of jurisdiction – applicable law – recognition and enforcement, as in legal relations.

15 Hungarian Journal No 72 of 2015.

Eventually, the latter option was discarded, as it would have made the structure of the law too complex. Finally, the Codification Committee decided to keep the present Codex's structure, amending it slightly in several places. The aim of the amendments was to follow the structure of the Civil Code: the rules of trusteeship were moved from the family law to the personal law chapter, the family law chapter comes after the personal law chapter, and the intellectual property chapter comes after the rights of ownership. On the other hand, some chapters that fall under the jurisdiction of the EU were removed from the law such as the employment law chapter.

Finally, after multiple modifications, the new Act consists of twelve chapters:

I. General Rules
II. Personal Law
III. Family Law
IV. Partnership, Registered Partnership
V. Property Law
VI. Law of Intellectual Property
VII. Obligation Law
VIII. Law of Succession
IX. Procedural Rules
X. Jurisdiction Rules
XI. Recognition and Enforcement of Foreign Judgments
XII. Concluding Provisions.

V. Conceptual Changes of the New Law

By the authorization of Article 81 of the Treaty on the Functioning of the European Union–TFEU, numerous EU regulations were adopted in the topic of private international law, which all have a priority to the domestic laws. In these cases, domestic laws are not allowed to regulate these topics; therefore, the new codex is not allowed to do that either. Therefore, the new law focuses on issues not regulated by either EU laws or international conventions. It is expressed in Chapter I. (General Rules): according to Section 2, the rules of the present laws shall only be applicable in cases which do not belong either to general, directly applicable EU jurisdiction or under an obligation of an international convention.

The unique attribute of private international law relations is that there is a relevant international element in the cases, which connects to two or more legal systems; therefore, it is up to the conflict-of-law rules to decide which national law shall be applied. The answer of private international law is the so-called 'indirect' application of law, which uses connecting factors to point out the applicable law. This rule is value-neutral by following an automatism, strictly

pointing out the applicable law. This strict system though is without regard to the individual interests of the parties, to the fact that in some cases the application of another law would result in a fairer resolution, and to the interests of the weaker party. The old Codex, in concordance with the traditional private international law point of view, followed this strict approach. From the second half of the 20th century, private international relations became more and more complicated and complex; therefore, a legal relation can be affected by many different legal systems; so, one could often feel that the strict rules result in an unfair resolution.

The EU law gradually phased out this strict point of view and introduced a more flexible one: by giving more opportunity to the autonomy of the parties (the freedom to choose applicable law), by the protection of the weaker party (mandatory rules, special rules of jurisdiction), and by more flexible judicial consideration (the principle of the closest link).

The new Hungarian private international law Act also follows these winds of change and is more flexible in contrast to the old, strict regulation by giving more freedom to the parties to choose applicable law within the frame of their agreement and also by giving the possibility of a more flexible judicial consideration. This modern approach – the dilution of rules pointing to only one applicable law – is an integral part of the new law.

In the following, the main amendments of the general and special parts are presented with focus to those rules which were not covered by the previous Codex.

V. General Part

In Chapter I (General), the effect of the law, the interpreting clauses, the classification, the renvoi, the rules applicable to states with multiple legal systems, the rules of application of foreign law, the choice of law, the escape clause, the general auxiliary rules, the public policy clause, the overriding mandatory rules, and the rules of change of connecting factors are placed.

The new Act begins with the interpreting clauses, a chapter which was completely missing from the previous Codex. Similarly to the structure of EU regulations, the Hungarian legislation placed the definitions of main principles in the first part of the law, which are used and referred to later in the text. The new law uses three definitions in Section 3: how to interpret in the context of this law: the definition of the court, habitual residence, and residence.

The definition of the court includes every authority with jurisdiction for cases under the scope of the law.

Habitual residence is one of the most commonly used connecting factors both in EU regulations and in international conventions. However, neither EU regulations nor the HCCH conventions define it. The European Court of Justice

(hereinafter referred to as: ECJ) declared the deciding factors helping to define habitual residence in several cases. The new act defines habitual residence based on the rulings of the ECJ in order to help its application. According to Section 3 Point b) of the new Act, it is the centre of the person's livelihood, which is specified by taking the facts and the intentions of the person into consideration. The new law intends to give an important connecting role to the definition of habitual residence: by applying it in personal law, to the protection of individual rights, to family law, and to registered partnerships.

The new Act uses the definition of residence in concordance with the Brussels I and Brussels I A regulations, mainly in the frame of rules of jurisdiction in property cases. Residence means the place where the person actually lives, permanently or with the intention of settling down permanently.

The rule of characterization and renvoi has also changed (sections 4–5). In the process of characterization, the legal category in the frame of the legal system and, depending on it, the applicable connecting factor has to be decided for the given fact – for example, whether the usufruct of the surviving spouse on the property is a matrimonial property right or a matter of succession. The rules of renvoi have also changed substantially. The Codex generally accepted the partial renvoi. The new Act, however, only regards the renvoi as an exception while requiring both the back and forward referral and therefore accepting the whole renvoi.

The new Act also takes inter-territorial and interpersonal conflicts into account and regulates the issue in the chapter of states with multiple legal systems (Section 6). There are states where multiple legal systems are in parallel use, especially in federal states, where the separate territorial entities have their own legal system (for example, the USA or Canada) and in private international law cases, where the facts are connected to multiple territorial units, and so an inner collision may arise. Given that it is not a genuine collision in terms of private international law, the solution to the case is to apply the national conflict-of-laws rules of the affected state.

There are also states where multiple legal systems are applicable to different groups of people: this is the so-called interpersonal conflicts. It may happen in states applying religious laws (for example, Israel or Muslim states) that different laws are applicable to different persons in cases on personal status. In this case, the state's domestic conflict-of-laws rules decide which law shall be applied to the affected person. Whether the solution of the inter-territorial or interpersonal conflicts is not possible – for example, if there is no proper applicable rule – or if the result after the application of the rules would not be clear, the closest connection clause shall be applied, meaning that the applicable law is the law of the state which has the closest connection to the case.

The private international law continues to give the parties autonomy by letting them choose the applicable law with an agreement in most cases. While the

previous Codex also let the parties choose the applicable law only for contractual and non-contractual obligations, the novelty is that the new one regulates the choice of law in a separate clause in the general part, as a general rule (Section 9). The law emphasizes that the choice of law must be expressed – in concordance with the EU laws – and the parties must choose the applicable rules without leaving any doubt. The rules of the chosen law also apply to both the foundation and the validation of the contract but are also valid if they are in concordance with the rules of the law at the place of the choice. However, the autonomy of the parties cannot diminish the rights of third persons.

The general escape clause is regarded as a conceptual novelty (Section 10). This means that if the judge decides that the facts of the case have a closer connection with another law, then he has the possibility to apply that instead of the original applicable law. The parties also have the right to initiate this proceeding, in which case it is up to the judge to decide on the acceptance and application of the clause. The previous Codex only used the escape clause in the chapter of obligations as an auxiliary connecting factor, but then the Rome I and Rome II regulations expanded its scope to contracts as a whole.

Its regulation as a general clause gives more possibilities to the court to consider the application of the law that is properly connected to the case. The only limitation of the freedom of the judge guaranteed by the general escape clause is the choice of law by the parties; in this case, the general escape clause is not applicable. The issue of the general substitute law (Section 11) is also relevant, which applies the closest connection clause to a case when the law does not provide other rules.

The aim of the public policy (ordre public) clause (Section 12) in private international law is to protect the basic values of domestic law and to refuse the application of a foreign rule against national values. In this case, the domestic law (lex fori) shall be applied as substitute law. Therefore, the public policy is a general clause filled with content by the applier of the law. Although the previous Codex also dealt with public policy, the new one further helps the applier of law by clarifying the scope of those fundamental values which expressly contain the protection of constitutional principles as well.

Besides the public policy clause, overriding mandatory rules (Section 13) also provide a layer of protection. The aim of these substantive rules is the protection of public interest, and it is not allowed to deviate from them. These substantive rules serve fundamental political, economic, and social political interests of the relevant country; therefore, their application is mandatory not only in domestic relations but also in relations affected by foreign facts. The previous Codex did not cover the overriding mandatory rules; that is why the new one had to fill this gap, also in concordance with the EU law (mainly with Rome I and II regulations). The new law also gives the possibility to the court to also take another state's

overriding mandatory rules into consideration if they have a close connection to the case and the debated case could not be decided in their absence.

VI. Special Part

Chapter II is complex, and multiple aspects have an effect on its thematic structure:

– EU regulations give its primary frame due to the fact that the exclusivity of EU law does not allow domestic legislation in fields covered by them (contract law, non-contractual obligations, divorce, alimonies, succession);

– it partially follows the thematic structure of the previous Codex (for example, the rights of persons and legal persons are in the personal laws' chapter);

– it regulates many questions which were missing from the previous Codex (for example, the protection of national cultural assets in the frame of property law);

– certain previously regulated questions were moved to other chapters (state immunity was moved to the procedural chapter from the personal laws' chapter).

In the chapter regulating persons, the new Act contains separate rules to natural and juridical persons. Similarly to the previous Codex, a natural person's legal capacity, acting capacity, right to name-bearing, and personal rights are still based on personal law. Following Hungarian and continental legal traditions, the main connecting principle of personal law is still nationality. Nationality is easier to follow and define than the other main connection principle: a person's habitual residence. The latter is a fact which needs extensive verification; that is why it is important to decide the personal law based on nationality, as a public law connection. It needs to be highlighted that the new Act eases the rigidity of the previous one regarding the rules on persons with multiple nationalities: if such a person also has a Hungarian nationality, his personal law is still Hungarian law according to the main principle except that he has the closest connection to his other nationality. If neither connection is close, the habitual residence is applicable.

Due to its specific nature, the new Codex regulates the applicable law on name-bearing in a separate section as part of the personal laws' chapter. The question of name-bearing has remained in the domestic scope although the rulings of the ECJ[16] have to be taken into consideration. These rulings also declared the need of compliance between multiple nationality and the basic freedoms (such as the

16 Several cases on the right to surname-bearing shall be highlighted: C-168/91, Christos Konstantinidis v Stadt Altensteig. ECLI:EU:C:1993:115; C-148/02 Carlos Garcia Avello v Belgian State. ECLI:EU:C:2003:539; C-353/06. Stefan Grunkin and Dorothee Regina Paul. ECLI:EU:C:2008:559; C-208/09. Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien. ECLI:EU:C:2010:806; C-391/09.MalgožataRunevič-Vardyn. ECLI:EU:C:2011:291; C-438/14. Nabiel Peter Bogendorff von Wolffersdorff. ECLI:EU:C:2016:401.

freedom of movement of the European citizens). The law also contains a separate regulation to both birth surnames and marital surnames.

Another novelty is that trusteeship now has separate regulation from guardianship in the personal laws' chapter, not in family law – in concordance with the structure of the new Civil Code. A further novelty is that rules of supporting forms with no effect to acting capacity are now also regulated besides the already regulated trusteeship with the limitation on acting capacity. Both regulations are now more differentiated and up-to-date. The main connecting factor is also the habitual residence and a limited choice of law.

The scope of Rome II regulation does not cover relations arising from the breach of privacy and personality rights; therefore, these remain in the domestic legislative scope. The new Act placed these rules in the personal law chapter based on the relation's specific nature despite that the breach indisputably creates a non-contractual relationship. The main rule for applicable law is the injured party's habitual residence and in case of a juridical person the place of real seat (registered office). Only the injured party has the right of limited choice of law instead of applying the main rule. The choice is the following:

– the state at the centre of his interests,[17]
– the state of the habitual residence or real seat of the offender,
– Hungarian law.

The recodification of the family law chapter resulted in several substantial changes. The thematic structure of the family law chapter is determined by EU regulations on divorce and legal separation (Brussels IIb) and alimonies (Maintenance Regulation); therefore, the Hungarian legislator chose not to cover these topics. Accordingly, the family law chapter regulates marriage, marital property law, family status, adoption, guardianship, and parent–child relationship.

Another new element is that there is an instruction among general rules to the applier of law on the definition of common nationality and on the case where the partners have multiple common nationalities. In this case, the applicable law is based on the principle of the closest connection.

Regarding family law questions about children, the general principle of the new Act is to better promote the best interest of the child. In the proceedings of Hungarian courts and authorities, it makes the application of Hungarian law generally possible if it is better for the interest of the child, while it is also possible to apply a foreign law of close connection if it is in the interest of the child.

There is no substantial change in the rules of contracting a marriage, contrary to matrimonial property rights. As Hungary does not take part in the enhanced cooperation on matrimonial property regimes,[18] the applicable law is regulated

17 This connecting factor was developed by CJEU in case C-68/93. Fiona Shevill Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA.ECLI:EU:C:1995:61.

18 COUNCIL REGULATION (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation

separately (sections 28–30). The new Act offers limited choice of law to matrimonial property rights, which is also possible prior to marriage; therefore, it is an option for persons planning a marriage. The choices are the following:

– the law of the state of one party's nationality,

– the law of the state of one party's habitual residence,

– the law of the court (lex fori).

If the parties do not use the option of choice, the rules state the following order:

– law of the parties' common nationality,

– if the parties do not have common nationality, the law of their common habitual residence,

– if they do not have a common habitual residence, then their last known habitual residence,

– and finally, the law of the court (lex fori).

The rules of registered partnership did not change substantially, though the appearance of rules of *de facto* partnerships is a novelty of the new Act. The rules of *de facto* partnerships of persons of different sexes is currently exceptionally problematic. As there is no EU regulation of this topic, it is possible to constitute domestic rules. The national legislator constituted these rules based on the rules of marriage, and as a result the structure of connecting factors is similar both in terms of the choice of law and the applicable law in the absence of party choice.

The rules of property law keep the traditionally accepted and unified general rule on a European level, by which the place of the property (lex rei sitae) is the primary connecting factor. Moreover, there are several new rules on certain questions previously not covered:

– the rules of property connections (to components and accessories, the place of the main property is the applicable law, while in the case of other property connections the principle of closest connection),

– the definition of the scope of the property law statute (the contents of property law, the order, the rise, the existence, the termination, etc. of guarantees),

– the change of statute of movable property,

– the usucaption of movable property (this rule has not changed).

There is a limited choice of law for the parties in connection with legal effects of property law, although this choice is limited to movable property and only available in case of transfer of property ownership. The parties may agree in the choice of rules either in the original or in a separate contract. The parties only have a choice between the laws of two states: either the law of the original place

in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes OJ L 183, 8.7.2016, 1–29.

COUNCIL REGULATION (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships OJ L 183, 8.7.2016, 30–56.

of the movable property or the law of the place of the designation agreed in the contract. In case of the transfer of complete company assets, the parties may also choose the personal law of the predecessor.

Following the present international tendencies, the arrangement of unlawfully removed cultural objects is now also regulated. These conflict-of-laws rules are expressly detailed in the new Act, as the aim is to restore the original status (*in integrum restitutio*), which is an important national interest of every state. In concordance with the EU regulation on the return of cultural objects unlawfully removed from the territory of a Member State, Hungary harmonized its domestic law, although only with substantive rules;[19] therefore, the regulation of conflict-of-laws rules remained in national legislative power. Following this opportunity, the new Act introduced these rules. The biggest issue is that in most cases the unlawfully removed or stolen goods are sold abroad to a bona fide buyer, resulting in the change of the ownership status. This means that the third countries' more lenient laws are applicable instead of those of the country of origin. In these cases, the regulation offers the original owner (either state or individual) an advantage by giving him a limited choice of law by:

– either choosing the law of the original state, from where the goods were removed (*lex originis*)

– or choosing the law of the present location of the goods (*lex rei sitae*).

The topic of law of obligations is properly detailed in Rome I and II regulations; so, the new Act only regulates questions out of the scope of the EU rules as, for example, the applicable law on arbitration agreements and on contractual obligations in securities. In both cases, the primary principle is the parties' choice of law or, in its absence, the contract's original law is governing the applicable law of the arbitration agreement or – if the parties have agreed on the location of the arbitration, and the facts of the case are in closer connection with it – the law of the place of the procedure.

VII. Jurisdiction–Procedure–Recognition and Enforcement of Foreign Judgments

The structure of this chapter is different from the previous Codex, as it details questions on procedure and immunity firstly, followed by rules of jurisdiction, and finally the rules of recognition and enforcement.

19 Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Amending Regulation (EU) No 1024/2012 (Recast) OJ L 159, 28.5.2014, 1–10. 2001. The Hungarian legislator complied by amending the Act LXXX of 2001 on the Return of Illegally Exported Cultural Goods.

The first part of the chapter contains general procedural rules in connection with international legal disputes. As in other parts of the Act, the EU regulations have to be taken into consideration; so, the Hungarian legislator stayed in the given frames. The general part declares the application of Hungarian procedural rules in front of Hungarian courts and authorities as primordial, although the law may contain exceptions as, for example, in procedural legal assistance. The rules on legal assistance (Section 72), on temporary measures (which is a novelty) (Section 70), on delivery of documents (sections 73–77), and on verification (sections 78–81) are placed in this chapter.

Moreover, another novelty is that the rules of state immunity are placed at the end of the chapter (sections 82–87). The previous codex placed these rules in the jurisdiction chapter. The reason of the structural change according to the explanation of the law is the following:[20] the state immunity has a primarily public law nature; therefore, it is not covered by the EU's private international law's regulation on jurisdiction. It means that the Hungarian court must be with regard to both international and domestic laws. It should be emphasized that these rules are only applicable under the scope of the law – so, only in procedures about private international law relations of states. The national legislator amended the previous rules of state immunity based on the UN's immunity convention.[21] The definitions of the state (Section 82), the cases of waiver from immunity (paragraph 1 of Section 84), the exceptions from immunity (paragraph 1 of Section 84), and the rules of delivery to a foreign state (Section 87) are all in concordance with the convention.

Among the rules of jurisdiction, the law also contains general rules and special rules to the types of legal relations. General rules often cannot be connected to a single type of legal relation. Therefore, they have to be applied together with the governing special rules. On the one hand, the legislator took the EU's regulations into consideration in the drafting process of the rules of jurisdiction in order to help the national courts with a unified structure of rules (for example, the prioritization of habitual residence) in spite of different sources. On the other hand, the legislator tried to harmonize the rules of jurisdiction with the rules of the national civil procedure in order to ensure the convergence between different areas of private law (see the definition of property lawsuit).

A further novelty in the topic of jurisdiction is that the law lists different causes of jurisdiction for different types of legal relations, which is particularly obvious in cases of personal status and family relations (sections 102–108). In the latter areas, habitual residence has a priority over nationality, ensuring that the chosen court is as close as possible to the person or legal relation.

20 The Detailed Explanation of the Act on Private International Law 105.

21 United Nations Convention on Jurisdictional Immunities of States and Their Property. New York, 2 December 2004.

In the field of recognition and enforcement of foreign judgments, there is a substantial change. While previously the reciprocity with another state was one general requirement for recognition and enforcement, the new Act is going to require reciprocity only in property law cases; meanwhile, in every other area – such as in family law – the foreign decision is still going to be adoptable and enforceable regardless, if it complies with other guarantees or not.

IX. Brief Summary

As I stated in the introduction, the drafting and adoption of the new Private International Law Act is timelier than ever. The frames of the legislation were given by European and international sources, which had to be harmonized with the recent results of private law codification. Moreover, the existing private International Law directions/trends and social changes also had to be taken into consideration. We should wait a few years to see whether the new codex is successful in overcoming these new challenges, as the success of a new regulation is always measured by the feedback of its practical application.

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The Organization System of Judicial Execution in Hungary from the Early Days to 1871

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Abstract. This paper examines the process of the development of the organization system of Hungarian judicial execution up to its first overall regulation in law in 1871 (which represents the prefiguration of today's organization system). An indispensable element of the historical survey is the exploration of the earliest appearance of legal institution (in particular, of judicial execution and more specifically of the judicial officer). In accordance with that, the first part of the paper examines the procedural law of the period of the Roman Empire in more details. In the course of that, it is reasonable not to limit the survey to execution only because the key structures and still existing basic institutions of our present civil procedural law developed at that time in the period of the Roman Empire. When turning to the history of Hungarian legal regulation, first, we analyse the system of the Middle Ages and Early Modern Age; more specifically, the appearance of the institution of *pristaldus* ('poroszló' – bum-bailiff, or delegate judge) until its change in status, which occurred in the 12th century as well as the multifunctional scope of tasks of places of authentication (*loca credibilia*), which embraces execution too, the operation of these places, and the decrease of their significance in the Early Modern Age. Finally, we examine the judicial officers' system in the mirror of the legal regulation set up in 1871 (starting from the conditions of becoming a bailiff through rules of incompatibility to the fees of the judicial officers' procedure in the period).

Keywords: judicial execution, bailiff, pristaldus, Hungarian legal history

I. Antecedents of Modern Judicial Execution in Roman Law

In Roman legal proceedings, we can speak about three codes of procedure gradually replacing each other and for a certain period living side by side. The rules of procedure of civil law is the *legis actio* procedure; as a second option, lawsuit in front of the *praetor* was introduced with its formular procedure, and these

two existed at the same time up to 17 BC, when *lex Iulia iudiciorum privatorum* terminated *legis actio* procedures. The formular lawsuit was accompanied in the period of the Principate by the imperial lawsuit, i.e. *cognitio* (*extra ordinem*) as an extraordinary rule of procedure, which developed into the sole proceedings in the period of the Dominate.

In the imperial code of procedure that developed as extraordinary procedure (*cognitio extraordinaria*) besides the civil law and *praetor* code of procedure as ordinary procedure (*cognitio ordinaria*), it was possible to enforce claims that were not enforceable in the *praetor* lawsuit (e.g. estates in fee tail). The lawsuit was no longer split into two, and the trial by jury was replaced by trial by officials, and the institution of appeal (*appellatio*) evolved.[1]

In the imperial lawsuit, the sentence (*sententia*), by which the procedure was closed, had to be set in writing, in addition to oral rendition. The sentence could cover not only the amount of money but also the release of the property itself. The party losing the case did not pay lawsuit penalty as in the lawsuit in front of the *praetor* but law charges, which embraced the fees of the judge proceeding in the case, the representatives and lawyers in the lawsuit as well as the costs incurred in relation to the demonstration.[2] It was in the *cognitio* procedure where proper legal remedies, i.e. appeal (*appellatio*), were available for the first time, which had to be submitted orally upon delivery of the judgment or subsequently in writing. The appellate court could take account of new evidence in the new trial; it could decide on both legal and factual issues. The appellate system had two or, in certain cases, three levels. The judgment became final when the highest judicial forum (the emperor, or from 331, the *praefectus praetorio*) pronounced the sentence or if the option of appeal was not exercised.[3]

In the imperial law, execution could be universal (since the former rules of execution known from the praetor procedure were not abrogated) and could be (that was the genuine innovation of the imperial procedural law) singularis. In the imperial law – contrary to praetor procedure, where a separate action was required for starting the execution –, the official judge instituted the execution on the basis of the judgment-at-law (or the acknowledged debt) purely upon the obligee's request.[4]

The singularis execution, i.e. execution on specific property items/elements of property, had become general by the 3rd century AD. They were seized by sequestration (so-called *pignus in causa iudicati captum*)[5] and then were sold in open auctions. The amount received from the auction served to satisfy the

1 Nótári 2011. 113.
2 Nótári 2014. 114.
3 Nótári 2014. 114.
4 Kaser–Hackl 1996. 511.
5 Marton 1947. 44. §, Brósz–Pólay 1974. 125, Nótári 2014. 115.

obligee's/creditor's claim for property.[6] As the authority attachment was deemed as a kind of a pledge or pawn (pignus), the amount remaining after the creditor's claim had been satisfied due to the debtor.[7] For lack of a valid offer in the auction, the creditor acquired the ownership of the property.[8]

The rules of execution in the period of the Roman Empire already proceed on the basis of the principle of gradience. The amount deposited with the banker (argentarius) – on the analogy of stoppage of payment from bank account – can be directly subjected to execution.[9] For lack of such an amount, first, movables, then, immovable properties, and then the debtor's claims were executed.[10]

If the judgment ordered service in kind, i.e. release of the property, then the party winning the case could avail itself of authority's assistance for taking the property away. It is important to highlight that in this age it was already possible in execution procedure to force other behaviours set out in the judgment; in other words, if the judgment did not formulate any condemnation in cash, then it was possible to assert it too under the execution procedure. Universal, bankruptcy-like execution was carried out primarily in case of the debtor's total insolvency,[11] but the debtor's assets were subjected to auction in this case too not as a uniform mass of property but element by element.[12]

Following the judgment-at-law, the debtor had four months available for performing the terms set out in the judgment.[13] The execution was started upon the creditor's written application – the *actio iudicati* that appears in the sources was no longer an independent action serving to institute the execution but a kind of option for legal remedy, which provided possibility for the judge to control the legal basis and course of the execution.[14]

Iustinianus's law did not change basically the rules of execution of the period of the Roman Empire, i.e. in contrast with the system of execution of civil law and praetor's law that allowed action on one's own authority too, it was invariably based on the state's/authority's coercion.

Iustinianus extended *beneficium competentiae*, i.e. only the part from the debtor's assets above those necessary for their conditions of life could be foreclosed of the assets existing at the time of the execution. It was in the period of Iustinianus when *actio Pauliana* developed, which protected creditors from the debtor's fraudulent alienation of property, causing damage to them. Later on,

6 Kaser–Hackl 1996. 512.
7 Callistratus D. 42, 1, 31.
8 Ulpianus D. 42, 1, 15, 3; Antoninus Pius C. 8, 22, 2, 1.
9 Ulpianus D. 42, 1, 15 1.
10 Ulpianus D. 42, 1, 15, 2; 9, 2, 29, 7; Papinianus D. 42, 1, 40; Antoninus Pius C. 4, 15, 2.
11 Kaser–Hackl 1996. 623.
12 Inst. 3, 12 pr.
13 C. 7, 54, 2–3.
14 Kaser–Hackl 1996. 624.

actio Pauliana was extended to transactions of absorbing funds entered into with the debtor in good faith but causing damage to the creditors.[15]

The executor, the judicial officer appeared for the first time in the period of Iustinianus. His tasks included causing delivery of the property to the creditor by the authority's/armed forces' assistance (*manu militari*) if the judgment ordered release of the property.[16] In case of judgments ordering the payment of a sum of money, it was also the executor's task to seize the debtor's chattels (*pignoris capio*), carry out their forced sale, and the delivery of the so realized amount to the creditor.[17] The amount received was distributed in proportion to claims; however, so-called privileged claims (debt outstanding towards the state treasury, the costs of the execution procedure, the executor's fee, etc.) were given advantage.

Under the so-called *cessio bonorum*, the debtor was allowed to keep the properties absolutely necessary for subsistence;[18] in other words, the law of the period of the Roman Empire regulated the scope of property that could not be subjected to attachment.

With respect to personal execution, private captivity was replaced by state captivity, i.e. the state's coercion,[19] the strictness of which gradually increased from the 3rd century AD.[20]

II. Organization of Judicial Execution in Hungary in the Middle Ages and the Early Modern Age

László Komáromi makes it clear that in the early days of Hungarian written legal documents private parties set down their unilateral and multilateral transactions in a charter before the king or they were confirmed by the king's seal, which provided full-scope validity for them. This procedure, on the other hand, was not applied with respect to the legal acts of the common people; so, working out other institutions of authentic attestation became necessary.[21] The first such institution was the delegate judge ('poroszló'). Determination of their earliest scope of tasks and dating the appearance of their institution was prevented by serious hindrances because no written notices were made of their activity in the earliest period since their task was primarily to attest orally to the legal acts concluded in their presence.[22] The delegate judge is referred to by sources in Latin as *pristaldus* – the

15 Brósz–Pólay 1974. 125; Nótári 2014. 115.
16 Ulp. D. 36, 4, 5, 27; 43, 4, 3 pr.; Nov. 18, 10; C. 7, 65, 5, 1.
17 C. 1, 12, 6, 4; Nov. 53, 4, 1; C. 8, 21, 1.
18 Kaser–Hackl 1996. 630.
19 C. 7, 71, 8. pr.
20 Kaser–Hackl, 1996. 625.
21 Komáromi 2007. 168.
22 Komáromi 2007. 168.

phrase is of southern Slavic origin (*pristav*), from which the Latin word *pristaldus* (and the Hungarian word 'poroszló') has developed.[23] Etymologically, the term *pristaldus* carries the meaning 'to be present', 'to stand by it'.[24] In those days, pristaldus/delegate judge meant a court person who, on the one hand, acted as the office assistant of the judge, i.e. as a kind of 'permanent court employee', and, on the other hand, proceeded in specific cases as a person assigned to this task.[25] (The *pristaldus*, who was appointed by the court, acted as the mediator of the parties; i.e. after the parties had been heard, he pleaded their claims – somehow similarly to the *Vorsprecher* known from ancient German law.)[26]

In terms of the institution of execution, as appropriate, their first role can be considered more important since as the judge's assistant they summoned the parties, accompanied them to the process of administration of an oath and executed the judgments, which is clear also from the fact that the name of the *pristaldus* was recorded in the letter of judgment too.[27] In the course of the execution, they entered the party winning the case in the possession of the disputed land and, if necessary, designated the borders of the lot.[28] The role of the delegate judge was thus inseparably connected with the judge's task and with the judgment, as it is shown also by the sentence-like formulation of the charter cited by László Solymosi: *nullum iudicium sine pristaldo*, i.e. naming the delegate judge is an essential part of the adjudication.[29] This is also supported by the fact that the *pristaldus* was appointed by the judge immediately at the beginning of the procedure for the entire duration of the action at law.[30] The law set forth the same requirements towards the *pristaldus* as towards witnesses, where an essential element was that the *pristaldus* had to have a landed estate to enable him to take responsibility for failures or irregularities committed in the course of his procedure[31] – i.e. the institution of the 'executor's liability/responsibility' appeared already in this early period.

Already the first texts of laws of the Age of the Kings of the House of Árpád make several references to *pristaldus* while providing information on their various tasks. For example, in accordance with Chapter 40 of the *decretum* of (Saint) László I, the task of the bishop's delegate judge in the course of collecting the tithe is to survey the property/produce of the person obliged to pay the tithe

23 Solymosi 2002. 523.
24 Komáromi 2007. 168, Zlinszky 1976. 10.
25 Juhász 1930. 258.
26 Zlinszky 1976. 8. Vértesi Lázár: Az ügyvédek hivatástörténetének áttekintése a kezdetektől a 20. század elejéig. *Jura* 2003/2. 179. (172–183).
27 Kálmán Juhász: A marosmenti hiteles helyek legrégibb emlékei. 258.
28 Solymosi 2002. 523.
29 Solymosi 2002. 523.
30 Kálmán Juhász: A marosmenti hiteles helyek legrégibb emlékei. 258.
31 Solymosi 2002. 523.

and collect the tithe[32] – thus, their task here is to execute tax liability. László I's *decreta* make reference to the delegate judge at other points in the text too. Foreigners may enter into a sale and purchase contract in the presence of the king's delegate judge[33] – so, their task here is to act as transaction witnesses, i.e. to ensure public attestation. Notification or charge on any theft committed in a nobleman's courtyard must be made to the owner/operator or delegate judge of the mansion house[34] – in this case, the *pristaldus* is again the guard of demonstration of evidence/authenticity. Two-thirds of goods/properties roaming about (which are collected by the king's stableman and by the overseer (*ispán*) of the county) are due to the delegate judge and one-third of it to the overseer[35] – thus, the law also provided for the remuneration of the delegate judge. King Kálmán Könyves's *decretum* stipulates that if the king's delegate judge is beaten up by somebody owing to the judgment/the property awarded, the fighting person should be sent to the overseer of the county and the provisions set out in the sentence should be executed[36] – accordingly, in the course of execution procedures (if the issue required statutory regulation) defiance, unlawful violence was certainly performed by the obligor in several cases. It was also prescribed by King Kálmán that the provisions prescribed for witnesses had to be applied to delegate judges too[37] – i.e. the *pristaldus* may be only a person who has a landed estate so that he could reimburse the 'damage caused in the course of the administrative act'. If the delegate judge proceeded in the case unlawfully, he was liable for it together with the judge who gave instruction to do so[38] – so, liability might have been joint and several; or, if the judge caused any damage through the delegate judge, he was liable for it by his assets[39] – this clearly indicates the fact that owing to the referred joint and several liability the *pristaldus* was also liable with his own property. The captured thief was led to the judge by the *pristaldus*[40] – in the absence of private and criminal law procedure being separated, which characterized the law and order in the Middle Ages and the Early Modern Age, the *pristaldus* was given a role also in criminal procedure.

At the same time, the system provided possibility for numerous abuses since during the period while the *pristaldus* took part in the action at law (and – as his role was not limited to execution – they were appointed at the beginning of the lawsuit) the party to the action at law was obliged to maintain them. For this

32 Decr. Ladislai I. liber I. cap. 40.
33 Decr. Ladislai I. liber II. cap. 18.
34 Decr. Ladislai I. liber III. cap. 12.
35 Decr. Ladislai I. liber III. cap. 12.
36 Decr. Colomani liber I. cap. 28.
37 Decr. Colomani liber I. cap. 29.
38 Decr. Colomani liber I. cap. 30.
39 Decr. Colomani liber I. cap. 31.
40 Decr. Colomani liber I. cap. 51.

reason, Article 22 of Act of 1231, which renewed the Golden Bull of Hungary (1222) owing to 'false delegate judges' (*falsi pristaldi*), prohibited that a party should keep the delegate judge at his place for a period longer than one or two years.[41] Simultaneously with (and most probably owing to) the loss of public faith in the *pristaldus* and oral evidence, the requirement of written form in procedural law started to gain more ground. Article 22 of the above-mentioned Act of 1231 stipulated that the summons and testimonies of delegate judges (*citationes vel testimonia*) should be regarded as valid only when confirmed by the *testimonium* of the county bishop or chapter (or convent).[42]

The phrase analysed above is inseparable from the development and operation of *loca credibilia* (or *loci credibiles*), places of authentication. The activity of places of authentication covered the powers and scope of responsibilities of several bodies that operate today since it carried out notarial, investigatory, and lawyer's duties at the same time.[43] Once the *pristaldus* was no longer allowed to proceed in the case independently, the presence of the chapter or convent was required for the operation. On the basis of the *testimonium* of the ecclesiastical person appointed to proceed besides the delegate judge, the church institution (originally the cathedral chapter and collegiate chapter and then other orders of monks, so the Benedictine, the Premonstratensian and Johannitan convent) issued a charter on the *pristaldus* procedure; for example, in case of border disputes, borders were designated as follows: the delegate judge carried out the designation in the presence of the agent of the competent place of authentication, of which the place of authentication issued a charter.[44] Now the judge usually forwarded a request to the place of authentication, calling it to assist and requesting information on the measures taken; the agent of the place of authentication accompanying the delegate judge was present at the summons, the demonstration of evidence, and execution. The church body issued a charter with a seal affixed thereto on the relevant act of procedure, which recorded the name of the delegate judge too.[45]

Once the activity of the place of authentication had spread, the institution of delegate judge continued to exist in the king's man, *homo regius*, which meant that in the act of procedure the *homo regius*, *homo palatinalis* (in Transylvania, the so-called *homo voyvodae*) sent by the king (palatine) had to be present.[46] The *homo regius/palatinalis* reported on his measures taken in the case to the agent of the place of authentication appointed to act beside him.[47]

41 Komáromi 2007. 168.
42 Komáromi 2007. 168.
43 Kőfalvi, 2008. 12. skk.
44 Solymosi 2002. 527.
45 Solymosi 2002. 527, Juhász 1930. 261.
46 Juhász 1930. 261.
47 Komáromi 2007. 169.

In accordance with the regulations of Werbőczy's Tripartitum (*Tripartitum opus iuris consuetudinarii inclyti regni Hungariae*), entry in possession of goods (real estates), land inspection, the so-called warning, and other judicial measures had to be implemented with the *homo regius*/*homo palatinus* and with the assistance, *testimonium* of the competent place of authentication (chapter or convent) (the chapter of Fehérvár, Buda, and Bosnia and the convent of Fehérvár had national competence).[48] Concerning the status of the *homo regius* and the agent of the place of authentication, it is worth highlighting that the Tripartitum classifies the cases of violence committed against the members of the court and the persons that implemented execution as cases of treason.[49] The wording of the Tripartitum seems to reveal that the law separates two phases of execution from each other: the act of ordering execution and the acts of execution themselves, emphasizing that implementation of the execution is conditional upon *res iudicata*, i.e. judgment on condemnation having become legally binding; the separation of these two phases of execution should not be considered insignificant in the history of the legal institution of execution.

As a new institution, the independent adjudicative power of noble magistrates appeared in the 16th century. Legislative Act 40 of 1588 pronounced that noble magistrates may conduct execution independently in so-called 'clean debts' (which may be interpreted as undisputed claims or *res iudicata*) up to the amount of 20 forints (in case of appeal, the county court of justice passed the judgment-at-law).[50]

Legislative Act LXV of 1635 enacted during the reign of Ferdinand II is worth mentioning, the title of which indicates that concerning the rules of execution numerous contradictions and unlawful violence hindering the process of execution appeared: 'judgments adopted by a judge lawfully must be implemented by execution so that contrary orders and private power should not prevent them'. The legislative act – without formulating any particular measures – simply declares that judgments-at-law may not be prevented either by 'private power' or by the parties 'finding faults'.[51]

The cited legislative act apparently did not bring any solution to the problems occurred because in 1638 the legislative act on extending the cases of abuse of power describes a particular problem: in the course of execution, the estimation of the property subjected to execution is not carried out in accordance with its real value – i.e. pursuant to the provisions of the law it shall be carried out 'not on the grounds of the claimant's oath but on the basis of the sum conscientiously charged by the county judges'.[52] In this legislative act, further provisions can be

48 Tripartitum liber II. cap. 21.
49 Tripartitum pars I. tit. 14. § 13.
50 Act. XL of 1588.
51 Act LXV of 1635.
52 Act XXVII of 1638. Art. 2.

read: if the deputy-lieutenant (*vice-ispán*) is unable to cause to carry through the execution of the judgement-at-law, then the Lord-Lieutenant (*főispán*) shall arrange for it under penalty of loss of office.[53] So, this provision brought a new aspect in a certain sense in the system of institution of execution since eventually it delegated remedying unsuccessfulness of execution procedures at a lower level to the Lord-Lieutenant.

In order to enforce executions prevented by arbitrary measures, legislative Act XLIV of 1659 – entitled 'Bailiffs Who Straighten out Disturbed Execution of Lawful Judgments Will Be Appointed' – ordered and repeated that if deputy-lieutenants should be insufficient for that, then lord-lieutenants and, in case of their insufficiency, the palatine (*nádorispán*) and, in case of his incapacity, the judge royal (*országbíró*) should arrange for it.[54]

Legislative Act XXXI of 1681 has the following title, which indicates that the outlined issues were invariably unsolved: 'Punishment and Proceedings Shall Be Ordered against Persons Who Disturb and Do Not Allow Judicial Executions and Persons Who Recapture Goods Sequestrated by a Judge'.[55] On the one hand, it orders that 50 marks 'promptly executable compensation for life punishment' (i.e. a kind of on-site fine) shall be imposed on the persons who oppose or hinder the execution, and, on the other hand, it encumbers them with the costs of the force of arms employed by the deputy-lieutenant or Lord-Lieutenant ordering the execution and obliges them to reimburse the damage caused to the property subjected to execution.[56]

The abuses meant to be eliminated by law-making efforts several times in the course of the 17th century survived in the 18th century, which can be shown by purely listing various acts of the age. In order to strengthen the protection of creditors, legislative Act CVII of 1723 ('On Registration and Mortgaging (*Intabulatio*) to Be Performed in Counties and Towns') orders that records of so-called mortgage books shall be kept, which was later on confirmed and made more accurate by Legislative Act XXI of 1840 ('On Mortgaging Debt Claims in Order to Secure Priority'). Legislative Act XXXII of 1723 ('On Setting Deadlines, Appearance of Litigators, Shortness of Arguments, and Execution of Judgments') confirms the effect of the cited Legislative Act XXXI of 1659 with respect to the execution procedures.

The operation of the place of authentication (chapter or convent) was regulated, and thereby the efficiency of execution was meant to be strengthened by Legislative Act XXXIX of 1723 ('On Chapters and Convents and Their Office and the Personnel to Be Employed by Them'), which quite instructively contained the oath to be taken by persons of places of authentication, which is worth

53 Act XXVII of 1638. Art. 3.
54 Act XLIV of 1659.
55 Act XXXI of 1681.
56 Act XXXI of 1681. Art. 1.

quoting: '...I swear to the living God .... that in all executions and in every thing that pertains to my chapter's or convent's office and to the chapter's or convent's authentic evidence, without taking account of any person, that is to say of rich and poor, and by laying aside any begging, award, favour, affection, fear, hatred, and search for pleasure and by making them depart, in the duties to be fulfilled in the chapter or convent just as outside the chapter or convent, in the provinces I shall carry out loyal execution and report...'[57]

A similar purpose was set by Legislative Act XL of 1723 ('On Evidence of Chapters and Convents to Be Sent for Execution'), which intends to confirm competence of places of authentication in order to 'prevent certain inhabitants of the country from keeping to flee treacherously and harmfully to more remote chapters and convents'.[58]

Action was taken against hindrance of execution procedures also by three legislative acts put into force in 1729: Legislative Act XXXIII of 1729 ('On Repelling'), Legislative Act XXXIV of 1729 ('On Opposing to Judge's Sentences and Recapturing Goods Subjected by Judge to Execution'), and Legislative Act XLI of 1729 ('On the Action at Law in Progress at a Lord's Court'). Frequent and repeated regulation allows one to draw the conclusion that the elimination of abuses and defects must have been far from being effective.

From the second half of the 18th century, the significance of places of authentication highly decreased since required written form was more and more generally employed in the practice of counties, towns, and notaries public; owing to that – as pointed out by Tamás Kőfalvi, too –, places of authentication became bodies to keep charters safe and issue authentic copies of the documents kept safe by them.[59] Their significance in terms of law of execution terminated by the 19th century and Legislative Act XXXV of 1874 deprived them of their other functions too: 'places of authentication may continue to issue authentic office copy of the deeds under their care in the future; however, they shall be no longer authorized to issue and keep safe new authentic documents'.[60]

III. Setting up the System of the Organization of Judicial Officers in 1871

Legislative Act LI of 1871 on Judicial Officers (i.e. setting up the organization of judicial officers) was sanctified by the ruler on 16 December 1871 and was

57 Act XXXIX of 1723.
58 Act XL of 1723.
59 Kőfalvi 2008. 25.
60 Act XXXV of 1874. Art. 214.

promulgated in the House of Representatives on 20 December 1871 and in the Upper House on the day following it.[61]

In accordance with the provisions of the law, the Minister of Justice shall assign judicial officers in a 'necessary number' to the court of justices proceeding in first instance and district courts.[62] The law did not specify and did not detail it in the explanatory provisions what should be meant by the phrase 'necessary number'; therefore, most probably, this number was defined in terms of the demand identified by practice; in other words, by the requirement of proper and efficient performance of judicial officers' duties. This provision seems to correspond with the regulation of the law in effect, which allows the appointment of several bailiffs to the same seat or to the same district court.[63]

Appointment of judicial officers was made subject by the law to satisfying four conjunctive conditions that the applicant had to comply with.

Accordingly, the first condition was for the applicant to have turned 24[64] – i.e. legal age, which started at this age in accordance with the regulations of the period. This provision – although our effective law does not tie any legal consequences to age 24 with respect to capacity to act under the law –, purely in terms of the age limit, corresponds with the statutory provision, which stipulates that turning 24 is a prerequisite of becoming an independent judicial officer even today.[65]

The second condition set out in law was 'unimpeachable character'.[66] Logically, this can be connected with several categories and prerequisites of appointment applied today: on the one hand, with the declaration of having a criminal record,[67] criminal law liability by court by final order,[68] and with the category of being banned from practising any profession,[69] while, on the other hand, with the concept of being unworthy of public trust owing to way of life or behaviour.[70]

As a third condition, the law required that the person to be appointed must have right of disposal over his/her assets.[71] On the basis of our present concepts, this simply meant that the relevant person could not be subject to the scope of guardianship affecting (fully or partly limiting) capacity to act under the law or of supported decision-making.[72]

61 Kormos 2002. 167.
62 Act LI of 1871. Art. 1.
63 Act LIII of 1994. Art. 232. (2).
64 Act LI of 1871. Art. 2. a).
65 Act LIII of 1994. Art. 233. (1) c).
66 Act LI of 1871. Art. 2. a).
67 Act LIII of 1994. Art. 233. (2) a).
68 Act LIII of 1994. Art. 233. (2) b).
69 Act LIII of 1994. Art. 233. (2) d).
70 Act LIII of 1994. Art. 233. (2) g).
71 Act LI of 1871. Art. 2. a).
72 Act LIII of 1994. Art. 233. (2) i).

As the fourth condition, beyond lack of grounds for exclusion of general nature, the law stipulated a professional requirement for the appointment of judicial officers: to pass the bar examination with 'good success',[73] which in terms of today's provisions may be related to a law degree and bailiff's examination.[74] The examination prescribed by law, which consisted of written and oral parts, could be taken before courts of justice proceeding in first instance. The board of examiners was composed of a chairman and two judges as members.[75] The material of the oral examination was made up by the applicable law (i.e. Legislative Act LI of 1871) and the 'instruction to be issued on the grounds thereof', i.e. its 'implementing decree' as well as the provisions of other laws that were in harmony with execution, the bailiff's operation. The written examination meant the 'judgement of the applicant's capacity to formulate' – the law specifically pointed out that this is justified by the 'accounting and written' tasks connected with the bailiff's activity.[76] The law set forth the option of exemption from examination too. In accordance with that, no examination had to be taken by persons who 'have competencies determined in Section 6 and Section 7 of Act IV of 1869 on the Judge's Power'.[77] The relevant provisions of the law stipulating the conditions of appointment of judges, on the one hand, set forth personal criteria (turning 26, unimpeachable character, lack of bankruptcy proceedings and guardianship, etc.)[78] and, on the other hand, prescribed qualification in theory and practice.[79] By this, as appropriate, a law degree had to be meant, which could be certified, on the one hand, by a general practice lawyer's examination[80] and, on the other hand, by legal studies completed at a domestic or foreign institute and three years' legal practice following it (the first year had to be spent at a court and the two years following it at a court other than that or beside an attorney-at-law), which was concluded by a successful judge's examination.[81] In other words, applicants who had a certificate of attorney's or judge's (bar) examination were exempted from the judicial officer's examination.

With respect to judicial officers, the law stipulates other grounds, too, for exclusion (using today's term: grounds for incompatibility): in accordance with that, a judicial officer may not fulfil any office and may not pursue any economic activity (using the term employed by the law: any 'business') and any occupation that might hinder them in the 'exact and loyal performance' of their

73 Act LI of 1871. Art. 2. b).
74 Act LIII of 1994. Art. (1) e)–f).
75 Act LI of 1871. Art. 3.
76 Act LI of 1871. Art. 3.
77 Act LI of 1871. Art. 3.
78 Act IV of 1869. Art. 6. a)–d).
79 Act IV of 1869. Art. 6. e).
80 Act IV of 1869. Art. 7. (1).
81 Act IV of 1869. Art. 7. (2).

judicial officer's profession.[82] This provision of the law is clearly a prefiguration of today's incompatibility rules that regulate judicial officers' other wage-earning activity, stating that solely scientific, academic, artistic, literary, educator's, inventor's, and sports activities are compatible with it as wage-earning activity,[83] and several economic and legal activities are excluded (among others, executive officer's position, membership in a supervisory board undertaken in a business association, and any enterprise activity carried out personally or with unlimited liability;[84] real estate and loan mediation;[85] and membership in a board of arbitration[86]).

As appropriate, not in connection with the appointment of bailiffs but with regard to the particular case, the law formulated grounds for incompatibility too. Judicial officers may not proceed in cases in which they themselves, their spouse, fiancé (/fiancée), a person under their guardianship, a person under their wardship, their lineal kin or collateral kin up to second degree of consanguinity, and persons who are their relatives by marriage in first degree are interested. They were obliged to notify these grounds to the competent court within 24 hours from receipt of the demand.[87]

In accordance with the provisions of law, within 30 days from appointment, the judicial officer had to take an oath before the chairman of the court of justice the territory of which he was assigned to and was obliged to start his activity immediately after the administration of the oath.[88] (The law determined this 30 days' deadline under penalty of forfeiture of right and loss of office because if within 30 days the appointed bailiff did not take an oath and did not start his operation, then this failure was deemed as a resignation. The bailiff could exculpate himself from the failure only by certifying 'hindrances beyond control',[89] which formulation allows one to draw the conclusion that the cause had to reach the level of force majeure, i.e. inevitable act of God.) The provision applying to the deadline for taking an oath corresponds with the effective rule which stipulates that independent judicial officers must take an oath before the chairman of the department within one month after they were appointed.[90]

The law does not specifically address the question whether the judicial officer was independent or was an 'employee' (using this not too fortunate term, which, as we shall see, corresponded with the terminology of the statutory provision)

82 Act LI of 1871. Art. 5.
83 Act LIII of 1994. Art. 227. (1).
84 Act LIII of 1994. Art. 227. (2) a).
85 Act LIII of 1994. Art. 227. (2) b).
86 Act LIII of 1994. Art. 227. (2) c).
87 Act LI of 1871. Art. 17.
88 Act LI of 1871. Art. 5.
89 Act LI of 1871. Art. 5.
90 Act LIII of 1994. Art. 238. (1).

of the court/court of justice; however, the wording of specific provisions gives a clear answer to that. The passage on appointment reads: 'judicial officers shall be employed for all courts of justice of first instance and district courts',[91] and the provision applicable to the seal states that 'it contains the specification of the court where the relevant person is employed';[92] furthermore, the stipulation set out regarding completion of the act of execution reads: 'he shall submit his report to the court where he is employed'.[93] The wordings used with respect to right of supervision 'The right of direct supervision over judicial officers employed at the seat of the court of justice shall be due to the chairman of the court of justice' and concerning disciplinary powers 'it shall be exercised by the disciplinary court of first instance on the territory of which they are employed'[94] leave no doubt that the employer of judicial officers was the court/court of justice. In other words, assignment to court/court of justice did not cover purely competence – so, it was not by chance that the attribute 'independent' appears nowhere in the text of the law regarding judicial officers since they were not independent in this sense.

The law contains an interesting provision which states that judicial officers were obliged to live as habitual residents in the place where their appointment assigned them to.[95] The effective law, as a matter of fact, does not set forth any provision of this sense, but under the conditions/possibilities of infrastructure and transport of the period this was by all means reasonable in the 19th century.

Judicial officers had an official seal, which was granted to them by the chairman of the court of justice following administration of the oath and after payment of its price. The seal showed the arms of Hungary and the notice 'judicial officer' as legend as well as the specification of the court where the relevant bailiff belonged to.[96] Our effective law does not provide specifically for the issue of the seal but stipulates the necessity of affixing the seal at several points, as for example with regard to the foreclosure of movable properties kept safe in a strongbox[97] and attachment,[98] which clearly indicates judicial officers' right to independent use of the seal.

The law makes not only execution but also service of documents the task of judicial officers.[99] This might seem to be a significant difference compared to today's regulation, as it is underlined also by Erzsébet Kormos,[100] because in accordance with the effective Code of Civil Procedure service by bailiff may

91 Act LI of 1871. Art. 1.
92 Act LI of 1871. Art. 7.
93 Act LI of 1871. Art. 14.
94 Act. LI of 1871. Art. 20.
95 Act LI of 1871. Art. 11.
96 Act LI of 1871. Art. 7.
97 Act LIII of 1994. Art. 103/C. (1).
98 Act LIII of 1994. Art. 105. (1)–(2).
99 Act LI of 1871. Art. 12.
100 Kormos 2002. 186.

be carried out only in particular cases specifically named in law and upon the petition and at the expense of the concerned party.[101] Quite interestingly, the law distinguishes service at the seat of the court and of the judicial officer from service performed outside them – and this holds in case of service in actions at law and in extrajudicial proceedings too. Service at the seat shall be the task of the judicial officer, while outside of it only if service in another manner could be performed with greater cost or upon the request and at the expense of the concerned party.[102] In other words, in view of the latter case, the 19th-century regulation can be related to the effective statutory provision.

As a general rule, acts of execution were carried out by the judicial officer except for (to use the words of the law) 'more important cases', when it was the task of one of the members of the court.[103] It should be added that at the same time the law does not determine more accurately what such 'more important cases' might have been, i.e. most probably decision on this issue fell within the powers of the judge.

The costs of execution were determined by the judicial officer.[104] They were obliged to charge them in a record and notify them to the court, which carried out the assessment thereof.[105] (Similarly, the court adopted decisions also with respect to ownership and priority issues that arose in the course of the execution procedure.)[106]

After completion of the act of execution, the judicial officer was obliged to make a report to the court/court of justice within 48 hours and had to hand over to the court the amounts of money and movables seized during the execution if it was not possible to hand them over to the party requesting the execution or its authorized representative. In case of failure to fulfil this obligation, a penalty up to the amount of 100 forints and, in case of repeated default, loss of office could be imposed on them.[107]

Judicial officers were obliged to take measures 'promptly' with respect to both service and execution tasks; consequently, as it is emphasized by the law, they were not allowed to postpone them owing to failure to pay the fee in advance.[108] On the other hand, the law allows an exception to this general rule – on the basis of the seat. If the judicial officer had to carry out the relevant execution or service task outside his seat, then, with respect to his per diem allowance and travel

101 Act CXXX of 2016. Art. 141.
102 Act LI of 1871. Art. 13.
103 Act LI of 1871. Art. 14.
104 Kormos 2002. 186.
105 Act LI of 1871. Art. 14.
106 Act LI of 1871. Art. 14.
107 Act LI of 1871. Art. 14.
108 Act LI of 1871. Art. 15.

expenses,[109] he was entitled to claim payment of the allowance and the expense in advance.[110] (The judicial officer was obliged to give a receipt of the amount paid either as a fee or as advance by the party requesting the execution.)[111]

The law regulated the right of supervision over judicial officers as follows. The right of supervision over judicial officers operating at the seat of the court of justice was exercised by the chairman of the court of justice and over judicial officers operating beside district courts by the district judge, who was obliged to report to the chairman of the court of justice. The chairman of the court of justice and the district judges verified the judicial officers' official proceedings, were obliged to examine the records taken and official documents made by them, and obtain information about exact and lawful fulfilment of their tasks and possible delays and their causes. The investigation had to be carried out at least on a quarterly basis.[112] The task of the chairman of the court of justice and the district judge, however, covered not only the revision of the judicial officer. If a judicial officer resigned, died, was transferred to another position, was suspended, or moved out of his office, he was obliged to hand over his seal, book, and all official documents to the chairman of the court of justice or the district judge – the latter forwarded them to the chairman of the court of justice within 24 hours –, and they were obliged to enter the fact and date of receipt thereof under the last current number of the bailiff's office book and sign it.[113]

The scope of the act on the judge's liability – i.e. Legislative Act VIII of 1871 on the Liability of Judges and Court Officials – was extended to judicial officers too.[114] The right of supervision over judicial officers was exercised by the disciplinary court of the court of justice of first instance on the territory of which they operated; the disciplinary penalty that could be imposed upon them was maximized in 300 forints by the law.[115]

Judicial officers were entitled to procedural fee, per diem allowance, and travel expense;[116] the latter two fees had to be paid in advance by the party requesting the execution or by the person in whose interest the proceedings were ordered by the court.[117] Judicial officers were bound by obligation to settle accounts with respect to the advance received against a receipt[118] and by obligation to return the remaining amount.[119] The law sets forth procedural fees in the following manner: with respect

109 Act LI of 1871. Art. 21. b)–c).
110 Act LI of 1871. Art. 15.
111 Act LI of 1871. Art. 15.
112 Act LI of 1871. Art. 18.
113 Act LI of 1871. Art. 19.
114 Kormos 2002. 186.
115 Act LI of 1871. Art. 20.
116 Act LI of 1871. Art. 21. a)–c).
117 Act LI of 1871. Art. 22.
118 Act LI of 1871. Art. 15.
119 Act LI of 1871. Art. 23.

to service, the procedural fee for service of 'first order adopted on the claim' was 30 pennies (*krajcár*) and 20 pennies in the case of service of further orders. With respect to acts of execution not exceeding one day (foreclosure, list of items, auction, or making an inventory): if the estimated value of the seized/listed assets was below 300 forints, the procedural fee was 1; in the case of assets with an estimated value from 300 to 1,000 forints, it was 2; in the case of assets with estimated value over 1,000 forints, it was 3 forints. If the duration of the act of execution is more than one day, then the fee will rise per half a day proportionately.[120] If the act of execution is carried out at the seat of the court, the judicial officer shall be entitled – over the procedural fee – to 2 forints per diem allowance.[121] With respect to travel expenses, the law orders application of court administration rules.[122]

The schedule of fees precisely set forth by the law was presumably not always applied in reality, as it is shown by the speech of Kornél Emmer too, which is quoted also by István Vida[123] and Erzsébet Kormos:[124]

> There were endless complaints raised against the, unfortunately, quite human carriers and manifestations of the lawmaker's idea resting in the institution… righteously or unlawfully the institution had to be considered almost as a national calamity by the general public searching for rights ... Inertness, ignorance, proneness to hack writing, jacking up prices – these were the main columns under which complaints against bailiffs received at the ministry of justice and the supervisory authority could be registered, which were, however, accompanied by more serious items.[125]

Conclusions

This paper examined the process of the development of the organization system of Hungarian judicial execution, the historical development of the institution system up to its first overall regulation in law in 1871.

In the course of the historical analysis, we found and established the following:

– the prefiguration of civil law proceedings can be found in Roman law in view of the fact that the development of law in the period of the Roman Empire worked out the uniform legal procedure conducted before an official judge, based on required written form and providing the option of ordinary and extraordinary legal remedy;

120 Act LI of 1871. Art. 24.
121 Act LI of 1871. Art. 25.
122 Act LI of 1871. Art. 26.
123 Vida 1978. 83.
124 Koromos 2002. 194.
125 Emmer 1911. 396–397.

– on the basis of the above, we could establish that the judicial officer (*executor*) as an independent institution appeared for the first time also in Rome in the law of the period of the Roman Empire – i.e. the roots of this institution (just as in the case of numerous substantive and procedural institutions) should be searched in Roman law;

– the first stage of mediaeval Hungarian legal development in execution law was represented by the institution of the *pristaldus* (delegate judge – 'poroszló'), who, in addition to their numerous other functions, carried out the task of execution of judgments independently too;

– once public trust in delegate judges had weakened, places of authentication (*loca credibilia*) evolved, which not only fulfilled activities that correspond to today's notarial activities but also supervised the work of the *pristaldus*; in other words, from the 13th century, delegate judges were allowed to implement acts of execution only jointly with the agent of the place of authentication;

– by the 18th century, the significance of places of authentication decreased and then by the 19th century terminated when in 1871 (following regulation of judicial execution in 1869) the order of judicial officers evolved – while analysing this regulation in the mirror of today's laws, we could establish that the regulation applying to the organization of judicial officers of the period survives even today with respect to several points and that 19th-century law-making applied several solutions that can be considered up-to-date even in the early 21st century.

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How to Develop a True European Society: the Ombudsman Institution

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Abstract. Since 2004, the European Union has been visibly enhancing its law with direct impact on the citizens' quality of life. Starting with 2006, a new strategy for deepening the cohesion of the European Union this law is about to be implemented. The citizens could and should become more and more aware of the existing and evolving European constitutional order, where the Western-type, pluralist democracy, on the one hand, and the rule of law, on the other hand, are the main pillars of the polity. The ombudsman/ mediation around Europe and beyond is a central tenet of this evolving new order. In 2015, the strategy became visible at the level of both the European Union as a whole and of its Member States. The key issue is to enhance the good governance via an ever better public administration.

Keywords: quality of democracy, European constitutional order, mediation, European deepening, ombudsman, European society

Public administration is the best place for practice and social science to meet in order to deliver the best services available for the citizens. A review of a list of selected, relevant EU and International documents enables us to better understand the strategic development of a true 'Europe of Citizens'. A short list of such documents would gather:

1/ European Ombudsman, press release No 10/2015 – 'Ombudsman welcomes improvements to Commission expert groups', 3 June 2015;[1]

2/ Speech by the European Ombudsman, Emily O'Reilly, at the 10th National Seminar of the European Network of Ombudsmen;[2]

3/ Final Report, Meeting of the Presidents of the Regional and International Networks of the Institutions for Institutional Mediation, Rabat, 6 and 7 July 2015;[3]

1 European Ombudsman 2015a.
2 European Ombudsman 2015b.
3 Le Médiateur du Royaume du Maroc 2015.

4/ European Ombudsman Institute website, historical section (European Ombudsman Institute 2016a);

5/ Nikiforos Diamandouros, Ombudsman institution and the quality of democracy, CIRCAP: Università degli Studi di Siena Speech on 17 October 2006.[4]

Several events marked year 2015 as one where the implementation of what could be called a strategy for the development and advancement of a Europe of Citizens started.

I. Implementation and First Steps

First of all, on the 3rd of June 2015, in its press release No 10/2015, the European Ombudsman 'welcomes improvements to Commission expert groups'.[5] The same press release further states that '[t]he European Ombudsman, Emily O'Reilly, has welcomed the Commission's agreement to improve its system of expert groups in response to proposals made by her in an own-initiative investigation. Hundreds of such advisory groups play a crucial role in the development of EU legislation and policy'.[6]

> In January 2015, the Ombudsman sent a list of proposals to the Commission on how to address several shortcomings in its expert groups system. This followed a public consultation, during which respondents cited issues such as perceived corporate dominance of certain groups and potential conflicts of interest of certain experts.[7]

The European Ombudsman equally announced 'a separate investigation', where it 'is looking into whether DG AGRI has properly implemented the obligations laid down in its legally-binding framework for 'civil dialogue groups'.[8]

A second event of this series took place in Warsaw, Poland, on the 27th of April 2015, where Ms Emily O'Reilly, European Ombudsman, gave a speech at the 10th National Seminar of the European Network of Ombudsmen. The speech is called *Developing the European Network of Ombudsman, towards 2019*. According to Ms O'Reilly, since 2013, the Institution has been striving to focus on three mutually reinforcing objectives, that is impact, relevance, and visibility.

4 Diamandouros 2006.
5 European Ombudsman 2015a.
6 European Ombudsman 2015a.
7 European Ombudsman 2015a.
8 European Ombudsman 2015a.

> The key purpose of the Network is, and will remain, to enable Network members to be fully informed of developments in EU law and policy, particularly wherever those developments are of greatest relevance to their work at the national and regional levels, to facilitate access to expertise within the EU institutions for members of the Network, and to encourage co-operation between the European Ombudsman and other members of the Network through parallel investigations on topics of mutual interest.[9]

The European Ombudsman suggests:

> that the Network's national, regional, and liaison seminars continue to be held every two years but that they all be held in Brussels; that the EU institutions be invited to play a more active role in the seminars; and that the seminars be web streamed live in order to enable Network staff members throughout Europe to follow the proceedings as well as interested members of the public.[10]

In other words, the ombudsmen across Europe are to become active actors in a citizens' Europe about to be established by their very actions of rendering the local, regional, national, and European administrations truly accountable to the citizens of the twenty-eight member states.

The present rate of meetings of the Network is, however, limited to three every two years, which is judged to be too few for the scope of the Network. Therefore, the European Ombudsman proposed to:

> explore the possibility of organising regular webinars, videoconferences, or other such solutions to bring Network staff together on a more regular basis; [t]o encourage co-operation that focuses on specific functional activities of staff through these online meetings; [t]o make a dedicated space available in the Extranet for these functional groupings of staff, once established, to share information with each other throughout the year.[11]

These measures are to be the main tools and instruments of a kind of ombudsmen's 'rapid reaction force' throughout Europe since '[t]he development of online meetings has the potential to increase the relevance of the Network to staff members throughout member institutions and to facilitate co-operation. It

9 European Ombudsman 2015b.
10 European Ombudsman 2015b.
11 European Ombudsman 2015b.

also has the potential to adapt and evolve to meet changing needs, with groups being created, developed, scaled-back, or disbanded as priorities evolve'.[12]

An additional instrument is the Query Procedure, by which – since the Network was created in 1996 – dozens of ombudsman offices have submitted queries to the European Ombudsman about European Union law issues arising during the inquiries conducted by their offices. Since the percentage is, however, low, the European Ombudsman suggests to make the query procedure more visible to the more than one hundred Network members by providing more information on the positive impact that the query procedure has had for the offices that have used it; thus, the relevance of the procedure for ombudsmen and committees on petitions can be greatly increased. Daily relevant members' news are to be broadcast over the Network. This looks like 'internal' European Ombudsman marketing for several national ombudsman institutions, some of which are rather jealous of their 'national' prerogatives. On the other hand, legal prerogatives differ widely over the Network, and different members are striving to develop and defend their scope and means by exploring the extent of their independence among their nation-state institutions.

Furthermore, the European Ombudsman is striving to develop joint parallel investigations.

> The excellent collaboration between Network members and the European Ombudsman greatly enhanced my own initiative inquiry regarding Frontex Joint Return Operations. Parallel investigations conducted by several national ombudsman offices and the European Ombudsman on this subject have shown the great potential for enhanced cooperation between Network members on issues of EU law and policy. This is the first time that such co-operation has been achieved through the Network, but [it] demonstrates the potential that exists for further such investigations.[13]

Mrs O'Reilly's conclusion is the following:

> I would like to pay tribute to my two predecessors, Jacob Söderman and Nikiforos Diamandouros, for having created and then developed the European Network of Ombudsmen over the last two decades. But as the Network approaches its 20th anniversary in 2016, I feel that the time is right to take it to the next level (i) by refocusing its activities on what it was originally created to facilitate – the promotion of knowledge of EU law and policy amongst ombudsmen and committees on petitions throughout Europe, (ii) by finding ways to promote greater cooperation between its

12 European Ombudsman 2015b.
13 European Ombudsman 2015b.

> members, and (iii) by transforming the visibility of the Network to a range of key stakeholders, including governments and administrations at the EU, national, and regional levels, the media throughout Europe, potential complainants, and the general public.[14]

A third step is the Final Report of the Meeting of the Presidents of the regional and international networks of the Institutions for Institutional mediation, which took place in Rabat on the 6th and 7th of July 2015.[15] The report is as relevant for the development of the Ombudsman institution as could be a report of conclusions written down by the President of the Association of Ombudsmen and Mediators in Francophone countries, the President of the International Ombudsman Institute in Vienna, and a president of the Mediterranean Ombudsmen Association. The Associations are to implement a mechanism of coordination in order to: facilitate a permanent ideas, experiences and expertise exchange at the international level;[16] mutually assist citizens in need in a third country in their dealings with local administrations,[17] thus following the European citizenship model; establish a Centre of Formation and Experience and expertise exchange in order to disseminate good practices and harmonize national procedures;[18] conduct comparative studies concerning ombudsman legislation and procedures in order to disseminate the ombudsman acquis and results.[19]

The implementation strategy is scientifically backed by the European Ombudsman Institute – EOI. The EOI is a centre of competence for information exchange among ombudsmen in Europe. It consists of eighty-nine members, among which forty-nine institutions and forty individual members, with twelve university professors. It is in fact a scientific association founded by relevant Austrian university professors in 1988. It conducts comparative university studies under the patronage of the ombudsman institutions. The aims are the scientific debate of human rights and citizen freedoms, promotion of research, cooperation with national and international institutions, promoting exchange of views among members. EOI has produced relevant ideas about the role of the ombudsman in Central and Eastern Europe. As such, the ombudsman is to be understood as a companion and guarantor of the democratic development.[20] His/her attention needs to focus on fulfilling the basic democratic criteria, namely freedoms and human rights. The Central and Eastern European ombudsman is to be a counter-power even to the power of the national parliament, as a majoritarian

14 European Ombudsman 2015b.
15 Le Médiateur du Royaume du Maroc 2015.
16 Le Médiateur du Royaume du Maroc 2015. 2.
17 Le Médiateur du Royaume du Maroc 2015. 2.
18 Le Médiateur du Royaume du Maroc 2015. 3.
19 Le Médiateur du Royaume du Maroc 2015. 3.
20 See European Ombudsman Institute 2016b.

expression of the political elite.[21] In the Romanian case, as put by journalist Cornel Nistorescu of *Cotidianul*, the fight against corruption would not ensure the democratic development, as some might think, but only purify the ground so that a parallel process of normal society formation should and could take place. In this second process, of democratic development, the ombudsman plays a central role. The ombudsman becomes a means to ensure parliament power in front of the administration (be it executive power in all its manifestations, from the Council of Ministers to the most diverse national administrations), hence means of democratic safeguarding in the era of regulation in both new eastern democracies and equally ancient western European democracies. By his/her action, the ombudsman is to ensure the confidence of the citizen in the public administration in particular and a societal consensus in general.[22]

II. Values and Principles, Strategy Defined for Developing the Pluralist Democracy

Mrs O'Reilly is accordingly declaring the willingness of the European Ombudsman to promote a Europe of Citizens (see the Open Government Partnership, OGP). In doing it, the European Ombudsman is implementing the values and principles stated by the previous European Ombudsman, Mr Nikiforos Diamandouros in his Università degli Studi di Siena Speech on the 17th of October 2006, while giving a lecture on the 'Ombudsman institution and the quality of democracy'.[23] According to Professor Diamandouros, 'the ombudsman institution both reflects and contributes to the maintenance and improvement of the quality of an evolving European constitutional order that embodies pluralist democracy and the rule of law as fundamental principles'.[24] Why is the ombudsman institution

21 For instance, when taking into account the public positions taken by the ambassadors of Western democracies in Bucharest (ranging from the United States, United Kingdom, the Netherlands, Switzerland, and up to even France and Italy), one could come to the perhaps strange conclusion that the Eastern European ombudsman could even get an informal level support in doing so, of course, if he/she acknowledges the utmost importance of its position as institutional mediator.

22 Put it rather egoistically, the State (as for instance the Romanian State) would enable and empower an ombudsman in order to avoid a general uprising and/or revolution in case of a societal crisis such as a cyclical global economic crisis.
Ensuring the societal consensus is the foremost concern and day-to-day study of the Belgian Federal Ombudsman and of the Belgian 'first-line' mediation departments. The Belgian mediation system is as complicated as the Belgian federal state itself. It provides for a first-line (autonomous departments inside every public administration at all levels of government) and second-line mediation (the Federal Ombudsman institution). This procedure and the coordination mechanisms enhance the chances for a citizen to see his/her rights acknowledged by the public administration at an as low administrative level as possible.

23 Diamandouros 2006.

24 Diamandouros 2006. 1.

so important? 'The acceptance of the legitimacy of the state in the eyes of its citizens constitutes a prior condition for the smooth operation of a democracy. […] Following Robert Dahl, […] if a state is not perceived as legitimate, then democratic elections cannot rectify this problem'.[25] The events in Bucharest after the Colectiv fire in autumn 2015 resulting in the stepping down of the socialist government are a good illustration of the issue; one of the main institutional requirements of the non-governmental organizations was: 'we [the People] want our ombudsman back'.[26] The Romanian Constitution is one of the only fundamental laws in a pluralist democracy where no preamble exists and where the state pre-exists the People – Article 1, 'The State'.[27] The Romanian state, as shown by 'its' Constitution, is not an instrumental expression of the nation/society/national community(-ies) but a transcendent, abstract institution imposed upon the 'citizens'. Starting from the two underlying principles of modern democracies, equality and freedom, two ideal-types of democracy can be formed. 1/ The Jacobin legacy privileging equality, where the sovereign people constitute the only source of power, whose sole institutional expression is (a mostly unicameral) parliament. The risk is a levelling egalitarianism, with serious concerns relating to the respect for individual rights and the observance of the rule of law (see also Alexis de Tocqueville in his account of the American democracy; American democracy, however, could deter such evolutions by making use of the libertarian principle). 2/ The pluralist logic seeks an optimal balance between the egalitarian and libertarian principles – a dense network of institutional checks and balances as mediated structures of powers characterize the rule of law. 'There are better conditions for the observance of the rule of law and for the quality of democracy'.[28] In the first form, accountability, that is, 'to explain and justify one's actions in terms of appropriate criteria and in sufficient detail' takes place only at the moment of the elections. All other forms of accountability are rejected as 'means of potentially limiting and constraining the sovereign people, as represented by those whom they have elected'.[29] The second form implies forms of continuous accountability. Citizenship encompasses a dynamic component transcending legal rights and duties and involving engagement with public authorities to exercise rights, including accountability rights, and to fulfil obligations. One additional role of the ombudsman is to seek to improve the quality of this interactive dimension of citizenship on both sides – citizen and administration – by helping to avoid, or to resolve, unnecessary and unproductive conflicts.[30]

25 Diamandouros 2006. 6.
26 Diamandouros 2006. 6.
27 The Constitution of Romania 1991/2003. 1.
28 Diamandouros 2006. 7.
29 Diamandouros 2006. 7–8.
30 Diamandouros 2006. 8.

Table 1. How the ombudsman contributes to the quality of democracy

Criteria	Courts system	Ombudsman institutions
Decisions	Binding (with sanction)	Non-binding (with moral obligation)
Determination of rights (I)	Legal rights of parties in individual cases (legality)	Broad principles of good administration (beyond legality)
Proceedings	Strict and not so flexible	Not strict, more flexible
Establishing guidelines of conduct	Reactive, case-by-case	Proactive
Determination of rights (II)	Adherence to legality	Good administration and avoidance of maladministration
Cost (money)	Expensive (non-free)	Cheaper (free)
Cost (time)	Time-intensive	Quicker proceedings
Access to justice	Limited	Widening access
Results	Rather zero-sum solutions	Positive-sum solutions

Advocate General L. M. Poiares Maduro at the meeting of the national ombudsman of the EU Member States in The Hague in September 2005: 'ombudsmen must disregard any national rules which prevent them from protecting rights under Community law'.[31] The role of the Romanian ombudsman is, in this respect, essential in a case where a truly constitutional order is missing.

The ombudsman institution can help to increase the quality of democracy both directly, by a contribution to rendering the politicians more accountable and by promoting active citizenship, and indirectly, by enhancing the rule of law, that is contributing to the establishment of an equilibrium between equality and liberty in the case of the pluralist democracy. His capacity to be successful in this task depends on the non-partisan and impartial way of dealing with the affairs brought to him.[32] When comparing the ombudsman institution to the tribunal system, a clear-cut distinction exists between the binding decisions of the latter versus the non-binding recommendations of the former. A tribunal can only take into account the legal aspects, while the ombudsman studies the case by virtue of larger principles of good administration. Secondly, the judicial proceedings are necessarily stricter and less flexible than the rules applied to the ombudsman institution proceedings, which are normally unrestricted by law. The ombudsman is as such complementary to the activities of the tribunal system.

31 Diamandouros 2006. 11.
32 Diamandouros 2006. 9.

The non-binding character of the ombudsman's recommendations results in the necessity to take their moral authority as base for their implementation and, subsequently, to be able to go public and convince public opinion. While the tribunals deal with the adherence of the citizens and of the state to legality, the ombudsmen deal with promoting good administration and avoiding maladministration.

Tribunals are not the best places and institutions to efficiently solve the conflicts between the citizen and the public institutions. The first reason is that petitioning the ombudsman is a cheaper and quicker way to seek justice than seeking justice in a tribunal. The second reason is that the tribunal system incurs the risk of overloading when all citizens are compelled to use it to seek justice against the public administration;[33] see the Belgian case in fiscal law. Furthermore, the ombudsmen can act with great discretion and with almost total flexibility, which a tribunal cannot. The services provided by the ombudsman are free and offer efficient remedies, thereby widening the citizens' access to justice. In a pluralist democracy, the different public administration bodies are to serve the citizens and not vice versa. This principle takes the form of citizen-friendliness, service-mindedness or even straight, good administration.

III. Issues of Institutional Mediation in a Young Eastern European Democracy. Between Romanian Practice and Belgian Theory, a Modus Vivendi of Euro-Atlantic Good Practice

The most comprehensive ombudsman institution from the point of view of its functions is the Swedish 1809 model. There, the ombudsman could survey the tribunals and the public authorities, manage citizen complaints and impeach officials and ministers on charges of illegal action.[34] Prosecution was kept in the Belgian federal model.[35] The Danish 1955 model, as well as the remainder of the ombudsman European institutions, covers areas related to public administration bodies but not to tribunals.[36]

As already stated above, Western-type democracies combine the rule of law with democracy. In an ideal-type, egalitarian/Jacobin democracy, intermediate groups are not allowed between the sovereign people and its representatives;

33 Diamandouros 2006. 12

34 Diamandouros 2006. 2.

35 The Belgian Federal Ombudsman contains a DNA-type [National Anticorruption Department, Romanian institution] unit but acting under secretive and confidential procedures.

36 Diamandouros 2006. 2.

therefore, the people practically are only sovereign during elections but not in between. In the pluralist model, where equality coexists with freedom (and rule of law), the link between the sovereign people and the power is not direct but mediated by several networks of different legitimate groups and institutions. Because legitimate, these intermediate institutions can put limits to the authority of the state administration, therefore rule out the possibility of the arbitrary use of power. The American Federal Constitution did not provide for the constitutional review. However, the US Supreme Court introduced it in the 1803 Marbury c/ Madison, with the following justification: the judges have to apply the law, the Constitution included, and so a constitutional review is needed. Until 1865, this review was rather circumspect. In the 20th century, the Supreme Court defended the federated states' rights against the US Government and against the US Congress, and the 'government by the judges' was denounced. But the system continues to function, and nobody complains finally… Excesses were few and incidental.[37]

Such a system is a break put on the legislator. There also was an incomprehensible check against the representatives of the sovereign people in a Jacobin rationale. During the last years, the same issues of conflict between the two types of democracy involved the Romanian institutions of Parliament and Judiciary. The issue is the not so constitutional character of the DNA, as a special prosecution unit. This is why DNA had to be directly defended by the Western ambassadors in Bucharest for the sake of a rather pluralist democracy versus a rather egalitarian one. The egalitarian principles strangely appeared among the defenders of the parliamentarian regime versus the presidential regime, which a lot of citizens interpreted as the conflict between a democratic pluralist approach against a rather populist and Jacobin democracy (perhaps Belarus-type). Therefore, nuances are indeed essential in a democracy. The public and political discourse has to be carefully analysed, and the parliamentarian mediation, i.e. the Ombudsman institution, acquires an important role as the fight against the corruption of the political and administrative elite has to be paralleled by the building of a true and open democratic society. The human rights of whatsoever citizen have to be upheld by an institution, even when that citizen is a felon. This is a fundamental principle of the rule of law. A strong and independent ombudsman can defend and contribute therefore to the building of pluralist democracy by helping to bring down the excesses of the public administration. If the ombudsman is under constant strain by the parliament, if a majority of the members of parliament can dismiss him/her anytime, his/her independence is rather illusory. Therefore, the French have implemented since 2008 (Constitution of 4 October 1958, 2008, 71-1) a system with only one mandate of six years but with a total independence. The French Défenseur des Droits [Rights Defender]

37 Cadart 1979 and Pactet 1989.

cannot be revoked by any institution.[38] As previously stated, the ombudsman helps the state become legitimate if he/she is able to properly exert his/her tasks. According to Robert Dahl,[39] if the state is perceived as illegitimate by the citizens, democratic elections cannot solve this problem.

IV. Conclusions

1/ One might note the importance of the ombudsman institution as a central tenet of the European institutional development strategy; the ombudsman is important for both the national-level pluralist democracy and the constitutional order at the European level;

2/ A global expertise and good practices exchange is taking place among ombudsmen at the international level. Much is to be learned from American county ombudsmen, for instance, or from the Namibian national ombudsman;

3/ The integration inside a truly integrated European network of ombudsmen could enable the members to be informed exhaustively on the evolutions in matters of European law and European policies, in particular on those issues interesting and relevant for the national and regional level;

4/ The institution of the European Ombudsman can facilitate access for the members of the European Network of Ombudsmen to the administrative expertise inside the European institutions (including by making extensive use of the query procedure); the European Ombudsman has the willingness, according to the 2014 Strategy, to help the members by receiving their information requests and specific help requests to hand in to the relevant European institutions for appropriate answer delivery;

5/ Meeting once per year in Brussels does not necessarily promote an integrated European citizen democracy and/or society; therefore, the Network should encourage the continuous cooperation between the European Ombudsman, on the one hand, and the/or variable geometry ad hoc regional and national ombudsmen groupings with the aim of conducting parallel investigations and delivering joint comparative reports, on the other hand, with the result of writing down good practices and finally harmonizing administrative practices across Europe at the highest denominator for the citizens;

6/ A grassroots democracy could be enabled under true auspices of the subsidiarity principle;

7/ The ombudsmen re-discover the good acquis in governance of the European Middle-Ages (see Diamandouros' argument for the feudal roots of the rule of law and pluralist democracy) and similarities and differences between European

38 French Organic Law No 2011-333 of 29 March 2011 concerning the Rights Defender, 2011. 1.
39 Diamandouros 2006. 6.

traditional values and those of other regions, with a positive impact on the development of a mutual understanding of cultures around the Globe;

8/ In the Romanian case, the ombudsman can complement the fight against corruption in politics and public administration in two essential ways. The first one is making extensive use of the Query Procedure of the European Ombudsman in order to enlighten the national administration and higher courts of the judicial system when dealing with citizen rights and freedoms; the second one is to help and constrain the public administration to act in a citizen-friendly way and urge the government to promote service-mindedness across all its units;

9/ The Central and Eastern European ombudsman is to be understood as a companion and guarantor of the democratic development. The Central and Eastern European ombudsman is to be a counter-power even to the power of the national parliament, as a majoritarian expression of the political elite;

10/ With a view to the East European experience, the ombudsman becomes a means to ensure parliament power in front of the administration (be it executive power in all of its manifestations, from the Council of Ministers to the most diverse national administration), hence means of democratic safeguarding in the era of regulation in both new eastern democracies and equally ancient western European democracies.

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Language of Legal Education in Multi-Ethnic Societies: the Case of Transylvania[1]

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Abstract. In 1945, a university with Hungarian as the language of instruction was founded in Cluj (Kolozsvár), Romania, receiving the name Bolyai in December the same year. This university offered a very successful Hungarian language legal education. In a nationalist turn, in 1959, the Bolyai University was forced to merge with the Romanian university of Cluj (Victor Babeş University), and the legal education was provided by the state only in Romanian. The merger in general and the cessation of the Hungarian language legal education was a historical shock for the Hungarian minority. According to the 2011 census, the Hungarians represent 6.5% of the population in Romania and 17.8% of the Transylvanian region. Due to the processes started in 1959, only 1.2% of the judges and prosecutors and 2.2% of the attorneys belong to the Hungarian national minority.

Keywords: legal education, minority protection, Bolyai University

The Historical Rule: What Determines the Language of Legal Education?

University is one of the most important, central institutions of society. In 1872, in the eastern part of the Austro-Hungarian Empire, in Transylvania, one of the founding faculties of the new Franz Joseph University of Cluj (Kolozsvár in Hungarian and Klausenburg in German) was the Faculty of Law and Political Sciences, where the language of legal education was Hungarian.[2] After the First

1 A first version of this article was published in Veress 2016a under the title 'The Past and Present of Legal Education in Cluj in the Light of the Language of Instruction'. This is a revised and completed text.

2 The first (Jesuit) university in Cluj was founded in 1581 by István Báthory, Prince of Transylvania. For a long time, it was believed that the University provided legal education as well, but the documents show that the short-lived institution that ceased to exist without a successor did not have the possibility to actually start legal education. University-level legal education commenced

World War, the multi-ethnic Transylvania and its 'capital', Cluj, was annexed to Romania. Making use of the infrastructure of Franz Joseph University, which was moved to Budapest for a short period of time and then relocated permanently to Szeged, Hungary, in 1919, King Ferdinand I University was founded in Cluj; the language of legal education was exclusively Romanian.

Based on the facts presented above, a simple rule can be set up: the language of legal education depends on whoever exercises sovereignty over Transylvania. The same rule prevailed between 1940 and 1944 as well: when Northern Transylvania, and with that Cluj, was returned to Hungary under the Second Vienna Award,[3] the university that returned from Szeged to Cluj provided legal education only in Hungarian, while the Romanian university moved to Sibiu, to Southern Transylvania, which remained under Romanian sovereignty.

According to the 1942 analysis of Gyula László (1910–1998), professor of archaeology, the Romanians after the First World War immediately realized that Cluj required something different from an ordinary university.

> Cluj was an intellectual border fortress and bastion. The Romanian university in Cluj set as its goal the research of the Romanian life, especially the research of Transylvania's Romanian nature, and the permanent international publication of the results. There is no doubt that parts of this work had significant results from the international point of view as well (e.g. the pioneering work of the Romanian language atlas). From their point of view, they did a very good job, and the state did not spare any money or other types of support to serve the great cause.[4]

Gyula László analyses the situation of Franz Joseph University as well: the institution was moved back to Cluj in 1940 under the Second Vienna Award in order to create a comprehensive development programme.

> If contrasted with the Franz Joseph University, the first thing to be noted is that it did not differ in any way from the structure based on humanities of the other universities in Hungary. It could be freely moved to any Hungarian territory as its organization does not express in any way the fact that it protects a fortress and builds a bastion.[5]

in 1774 at the Academy of Law founded by Empress Maria Theresa. However, this academy of law quickly lost its status of a higher education institution and became a law high school; it regained its rank only in 1863, the language of education being Hungarian. The duration of education increased to 4 years from 1866. The Cluj Academy of Law is the predecessor of the Faculty of Law and Political Sciences established in 1872 at Franz Joseph University.

3 For an overview of the Second Vienna Award, see Juhász 1987. 23–38.

4 Published in Vita 2015. 464–465.

5 Vita 2015. 465.

The Second Vienna Award proved to be a temporary settlement, and the implementation of Gyula László's programme (for example, the founding of the Department of the History of Transylvania and the Department of the History of Hungarian Settlements, the launch of a coordinated research programme based on the activities of the Transylvanian Museum Society[6] and the Székely National Museum from Sfântu Gheorghe[7]) did not take place.

This short analysis shows that in Transylvania both the Romanians and the Hungarians saw the university as the main instrument in attaining their own national goals. 'Our own university' was perceived not only as a question of language but that of control as well: the university was a framework where research programmes can be given direction and coordination, where research programmes can be funded and the necessary internal and external visibility can be provided. The university was and still is the tool to preserve and develop the ethnic community and culture, the basic need of Transylvanian Romanians and Hungarians alike. However, according to the nationalist ideology defining the 19th and 20th centuries – and that still affects society today –, the existence of a community's own university necessarily incurs the denial of the right of a university with the other language of instruction to exist. This strict interpretation of the nationalist goals is basically incompatible with the existence of a university of 'the other' Transylvanian ethnicity. According to the previously discovered rule, the state that exercised sovereignty over Transylvania and Cluj controlled the university and also the language of legal education.

Thus, between 1872 and 1919, only the Hungarian, between 1919 and 1940, only the Romanian, while between 1940 and 1944 only the Hungarian was the language of university-level education in Cluj.

The Exception to the Historical Rule

There is a surprising change to this rule in 1945. In 1944–1945, Transylvania was reunited under Romanian sovereignty.[8] The Romanian university moved back from Sibiu to Cluj, and, in parallel, a university with Hungarian as the language of instruction was founded on 1 June 1945, receiving the name Bolyai in December.[9] The question arises: does this mean that one of the key issues of the nationalist

6 Gyula László described the Transylvanian Museum Society as the only truly large-scale social creation of the Hungarians in Transylvania for research of the land and of the peoples of Transylvania and establishing museums. Vita 2015. 478.

7 In Hungarian: Sepsiszentgyörgy.

8 From the point of view of public international law, this was confirmed by the Paris Peace Treaty of 1947.

9 The name was given to honour two Transylvanian mathematicians, father and son, Farkas Bolyai (1775–1856) and János Bolyai (1802–1860).

rivalry between Romanians and Hungarians in Transylvania is at least partially concluded on a positive note? Those who are familiar with the situation that is still going on today also know that the answer is unfortunately negative.

How did and how could Bolyai University in Cluj be established in 1945?

It was the result of circumstances and of politics. However, it was not created by some kind of a political agreement nor by the free will of the new, post-war government of the country that aimed to settle the situation of the minorities in a positive tone. The existence of Bolyai University is an exceptional, special situation, the path of which – as we shall see – inevitably turned in the direction of dissolution, its virtual termination in 1959; it was called a merger, a unification, and it was the result of the absence of a 'national reconciliation' between Transylvanian Romanians and Hungarians. With the merger of the two universities, legal education returned to the linguistic monism prevailing before 1945.

This situation also explains the failure to re-establish Bolyai University after the regime change (one of the most important demands of the Hungarian minority): the above mentioned 'national reconciliation', or 'Transylvanian compromise' between Romanians and Hungarians has still not been established.

Let us return to the question: how could Bolyai University in Cluj be founded in 1945?

The first reason is that the Hungarian university that was moved back from Szeged to Cluj in 1940 was not closed. On 14 September 1944, Sándor Vita formulated the short letter signed by Béla Teleki, Imre Mikó, Géza Nagy, János Vásárhelyi, Imre Sándor, Áron Tamási, and others in support of the Hungarian university. The letter is addressed to Dezső Miskolczy, professor of medicine, rector of the University.

> Being aware of our responsibility towards Hungarian-language science and culture in Transylvania, we turn to your Magnificence to consider the importance of the continuance of the century-long cultural life of the Transylvanian Hungarians and convince the Council of the Hungarian University of Transylvania not to let themselves influenced by anything and anyone – even while trying to escape the threat of war and within the limits of their possibilities – in their determination to keep the five faculties and the departments of the university in Cluj.[10]

Thus, despite the evacuation order, the University stayed in Cluj. In a period when the territorial status of (Northern) Transylvania was not officially decided yet and Romanian politics was under pressure, as they had to work with the Soviets, who, on their behalf, were skilfully manipulating the Transylvanian issue in order to achieve their goals, the liquidation of the University was not

10 Vita 2015. 488.

an acceptable step. This is the context in which we should interpret the Decree of King Michael I issued on 28 May 1945 regarding the establishment of a new university with Hungarian as the language of instruction, on 1 June 1945. This is the covert but politically defensible step to formally terminate the activity of Franz Joseph University: the establishment of a new university.

A second reason closely linked to why the University could be founded is the result of Russian (Soviet) politics, as Stalin used the Transylvanian issue masterfully: Romanian politics had to please Stalin, prove that they were proceeding in the light of the new ideas, and implement the socialist model of settling the minority question. Northern Transylvania was under Soviet administration for 6 months starting from November 1944 (the Romanian administration was expelled). Transylvania's status was used by Stalin to achieve his own political goals. The Romanian administration was allowed back after creating the Petru Groza government, supporting the communists, in the spring of 1945.

Therefore, the approach that links the foundation of Bolyai University with proletarian internationalism and the real decrease of Romanian nationalism is actually wrong. Such sudden and fast ideological enlightenment did not happen and was not possible. Short-term political goals were much more significant than the long-term settling of the national minority issue. The classification of the society into social classes overwrote the doctrines of nationalism only in the short term and merely apparently.

The third reason, however, is the left-wing idealism of Transylvanian Hungarians, which I consider a serious factor: many of the Hungarian leftists believed that the existence of this university is justified and its creation in the new system is natural and self-evident. They also began to act in this spirit, and that is also one of the factors of the creation of the University. The closing of the University in 1959 was a huge disappointment to Hungarian communists in Romania as well as to the leftists who supported the system. The idealistic left-wing activists were mere tools in the hands of the dictatorship.

As the foundation of Bolyai University was the result of circumstances, it was not a desired and wanted institution but in fact a tolerated one. As it was not wanted, it was established with extraordinary difficulties. It could have even been predicted that its fate was sealed, and the possibility of the 1959 merger was encoded into its establishment. Nevertheless, the independent Bolyai University functioned or rather was able to function for 14 years.[11] Much research needs to be conducted to have a full and accurate picture of the history of the University: Romanian and even Russian archives could hold significant surprises. Researching the archives can provide information, for example, on how the founding of Bolyai University was seen in Bucharest in 1945, on the role of legal professionals in the dictatorship, on the way the 'healthy' social background of the students was checked, etc.

11 For a history of the legal education of Bolyai University, see Veress–Kokoly 2016.

It is not my goal to paint an idealized picture of this university that has a symbolic weight and value to the Hungarians of Transylvania. From 1945 onwards, Romania witnessed the unfolding of a totalitarian dictatorship that replaced the diversity of ideas with the forced domination of only one idea: the very much mundane distorted images of utopian communism, that is, Leninism and Stalinism.

Legal education had political goals: the old 'cadres', especially judges and prosecutors, had to be replaced with legal experts educated in the spirit of the new system. Bourgeois judges and prosecutors were remnants of a bygone age and needed to be replaced, set aside, or even excluded from the system because of their untrustworthiness. The legal experts educated in the new spirit were meant to implement socialist justice, sentence people to death, or conduct show trials.

György Fekete (1911–2002), professor of civil law, starts his book on the general theory of civil law published in 1958 with the following text: 'Soviet armed forces crushed German and Japanese fascist armies and thus made possible for a number of European and Asian states to break the chains of imperialism for good.'

Ideology impregnated education. The condition to every professor's appointment was to be loyal to the system, and the professors were constantly scrutinized. Nevertheless, several waves of layoffs took place; some professors were even sent to jail.[12]

Back to the Historical Rule

The 1959 merger, decided by the Communist Party (by its official name in this period: Romanian Workers Party), ended the history of Bolyai University. László Szabédi, one of the professors of the University, addressed his suicide note to the county party committee secretary.[13] The letter says the following.

> With the occasion of the meeting regarding the merger of the two universities, I was convinced that I was surrounded by informant eyes and ears... The only goal of my life was the happiness of the working class (the working people), and communism is where our People's Republic is heading towards. Long live the bright future of the socialist world![14]

A part of the professors at the law school of Bolyai University were transferred to the merged university; however, no new Hungarian-speaking teachers were

12 For example, even the faithful communist János Demeter (1908–1988), professor of constitutional law, was in jail for political reasons between 1952 and 1955.

13 Several university professors protested the merger by committing suicide.

14 Szabédi 2014. 303–304.

employed to the Law Faculty. It was a conscious, directed plan. The transferred professors of the former Bolyai University continued to teach in Romanian language. The regime, which created a strange fusion between socialist ideas and fervent nationalism, especially starting from the 1970s, waited until the retirement of such faculty members. Romanian colleagues had been chosen in advance to take over their lectures. While in the case of other fields of study we can speak about a survival of Bolyai University, this is not the case of legal education, where continuity was disrupted. The merger of the two universities represents a breaking point in legal education in Cluj. Its result was in fact a return to the original rule that connected the language of instruction directly to the one exercising sovereignty.

György Poszler (1931–2015), literary historian and aesthete, called Bolyai University the University of Sisyphus.[15] No wonder. The great writer István Örkény (1912–1979) also indicated that the Hungarian fate was always full of Sisyphean situations and historical periods. György Poszler wrote the following:

> This story is about Bolyai University in Cluj and its fourteen years of existence. The way it was built and torn down. They roll the rock to the mountain-top. The rock rolls down from the mountain-top. In its short history, the rhythm of the rolling up and rolling down can be followed exactly. I am also interested in the moment. As they go back for the rock that rolled down. That it needs to be started from the beginning. Because after every rolling up one might think it is over. The rock stays up. And maybe – for a second – this means happiness.[16]

The first fall of the rock was the end in the continuity of Franz Joseph University, the confiscation of its buildings and collections, the expelling of Bolyai University to the periphery. According to Poszler, this is 'the first Sisyphean step of Sisyphus's university. The first rolling up – and the first rolling down'.[17] But then the superhuman effort to roll the rock back to the mountain-top commences immediately: consolidation, the start of university work. But it is in vain: the second fall of the rock is forthcoming. The University is turned into a Marxist university, the highly respected and admired teachers from Hungary (such as László Buza, professor of public international law and György Bónis, professor of legal history), who used to work at Franz Joseph University, are sent home, the content of education is restructured and reformed, and even devout communist teachers, such as János Demeter, are persecuted. To quote György Poszler again: 'There is no need to embellish. The rock that was slowly and painfully rolled

15 Poszler 2016.
16 Poszler 2016. 45.
17 Poszler 2016. 49.

back to the mountain-top between 1945 and 1948 quickly rolled down for the second time in 1948–1949.'

During the third and last uphill roll, as Poszler observed correctly, a shift in the Romanian–Hungarian relations in Transylvania occurred.

> Something changed in the course of history, outside and around the University. It was the end of an era. A strange compromise was born between the Romanian power and the Hungarian minority, at least part of the Hungarian minority. On the one hand, the illusion that the world has changed. That ethnic oppression can never happen again. And fear that ethnic oppression can happen again. So, infiltrate into power to prevent that. On the other hand: simulating that the world has changed. That ethnic oppression can never happen again. And proof: the partners of power are not oppressed. So, be included into power for proving this. This compromise, this fake symbiosis is no longer needed.[18]

After the 1956 uprising and revolution in Hungary demanding the end of Soviet rule and as a consequence of its defeat, in Transylvania, the fragile and informal political compromise between leftist Romanians and Hungarians failed, and one of the emphatic signs and proofs of this failure was the merger of the two universities in Cluj. In 1959 the rock, Bolyai University plunged into the abyss again, and with that 'the last representative minority intellectual centre' was abolished.[19] Bolyai University was incorporated into the Romanian university, and Hungarian-language legal education, which by its nature had a prominent long-term anti-regime (anti-communist) potential, was closed.

However, the establishment of Bolyai University serves as evidence for several things. The first of these is the self-organizing ability of Hungarians in creating an institution with quality education in a very short time, under difficult circumstances.

Secondly, it is the proof of the effectiveness of education in the mother tongue, even in the sensitive area of legal education. Even though it sounds as a cliché, it must be repeated that education in the mother tongue is the most effective one. The graduates of Bolyai University have accomplished outstanding professional performances in a variety of legal fields, nothing less than Romanian students. After the merger, fewer Hungarian lawyers could graduate, and therefore the role of law school graduates from Bolyai University became more appreciated.

The lawyer graduates of Bolyai University had formed until recently one of the most important intellectual groups of the Hungarians in Transylvania. Several university professors, including two outstanding professors of the Faculty of

18 Poszler 2016. 60–61.
19 Poszler 2016. 62.

Law at the University of Bucharest,[20] judges, including judges of the Supreme Court, prosecutors, lawyers, administrative professionals graduated from Bolyai University. A Hungarian judge of the Romanian Constitutional Court created after the collapse of the Soviet-type dictatorship was a former student of Bolyai University.[21] Former law students from Bolyai University were appointed as ministers or became members of the Parliament and senators.

Between 1945 and 1959, legal education at Bolyai University was carried out exclusively in Hungarian; however, it trained legal professionals for the Romanian judicial system at an extremely high level. The explanation is simple: the thorough, serious legal knowledge acquired in the mother tongue can constitute a solid base for professional language skills. However, the knowledge acquired in Romanian superficially and partially is more difficult to be deepened.

Thus, the merger of the Romanian Victor Babeş University and Bolyai University represents a radical breaking point in the legal education of Transylvania because the merger marked the end of Hungarian legal education. The continuity of Hungarian legal language and legal culture in Transylvania was disrupted. The results of this affect the entire Hungarian minority.

Firstly, the merger led directly to the gradual disappearance of the Hungarian legal language. One result of the suppression of legal terminology is that the legally recognized rights regarding the use of mother tongue (for instance, in public administration) after the transition mostly remained on paper because the group of legal professionals who could provide content to these rights was and is still missing. Hungarian legal practitioners use a mixed language among themselves that includes Romanian terms – since the Hungarian legal terminology has basically withered.

Secondly, the merger of the two universities made it possible to control and minimize the number of Hungarian-speaking legal professionals with law degrees and high qualifications, who had to learn in Romanian after 1959. This resulted in the fact that Hungarian speakers are massively underrepresented among magistrates, way under the Romanian/Hungarian population ratio, and its improvement will probably require decades. Clearly, the complete control of legal education is crucial in any dictatorship, especially when it carries strong nationalist features, as the Romanian Soviet-type dictatorship did.

Thirdly, the minority-friendly provisions of Law No 86/1945 on the Statute of Minority Nationalities (never formally repealed) were quickly forgotten. Important provisions, such as paragraph 8 of the Law, state:

20 Such as Professor of Civil Law, Ferenc (Francisc) Deák (1927–2001).

21 Gábor Kozsokár (1941–). The first Hungarian judge of the Romanian Constitutional Court, Miklós Fazekas (1918–1995) graduated at Franz Joseph University in Cluj.

> Tribunals and courts having jurisdiction over judicial districts in which, according to the latest census, at least 30% of the inhabitants are speaking a language other than Romanian shall:
> a) accept any document written and submitted by residents of that constituency that belong to the community that forms the 30% without requiring their translation into Romanian;
> b) rule on the documents in the same language;
> c) listen to the parties in their mother tongue.

According to paragraphs 9 and 12, the judges need to know the language of the respective ethnic groups as well. The regulation accepted that *the official language of the Romanian state is Romanian*; yet, according to the concept of the Law on the Statute of Minority Nationalities, there is no conflict or tension between the official nature of the Romanian language and the widespread official language use of the minorities. However, from the 1970s in Romania, trials have not taken place in Hungarian, regardless of the ratio of nationalities. Moreover, if we look at the status of different minority rights in Romania in the 20th century, it can be stated that an entire political programme can be built on the re-recognition of the rights, institutions, and solutions that were recognized by the Romanian state at a given point and later were diverted, dismantled, terminated overtly or covertly.[22]

This negative situation outlined above was decisively affected by the termination of legal education at Bolyai University in 1959. Despite the results gradually achieved in the case of other professional fields at Babeş–Bolyai University, where interested students can learn and graduate in a relatively wide range of specializations offered by this university in Hungarian, the framework of legal education could not be properly modified, even though several attempts have been made.

As a result of the lack of compromise, within the private academic framework of Sapientia Hungarian University of Transylvania, founded by historical churches (the Calvinist Reformed Church, the Roman Catholic Church, the Unitarian Church, and the Evangelical Lutheran Church) to complement education in the areas where the Romanian state is not offering mother-tongue university education,[23] starting with 2010, a bilingual, Romanian-Hungarian law school (Department of Law) was established and launched on the highest professional and academic grounds.

22 The Law on the Statute of Minority Nationalities has not been formally repealed by the Romanian state, but its provisions are not applied.

23 Also, the establishment of Sapientia University was motivated by a lower percentage of Hungarian university students in Romania compared to the percentage of the Hungarian-speaking population.

The Present Situation: Remodelling the Historical Rule

The experience of Hungarian legal education between 1945 and 1959 should be somehow utilized in the bilingual legal education at Sapientia University. For instance, while teaching the general part of the civil law in Romanian, we found that the Hungarian first-year students have difficulties understanding and learning the Romanian curriculum. The 'shock effect' caused by the abstract nature of the legal language and reasoning affects the Romanian students as well; therefore, this is not surprising. The question is whether understanding can be improved by the mother tongue in conditions where the lectures and exams take place in Romanian, or not. This subject, as all other subjects, was taught in Hungarian at Bolyai University. It was during the state socialist dictatorship, in 1958, when the last Hungarian textbook on the general part of the Romanian civil law was published. György Fekete's book[24] – if we cast aside the mandatory ideological burden of that time – is a thorough and accurate work. However, the archival sources indicate that Professor György Fekete was reprimanded because he had not emphasized the ideology enough; he only described civil law, while avoiding to present the 'class aspects' of civil law – which was expected and required by the dictatorship.

After the abolition of the independent Bolyai University in 1959, no Hungarian-language textbooks discussing the general part of the Romanian civil law were published until 2016. As indicated above, the civil law subjects are taught in Romanian at Sapientia University and so are criminal law and procedural law. However, in addition to our detailed, 400-page Romanian-language textbook published in 2012,[25] in 2016, I drew up a brief, schematic Hungarian lecture note on the general part of civil law.[26] This short textbook does not intend to replace learning the more detailed information discussed in the Romanian volume; however, it is a useful tool both for the understanding of legal information and for the appropriate processing of the Romanian–Hungarian legal terminology. A thorough acquisition of the general part of civil law is essential for understanding the future civil law subjects; it is the base and framework of the knowledge on civil law. Legal institutions of great practical importance, such as invalidity or prescription, are only discussed in detail in the framework of the general part of civil law; so, this is not just an introductory subject of only theoretical significance. Civil law studies have had a practical significance from the very first moment. Later, in the case of other civil law subjects, we only refer to the knowledge acquired during the study of the general part. The practice demonstrated that by using this complementary book, the results at the exams conducted in Romanian became higher compared to the previous years.

24 Fekete 1958.
25 Lupan–Pantilimon–Sztranyiczki–Veress 2012.
26 Veress 2016b.

This civil law textbook introduces the new method of teaching Romanian–Hungarian legal terminology, developed within the framework of the bilingual, Romanian–Hungarian legal education at Sapientia University: we do not teach only words or Romanian–Hungarian word pairs; we work with Romanian- and Hungarian-language jurisprudential texts simultaneously so that university students can acquire the competences of real Romanian and Hungarian legal bilingualism. The core of this method is not substituting Romanian-language education required by the labour market conditions and the special professional examination systems for access to legal professions but is making use of the benefits of teaching in the mother tongue for a more thorough preparation of the students.

Another interesting feature of this 2016 book is that it builds upon György Fekete's 1958 volume. The planned future Hungarian 'parallel' manuals[27] will also use the former textbooks, lecture notes of Bolyai University. Professionally, it appears that the dots can be connected, and it seems that, despite the worrying lack of continuity, the roots and the foundation of a fresh start do exist.

Dilemmas

In legal circles, it is often debated whether due to the differences of the Hungarian and Romanian legal system the use of the Hungarian language is possible in teaching Romanian law or not. The emergence of this serious concern can easily be explained: the lack of the knowledge of the Hungarian legal language can give the impression that there are serious problems and difficulties, insurmountable divergences in this regard. If someone draws a parallel only between the Hungarian Civil Code in force and the Romanian Civil Code in force, appropriate and reassuring language solutions cannot be discovered immediately and automatically because the different legal families they belong to (in the case of Hungary, a German connection is evident; in the case of Romania, the traditional model also shaping the legal language was the French).

During the writing of the 2016 textbook, in order to explain Romanian civil law, I used the works of a number of important Hungarian scientists of private law – such as Károly Szladits (1871–1956) and Bálint Kolosváry (1875–1954) –, and I was surprised to find that this help was significant: despite the differences of legal terminology, as a result of the convergence of civil law,[28] these works

27 In the spirit of this concept, a number of complementary Hungarian textbooks will be made available on civil law, criminal law, and procedural law to help the professional development of the students.

28 Convergence is the process in which legal systems, legal institutions, legal ideologies, and legal methods come closer to each other, in some cases becoming almost similar. Convergence is a dynamic phenomenon; statically it complies with resemblance, correspondence (Eörsi 1975. 342–343). The most advanced degree of convergence is conscious harmonization (this

are suitable to make a description of maximal precision of the institutions of Romanian civil law. However, it is necessary to point out that this task cannot be carried out without the knowledge and use of the classic (pre-WWII) Hungarian private law terminology. For example, the concept and text of the 1900 Hungarian Civil Code proposal or even the 1928 private law bill project are closer to the present Romanian Civil Code than the Hungarian Civil Code in force. In fact, at the end of the nineteenth century and in the first half of the twentieth century, in terms of Hungarian law, the French influence with an Austrian mediation was present; therefore, the classic Hungarian legal language is much more related to the modern Romanian legal vocabulary formed under decisive French influence. Later, Hungarian private law went in a different direction, moving towards the German model, resulting in conceptual and linguistic differences. But the point is that initial concerns have been proven to be unfounded: the apparently lacking language tools are indeed available.

Offering legal education at least partially in the mother tongue is essential in Transylvania, and we hope that its effects will be felt in a few decades. It is a reasonable goal that the Hungarian language can become a locally official language in Transylvania, in accordance with the positive practice of other European states;[29] however, this requires not only political circumstances but also a living Hungarian legal language. In Switzerland, for instance, the unitary private law is applied in German, French, and Italian as well. One very interesting experience is the one of New Brunswick, Canada. According to Fernand de Varennes:

> Education is the foundation stone for the development and the realization of the potential of linguistic minorities… This has been the experience in New Brunswick, Canada, where the first school to teach law in the language of the French minority opened less than 40 years ago at the Université de Moncton. Of course, the situation there is completely different from Romania and other countries in Europe: French became an official language in New Brunswick some 40 years ago, and it must be used as a language in court by the judiciary equally to English. The lessons and impact of legal education in the minority's own language have been astounding. In addition to an increasing number of lawyers and judges who come from the French-speaking minority in New Brunswick – about 30 percent of the population, some 250,000 people in the whole province[30] –, members of the minority through legal education in their own language have come to

phenomenon is taking place within the framework of the European Union, including some areas of civil law).

29 Even the not so minority-friendly French law recognizes that regional languages are part of France's cultural heritage (Constitution, Article 75-1).

30 In Transylvania, according to the 2011 census, there are 1.215 million Hungarians.

> be members of the political, economic, social, and even cultural elite of the province. This has in no small amount permitted the linguistic minority to improve its financial and social standing dramatically in the last four decades.[31]

Back to Sisyphus with a Summary

Practically, the rock of the – now partly Hungarian – legal education in Cluj is being rolled up the mountain again. According to Albert Camus:

> I leave Sisyphus at the foot of the mountain! One always finds one's burden again. But Sisyphus teaches the higher fidelity that negates the gods and raises rocks. He too concludes that all is well. This universe henceforth without a master seems to him neither sterile nor futile. Each atom of that stone, each mineral flake of that night-filled mountain, in itself forms a world. The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy.[32]

The Hungarian writer Péter Esterházy can also be invoked: 'The struggle of breaking towards heights alone is enough to fill the human heart, every granule of this stone, of Sisyphus, every mineral shard of this mountain sunk in the night is the world in itself...'[33]

In this part of Europe, overcoming the nationalist ideology, just as developing and preserving normality, is very difficult. As Professor Fernand de Varennes stated: 'In the context of an increasingly globalized world, legal education in more than one language is additionally widely practised in many countries and can be beneficial to protect the rights of minorities and contribute to their vitality – and their opportunities.'[34]

The normality of legal education in Transylvania means that Romanian- and Hungarian-language legal education can coexist and can even cooperate effectively and closely. The question remains: can or will the rock stay on the mountain-top, has Sisyphus's punishment ended, or do we just feel the absurd happiness of the struggle seeing the modest and fragile results of this start?

31 de Varennes 2016. 41–42. For details on New Brunswick, see also McLaren 2016. For the Basque situation, see Arzoz 2016; for Wales, Parry 2016; for South Tirol, Alber 2016, etc.

32 Translation by Justin O'Brien.

33 Esterházy 1986. 166.

34 Varennes 2016. 31.

Overview

Legal education in Cluj/Kolozsvár/Klausenburg in the modern era			
Period	**University**	**Sovereignty**	**Language of education**
1872–1919	Franz Joseph University	Austro-Hungarian Empire	Hungarian
1919–1940	Ferdinand I University	Romania	Romanian
1940–1945	Franz Joseph University	Hungary	Hungarian
1945–1959	Victor Babeş University	Romania	Romanian
	Bolyai University	Romania	Hungarian
1959–present	Babeş–Bolyai University	Romania	Romanian
2010–present	Sapientia University	Romania	Bilingual education (Romanian and Hungarian)

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Policies and Doctrines in the Regulation of Air Passenger Rights

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Abstract. Air travel is not only a popular form of moving people for either business or leisure purposes but a risky activity that comes with so many complaints on the part of passengers. The aviation market is forced to face important consumer protection issues in Europe, and the European Union seems to be the first international organization that created unified liability rules for air carriers across the European Union and its Member States. The essay discusses the liability of air carriers and the interpretation and scope of defences listed in the Regulation, illustrating them with real cases in which national courts requested preliminary ruling from the European Court of Justice.

Keywords: strict liability, airlines, European Union, delay, cancellation, exoneration, compensation, Regulation (EC) No 261/2004, extraordinary circumstances

Aviation became a commonly accepted and popular form of travel and transportation during the 20th century. More and more people worldwide prefer flights over train or car travel. National legislative bodies realized early in the 20th century that operating aircrafts and conducting activities in the aviation business qualified as dangerous activities and risky business, so the aviation sector needed a set of safety and liability rules in order to guarantee the safety to passengers. There are multiple legislative products on the international level related to aviation, adopted by the majority of states of the world, just like the Warsaw and Montreal Conventions.[1] They unified the procedural and liability rules of carriers in case of accidents or if passengers' baggage were damaged or lost.

The events of 11 September 2001 in New York caused a big turmoil in the aviation sector, and the volume of air traffic decreased significantly as

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air – Warsaw, October 12th 1929 – and Convention for the Unification of Certain Rules for International Carriage by Air – Montreal, May 28th 1999.

a consequence of the terrorist attacks carried out that day. It took a couple of years until everything got back to normal, and the intensity of air travel even superseded its past results.[2] Nowadays, aviation is one of the busiest and safest ways to travel.

However, aviation is not only a risky activity but also a sector of economy, where carriers have to deal with passengers and satisfy their needs. This activity may come with many complaints coming on the part of passengers. On the other hand, carriers continuously compete with each other in order to convince millions of passengers to choose their services over the competition. In this heavy competition, passengers are left defenceless and may suffer harms caused by the carriers in the form of breaching the travel contracts.

At the beginning of the 21st century, the aviation market has to face important consumer protection issues in Europe, and thus a new regulatory approach has emerged in the continent. This new phenomenon is the recognition of passenger rights. States should provide more powerful rights to passengers and protect their interests against the carriers.

The European Union was the first international organization that established unified liability rules[3] mandatory to air carriers across the European Union and enacted new rules for the undesirable events of cancellation, delay, and overbooking. As a result of the new regime, passengers now have efficient and powerful rights when the carrier breaches the contract and fails to fulfil its obligations.

However, in case a flight is delayed or cancelled under the scope of the 261/2004/EC Regulation, it does not automatically mean that the carrier must pay a compensation. The airline is obliged to do so only if the passengers reach their destination at least 3 hours later than originally scheduled,[4] and there are not any extraordinary circumstances that could lead to the exoneration of the carrier.

This essay focuses on the policies that formed the valid rules in Europe and influenced the interpretation of the European Court of Justice. In order to do so, it is necessary to examine in which cases the carriers are able to successfully exonerate themselves under the strict liability rules based on the recent case-law and interpretation of the European Court of Justice.

2 http://www.icao.int/sustainability/Pages/Facts-Figures_WorldEconomyData.aspx.

3 Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport; Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

4 Court of Justice, judgment of 19 November 2009, case C-402/07, Christopher Sturgeon and Stefan Böck.

Policies behind the Defences

An operating air carrier shall not be obliged to pay compensation in accordance with the Regulation if it can prove that the cancellation is caused by extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken.[5] Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes that affect the operation of an operating air carrier. Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

Defences under liability of air carriers still remain an uncertain and most crucial topic when it comes to the interpretation of the Regulation. Although the Regulation does not directly and explicitly list the potential defences in its text, its preamble gives some possible circumstances listed above. The ECJ carried the interpretation of these defences far in some aspects, while leaving doubtful questions and uncertainties in others.

The first question we should try to answer is why the ECJ interprets the Regulation in that way. We could assume that there must be some policy behind this concept.

At first sight, the lobbying activity and influence of various carriers may be one of the reasons. By examining the liability rules of all carriers in the European Union, there is an important fact we have to pay attention to. Bus and water carriers are in a better position than railway and air carriers. They can seek for exoneration much easier than carriers in the aviation and rail business. For example, according to the findings in the McDonagh case,[6] airlines have to cover the costs of accommodation and take sufficient and reasonable care of passengers when extraordinary circumstances – such as a volcanic eruption – lead to the cancellation of a flight. When bus and water carriers have to face a force majeure situation, they are not obliged to cover the costs of accommodation for passengers.

The other significant difference is that the amount of compensation is much higher when air carriers breach the travel contract. Carriers in other sectors have an obligation only to pay back a fix percentage – not more than 50%[7] – of the cost

5 Art. 5, para. 3 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

6 Court of Justice, judgment of 31 January 2013, case C-12/11, Denise McDonagh.

7 Art. 17 Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations; Art. 19 Regulation (EU) No 1177/2010

of the fare, taking into consideration the length of the delay. Airlines, however, have to compensate passengers with €250, €400, or €600, depending on the length of the flight.[8] It seems that the airlines have the weakest influence and lobby power in vindicating rights, while other carriers could certainly achieve better positions. There is a significant difference in the status of the carriers not only because the European Union's legislative bodies have enacted such rules but because of the even more rigid interpretation of the European Court of Justice.

The second question is why the European Court of Justice interprets the rules of the Regulation (EC) 261/2004 in such a way to establish an even stricter liability of the airlines. It is not a question that the Regulation has originally introduced a strict liability of the air carriers for the events of delay, cancellation, and denied boarding. Although there is no such thing as a unified European tort law and there are no principles that could govern the adjudication of compensation, national courts still have to deal with these questions, theoretically, in a somewhat unified way. National courts can, however, rely on the case-law and interpretation of the ECJ, as the ECJ is the only judicial body that has a right to authentically interpret the primary and secondary law of the European Union. Based on our experiences, the ECJ often uses the methods of grammatical and teleological interpretation. The purpose of Regulation (EC) 261/2004 aims to give more power to passengers and to protect their interests against the cost-efficient policy of the airlines. The Court is definitely widening the scope of the Regulation by emphasizing the consumer protection approach.

In the analysis of the case-law of the ECJ, we can also notice that there should be a contract between the airline and the passenger. It means that, theoretically, we are faced with a breach of contract situation when a delay or a cancellation occurs. Although the Vienna Convention on International Sale of Goods (CISG) is not applicable, we may still identify certain similarities when an airline tries to seek for defences in order to exonerate itself under the burden of strict liability. According to the CISG, a fundamental breach occurs when one party substantially fails to deliver what the other reasonably anticipated receiving. In order for the breaching party to exonerate himself, he should prove that his failure was due to an impediment beyond his control, the impediment was not something he could have reasonably taken into account at the time of contracting, and he remains unable to overcome the impediment or its consequences. The breaching party

of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004; Art. 19, para. 2 Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.

8 Art. 7, para 1 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

should prove these circumstances at the same time, as these conditions are meant to be interdependent conditions. In the aviation business, it is quite easy to prove the second requirement, namely that the airline could not foresee a circumstance that impedes it in fulfilling the contractual obligations. The remaining two conditions, however, seem to be more problematic; still, we can see that the ECJ applies these rules with analogy based on the case-law attached to the application of the CISG. We believe that it is quite obvious that if the European Parliament and the Council adopt a law in order to establish new rules for a sector as the aviation sector, the ECJ needs to look elsewhere to fill the gaps the Regulation has left. The CISG seems to be a sufficient choice as we are facing a contractual problem in both cases. According to the 261/2004/EC Regulation, the liability of the airlines shall be strict liability. The case-law attached to the application of the CISG is quite developed by now, so it may really help the ECJ in interpreting the rules of the Regulation. In order to understand the exact cases when the airlines are not held liable for breaching the contract, we should examine the case-law of the ECJ related to the interpretation of the Regulation.

According to the Sturgeon decision ruled in 2009, the ECJ found that passengers might also be entitled for compensation not only in case of cancellation and denied boarding but in case the flight is delayed three or more hours.[9]

First of all, we have to clarify what the relevant time is under the term 'time of arrival'. We may list four different circumstances that can easily qualify as 'time of arrival'. These events are the following:

– the time the aircraft lands on the runway ('touchdown');

– the time the aircraft reaches its parking position and the parking brakes are engaged or the chocks have been applied ('in-block time');

– the time the aircraft door is opened;

– a time defined by the parties in the context of party autonomy.

There could be slight differences in these referred moments, and these several-minute differences should decide whether the air carrier has breached the contract and, therefore, is obliged to pay compensation to the passengers. In the Germanwings GmbH versus Ronny Henning case,[10] the European Court of Justice had an opportunity to examine this problem and to interpret the underlying provisions in the Regulation. According to the ECJ's ruling, the time that the aircraft door is opened should be relevant in such cases as passengers may feel the end of the journey at that time. This is when the physical opportunity to leave the plane opens to all passengers.

After the question of breach has been decided, the airline can seek for defences and state that one of the following extraordinary circumstances was the underlying

9 Court of Justice, judgment of 19 November 2009, case C-402/07, Christopher Sturgeon and Stefan Böck.

10 Court of Justice, judgment of 4 September 2014, case C-452/13, Ronny Henning.

cause of the delay or the cancellation: political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, strikes that affect the operation of an operating air carrier, and air traffic management decisions. All of these situations seem to offer easy defences under the strict liability; however, they are more complicated than they seem. At least, this is what the recent case-law of the European Court of Justice proves.

Unexpected Flight Safety Shortcomings

Before we interpret unexpected flight safety shortcomings as easy defences for the air carrier, we must state that all safety issues must fall outside the control of the airline in order to provide successful exoneration under the duties as stipulated by the Regulation. This is the reason why the ECJ can only accept safety shortcomings as defences with many restrictions.

In order to get the true meaning of unexpected flight safety shortcomings, we have to analyse two cases: the Wallentin-Hermann[11] case and the Siewert[12] case. In the first case, Alitalia airline had some trouble with the plane's engines, and the flight was delayed 24 hours. In the second case, the flight was performed with a six-and-a-half-hour-long delay that occurred because the aircraft that was due to operate the flight concerned suffered some damage the evening before at Stuttgart Airport. A set of mobile boarding stairs had bumped against the aircraft, causing structural damage to the wing, and, as a consequence, the aircraft needed to be replaced. The two most important questions the court had to examine was whether the airline could not, on any view, have avoided the extraordinary circumstances by measures appropriate to the situation – that is to say, by measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned,[13] and the circumstances surrounding such an event can be characterized as 'extraordinary' within the meaning of the Regulation only if they relate to an event which is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin.[14]

The reason of this strict and narrow interpretation of the Regulation is the fact that consumers need a high level of consumer protection in the EU.[15,16]

11 Court of Justice, judgment of 22 December 2008, case C-549/07, Wallentin-Hermann.
12 Court of Justice, judgment of 14 November 2014, case C-394/14, Sandy Siewert.
13 Court of Justice, judgment of 12 May 2011, case C-294/10, Eglītis and Ratnieks, para. 25.
14 Court of Justice, judgment of 22 December 2008, case C-549/07, Wallentin-Hermann, para. 23.
15 Court of Justice, judgment of 10 January 2006, case C-344/04, IATA and ELFAA, articles 43–47.
16 These authors criticize the C-549/07. Friederike Wallentin-Hermann v Alitalia – Linee Aeree Italiane SpA case and the rules of the Regulation: Arnold de Leon 2010. 91–112, Balfour 2009.

There are only three unexpected safety shortcoming cases which can qualify as circumstances outside the interest of the carrier. Manufacturing defect is one of those cases, when the airline has no influence on the risk. The other two cases are terrorist attacks or sabotage. In the two latter cases, terrorists or saboteurs are responsible for the mechanical failures of the plane. Anything else other than the three cases mentioned above could be prevented with exercising the necessary maintenance duties.[17]

Meteorological Conditions Incompatible with the Operation of the Flight Concerned

Weather is always an uncertain factor in the aviation business. In most countries of the world, bad weather will not constitute liability for the air carriers since weather is a typical example of force majeure. It is true that the air carriers do not have influence on this extraordinary circumstance. Although science and technology are well-developed and high-standard these days, it is a generally accepted fact that airplanes cannot take off in a snowstorm, T-storm, or thick fog.[18]

Seeking for the interpretation of meteorological conditions incompatible with the operation of the flight concerned, we would like to demonstrate the Denies McDonagh[19] case. Volcano Eyjafjallajökull in Iceland started to erupt on 20 March 2010. On 15 April, right after the volcano entered an explosive phase, the authorities shut down the airspace over a number of Member States due to potential risk and hazard to aircrafts and grounded many planes for almost a week. Some airlines interpreted the rules of the regulation as an absolute, unconditional reason to exonerate under strict liability. They thought they were not obliged to provide any services or compensation to their customers at all. Even the necessary care (food, accommodation, communication, etc.) does not seem relevant.

Ms McDonagh booked a flight with Ryanair that was scheduled to depart on 17 April 2010. The airfare cost €98. Her flight was cancelled due to the eruption. During the period between 17 and 24 April, Ryanair did not provide Ms McDonagh any care as it was laid down in details in the Regulation.[20] The question was whether a meteorological condition like a volcano eruption can qualify as *vis maior*, in which case airlines do not have to pay compensation and provide sufficient and reasonable care to their passengers. The plaintiff claimed €1,129 to cover her meal,

224–231, Croon 2011. 1–6, 2012. 609–617.

17 Court of Justice, judgment of 22 December 2008, case C-549/07, Wallentin-Hermann.

18 Arnold, K. 2007. 105.

19 Court of Justice, judgment of 31 January 2013, case C-12/11, Denies McDonagh.

20 Art. 9, Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

accommodation, and transportation during that period. The ECJ did not argue that a volcanic eruption was a force majeure; however, the ECJ ruled for the plaintiff. The Court emphasized that the duty to provide passengers with reasonable care in the undesired events of delay or cancellation are imperative rules ordering an absolute obligation for the airlines, and they cannot be neglected on the sole reason that a force majeure arose. Providing meals, accommodation, and transportation to passengers is an absolute obligation of the air carriers, and therefore they do not have proper defences that could lead to their exoneration, according to the interpretation of the ECJ. Regarding the amount spent on these expenses, the Court examined whether the given care was adequate and reasonable. The evaluation of the exact amount belongs to the jurisdiction of national courts, according to the ECJ.

Security Risks

Security risks are not defined in the regulation, and no ECJ case-law exists in this field. If boarding is completed and doors are closed although the final check before take-off reveals extra bags on the plane travelling without passengers, this may qualify as a security risk that prevents the airline to operate the flight according to schedule. Another typical security risk may be when more passengers boarded the plane that it is shown on the check-in list. In these cases, it is not relevant whether this situation is a result of the airline's negligence or the intentional conduct of passengers since these security risks must be clarified before take-off in order to provide safe service to customers. Especially after 9/11, the European Union and air carriers value security measures a lot more than before.

Worker Strikes

In the case of either a lawful or wrongful strike of employees, the air carrier is exempted from liability.[21] The reason why there is no difference between a lawful and a wrongful strike is that both are outside the influence of the employer, the air carrier. Even if the airline later gets a decision from the national court to evaluate the strike as an unlawful one, the employer had no reasons to believe so and, more importantly, had no lawful instruments to intervene without a binding court decision. However, the European Court of Justice drew attention to the fact that the carrier's exemption is only valid for the passengers of the actual flight concerned in the strike. All other flights must operate according to schedule, and the carrier cannot extend this defence generally to more flights.[22]

21 ILO judgment No 368.

22 Court of Justice, judgment of 4 October 2012, case C-22/11, Timy Lassooy.

Air Traffic Management Decision

According to the Preamble, the extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.

However, the air carriers cannot rely on extraordinary circumstances as general defences that lead to their exoneration. The moment the extraordinary obstacle diminishes, the airline has to continue the service as planned. In one case, passengers have already boarded the plane, waiting for take-off, when a sudden black-out intervened. When the power had come back, the plane still could not take-off and the airline cancelled the flight. Later, passengers learned that the real reason of cancellation was not the black-out, which is an extraordinary circumstance, but that the flight attendants' time shift expired. The European Court of Justice ruled for the passengers claiming damages for the cancellation. The court stated that an air carrier must plan ahead and think of such extraordinary measures that differ from force majeures. Since these extraordinary circumstances may happen at any time, the carrier must plan accordingly and take reasonable care in order to minimize their consequences. This is why all flight schedules are planned with some gaps. If the airline does not fulfil this obligation, they cannot successfully refer to the defence of extraordinary circumstances.

Political Instability

Political instability does not have a commonly accepted definition neither in the text of the regulation nor in the practice of the European Court of Justice since no case has ever reached the ECJ to scrutinize this problem. In order to get closer to the definition of political instability, we should take into consideration constitutional and public international law institutions as well. According to these, political instability is the governing of a country without a stable and well-functioning government. In this case, an opposition party or militia aspire to the acquisition or alteration of the governing political power. Such circumstances may be military operations, military coups, civil wars, revolutions, or rebellions.

Although political instability seems to be an objective defence for the air carriers, still, in every case, we must examine whether the air carrier could have avoided the influence of such circumstances by taking necessary and reasonable measures and care. Another criterion for a successful exoneration under the

strict liability rules is that political instability should qualify as force majeure, independent of the influence of the air carrier.

In one case, a British Airways flight was forced to stay on the ground due to the activity of military groups in Kuwait.[23] The English court had to decide whether this situation is qualified as one outside the air carrier's scope of influence.[24] The court applied the rules of the Montreal Convention[25] in this case. The trial judge came to the conclusion that military group activities did not belong to the influence of the air carrier, so it could not have been foreseeable and avoidable even if the air carrier had been aware that military operations were going on in the country. This interpretation might be applicable in cases under the scope of the EU regulation.

Closing Remarks

After having examined the nature of the regulation on air passenger rights, we can safely conclude that the problem is not only the strict liability imposed against air carriers and other transportation service providers but the interpretation and application of such rules by the European Court of Justice. A rigorous approach on the defences available to air carriers may easily change the structure of competition in the European aviation market. It may have a significant impact on not only the fares but on the mentality of the passengers too. We may already experience a change in the passengers' attitude. More and more disputes are raised against airlines based on claims about insufficient services. In these disputes, national courts are obliged to follow the interpretation of the ECJ as the Regulation requires a uniform application across the entire European Union.

The strict rules on passenger rights in the European market may also induce a change in the U.S. and in Asia, and the competitiveness of American, Asian, and European airlines may also suffer consequences induced by this improving concept on passenger rights in Europe. The revision of the Regulation on air passenger rights is ongoing in the European Union. However, we believe that any restriction on the rights granted to air passengers would be a significant step back from the current situation, and it could lead to a long adoption and implementation process.

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24 Jones 1996. 134–135.

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In Memoriam

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In memoriam
Professor Imre Molnár (1934–2016)

Professor Emeritus Imre Molnár, internationally recognized scholar of Roman law, respected and beloved teacher of generations of jurists, passed away on 15 October 2016.

Imre Molnár was born in Tataháza on 22 September 1934. He pursued his secondary school studies in Baja and later on at Baross Gábor Grammar School in Szeged. He took an interest in classical antiquity in these years already primarily owing to the influence of his teacher of Latin at the grammar school, József Visy (1911–1988).

During the years of dictatorship in the 50s, he was labelled as a class alien – paying regard to the family's former landed property amounting to fifteen cadastral acres –; so, he could start his university studies only in 1956 at the Faculty of Law of the University of Szeged, where he took a degree in law in 1960. He became closely connected with Roman law already as a university student as he actively took part for four years in the work of the Roman Law Scientific Students' Association led by Professor Elemér Pólay (1915–1988).

The opportunity of the researcher/lecturer profession was preceded as a kind of detour by a practising lawyer's career: it was followed by more than a decade's activity at the Csongrád County Catering Company first as a company solicitor, then as senior juris consult, and finally as Head of the Administration Department.

At Elemér Pólay's invitation, he returned to the Roman Law Department of the University in 1968, where he taught and researched as Assistant Lecturer from 1968 and then as Assistant Professor from 1971. He defended his candidate's thesis in 1977, and after acquiring the degree *Candidatus Scientiarum* he was appointed an Associate Professor in 1979. He took over leadership of the Roman Law Department in 1985 from his master Elemér Pólay, who unselfishly helped him both in his academic activity and in the academic scene in general – with whom he was from first to last on sincere friendly terms –, and he headed the Department until 1999. He was awarded the degree *Doctor Scientiarum* in 1987 and was appointed University Professor in 1988. From 1994 to 1998, he filled the office of the Dean of the Faculty of Law and Political Sciences of József Attila University of Szeged.

As a regular speaker of international conferences, he kept up deep friendly relations with numerous foreign scholars. Under longer scholarships abroad, he

researched in Munich, Rome, and Cologne; he gave presentations at conferences and delivered guest lectures, among others, in Rio de Janeiro, Munich, Salzburg, Cologne, Graz, Halle, Venice, Bratislava, Belgrade, and Cluj-Napoca.

His field of research covered three large subject areas – as his most important publications also show –, which came from the scope of *locatio conductio*, the rules of liability in Roman law and Roman criminal law.

The revised edition of his candidate's (i.e. PhD) thesis defended in 1977 (*Locatio Conductio in Roman Law of the Classical Age*) was published in 1982 (in *Acta Universitatis Szegediensis*) in Hungarian with the title *Chapters from the Scope of Locatio Conductio in the Classical Age*. In this subject area, he published a study with monographic demand *(Verantwortung und Gefahrtragung bei der locatio conductiozur Zeit des Prinzipats)* in the highly respected encyclopaedic series entitled *Aufstieg und Niedergang der römischen Welt*.[1] In the subject area of *locatio conductio*, he published several further studies in Hungarian and foreign languages.[2]

His doctoral thesis *Rules of Liability in Roman Private Law* defended in 1987 was published in Szeged in 1993. Five years later, this monograph appeared in German too under the title *Die Haftungsordnung des römischen Privatrechts* (Szeged, 1998). During the decades, he published several studies that analyse the issues of the rules of liability in Hungary and abroad.[3] The researches carried out and the results attained by him in this subject area made him an internationally indispensable and recognized expert now not only in *locatio conductio* but also in this topic that represents one of the most important issues of Roman law.

In the last two decades of his career, his scholarly interest turned towards Roman criminal law; as the first result of his research, he analysed numerous details of the issues of this subject area. He published several of the listed papers

1 Molnár, I.: *Verantwortung und Gefahrtragung bei der locatio conductio zur Zeit des Prinzipats.* In: *Aufstieg und Niedergang der römischen Welt.* Teil. II. Band 14. Berlin–New York, 1982. 583–680.

2 Molnár, I.: Gefahrtragung beim römischen Dienst und Werkvertrag. *Labeo* 1975. 23–44; Subjekte der locatio conductio. In: *Studi in onore di Cesare Sanfilippo, II.* Milano, 1982. 413–430; Objekt of locatio conductio. *Bullettino dell' Istituto di Diritto Romano* 1982. 127–142; The Social Determination of Lease Relations and the Social Programs Arising from that in the Ancient Rome. In: *Studia in honorem L. Nagy.* Szeged, 1984. 223–229; Rechte und Pflichten der Subjekte der locatio conductio. *Index* 1983–1984. 157–188; Le cause di estinzione del contratto e il problema dell' esistenza del diritto di disdetta nella „locatio-conductio". *Labeo* 1986. 298–309; Beruf und Arbeit im römischen Recht. In: *Facetten des Wandels.* Mannheim, 2001. 54–62.

3 Molnár, I.: Die Ausgestaltung des Begriffes der vis maior im römischen Recht. *IURA* 1981. 73–105; *Erfolgshaftung oder ein typisierter dolus malus im archaischen römischen Recht. Bullettino dell' Istituto di Diritto Romano* 1987. 27–43; Der Haftungsmaßstab des pater familias diligens im römischen Recht. In: *Vorträge gehalten auf dem 28. Deutschen Rechtshistorikertag (Nimwegen 23. bis 27. September 1990).* Nijmegen, 1992. 23–31; Die Haftungsordnung des römischen Privatrechts. In: *Emlékkönyv Dr. Szentpéteri István.* Szeged, 1996. 371–383.

in German too.[4] Although he did not summarize his researches in Roman criminal law in a monograph, in 2013, his papers were summed up in a volume of studies with monographic demand in Hungarian and German with the title *Iuscriminale Romanum*in Szeged as volume no 45 of the *Library of Pólay Elemér Foundation*.

In addition to these three large subject areas, he treated numerous topics in his studies; in particular, the issues of the study of contracts, especially of sale and purchase and bearing hazards[5] as well as of education and research on Roman law. He published several studies that examine the history of development of Roman law and papers on history of sciences and recollections; the first edition of his textbook entitled *Roman law* written with a co-author was published in Szeged in 2001.

His academic achievements were recognized by numerous official honours. In 1999, by the *Apácai Csere János Prize*, on two occasions (in 1995 and 2004) based on students' votes by the title *Lecturer of the Year*, in 2004, by the title *Professor Emeritus*, and in 2005 by the *Klebersberg Kúnó Prize*. In 2003, he was awarded the *Silver Commemorative Medal of the Academic Committee of Szeged*, also in 2003 the *Order of Merit of the Republic of Hungary, Officer's Cross*, and then in 2007 the *Eötvös József Wreath*. The appreciation of him and his life-work is indicated by the fact that his colleagues and students congratulated him with a *Festschrift* on the occasion of his 70th, 75th, and 80th birthday (published in Szeged in 2004, 2011, and 2014 resp.).

The background of his successful researcher's and teacher's life was provided by the harmonious private life of a *bonus et diligens pater familias.* Sports also played a key part in his life: from first to last, he lived up to the principle of *mens sana in corpore sano*; in the 1970s, he won a gold medal with his team in hammer throw at the National Athletic Championship.

As a teacher, during his almost half-a-century-long activity at the university, he made several thousands of law students acquainted with and like Roman law. He was able to pass his knowledge plastically, with the one-time practising lawyer's sensitivity of problems of real life and with the scholar's thorough grounding – in the spirit of his lecturer's creed taken over from Professor Pólay – as a *Schulmeister*.

4 Molnár, I.: Grundprinzipien des römischen Strafrechts. In: *A bonis bona discere: Festgabe für János Zlinszky zum 70. Geburtstag.* Miskolc, 1998. 189–208; Das adulterium als ein das Ansehen der römischen Familie verletzendes Verbrechen. In: *Status familiae. Festschrift für Andreas Wacke zum 65. Geburtstag.* Munich, 2001. 345–364; Ausgewählte gesetzliche Straftatbestände im antiken Rom und in unserem geltendem Recht. In: *Roman Law as Formative of Modern Legal Systems. Studies in Honour of Wieslaw Litewski.* Kraków, 2004. 15–24.

5 Molnár, I.: Periculum emptoris im römischen Recht der klassischen Periode. In: *Sodalitas. Scritti in onore di Antonio Guarino.* Napoli, 1984. 2227–2255; Die Frage der Gefahrtragung und des Eigentumsüberganges beim Kauf. *Index* 1987. 57–75.

By the death of the master and friend – who unselfishly helped, supported his colleagues, students in word and deed – Imre Molnár, by the last member of the Romanistics generation following Elemér Pólay (1915–1988) and Róbert Brósz (1915–1994) – where, listing the most significant ones, György Diósdi (1934–1973), Ferenc Benedek (1926–2007), and János Zlinszky (1928–2015) also belonged to – making his exit, the great age of Hungarian Romanistics has ended. *Sit ei terra levis!*

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Book Reviews

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On a Volume of Greek Wise Sayings[1]

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The volume 'Teach and Learn the Better' by Terézia Dér and Tamás Nótári contains a selection of the wise thoughts of several creators of ancient Greek literature with translation into Latin and Hungarian. A former work of the same authors/editors entitled 'Exemplaria Graeca',[2] published by Belvedere Meridionale, appeared in 1999. The two classical scholars Terézia Dér and Tamás Nótári were urged to compile this former selection by the fact that in the previous one hundred years no collection of Greek/Latin/Hungarian sayings had been published in Hungary.

The volume of Terézia Dér and Tamás Nótári 'Teach and Learn the Better' was published by Lectum Kiadó first in 2005.[3] The title of the volume is an allusion to the saying by Thales: 'Didaske kai manthane to ameinon (Doce ac discemeliora)'. In addition to the sayings that can be read in the selection of 1999, this volume contained several further wise old sayings in a structure that justifies their publication in a completely different, independent volume. (Terézia Dér and Tamás Nótári also published a volume of Greek quotations and proverbs with Latin translation in 2008, which was published by Societas Latina in Saarbrücken.)[4] The volume of 2005 was published for the second time by Lectum Kiadó (Szeged) in 2016.

When compiling the collection, it was kept in view that the translation of the selected Greek sayings into Latin and Hungarian should be possibly available. Thereby, on the one hand, they tried to enable a comparison of the two classical

1 Dér, Terézia–Nótári, Tamás: *Tanítsd és tanuld a jobbat! Görög bölcsességek latin és magyar fordítással* (Teach and Learn the Better. Greek Wise Sayings with Translation into Latin and Hungarian). 2nd edition, Szeged, Lectum Kiadó, 2016.

2 Dér, Terézia–Nótári, Tamás: *Exemplari Graeca – Görög bölcsességek latin és magyar fordítással* (Exemplaria Graeca – Greek Wise Sayings with Translation into Latin and Hungarian). Szeged, Belvedere Meridionale, 1999.

3 Dér, Terézia–Nótári, Tamás: *Tanítsd és tanuld a jobbat! Görög bölcsességek latin és magyar fordítással* (Teach and Learn the Better. Greek Wise Sayings with Translation into Latin and Hungarian). Szeged, Lectum Kiadó, 2005.

4 Dér, Teresia–Nótári, Thomas: *Sapientia liberatanimum*. Composuerunt. Saarbrücken, Societas Latina, 2008.

languages, and, on the other hand, they wanted to please the readers who want to get familiar more profoundly with the antique sources containing those sayings. They indicated the data of the works the translations of which they took over concerning specific sayings, under the heading 'Bibliography'. At several points – for example, for the works of Galen and Marcus Aurelius –, they publish the Latin and Hungarian versions in their own translation.

The volume is introduced by a preface in Hungarian and Latin; it is followed by sayings grouped around five large topics (*human attributes, characteristics, activities; human relations; man and fate – relation of man and gods; general worldly wisdom; famous sayings*), quoted in Greek, Latin, and Hungarian. Within each topic, the order of the sayings follows the alphabetical order according to the Greek original. The 'Bibliography' lists the volumes of editions of the used Greek texts, translations into Latin and Hungarian – this also shows the double, educational and academic character of the work. The 'Appendix' contains the transcription of the Greek alphabet by Latin letters and a short summary of key pronunciation rules. This is followed by the 'List of Abbreviations' and short biographies of the authors that appear in the volume.

The creators of the volume made effort to demonstrate the diversity of ancient Hellenic culture and literary genres: so, they quoted not only from works of poets, playwrights, historians, and philosophers – i.e. of authors in the field called humanities – but endeavoured to redirect the reader's attention to the field of natural sciences too. From among several branches of science, they emphasized medicine, selecting wise thoughts from the works of Hippocrates and Galen.

For their work, they chose Xenophon's words as a guiding principle: 'I research into... the treasures of old wise men that they left to us written down in their books, and if we come across some wonderful thought, we take them out' (Mem. I, 6, 14).[5] The classical authors quoted in the volume are of a very wide scope: epic is represented by Homer and Hesiod, drama by Aeschylus, Sophocles, and Euripides, the genre of the novel by Heliodorus and Longus, historiography by Herodotus and Thucydides, the genre of fable by Aesop. Philosophy is represented by Plato, Aristotle, Democritus, Heraclitus, Marcus Aurelius, and the so-called Seven Wise Men (Bias, Chilon, Cleobulus, Periander, Pittacus, Solon, and Thales).

As they expound it in the preface, Terézia Dér and Tamás Nótári compiled their work with the intention to give into the hands of students and lecturers a kind of handbook that makes them think and offers them a basic training in the Greek and Latin languages in an entertaining manner. The edition can be read with benefit also by college and university students of history, Hungarian, and philosophy. The demanding quality of the work is again an example of the books with aesthetic appearance of Lectum Kiadó in Szeged.

5 Dér–Nótári 2016. 6.

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Pope Nicholas I's Responses to the Bulgarians' Questions[1]

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In the early Middle Ages, adopting Christianity did not only mean a change in religion for a newly converted people but also served as a prerequisite for being admitted to the community of the European peoples. Most historical sources reveal merely the outlines of the political background and the result of adopting Christianity, but they usually do not provide details of the process that takes place in the legal system, customs, or way of life of the peoples concerned.

The source entitled 'Pope Nicholas I's Responses to the Bulgarians' Questions' (Responsa Nicolai Papae I. ad consulta Bulgarorum), the translation of which with explanations and an introductory study is given into the readers' hands in the volume of Tamás Nótári – the author and editor of several monographs[2] and editions of sources[3] on mediaeval legal history –, is of unprecedented significance in this respect.

The study and the translation reveal the following historical background. Bulgarian Prince Boris (852–889) was attracted to Christian religion, which was strengthened by several current political efforts: on the one hand, he intended to exert greater influence on the population through the clergy and wanted to use the church organization to drive the boyars back and thereby facilitate the fusion of native Slavs and the Bulgarians settled in the country.

1 I. Miklós pápa válaszai a bolgárok kérdéseire (Pope Nicholas I's Responses to the Bulgarians' Questions). Editing, translation, annotations, and accompanying studies by Tamás Nótári. Szeged, Lectum Kiadó, 2015.

2 Nótári, T.: A kora középkori bajor jogrendszer a Lex Baiuvariorum tükrében (The Early Mediaeval Bavarian Legal System in the Mirror of the Lex Baiuvariorum). Szeged 2014; Jog és társadalom a Lex Baiuvariorumban (Law and Society in the Lex Baiuvariorum). Szeged 2012; A salzburgi historiográfia kezdetei (The Beginnings of the Historiography in Salzburg). Szeged 2007; Law and Society in Lex Baiuvariorum. Passau 2014; Bavarian Historiography in Early Medieval Salzburg. Passau 2010; Show Trials and Lawsuits in Early-Medieval Bavaria. *Rechts geschichtliche Vorträge* 53. Budapest 2008.

3 Nótári, T.: Lex Baiuvariorum. Szeged 2011; Források Salzburg kora középkori történetéből (Sources from the Early Medieval History of Salzburg). Szeged 2005; Notitia Arnonis – Epistola Theotmari. Aetas 2004/2. 72–95; Conversio Bagoariorumet Carantanorum. Aetas 2000/3. 93–111; Gesta Hrodberti. In: Classica – Mediaevalia – Neolatina. Debrecen 2006. 131–146.

The prince adopted Christianity in 864 in Byzantium, in which he was given the name Mikhael. After that, he forwarded a letter to Photius, the Patriarch of Constantinople, in which he wanted to get answers to their practical questions concerning missionary work and church organization. Photius's response, however, was so much abstract and of high theological level that it did not give a satisfying answer to the ruler's questions. In turn, Boris turned to Pope Nicholas I (858–867) and sent him his letter[4] through his delegates, containing his questions concerning the Christian religion. The questions of the Bulgarian mission addressed to the Pope were lost, but the Pope's response letter, the 'Responsa Nicolai Papae I. ad Consulta Bulgarorum', i.e. the Pope's answer written in the autumn of 866 has survived in full. In the volume, the translator first analyses the Patriarch's letter and then examines the Pope's letter more profoundly.

Although the questions put by the Bulgarians, the *consulta*, are lost, the author endeavours to deduce their content and structure from the Pope's answers.

The Pope's letter divides the responses into one hundred and six chapters; however, the structure of the answers makes it highly probable that the Prince's letter contained one hundred and fourteen questions, to which the Pope summed up his answers in one hundred and six chapters. The answers are disorderly in terms of topics, but this might be probably attributed to the fact that he followed the order of the questions and gave his answers in accordance with that.

In terms of topics, it is the answers that apply to Christian religion, its practice, the issue whether heathen customs can be incorporated into Christianity, law and order, and church organization that prevail. The answers from which we can indirectly obtain data about the ancient Bulgarian religion and way of life as well as law and order are especially interesting. For example, the text clearly reveals that polygamy was a generally accepted practice since otherwise they would not have asked the Pope whether it was possible for a man to have two wives at the same time. It was customary among the Bulgarians that before getting married the fiancé gave the fiancée gold and silver objects and other valuable goods as dowry. After her husband's death, a widow was not allowed to get married again; yet, it was a generally accepted practice that a man having become a widower could get married again. Serious punishment was imposed on a servant who ran away from the owner, if captured, and similarly on a slave who slandered his

4 See also Nótári, T.: De conversione Bulgarorum – On the Legal Background of the Conflict between Rome and Byzantium. Zbornik Radova Pravni Fakultet 43/1. 2009. 445–461; On Two Sources of the Early Bulgarian Christianity. Chronica: Annual of the Institute of History University of Szeged 6. 2007. 37–51; Róma és Bizánc missziós kísérletei a IX. századi Bulgáriában (Missionary Work of Rome and Byzantium in 9th-century Bulgaria). *Belvedere Meridionale* 17/1–2. 2005. 22–35; De Consultis Bulgarorum. Collega 6/5. 2002. 47–53; Adalékok a Responsa Nicolai Papae I. ad consulta Bulgarorum keletkezéstörténetéhez (Some Remarks on the Responsa Nicolai Papae I. ad consulta Bulgarorum). *Acta Universitatis Sapientiae Legal Studies* 4/2. 2015. 239–256; Some Remarks on the Responsa Nicolai Papae I. ad consulta Bulgarorum. *Acta Universitatis Sapientiae Legal Studies* 4/1. 2015. 47–64.

master. It was also punishable if a free man fled from his homeland: the frontiers of the country were strictly guarded, and the border guard who made the escape possible was sentenced to death. Murderers of relatives, persons who killed their mate, and who were caught in the act of adultery with an alien woman suffered capital punishment. Involuntary homicide, theft, and kidnapping were sanctioned. Punishment was imposed on persons who castrated others, who brought false charges, and who gave deadly poison to others. Women who treated their husband badly, committed adultery, and slandered their husband were threatened with the punishment of abandonment. Revolt against the ruler was punished by death, which punishment was imposed not only on the perpetrators but also on their families.

In terms of historical aspects, it is important to point out that Prince Boris and his country eventually – in spite of the relations established with Rome, which looked promising – followed the Byzantine rite of Christianity. At the Constantinople Council of 869/70, Bulgaria was subjected to the authority of the Patriarch of Constantinople, and the Prince expelled the missionaries of Rome from his country. Nevertheless, in spite of the Bulgarians not adopting Christianity of the Roman rite, the Pope's letter as a source is very important; one might say, it provides a snapshot-like and uniquely precious picture in the history of the changes in laws, customs, and way of life of a people that converts from heathenism to Christianity.

By Tamás Nótári's volume, the *Responsa* appears in Hungarian for the first time, and so this work provides access to an important source for researchers of not only church history and Slavonic studies but also of the history of law, religion, and way of life as well as for readers interested in these topics.

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