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Impacts of European Law on the Rules of Remedy of the New Code of Hungarian Civil Procedural Law

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Abstract. The adoption of the new Code of Hungarian Civil Procedural Law (Act CXXX of 2016) was motivated by the aim of regulating the legal framework of private enforcement before courts by modern procedural rules in accordance with international and European Union tendencies. The provisions of procedural guarantees in the field of remedies and related proceedings are especially important due to their connection to fundamental rights. The new Act includes – both in the fields of ordinary and extraordinary remedies – conceptually new rules as well as fundamental rights guarantees and new legal instruments among the traditionally accepted provisions.

Keywords: civil procedural law, ordinary and extraordinary remedies, fundamental rights, guarantee provisions

1. Introduction

When a party to proceedings is affected by a violation of fundamental rights during the procedure conducted by the court and/or the legally binding decision rendered as a result, legal literature has dedicated significant resources to determining ways to settle such situations by some form of procedural remedy.[1] During the establishment of the rules of the new Code of Hungarian Civil Procedural Law prescribing the forms of remedy,[2] the judicial practice on fundamental rights of the European Court of Human Rights (ECtHR),[3] the Court of Justice of the EU[4]

1 Hungarian law differentiates between remedies in administrative procedures and remedies during court (usually) litigious procedures. Litigation remedies mean the kind of remedies which apply during the court procedure.
2 Act no CXXX of 2016 on the Code of Civil Procedure.
3 Hereinafter as: ECtHR.
4 Comprehensively upon the matter of European legal remedies, see: Dougan 2004.

(CJEU),[5] and the Hungarian Constitutional Court[6] (HCC)[7] had significant impact. Moreover, the novel rules of European countries established within this field and the opportunity for the introduction of dynamic new instruments for the protection of rights during the procedure into Hungarian law have all affected the final legislative result.

2. Influences That Mobilized the Legislator

In case no 30789/05, which is the case of Ferenc Rózsa and István Rózsa v Hungary, the ECtHR declared it in its judgment that the State of Hungary had violated Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention or ECHR).[8] According to the reasoning of the decision, the courts violated the applicants' fundamental right to access to justice.[9] The ECtHR – referring to its former practice – noted that if an individual's access to justice was denied in a way which is incompatible with the Convention's requirement of fairness, a reopening or a review of the case, if requested, principally represents an appropriate way of redressing such a violation.[10] The particular decision was not one of the so-called pilot judgments,[11] which means that a direct duty for legislation was not implied; however, it was a powerful stimulant for procedural-law-related measures subsequent to the ECtHR judgment declaring the infringement of fundamental rights for the problem to be tackled by new rules of Hungarian procedural law. It is implied from the decision of the ECtHR that it may become necessary to conduct one of the 're-examination' or 'reopening' proceedings to remedy the applicant's injury of rights, which was not possible upon the basis of the set of Hungarian procedural law rules formerly in force.

On 19 January 2000, the Committee of Ministers of the Council of Europe on its 694th session dealt with similar matters and adopted the Recommendation to the Member States on the re-examination or reopening of certain cases at domestic

5 Hereinafter as: CJEU.
6 For more details, see: Tatham 2013.
7 Hereinafter as: HCC.
8 Hereinafter as: the Convention, promulgated by Act no XXXI of 1993 in Hungary.
9 The right to a fair trial.
10 See: Öcalan v Turkey [GC] no 46221/99. §§ 207–210, ECHR 2005-IV.
11 The essence of the pilot judgment is that if any systemic or structural failure to the legal order of an accused state can be identified and if this malfunction shall result in the anticipation of a further volume of similar repetitive cases to be submitted to the Court, the Court may select one or more of such cases for priority treatment. The Court shall expose the error or deficiency of the national law which caused the mass breach of fundamental rights. In addition, the Court has to show as well which are the legal remedies to be provided at the national level so that the states could be enabled to execute the measures imposed by the Court's judgment. In case of the state's failure to comply, the Court shall be entitled to judge upon all of the similar cases in progress.

level, following judgements of the ECtHR (hereinafter: Recommendation).[12] In certain circumstances, the above-mentioned obligation may entail the adoption of measures other than just satisfaction awarded by the ECtHR in accordance with Article 41 of the ECHR. This rule ensures that the injured party is put, as far as possible, in the same situation as enjoyed prior to the violation of the ECHR (*restitutio in integrum*).

The practice of the Committee of Ministers in supervising the enforcement of ECtHR judgements shows that under exceptional circumstances the re-examination of a case or the reopening of proceedings has proven to be the most efficient but not the sole way of achieving *restitutio in integrum*. The recommendation encouraged Member States to review their domestic legal systems in order to ensure that adequate opportunities are available for the re-examination of the case – including the reopening of the proceedings – in cases in which the ECtHR found that there is a violation of fundamental rights or freedoms. This is especially true when the injured party continues to suffer very serious negative consequences resulting from the domestic decision at issue, which are not adequately remediated by just satisfaction and cannot be eliminated except by the re-examination or reopening of the initial case. The judgement of the ECtHR concluded that the domestic decision against which the applicants complained is, on its merits, contrary to the ECHR, or the violation is based on procedural errors or deficiencies, which places doubt on the outcome of the domestic proceedings to which the parties objected.[13]

The recommendation deals with the construction of procedural possibilities linked with the reparation of an injury of a right in accordance with the gravity of the infringement and not with fields of law. There is no doubt that in practice the majority of violations of rights provided for by the ECHR appear in the field of criminal law. However, it cannot be concluded that the re-examination or the reopening of proceedings may not become necessary in civil cases, as well.

This interpretation was further reinforced by the fact that 10 countries of the Council of Europe (hereinafter: CoE)[14] passed such civil procedural-law rules, which had met these criteria. A review was carried out in 2006, focusing on the enforcement of the recommendation. It showed that even in civil cases a construction of peculiar rules should take place in order to ensure the possibilities for the re-examination of the case – including the reopening of the proceeding as well – in case the ECtHR has established the violation of rights.[15]

12 Rec(2000)2/19 January 2000 of the CoE Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the ECtHR (hereinafter as: recommendation).

13 See: recommendation.

14 Hereinafter as: CoE.

15 Reopening a case, retrial; Wiederaufnahme des Prozesses / des Verfahrens réouverture; de la procédure.

The 10 countries, where such civil procedural-law rules apply, are the following: Bosnia and Herzegovina, the Czech Republic, Estonia, the Netherlands, Poland, Latvia, Lithuania, Germany, Italy, Portugal, Romania, Switzerland, and Slovakia. Regarding the above-mentioned countries, the regulatory system of Switzerland is the most comprehensive.

2.1. Switzerland

Switzerland provided the possibility for retrial based on the judgement of the ECtHR as early as 1991. At present, the applicable provisions can be found in the Federal Act of 17 June 2005 on the Federal Court. According to this Act, a motion for retrial may be filed against the decision of the Federal Court on the basis of a breach of the ECHR once the ECtHR has delivered a legally binding judgement upon the violation of the ECHR or any of its Protocols. Moreover, if the injury cannot be remediated by the mere satisfaction of damages, retrial is necessary for repairing the injury.[16] The rule has set up a relevant time limit, so the claim for retrial may be filed at the Federal Court within no more than 90 days from the final judgement of the ECtHR,[17] as per Article 44 of the ECHR.[18] According to the general rules of retrial, if the Federal Court does not find the claim for retrial inadmissible (impermissible) or unfounded, it informs the court of the initial case, the possible other parties or other participants of the given proceeding, and also the authorities affected by the case. The Federal Court addresses them to disclose their views to it within a given deadline.[19] If the Federal Court accepts the arguments listed in the claim for retrial, it annuls (voids) the decision and renders a new one.[20] If the Federal Court annuls a decision which ordered the court having acted on a lower level to conduct a new proceeding, then it also decides over the impacts of the annulment by the new decision rendered by the court having acted on a lower level in the meantime.[21]

In Switzerland, the proceedings of retrial following a judgement of the ECtHR have established a practice by now, which shows, on the one hand, that this extraordinary remedy possibility does not produce its effects automatically and, on the other hand, that, moreover, the legal institution fulfils a peculiar remedial function. In the Hertel case of 1998,[22] the ECtHR declared that the judgements

16 Federal Act of 17 June 2005 on the Federal Court, Article 122.
17 Practically, this means the gaining of ultimate binding force, that the provision is directly enforceable following this.
18 Federal Act of 17 June 2005 on the Federal Court, Article 124.
19 Same as above. Article 127.
20 Same as above. Article 128. (1).
21 Same as above. Article 128. (2).
22 Case of Hertel v Switzerland (59/1997/843/1049), Judgment 25 August 1998, Application No 25181/94.

of Swiss courts, having prohibited the applicant from stating in public that microwave ovens are a hazard to health and also that they have carcinogenic effects, violated Article 10 of the ECHR.[23] With respect to this, the applicant filed a claim for retrial. The Federal Court rejected the claim for retrial since it did not assess the retrial as indispensable to redressing the injury nor did it deem necessary to void the above-mentioned prohibition entirely. Instead, it declared that, in accordance with the judgement of the ECtHR, the prohibition shall be applied in the future in such a manner that the applicant may not state the above content in public without making reference to dissimilar views. In addition, he may also not propagate his statements as scientifically proven facts without referring to dissimilar views. The Federal Court rejected the request for review against this decision (rejecting the claim filed for retrial by keeping the original prohibition in a modified form adjusted to the judgement of the ECtHR) as manifestly ill-founded.

In the Losonci case of 2010,[24] there was a debate over the choice of the marital surname of a husband, who was a Hungarian national, and his wife, a Swiss national. The Swiss courts did not allow the married couple to keep their own, original surnames, whereas in the reverse situation, namely with a Swiss husband and a Hungarian wife, there would have been no impediment to keeping the original surnames. The ECtHR declared the violation of Article 14 of the ECHR[25] in connection with Article 8 of the ECHR.[26] The Federal Court acknowledged the claim for retrial and has partially annulled its own earlier decision and furthermore ordered the Registry of Births, Deaths, and Marriages to register the husband's original surname (Losonci).

2.2. Germany

According to the amendment of the German civil procedural act (ZPO) in 2006,[27] a claim for retrial[28] may be submitted if the ECtHR declares the injury to the ECHR or any of its ancillary protocols, and the judicial decision (against which the retrial has been requested) is founded on this violation.[29] A claim for retrial is to be submitted no later than a time limit of one month from the date of recognition of the circumstance supplying the reason for retrial (but at the earliest beginning from the date on which the judgement became binding). In general, a five-year

23 The right to freedom of expression.
24 Losonci Rose and Rose v Switzerland, Judgment 09 November 2010, First Section, Application No 664/06.
25 Prohibition of discrimination.
26 The right to respect for private and family life.
27 Zivilprozessordnung.
28 Wiederaufnahme.
29 ZPO § 580, point 8.

limitation period applies for claims for retrial but only if the basis of retrial is not a judgement of the ECtHR.

German rules include ancillary decrees as well,[30] a state contribution to the expenses (e.g. the costs of legal counsel, travel costs, etc.) of retrial based on a judgement of the ECtHR can be requested according to general rules.

2.3. Italy

The peculiarity of Italian Law is the so-called 'sentenza additiva', which may be rendered by the Constitutional Court. It is an ancillary decision, which is complementary to a given act of law or decree of law in order to make it comply with the Constitution. After such decision was passed down, the given legal norm may only be applied together with the addendum included in the 'sentenza additiva', regardless of whether the legislator has modified the text of the norm in accordance with the decision or not.

According to Decision No 113/2011 of the Italian Constitutional Court, Article 630 of the Italian Criminal Code determining the situations in which an application for retrial may be submitted, retrials are allowed also in cases where the ECtHR has declared a violation of Article 6 of the ECHR, namely the right to a fair trial. Following two ECtHR decisions condemning Italy in relation to the Italian Civil Litigation Act, the Italian Council of State initiated the constitutional examination of the relevant decrees of both the Italian Administrative Procedural Act and the Italian Civil Procedural Act.

2.4. The Czech Republic

Bearing in mind that the prerequisite for turning to the ECtHR is the exhaustion of all domestic remedies, which, in the case of the Czech Law means that the submission of a constitutional complaint is among those prerequisites, the Czech Law regulates retrial based on the ECtHR's judgment by means of the Constitutional Court Act. Basically, the constitutional complaint is the object of retrial. This particular possibility has been enabled since 2004 in criminal cases and since 2012 in any other case.

If the ECtHR decides in favour of the applicant in a case formerly examined by the Constitutional Court, the applicant may request the reopening of the case within not more than six months from the date of the ECtHR's decision. At the same time, the applicant may raise an objection as to the unconstitutionality of the legal text which underpinned the decision. The claim is inadmissible once the consequences of the violation no longer subsist and the just satisfaction of

30 Such ancillary rule is, for instance, the applicability of the statute on the contribution given by the State (EGMR-Kostenhilfegesetz) also to the decisions made by the ECtHR.

damages provided for by the ECtHR has either sufficiently redressed the injury or a sufficient remedy for the injury has been supplied in any other way. This does not apply if the public interest linked with retrial is stronger than the claimant's private interest; so, even if the private injury has been relieved, retrial is permitted. The Constitutional Court delivers its judgment over the claim on a full session, without any hearings. Should its prior decision conflict with the decision of the ECtHR, it renders the prior judgement void and delivers a new decision based on the judgment of the ECtHR.

The law only makes retrial possible based on a decision of the ECtHR (the re-examination of the constitutional complaint) – so, retrial effecting an out-of-court settlement or a unilateral declaration of the Government is not permitted. The Constitutional Court has, however, recently allowed retrial in two such cases, in which the proceedings have ceased based on the unilateral declaration of the Government.[31] In several cases, the ECtHR concluded that the Czech Constitutional Court had violated a rule of procedural law. After the correction of the procedural failures, identical decisions with the former ones of the Constitutional Court were delivered.

The practical problem with this system is that the ECtHR may also accept cases in which the Constitutional Court has not been involved, which means that no constitutional complaint was submitted.[32] Theoretically, retrial is not possible on the basis of the ECtHR's decision in such cases provided that the Constitutional Court pursues a strict application of the law.

2.5. Estonia

The Estonian Civil Procedural Act enables retrial if the ECtHR declares a violation of the Convention or any of its ancillary protocols, and reasonable remedy for the injury endured cannot be reached by any method other than retrial.[33] The administrative procedural law provides similarly. In terms of both civil and administrative cases, the claim for retrial has to be filed within no more than six months at the Supreme Court, which shall first decide over the admissibility of the claim, thereafter examine its relevance, and finally shall either reject the motion for retrial or annul the former decision. In the latter case, the Supreme Court shall order the lower court to conduct a new proceeding or shall deliver a new decision itself.[34]

31 It is yet to be noted that the claim was rejected in both cases as manifestly ill-founded.

32 E.g. the case of Buchen v the Czech Republic (36541/97; 26/11/2002, final: 26/02/2003).

33 Estonian Civil Procedural Act, point no 702. § (2) 8.

34 There has not been any example for the renewal of litigation in a civil case on the basis of the ECtHR's decision, and even in administrative cases there had only been one example to such renewal of litigation until 2015, when the ECtHR declared in relation to a refugee's proceeding that the Russian national who sought asylum had been held in custody for too long. The

2.6. Lithuania

The Lithuanian Civil Procedural Act enables retrial since 2002 in cases in which the ECtHR declares that the judgements or interim orders of Lithuanian courts violate the ECHR or any of its ancillary protocols. The claim for retrial – according to the general rules of the submission of a claim for retrial – is to be submitted at the Supreme Court within three months from the date of recognition of the circumstance which supplies the reason for retrial but not later than five years after the date the decision appealed via retrial has been rendered. The five-year limitation period is problematic since in many cases it usually takes longer for the ECtHR to deliver a judgment.

The Lithuanian Supreme Court decided in favour of a claim for retrial in one of its judgments delivered in 2005 despite the five-year limitation period having been exceeded and declared that in case of a claim for retrial submitted on the basis of the ECtHR's decision the five-year limitation period is non-applicable. A bill for amending the Civil Procedural Act is also underway, which would, in accordance with this decision, confirm that in the case of a claim for retrial filed on the basis of an ECtHR's decision the five-year limitation period is non-applicable.

Retrial based on a judgement of the ECtHR has taken place only four times since 2002.[35] In one of the cases, the Supreme Court decided to grant further compensation of damages beyond the satisfaction granted by the decision of the ECtHR. In another case, the Supreme Court declared the termination of the applicant's employment to be unlawful on the basis of the judgement of the ECtHR.[36] In a third case, the Supreme Court commenced a civil proceeding on the basis of the ECtHR's judgement that was previously rejected by Lithuanian courts referring to state immunity. The termination of employment was declared unlawful also in this case; moreover, compensation for damages was ordered. Lastly, the Supreme Court accepted a claim for retrial, in which it examined whether a further compensation of damages beyond the satisfaction granted by the ECtHR is justified.

As a practical issue related to Lithuanian cases, the particular practice of the ECtHR shows that in certain cases they shall grant lump-sum satisfaction for damages upon the grounds of equity. The question arises: beyond such a lump-sum satisfaction granted, to what extent is the provision of any further compensation of damages by national courts justified?

Estonian Supreme Court decided partially in favour of the claim for the renewal of litigation in accordance with the decrees of the decision of the ECtHR, and they annulled the former decisions made on a lower level.

35 Source: http://www.lat.lt/lt/titulinis.html (date of download: 24/06/2016).

36 On the basis of the legal ban on the employment of former KGB employees in the private sector, which was not against the Convention according to ECtHR.

2.7. Bosnia and Herzegovina

In 2009, the Act on Non-Litigious Proceedings of Brčko District[37] regulated that it is possible to submit a claim for retrial within no more than thirty days from the date on which the judgement of the ECtHR declaring a violation of the Convention or any of its ancillary protocols gained binding force. The court must decide in line with the contents of the judgement of the ECtHR in the new proceeding. In addition, in 2013, the Federal Act on Non-Litigious Proceedings was amended, and its only current difference when compared to the one of Brčko District is that it allows ninety days for the party to submit a claim for retrial. Out of the two other entities constituting Bosnia and Herzegovina (the Republic of Serbia, the Federation of Bosnia and Herzegovina), the first has amended its Non-Litigious Proceedings Act in concordance with the federal law.

So far, there have not been any examples of retrial based on a decision of the ECtHR but in 2014. Following the judgement rendered by the ECtHR in the case of Avdić and Others v Bosnia and Herzegovina,[38] the Constitutional Court amended its Rules of Procedure by introducing the rule that: once the ECtHR declares a violation of the 'right to a court' in relation to a proceeding undertaken in front of the Constitutional Court, the affected party may request a new proceeding from the Constitutional Court within a three months' subjective time limit or an objective deadline of six months' duration at most.

3. The Hungarian Situation

According to Article Q) § (2) of the Fundamental Law of Hungary[39] (formerly: The Constitution of the Republic of Hungary),[40] Hungary ensures concordance between international law and domestic law in order to fulfil its obligations imposed by international law. Pursuant to § (3) of the same Article, Hungary accepts the generally recognized rules of international law. According to the findings of the Constitutional Court[41] within the framework of the interpretation of § 7 (1) of Act XX[42] of 1949 (the above mentioned Constitution of the Republic of Hungary, which is not in force anymore; however, the current constitutional text contains a similar rule),[43] the domestic law, international treaties, and the

37 One of the three constituent entities of Bosnia and Herzegovina.

38 Avdić and Others v Bosnia and Herzegovina. Judgment: Strasbourg, 19 November 2013 (final: 19 February 2014), applications nos 28357/11, 31549/11, and 39295/11.

39 Fundamental Law of Hungary (25 April 2011).

40 Act no XX of 1949.

41 See: HCC.

42 The Constitution of the Republic of Hungary.

43 As per which the legal system of the Republic of Hungary adapts to the generally acknowledged

Constitution must be examined altogether in correlation.[44] The State of Hungary must fulfil its undertaken duties by constructing domestic rules that settle the occurring situation in concordance with the Constitution.[45] The Republic of Hungary has joined the ECHR and its ancillary protocols. The Convention became ratified as well as adopted in Hungarian Law via Act no XXXI of 1993, including Article 6 of the ECHR declaring the 'right to a fair trial' and Article 13 affirming the 'right to an effective remedy'. According to the interpretive practice of international judicial forums, the term 'effective remedy' covers not just appeal procedures but all other legal instruments that make it possible to repair a violation of rights through legal instruments. The ECtHR is in no way an appellate forum for national courts, and so the revision of the decisions made by national courts does not fall under the scope of its operation. The judgments of the ECtHR declaring the violation of a fundamental right do not result in the automated retrial of the affected proceedings, and such a procedural rule is not justified to be implemented in general, without any restrictions. However, after reading the ECHR and the Article of the Hungarian law on ensuring efficient legal remedies,[46] along with the judgements of the ECtHR – also considering Recommendation no (2000) 2 by the Committee of Ministers to the CoE –, it could be concluded that the initiation of the retrial on the applicant's request can provide a sufficient instrument of legal remedy for the elimination of the injury.

3.1. The Instruments of Protection of Fundamental Rights in the Rules of the New Hungarian Procedural Law

3.1.1. The Retrial

While codifying the new Hungarian Code on Procedural Law, it was an important aspect to align the new rules with the above criteria; moreover, to restructure the Hungarian system of procedural remedies on the basis of a comparative analysis of functioning European procedural law rules. For this reason, point c) of § 393 of Act no CXXX of 2016 on the Code of Civil Procedure (the new Civil Procedural Act, hereinafter: CPA)[47] introduced a new ground for retrial into the Hungarian set of procedural rules, namely that retrial may be requested if a judgement of the ECtHR declaring the violation to any of the rights included in the Convention or any of its ancillary Protocols is rendered. This extraordinary legal remedy is an individual instrument of rights protection. The claimant for retrial may only refer

rules of international legislation and furthermore ensures the concordance of undertaken international duties with the domestic law.

44 HCC Decision no 4/1997. (I. 22.).

45 HCC Decision no 30/1990. (XII. 15.).

46 Article 13 of the Convention.

47 Hereinafter as: CPA.

to a judgement delivered in his own case. In other words, a reference made to the general practice of the ECtHR may not form a basis for retrial even if the ECtHR declares the violation of the Convention grounded on similar facts in favour of any other claimant. The conjunctive prerequisite to the retrial is that the legally binding judgement rendered in the case should be based on the same violation of right for which the judgment of the ECtHR applies. This means that retrial is strictly justified by the framework of the actual elimination of the injury, and any other further decisions made in any further proceedings can be eliminated from this framework, even if they are connected to the dispute. Another prerequisite to the retrial on request is that the claimant for retrial has not been granted any satisfaction of damages by the ECtHR, and thus the injury cannot be (or has not been) redressed by a satisfaction of damages. These last two prerequisites are alternative, which means that the recognition of any of these two is eligible for a reasoning underpinning the application for retrial which is submitted.

The general subjective deadline for the submission of the claim for retrial is six months calculated from the date on which the contested judgement or the decision carrying the effect of a judgement gained binding force. A motion for the equitable extension of this time limit may be submitted in case of missing this deadline through no fault of the interested party. Section (3) of § 395 of CPA declares five years as the general objective deadline, calculated from the date on which the contested judgement gained binding force. The novelty of the regulation is that – also in the case of a successful constitutional complaint and a retrial grounded upon the judgment of the ECtHR – the law breaks through the objective rule regarding the submission of the claim for retrial. The Constitutional Court of Hungary (hereinafter: HCC) has declared earlier that the objective deadline of five years starting from the date when the judgement gained binding force shall not apply to the claim for retrial proposed after a successful constitutional complaint, meaning that there is a possibility granted to get the constitutional complaint redressed via ordinary court proceedings.[48] The CPA sets the deadline for the submission of a claim for retrial grounded upon the judgment of the ECtHR according to an analogy derived from this rule. Section (3) of § 395 of the CPA still permits the submission of a claim for retrial within sixty days from the date of the ECtHR judgement even if five years have already elapsed since the coming into force of the contested judgement.

3.1.2. The Constitutional Complaint

Act no CLI of 2011 on the Constitutional Court (hereinafter: ACC)[49] has significantly broadened the possibilities for submitting a constitutional complaint.

48 HCC decision no 459/B/1999.

49 Hereinafter as: ACC.

The Fundamental Law of Hungary,[50] which entered into force on 1 January 2012, specifies several forms of a constitutional complaint, complemented by the detailed rules of ACC. Three types of the new constitutional complaint can be distinguished based on the above legislation. Legal literature distinguishes between the given subtypes by using adjectives. According to this, the 'old' type of constitutional complaint still exists unaltered [section (1) of § 26 of ACC] according to point c) of section (2) of Article 24 of the Fundamental Law of Hungary. This means that the person or organization affected by an individual case may turn to the HCC with a constitutional complaint if any of his rights set forth by the Fundamental Law of Hungary were violated by the court proceeding conducted via the application of a statute conflicting with the Fundamental Law of Hungary if the interested party has already exhausted all remedies available to him or if there are no remedies available at all. In this particular case, the constitutional complaint is a form of concrete (particular) norm control. On the basis of such a constitutional complaint, the HCC revises the concordance of the statute applied in the individual case with the Fundamental Law of Hungary. This particular constitutional complaint is to be filed within 60 days from the date of delivery of the decision by the competent court of first instance, addressed to the Constitutional Court.[51]

The second type of constitutional complaint [section (2) of § 26 of ACC] is denoted by the literature as 'prompt' (or, in other words, 'direct') constitutional complaint.[52] In this case, the examination of the legal provision can be initiated exceptionally even if there is no judicial decision. In this case, the injury invoked as grounds for the complaint shall be caused by the direct application of a statute conflicting with the Fundamental Law of Hungary or by its coming into force, and there should be no proceeding in course which would be capable of efficiently redressing the given injury. This particular constitutional complaint can be initiated within 180 days directly at the Constitutional Court.

The third type of constitutional complaint is used in a restrictive sense and called a 'genuine' (or 'proper') constitutional complaint (§ 27 of ACC), when the

50 For more details, see: Csehi 2014. 111–135.

51 It shall be pragmatic to note here that, although they are frequently confused, this form of legal remedy is not equal to another concrete norm control proceeding [ACC 25. § (1) & 37. § (2)] when the HCC's proceeding commences upon the initiation of a juror, as prescribed by Article 24. (2) point b) to the Fundamental Law of Hungary. It is the right of any juror to initiate the proceeding of the examination of compliance with the Fundamental Law of Hungary (and an international treaty) of the legal rule (a common law instrument of organization regulation or a legal coherence provision) at the proceeding being conducted in front of it, which they are obliged to apply. In these cases, the court has the right to suspend its own proceeding until the decision of the HCC. Following the decision of the HCC, the court may only draw its own provision by the evaluation of the result of this decision. It is an instance of the independent initiation by a juror, when he should apply such rule of law, the conflict of which was already declared by the HCC before. In this instance, the juror may also turn to the HCC in order to request the prohibition of the application of such legal rule in the specific case.

52 Trócsányi–Schanda 2014.

initiator may appeal against the judicial decision conflicting with the Fundamental Law of Hungary,[53] and not the legal provision upon which the decision is grounded. According to point d) of section (2) of Article 24 of the Fundamental Law of Hungary, the person or organization affected in an individual case may address a constitutional complaint to the HCC if any of his rights ensured by the Fundamental Law of Hungary were violated by the decision rendered regarding his case or any other decision rendered which ceases the court proceeding and the initiator has already exhausted all of the legal remedies available to him, or if there are no legal remedies available at all.[54] This particular constitutional complaint is to be submitted within 60 days from the date of delivery of the decision at the competent court of first instance, addressed to the Constitutional Court.

It is frequent that the initiators appeal against the judicial decision based on both section (2) of § 26 and § 27 of ACC at the same time. This is possible – so, in this way, the assessment of combined or alternate complaints can be carried out in front of the HCC (this competence was already included in the former act on the constitutional court, as well). § 28 of the ACC allows transposition for the HCC even if the claimant has only grounded his constitutional complaint upon either section (1) of § 26 or § 27 of ACC.[55]

The transformed constitutional complaint is an ex post instrument of legal remedy in constitutional law. Since the HCC is not a forum for resolving appeals, situated within the system of ordinary courts of law, the constitutional complaint cannot have as its scope the revision of either the legality or the merits of any judicial decision rendered. Moreover, the constitutional complaint against a court decision may not be considered as a remedy tool for all of the rights violated by the (already) non-litigable judicial decisions inside the judiciary organization either.[56] The HCC examines whether the court decision or the applied legal provision infringes upon any of the rights of the claimant that are guaranteed by the Fundamental Law of Hungary.

Taking into account all of the constitutional complaint proceedings carried out with relevance so far, it can be stated as a tendency that, based on § 29 of ACC, the HCC accepts a constitutional complaint in case the court decision was substantially influenced by a violation of the Fundamental Law of Hungary or in case of an essential constitutional law matter. This legal remedy is indeed also a peculiar ex-ante type of tool for the protection of constitutional rights when we examine its impacts. Consequently, a certain fundamental law approach should originate from the transformed constitutional complaint for ordinary courts which should adhere to the conclusions of the HCC, expressed when

53 For more details, see: Csehi 2017. 17–32, Csehi 2013. 157–180.
54 HCC decision no 33/2012 (VII. 17.).
55 HCC decision no 19/2015 (VI. 15.).
56 HCC order no 3018/2013 (I. 28.).

resolving the constitutional complaint.[57] This particular feature of the genuine constitutional complaint also results in the consequence that the constitutional demands are transposed into the system of ordinary jurisdiction. In other words: the interpretation of law, in conformity with the Fundamental Law of Hungary (such as the demand described in Article 28 to the Fundamental Law of Hungary), becomes enforceable within the system of the genuine constitutional complaint.[58] The role of legal interpretations, rendered in constitutional judicial practice – even as an instrument of rights protection[59] – becomes part of the practice of courts in ordinary jurisdiction.[60]

In the cases of the first (old constitutional complaint) and third (genuine constitutional complaint) type of the constitutional complaint, the ordinary courts may have some duties both during the commencement of the proceedings and following the closure of the proceedings in front of the Constitutional Court. Therefore, the rules of the Hungarian Civil Procedural Act no III. of 1952 has already contained provisions since 1 January 2012, governing the rules of procedure for these cases. The substantive elements of this regulation have been adopted by the new CPA. Both types of constitutional complaint may be submitted at the competent court of the first instance. Once the HCC has accepted the claim as grounded in accordance with section (1) of § 26 and/or § 27 of ACC in the course of a proceeding over a constitutional law complaint, it may decide to annul the act, legal provision, or court decision violating the Fundamental Law of Hungary. In case of annulling an act or a legal provision, the main rule is ex nunc binding force of the decision; exceptionally, the annulling decision may be rendered with ex tunc binding force, as well. As another exception, the annulment may also be valid for the future (pro futuro). In this case, the rendered HCC decision marks a future date when the annulment of the norm conflicting with the Fundamental Law of Hungary shall take effect. This shall occur in cases when the immediate annulment would result in severe injury to the rule of law.

It is derived from the practice of the HCC that it can determine constitutional requirements as legal consequences of equal range.[61] In accordance with the legal practice already developed before 2012, in such cases, HCC declares the constitutional requirements via its decision, which originates from the regulation of the Fundamental Law of Hungary and enforces the implementation of the provisions of the Fundamental Law of Hungary, which the application of the examined legal provisions in the judicial proceeding must be compatible with. The ex officio application of this particular legal consequence, based on section (3) of

57 Orbán 2016. 13.
58 Balogh–Marosi 2012. 79.
59 Gombos 2014a. 123–134, 2014b, 2015. 603–613.
60 Jakab 2011.
61 E.g. HCC decision no 12/2015 (V. 14.) on the specification of a client to the administrative proceeding.

§ 52 of ACC, is to be recognized especially in such cases when multiple interpretations of the norm are possible and only a part of the interpretation (judicial practice) is incompatible with the provisions of the Fundamental Law of Hungary. In such cases, the redressing of the violation of fundamental rights after a successful constitutional complaint is enabled without the annulment of the legal provision, with the exclusion of the interpretations beyond the constitutional framework. Also, in case a constitutional requirement is set and the ordinary court is designated to redress the injury, in individual cases, the competence of the HCC extends to setting out the constitutional framework for the interpretation of a legal norm, by excluding certain interpretations.

According to section (1) of § 26 of ACC, the HCC may also bar the application of a legal norm in cases of successful constitutional complaints, typically regarding legal provisions that have lost their binding force but are still applicable in individual cases. This has an *inter partes* force on the individual case, meaning that the HCC's decision makes the provisions of the norm inapplicable without annulment (which may literally not be possible in the case of legal provisions that have lost their binding force) in the given case.

In cases of successful constitutional complaints defined by section (1) of § 26 of ACC, the HCC can furthermore declare a conflict with the Fundamental Law of Hungary caused by the neglect of a duty to legislate. This legal consequence can have an impact on legislation, on the body that has committed the failure, but it shall bring no legal consequence as an individual legal remedy in the concrete case – as a main rule – upon the proceeding. It should, nevertheless, be noted that if upon dual legal basis the HCC decides for the annulment of a court decision grounded on a conflict with the Fundamental Law of Hungary caused by a neglect of the duty to legislate, then, in the case of ordering the initiation of a new proceeding made by the Curia of Hungary (which shall determine the tools for remedy), it must be taken into account that on the basis of a conflict with the Fundamental Law of Hungary manifested by neglect of duty the HCC marks a deadline for the fulfilment of this duty for the legislator to perform its legislative activity. If the so formulated new regulation applies also to the judicial proceedings in progress, the jurisdiction may be conducted by taking into account all possible means of individual remedy.[62]

Apart from the main rule of the legal consequence of a conflict with the Fundamental Law of Hungary caused by failure of duty, there is the obligation to conduct proceedings in front of ordinary courts, directly generated from a legal consequence determined by the HCC. This is why it was necessary for the new CPA to set up procedural law rules in relation to this. It is a common rule that the Curia of Hungary is both entitled and obliged to determine the procedural tools for the remedy regarding the constitutional complaint, regardless of either the

62 HCC decision no 19/2015 (VI. 15.).

level of the court making the decision that has to be annulled or the type of the legal provision to be annulled, which is applicable before a court.

If the HCC annuls an act or a legal provision in a constitutional complaint proceeding in such a way that – due to another decision of the HCC – it cannot be applied in the case giving the reason for the proceeding of the HCC or if it declares that the court decision delivered in the individual case violates the Fundamental Law of Hungary and annuls it, it can become necessary to determine the order of the remedy of the constitutional complaint in ordinary jurisdictional competence. The competence of the HCC shall cover the annulment of a legal provision and a court decision, whereas in such cases, on the basis of the decision made by the HCC as well as via the appropriate application of the relevant procedural rules, the procedural instruments of the remedy of the constitutional complaint must be defined by the Curia of Hungary.[63]

The different ways of legal remedy can be identified based on whether HCC has annulled a legal provision of substantive law or procedural law, a court decision or a decision of another authority revised by a court decision. As instruments of remedy, in terms of both judiciary proceedings and proceedings of other authorities, retrial (based on a special reason for the renewal of litigation), reopening of the entire proceeding or only the part of it causing the violation may be considered.

If the HCC has annulled a legal provision or act of substantive law and there has been exclusively a litigation or non-contentious proceeding in progress, the Curia of Hungary notifies the initiator of the complaint that he can file a claim for retrial within thirty days at the competent court of the first instance [point a) of section (2) of § 427 of the CPA]. However, even in such a case, retrial is not automated as it is subject to the claimant's submission of his claim (following the above notification). The deadline for submission of the claim for retrial is to be calculated to commence on the date of receipt of the notification of the Curia of Hungary. Some special procedural rules shall apply to retrial, considering the protection of fundamental rights. The permissibility of retrial in these cases – even without a decision made specifically in this context – is prescribed by law. The law provides for an exception to the rule of the five-year objective deadline provided for the submission of the claim for retrial[64] since there is a possibility to submit the claim for retrial within thirty days from receipt of the notification of the Curia of Hungary even if the five-year deadline has already passed, calculated from the date on which the judgement gained binding force.

If the HCC has annulled a legal provision or any act of procedural law, the Curia of Hungary determines the applicability of the procedural provision deriving from the decision of the HCC with the appropriate application of relevant procedural rules. If necessary, the Curia of Hungary shall order the reconduction of that

63 CPA point no 427. § (1).
64 HCC decision no 459/B/1999.

section of the proceeding, the outcome of which could have been affected by the application of the legal provision violating the Fundamental Law of Hungary. Simultaneously, it shall repeal the decision ending that section of the proceeding.[65]

If the HCC has annulled a court decision, the Curia of Hungary – based on the decision of the HCC – shall order the competent court of first or second instance to conduct a new proceeding and render a new decision or shall order the delivery of a new decision in the subject of a claim for judicial revision [point c) of section (2) of § 427 of the CPA]. If the HCC has also annulled the decision of another authority revised by a court decision along with the annulment of the court decision itself, the Curia of Hungary shall notify the authority involved in order to ensure that all of the required measures are taken, along with sending the HCC's decision to the authority. The Curia of Hungary shall simultaneously notify the claimant, as well [point d) of section (2) of § 427 of the CPA].

If the HCC has annulled a court decision, the Curia of Hungary is obliged to decide – based on the decision of the HCC – which institution should be ordered to reconduct a new proceeding: either the competent court of the first or second instance[66] or the authority having made the decision revised by a court decision. The chosen institution shall be notified with the purpose of ensuring that all the necessary measures are taken.[67] It must be stressed that the HCC shall only annul the court decision and cannot provide the court with any instructions or directives in addition to that.

3.1.3. Revision

Revision as a traditional instrument of protection of rights is a form of litigation remedy to be initiated at the judicial forum of the highest level in the system of ordinary jurisdiction, which is the Curia of Hungary. The role of the supreme judicial forum can be described by two traditional functions. On the one hand, it is responsible for directing the application of law, the establishment and sustainment of legal coherence as well as the fulfilment of its public duties (legal coherence is the main public law function of supreme courts). On the other hand, it makes individual decisions in cases submitted to it, in which it safeguards the rights of the parties (safeguarding of rights is the main private law function

65 CPA point no 427. § (2) b).

66 HCC decision no 19/2015 (VI. 15.).

67 EBH 2004. 1078. While carrying out the functions delegated under Section (3) of Article 25 of the Fundamental Law of Hungary, the Curia of Hungary shall adopt uniformity decisions, perform jurisprudence analysis of cases resolved by final decision, issue decisions on principle of the Curia, and publish court decisions which set out principles of legal interpretation. The Curia of Hungary shall adopt a decision on principle in a case that concerns the majority of the population or that is of high importance with respect to the general public. This EBH is one of the published principle decision collections of the Curia.

of supreme courts).[68] The activities deriving from the legal coherence function dominate since the superior judiciary forums supervise the jurisdictional activity of lower courts, ensuring the coherence of the application of law by the full set of instruments available. They release professional directives, conduct legal practice analyses and judge over cases with outstandingly important consequences in terms of the coherence of jurisdiction or cases of major importance to society. The safeguarding of rights as a function is also significant, it is needed for the supreme judicial forum to be capable of meeting the requirements of its assignments deriving from its supreme function. The distinctive feature of revision as an extraordinary remedy is that it is not an absolute right.[69]

Revision can be described as an extraordinary remedy to be used against judgements with ultimate legal binding force. It is like an appeal by nature but with regard to the primary function of supreme judicial forums, it is a strictly restricted type of remedy the evaluation of which belongs to the competence of the supreme judicial forum. In the course of the creation of the new CPA, revision has been intended to be converted into a more efficient legal institution. This conversion was influenced by international experience (through comparative analysis) and the legal practice of the Court of Justice of the European Union (CJEU)[70] through the efficient enforcement[71] of the function of preliminary ruling proceedings,[72] especially in the field of fundamental rights.[73] This was meant to assure the real and unified implementation of EU legislation.[74]

3.1.3.1. International Overview

The most frequently used filters in several countries, which can be justified by constitutional reasons regarding revision, are the restriction of cases on the basis of their value, according to a given threshold, and their importance

68 See e.g.: Bobek 2009. 33–58, Domej 2014. 277, Galič 2014. 292.

69 As per the recommendation of the Committee of Ministers to the Council of Europe on the implementation and the improvement on the pursuing of legal remedy proceedings in civil and commercial law fields, the addressing to the court of third instance (to supreme judicial forums) must be restricted to such cases in which the third-level revision is justified, for instance, which are immanent to the development of law or that facilitate the coherence of the application of statutory acts. This approach is reflected through Article 25 of the Fundamental Law of Hungary and also through the regulations of the Member States of the EU.

70 See e.g.: Tatham 2006. 148–216.

71 For more details, see: Arts–Lenaerts–Maselis 2010; Lenaerts–Maselis–Gutman 2014.

72 For more details, see: Barnard et al. 2013.

73 Schermers–Waelbroeck 2001.

74 For more details, see: Clergerie–Gruber–Rambaud 2016, Craig–de Burca 2015, Barnard–Peers 2017, Arndt–Fischer–Fetzer 2015, Bieber–Epiney–Haag–Kotzur 2016, Borchardt 2015, Fastenrath–Groh 2016, Frenz 2016, Hakenberg 2015, Haratsch–König–Pechstein 2016, Hemmer–Wüst–Hutka 2016, Herdegen 2016, Hobe 2014, Oppermann–Classen–Nettesheim 2016, Streinz 2016, Thiele 2016, and Terpan 2014.

from the perspective of the legal coherence aspect. The first technique ensures cases of small value that do not reach the supreme judicial forum. The second one consistently allows only those cases to reach the court which are of core relevance to legal coherence. Civil law procedural systems usually combine these two techniques.[75]

Only cases conveying significant legal matters or which are essential to legal coherence or the further development of legal practice may be brought in front of the Federal Supreme Court of Germany.[76] The Austrian litigation order[77] applies the filter of a value threshold and the legal coherence aspect combined. Cases under EUR 5,000 as the value of the subject matter of litigation may not reach the Austrian Supreme Court. Cases between a value of EUR 5,000 and 30,000 may only gain admissibility if they convey a significant legal matter. Cases with a subject matter valued above EUR 30,000 may be subject to revision regardless of their importance for legal coherence.[78] Similarly to the German solution, the rules of civil procedure of Scandinavian states exclusively allow the admissibility of a case if it pertains to a significant legal matter.[79] As per the recently reformed Slovenian litigation law,[80] cases over EUR 40,000 in value of their subject matter may be brought in front of the supreme judicial forum without any explicit permission. However, under this threshold, it is only the cases essential to legal coherence or the further development of legal practice that may gain admissibility to the Slovenian Supreme Court.[81]

It is a common feature that the fulfilment of the prerequisites and the filtering criteria must be examined before the examination of the case in relevance. The preparation of the cases is divided into two phases. First, their admissibility must be tested,[82] and the ordinary preparation of the case may only happen thereafter if revision is admissible. It occurs that during the first phase of the preparation a separate set of judges cooperates. In the case of mandatory admission, the case shall be examined exclusively regarding the other criteria of admissibility by the courts. The supreme judicial forums using the legal coherence filtering method have found their consistent practice regarding the determination of the criteria when it

75 It must be noted that the method of restriction has recently moved from the application of the subject matter value threshold to the legal coherence aspect filtering.

76 ZPO 543. §.

77 Austrian civil procedural act (hereinafter: Özpo).

78 Özpo 502. §.

79 To convey a significant legal matter in these states means the cases that include significant theoretical questions in terms of coherent jurisdiction and the coherence of law and which divert from the theoretical directives issued by the supreme judicial forum, etc. On this, see: Domej 2014. 277.

80 Slovenian civil procedural act (hereinafter: ZPP-D).

81 ZPP-D 367. §

82 Typically: through an examination focusing on legal coherence, it must be clarified whether the provision shows any diversion from the decisions of the supreme judicial forum.

is needed to revise a case in order to preserve legal coherence.[83] It is important to stress that admission is no discretional judicial decision. The filtering criteria set on the level of statutory law must be accompanied by a consistent practice.

3.1.3.2. The Hungarian Rules of Revision

The new CPA has changed the rules[84] on decisions excluded from revision and has introduced an admission system that enables revision in certain case groups actually excluded from revision, on the basis of an individual permit. Due to this, objectively excluded cases are to be treated separately from relatively excluded cases. In the case of a relatively excluded revision, it is not only the unlawfulness of the decision that must be referred to in the application for revision by the applicant, but the applicant must elaborate and justify the existing conditions thereof in order to achieve admission. The Curia of Hungary decides over the admissibility of these revisions. The law prescribes the mandatory requirements of the application for admission.[85] In case there is a failure to suffice these, the application must be rejected. The Curia of Hungary judges the application for admission outside of trial, in a council of three. The proceeding on the judging of the application for admission in front of the Curia of Hungary divides into two phases: the decisions on admission and on revision in relevance are made separately.

3.1.3.3. The Filtering System Used for the Relatively Excluded Revision in Hungary

By enabling a broad framework of legal interpretations on the conditions set to the admission of revision, the Civil Department (which is named: 'College')[86] of the Curia of Hungary rendered a Civil Department Opinion on 13 November 2017,[87] dedicated to supplying a set of directing criteria relating to the unified

83 See e.g. Gottwald 2008. 87–106.

84 For more details, see in the new commentaries of the CPA, e.g. Petrik 2017, Varga–Éless 2016, Wopera 2017a, or Wopera 2017b.

85 These conditions are the following, based on point no 409. § (2) to the new CPA: the Curia of Hungary grants the permission for the revision if the examination over the breach of law affecting the relevance of the specific case is justified by the coherence of the legal practice or its further development, the extraordinary weight of the legal matter raised, and also its social weight in lack of a decision having been made on secondary judiciary level on this matter – the need for the preliminary ruling proceeding of the CJEU or a provision of a judgement that is divergent from the judicial practice promulgated by the Curia of Hungary.

86 A college is a body of judges handling specific types of cases. The colleges of the Curia shall comprise the judges of the Curia and the heads of the same colleges of the courts of appeal. The colleges shall form opinions in several professional questions which are recommended but not obliged for application.

87 Civil Department Opinion no 2/2017 (XI. 13.) on certain queries re: the admission of the revision (hereinafter as: Civil Department opinion).

filtering system to be used when processing claims for revision and establishing their admissibility. This opinion aimed to facilitate the proceeding of the parties and their legal counsels by considering the aspects of human rights and constitutionality, devoted to establishing a consistent as well as coherent practice. It takes into account the experience of the formerly used admission system and also several foreign admission systems. As a separate reasoning, with regard to the demand for a preliminary ruling by the CJEU, revision is permissible in cases which are relatively excluded if the Curia of Hungary states that the issue raised by the applicant is to be forwarded to the CJEU. It is a procedural legal prerequisite of the admission of revision that the party already objected during the course of the proceeding, stating that the legal interpretational issue raised by him should be forwarded to the CJEU but the court rejected this or – despite the objection of the party – failed to make a decision regarding the motion for a preliminary ruling to be requested of the CJEU.[88] As a main rule in Hungary, the Curia is to be regarded as the court responsible for fulfilling the obligation to initiate the preliminary ruling proceeding as it is declared by Article 267 (3) to the Treaty on the Functioning of the European Union (TFEU).[89] The reason for granting admission, which is bound to the obligation flowing from EU legislation and was adopted by the revision admission system, serves a twofold purpose. The Curia of Hungary as the ultimate judiciary forum – as the main rule – may not fail to address the CJEU. Hence, in this case, one of the purposes of the admission of revision is to ensure that the Curia of Hungary can fulfil its duty as the court acting on the highest level to initiate the preliminary ruling proceedings. This reason for the granting of admission does also enable the CJEU to declare the error in this legal interpretation through the framework of its preliminary ruling proceeding if the legally binding judgement violates EU law due to the misinterpretations of EU legislation (consequently, it leads directly to the violation of the unified application of EU law). This could mean that the application of the legal provision of the EU or the lack of its application has impacted (or could impact) the case in relevance and also that it is the initiation of a preliminary ruling proceeding that is required for the interpretation of the given legal provision of EU law concerning the given legal issue.

According to the Civil Department opinion, however, the admission of revision shall not be automated even if referring to the above rule with respect to Article 267 (3) of the TFEU, as to which the prescribed duty is not an absolute duty of the supreme forum. There is no obligation of reference once the Curia of Hungary has found that the raised issue is non-relevant to the judgment of the legal dispute or if there is already a pursuant legislative practice of the CJEU in place for the affected EU provision or if the application of EU law is so obvious that it eliminates

88 Point 4 of Civil Department opinion.
89 Hereinafter as: TFEU.

any reasonable doubt.[90] It is going to be the judicial practice which evolves on the basis of the Civil Department opinion that will show the borderline for the effectiveness of the rule that is demanded for the admission that the party already stressed in the course of the proceeding that the legal interpretational issue raised by him should be forwarded to the CJEU but the court rejected this or – despite the request of the party – failed to make a decision thereof. Several references have already been made in this respect,[91] some of which are still ongoing, and the professional legal literature is rather disunified on this topic. In my view, the guidelines of the CJEU related to the obligations of applying EU law in an ex officio manner can be decisive in the progression of this practice.[92]

4. Conclusions

As we have seen, the possibilities granted by the CPA and the norms governing the activity of the HCC provide a three-pronged approach to the correction or annulment or correction of judicial decisions which infringe upon the fundamental rights of the parties to the procedure in which they were rendered.

While retrial is an option for eliminating errors of procedure and the application of substantive law, which have resulted in the infringement of fundamental rights established by the ECtHR, the constitutional complaint in its various forms is meant to impose the supremacy of the Fundamental Law not just upon the legislative power but also on the judiciary to ensure that judicial decisions are not exempt from direct constitutional review. Finally, the procedure of revision is meant to guarantee unitary application of the law in cases significant to the development of jurisprudence.

90 The judgment drawn in the case of CILFIT no 283/81 (ECLI:EU:C:1982:335).

91 For example, the case of Peterbroeck no C-312/93 may be mentioned (C-312/93. Peterbroeck, Van Campenhout & Cie SCS v the Belgian State. ECLI:EU:C:1995:437), yet a conclusion to some extent in opposition to this can be drawn from the decisions of the CJEU made in the field of consumer protection [e.g. joined cases of C-240-244/98, Océano Grupo Editorial SA v Rocío Murciano Quintero (C-240/98.) and Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98.), José Luis Copano Badillo (C-242/98.), Mohammed Berroane (C-243/98.), and Emilio Viñas Feliú (C-244/98.). ECLI:EU:C:2000:346].

92 The CJEU in its joined cases of van Schijndel and van Veen nos C-430/93 and C-431/93 (C-430/93. Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten. ECLI:EU:C:1995:441) unequivocally acknowledged the boundaries marked by the peculiar features of national civil proceedings with respect to the national courts' 'act of its own motion' examinations. This judgement proclaimed that the law of the Union does not prescribe for the national courts the 'act of its own motion' consideration of the argument on the breaching of the regulations of the Community in case the examination of this argument would oblige them to suspend their respective binding force to the claim if thereby they would exit the border of the legal dispute as determined by the parties, by considering such other facts and circumstances which shall lead beyond all of those upon which the party in whose interest the application of the aforementioned decrees are based on his claim.

The CPA has not yet generated the high number of case-by-case solutions necessary to draw deep conclusions regarding the merits and perhaps the shortcomings of its rules on procedural remedies; however, such conclusions are forthcoming in the future.

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Foreign Exchange Loan Contracts – A Romanian Case from a Hungarian Perspective[1]

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Abstract. The period in which the daily news reports were about the economic crisis, its impacts, and the foreign currency crisis is behind us. However, sometimes new information appears, which in a given case gives hope for those hundreds of thousands who fell victim to thoughtless loan constructs denominated in a foreign currency. Our study concerns the CJEU's recent judgement in the case of Andriciuc et al. (C-186/16), published in September 2017, in which the CJEU answered the questions submitted by the Court of Appeal of Oradea. People expected that the judgement would not only change the situation of the Romanian debtors but would affect all debtors living all over Europe. Accordingly, the study intends to compare the Hungarian and Romanian regulatory environment and the results and solution proposals of the judicial practice by the analysis of the judgement. Recently, new civil codes came into force both in Hungary and Romania; our examination extends to the relevant substantive law provisions as well. Fundamental dogmatic changes occurred in both countries' civil law regulation relating to foreign exchange loan contracts. However, instead of the examination and comparison of the national regulation and practice, our analysis shall primarily concern the CJEU's recent judgement, which, despite the lack of new statements, could have an impact on both the Hungarian and Romanian regulatory environment.

Keywords: foreign exchange loan contract, loan denominated in a foreign currency, unfair contract term, the Kásler case, the Andriciuc case

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Introductory Remarks

In the past few years, after the global economic crisis, lending in foreign currencies has become one of the core questions of European economic policy. Although the gravity of the situation could be felt from the beginning, the significance and the complexity of this problem became obvious after the initial economic issue expanded into a social one. Due to foreign exchange loans, not only economic but several legal questions arose in the Member States of the European Union,[2] where such contractual constructs have been applied, and in the judicial practice of the Court of Justice of the European Union (hereinafter: CJEU).

In those jurisdictions where the economic problems caused by foreign exchange loans were the gravest, the demands for a solution arose the strongest,[3] prompting national legislators to take steps. Nevertheless, the solutions worked out by the different national legislators do not necessarily overlap since not only the regulatory framework for such loans but also the applied lending practices were different in the Member States.[4]

In Hungary, the search for solutions and the sorting out of problems arisen in relation to the loan contracts denominated in a foreign currency already started in the judicial practice during the year 2013. Several applications were sent to the courts; most of them asked for stating the invalidity of the given loan contract, although their legal grounds were different. Some actions referred to the fact that the contract is incompatible with the law or it was concluded by circumventing the law (illegal contracts) or the contract is manifestly in contradiction to good morals (immoral contract).[5] Other actions referred to the 'gross disparity in value'[6] or the debtor's mistake,[7] while in some other cases the claimant debtors argued the unfairness of the stipulation that facilitates the financial institution's right to amend the contract unilaterally.[8] Moreover, a significant amount of the applicants asked for stating the invalidity of the contract upon the unfair nature of a certain contractual term. With regard to this, a question arose as to whether a contractual term which shifts unilaterally the burden of foreign exchange risk to the consumer is unfair or not.[9]

2 Pann–Seliger–Übeleis 2010. 60, Buszko–Krupa 2015. 124.

3 As *Fazekas* commented, the increase of foreign exchange loans could be experienced not only in Hungary but in the Baltic countries, i.e. Estonia, Latvia, and Lithuania. Similar constructs were also known and used in Poland, Bulgaria, and Romania. See: Fazekas 2016. 84–90.

4 About the lending constructs which were applied in the banking practice, see: Kriston 2015. 229.

5 See articles 6:95 and 6:96 of Act V of 2013 on the (Hungarian) Civil Code (hereinafter HCC).

6 See Article 6:98 of the HCC.

7 See Article 6:90 of the HCC.

8 Cf. Article 6:191 of the HCC. For the context of the foreign exchange loan contracts and contract amendment, see: Harmathy 2016. 537–547.

9 About the relevant Hungarian judicial practice, see: Fazekas 2016. 83.

Since the legal grounds of the actions were very different, the judgements showed also a decided difference in their theoretical and dogmatical approach to foreign exchange loan contracts. In order to unify the divergent judicial practice, in December 2013, the Curia of Hungary (the supreme court of the country, hereinafter: Curia) adopted the uniformity decision no 6/2013 PJE on issues of principle that arose in connection with such loan contracts.[10] Although this uniformity decision (which is to be examined later in detail) was a milestone in the process of solving those problems which arose in relation to the loan contracts, several questions remained unanswered. After the CJEU's judgement in the landmark Kásler case (C-26/13),[11] the consolidation of jurisprudence in matters of loan contracts where the lent amount was denominated in a foreign currency started. As the instrument of this consolidation, another uniformity decision (2/2014 PJE) appeared, and the Hungarian Parliament systematically amended the applicable regulatory framework.

Due to loans denominated in foreign currencies, problems also arose in Romania. Several applications were sent to courts, and the search for an appropriate solution started not only at judicial level but by the legislator as well. During the years 2015 and 2016, several acts were adopted by the Romanian Parliament, which aimed directly or indirectly at the consolidation of the situation of debtors who had owed lenders based on foreign exchange loan contracts. These legal provisions, which were also examined by the Romanian Constitutional Court, did not bring satisfactory solutions for the consumers. This is the reason why Romanian courts also turned to the CJEU and sent questions for a preliminary ruling. Similar to the Kásler case for Hungarians, Matei[12] was a landmark case for the Romanian consumers. However, a new judgement appeared, which gave new hope for both Hungarian and Romanian debtors.

In the next few pages, we will review the CJEU's judgement in the case of Andriciuc et al. (C-186/16),[13] which was recently published, in September 2017. This judgement facilitates the examination of some problematic questions in detail, with reference to the interpretation of Directive no 93/13/EEC[14] and with regard to the particularities of both the Hungarian and Romanian regulatory environment.[15]

10 The text of the operative part of the uniformity decision no 6/2013 PJE is available at the following link: http://www.lb.hu/en/uniformity-decisions. About the analysis of the uniformity decision, see: Czugler 2014. 36.

11 Judgement of the Court in the case C-26/13 Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt. of the 30th of April 2014, ECLI:EU:C:2014:282. For a detailed analysis of the judgement, see: Somssich 2014. 83.

12 Judgement of the Court in the case C-143/13 Bogdan Matei and Ioana Ofelia Matei v SC Volksbank România S.A. of the 26th of February 2015, ECLI:EU:C:2015:127.

13 Judgement of the Court in the case C-186/16 Ruxandra Paula Andriciuc and Others v Banca Românească S.A. of the 20th of September 2017, ECLI:EU:C:2017:703.

14 Council Directive no 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, pp. 29–34.

15 In the past few years, the interpretation of the different articles of Directive no 93/13/EEC became again a core question of the European law. See Micklitz–Reich 2014. 771.

1. The Dispute in the Main Proceedings and the Questions Referred by the National Court for Preliminary Ruling

Between April 2007 and October 2008, the applicants of the main proceeding concluded loan contracts with *Banca Românească S.A.* (hereinafter: Bank), denominated in Swiss francs (CHF), with a view, among others, to acquiring immovable property and refinancing other credit arrangements. Each of these agreements contained the contractual term, which prescribes that debtors are required to make monthly payments on the loans in the same currency as that in which they had been concluded. It meant that debtors had to pay in Swiss francs although they received their income in Romanian lei (RON) in these years. This contractual term was complemented by another one, which authorized the Bank to debit the debtor's account and, if necessary, to carry out any conversion of the balance available on the debtor's account into the currency of the contract at the Bank's exchange rate as it stood on the day of that operation when the monthly payments had fallen due or the debtor failed to comply with the obligations arising from the agreement (breach of contract).

According to the applicants' statements, by the application of the above-mentioned contractual terms, the Bank fully placed the exchange rate risk on the debtors. In accordance with their argumentation, the Bank could foresee the changings and fluctuations in the exchange rate of the Swiss franc, but such information was not disclosed to the debtors.[16] Since the debtors considered both contractual terms unlawful, in 2014, they took a legal action against the Bank before the County Court of Bihor, Romania (*Tribunalul Bihor*). In their application, they asked the Romanian Court to ascertain the nullity of the above mentioned contractual terms and to oblige the Bank to work out a new loan repayment schedule, which is applicable for each loan contract and which provides the conversion of the credit amount (initially stated in a foreign currency) into Romanian lei at the exchange rate which was in force at the time of the conclusion of the loan contract.

The Romanian Court of First Instance rejected the application and stated that a contractual term, which provides for the debtors to pay back the loan in the same currency as that in which the contract had been concluded, shall not be regarded as unfair even if it had not been individually negotiated with the consumers.

16 In the above-mentioned period, the exchange rate of the Swiss franc fluctuated significantly compared to other foreign currencies. In spite of this, financial institutions emphasized the advantages of the applied product and currency and did not provide information about risks or potential hazards and the chance of their occurrence.

The debtors brought an appeal against that judgement. The Court of Appeal of Oradea (*Curtea de Apel Oradea*) disputed the interpretation of the applicable provisions of Directive no 93/13/EEC, wherefore it made a request for a preliminary ruling. In its request, it submitted the following three questions:

a) The first question referred to Article 3 (1) of Directive no 93/13/EEC. It enquired if the significant imbalance in the parties' rights and obligations arising from the contract must be examined strictly at the time of the conclusion of the contract or it can also be examined during the performance of the contract, with regard to the circumstances of the case and to the significant variations in the exchange rate.

b) The Court's second question tended to the interpretation of Article 4 (2) of Directive no 93/13/EEC. It queried the CJEU as to the interpretation of the plainness (clearness) and intelligibility of a contractual term and also referred to the extent (scope and level) of the obligation to provide information. The question was whether the notion of a plain and intelligible contractual term includes only those reasons and facts which pertain to the base of the parties' contract or it should also cover every potential consequence upon which the debtor's contractual obligation may be subject to change. These latter include the exchange rate risk. In this context, the core of the question was if the obligation to provide information should cover only the conditions of the loan (e.g. interests, charges, and guarantees required of the debtor) or it should also include the possible overvaluation or undervaluation of a foreign currency.

c) The third question also tended to Article 4 (2) and asked whether the expressions 'the main subject matter of the contract' and 'adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other,' may be used for a term incorporated in a loan contract in a foreign currency which has not been negotiated individually and pursuant to which 'the credit must be repaid in the same currency'.

In the subsequent points of our study, we will review the CJEU's standpoint on the above-mentioned three questions. Since the CJEU inverted the order of the questions submitted by the Romanian Court and moved logically backwards in the course of the preliminary ruling, we also present the answers given by the CJEU in compliance with the CJEU's judgement.

2. About the Third Question, or What Is the 'Main Subject Matter of the Contract'?

In some other similar cases, the CJEU already examined the question regarding the interpretation of the expression 'the main subject matter of the contract' stated in Article 4 of Directive no 93/13/EEC. This is quite important since the unfairness

of those contractual terms which fall into the scope of this expression cannot be examined according to the Directive. These contractual terms are exempt from being assessed for unfairness provided that they are in plain and intelligible language.[17] Accordingly, in order to assess the fairness of a certain contractual term, one should use a two-step test. Firstly, it should be examined if the given contractual term might be deemed as 'the main subject matter of the contract' or not, according to the Directive.

The first case, in which the CJEU dealt with the notion of 'main subject matter of the contract', was the Caja de Ahorros (C-484/08).[18] According to the judgement, a contract term falls into the scope of the above mentioned notion if it has not been individually negotiated and it describes the essential obligations in a contract concluded between a seller or supplier and a consumer.[19] The general notion of the 'main subject matter of the contract' given by the CJEU was clarified in the judgement of the Kásler case. In its judgement, the CJEU stated that the consumer protection mechanism created by Directive no 93/13/EEC is based on the principle which declares that a consumer is in a much weaker position than the other contractual party (seller or service provider). This 'information imbalance'[20] (i.e. the consumer's defencelessness) appears both in the negotiating position of the consumer and in the level of information available since sellers (or suppliers) often institute such conditions over which the consumer has very little influence or none at all.[21] With regard to this, the examined expression – as an exception to the mechanism for reviewing the substance of unfair terms – shall be strictly interpreted.[22]

Summing up the settled case-law of the CJEU, a certain contractual term falls into the scope of 'the main subject matter of the contract' if it lays down the *essential* obligations of the contract and, as such, characterizes it. However, a contractual term does not fall into the scope of the expression if it is merely *ancillary* compared to the terms laying down essential obligations.[23] During the determination of the essential or ancillary nature of a certain contractual term, both the nature and the general scheme of the given contract (e.g. loan contract) and its legal and factual context shall be taken into account. [24]

17 Directive no 93/13/EEC, Article 4 (2).

18 Judgement of the Court in the case C-484/08 Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc) of the 3rd of June 2010, ECLI:EU:C:2010:309.

19 Caja de Ahorros, para 34.

20 Gárdos-Nagy 2013. 377.

21 Kásler, para 40.

22 See in particular Kásler, para 42, Matei, para 49 and Judgement of the Court in the case C-96/14 Jean-Claude Van Hove v CNP Assurances SA of the 23rd of April 2015, ECLI:EU:C:2015:262, para 31.

23 Kásler, para 50, Van Hove, para 33, Matei, para 54.

24 Kásler, paras 50–51, Matei, paras 53–54, Van Hove, para 37, Andriciuc et al., para 30.

The opinion of Advocate General Wahl, in accordance with the judgement in the Kásler case,[25] emphasized that in the case of a loan agreement the bank's essential obligation is to make the amount loaned available. In parallel with this duty, the debtor's essential obligation is to repay the principal and interest (which represents the price of the loan).[26] Since these obligations are not separable from the currency of the loan, an approach according to which 'the main subject matter of the contract' covers only the numerical sum but does not include the foreign currency exchange rate used as a reference to calculating the amount due for repayment is not acceptable.

Furthermore, the question arises as to whether the determination of the currency in which the debtor shall fulfil the monthly payments is a necessary condition with regard to the loan contract or not. If it is, it shall be deemed as an essential feature of the contract, and therefore it falls into the scope of the above examined expression.

It is also worthy to mention that during the main procedure and the preliminary ruling both the Romanian bank and the Romanian government referred to the fact that the above examined contractual terms, which prescribe for the debtors to pay back the loan in the same currency as that in which they had been concluded, were in conformity with the principle of *monetary nominalism* stated in Article 1587 of the Romanian Civil Code (*Codul civil*) in force at that time. According to the above-mentioned article, an obligation arising from a money loan is always limited to the same numerical sum shown in the contract. The debtor is obliged to pay back the sum lent in the currency of the loan, according to the exchange rate at the time of repayment, even if the value of a currency changes (increases or decreases) before such payment becomes due.[27]

This provision stood at the basis of the defendant's argumentation since those terms which reflect mandatory statutory or regulatory provisions of either of the EU's member states do not fall into the scope of the provisions of Directive no 93/13/EEC. Though the contractual term examined in the case of Andriciuc et al. refers to a certain regulatory provision of the Romanian Civil Code and therefore it is exempted from the application of the Directive's provisions, the CJEU stated that this exclusion is only applicable if both prescribed conditions are fulfilled. Thus, the exemption applies insofar as the certain contractual term reflects a mandatory statutory or regulatory provision. In its judgement in the Andriciuc et al. case, the CJEU stated that the examination of these conditions falls within the jurisdiction of the national courts. In its judgement, the CJEU prescribed for the Romanian court the strict interpretation of the above-mentioned terms in order to maintain and ensure the consumer protection mechanism created by the Directive.[28]

25 Kásler, para 51.
26 Opinion of Advocate General Nils Wahl (27 April 2017), para 43.
27 Andriciuc et al., para 7.
28 Andriciuc et al., paras 27–31.

3. About the Second Question, or What Does the Clarity and Intelligibility of a Contractual Term Mean?

The second question submitted by the Romanian Court to the CJEU closely relates to the problem examined in the previous point of the study. As it was mentioned before, the method of assessing the fairness of a certain contractual term can be divided into two steps. According to the provisions of Directive no 93/13/EEC, the assessment of the unfairness of the terms is not possible if they fall into the scope of the definition of 'the main subject matter of the contract' provided that these terms are in plain and intelligible language.[29] According to the CJEU's judgement, the above examined terms should expressly be deemed as 'the main subject matter of the contract', wherefore it is necessary to examine if these terms were in plain and intelligible language, i.e. they were transparent for the debtors.

The criterion of clarity and intelligibility was also examined by the CJEU in many cases. In this case, the following must be examined: what is the extent of the consumer's awareness to be expected and of the seller's or service provider's obligation to disclose information?

With regard to the criterion of clarity and intelligibility, the CJEU stated in its judgement in the Kásler case that the requirement of transparency cannot be restricted to the linguistic and grammatical intelligibility[30] of the contractual terms (i.e. it is not enough if a consumer is able to interpret the contractual terms grammatically, according to the general meaning of the words).[31] Transparency includes the real content of the contract since consumers are in a weaker position when it comes to acquiring information as compared to the position of the sellers or suppliers. Consequently, the requirement of transparency should be interpreted in a broader sense and the seller (or supplier) should set out transparently, in plain and intelligible language, the specific functioning of the mechanism to which the given contractual term refers.[32]

In the case of loan contracts, a contractual term is transparent if it sets out the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and the one provided for by other contractual terms relating to the advance of the loan in such a way that the consumer is in a position to evaluate on the basis of clear and intelligible criteria and the economic consequences for him which derive from it.[33]

In its judgement in the Kásler case, the CJEU also stated that the Bank should have explicitly given information about the use of different exchange rates and its reasons

29 Directive no 93/13/EEC, Article 4 (2).

30 The linguistic and grammatical intelligibility means the narrower approach of the criterion of clarity and intelligibility.

31 Kásler, para 75.

32 Andriciuc et al., paras 45–46 and Kásler, para 75.

33 Kásler, paras 73 and 75.

(i.e. why the buying rate of exchange was used in the case of the loan's disbursement and why the selling rate was used in the case of the conversion of the monthly debt payments). As many scholars emphasized, the lending practices were different in the Member States. This difference between the Hungarian and Romanian lending practice has great significance in the case in question. Namely, in the Kásler case, the financial institution applied a foreign exchange lending construct, according to which the loan's disbursement and the repayment are counted in a different currency. This financial method complied with Hungarian regulations since neither the previous Hungarian Civil Code (Act IV of 1959 on the Civil Code, hereinafter: HCC [1959]) nor the legal regulation in force, Act V of 2013 on the Hungarian Civil Code (hereinafter: HCC), barred parties from distinguishing between the 'denominated currency' and the 'paid currency' of a loan contract. On the contrary, in the case of Andriciuc et al., parties agreed in such a lending construct where the 'denominated currency' and 'paid currency' do not differ, i.e. the disbursement and the repayment is carried out in the same currency (Swiss francs).

In the case of Andriciuc et al., grasping the meaning of the fluctuation in exchange rate was from the beginning expected from the debtors. Nevertheless, the Bank should expressly inform the clients that they must bear the risk of the exchange rate and that this duty could become more burdensome during the paying back of the debt, in particular when the currency in which the debtors get their monthly income depreciates.

In our view, AG Wahl's opinion delivered in the case of Andriciuc et al. is justified. As he stated, the bank, having regard to its expertise and knowledge in the area, is obliged to draw the consumers' attention to the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer debtor does not receive his income in that currency. However, the bank is not under an obligation to inform the consumer about those facts and circumstances which the bank itself could not have foreseen even if it acted with prudent diligence.[34]

In the judgement of Andriciuc et al., it was also stated that the examination of the clarity and intelligibility of a certain contract with regard to all relevant circumstances of the case falls within the jurisdiction of the national courts. Accordingly, the Romanian court should examine, if debtors were informed by the bank about all facts and circumstances (e.g. the total cost of the loan) which could influence their decision. During this examination, it will be important if a reasonably well-informed, reasonably observant and circumspect consumer[35] can estimate the costs. Namely, it is essential to allow the consumer to become

34 Opinion of AG Wahl (C-186/16), paras 67–68.

35 The standard of the average consumer, i.e. who is 'reasonably well-informed, reasonably observant and circumspect', was explicitly employed by the CJEU. See Kásler, para 74; Van Hove, para 47; Durovic 2016. 60; Leone 2017. 8.

aware, before the contract is concluded, of all contractual conditions and relating circumstances since the consumer can make a deliberate decision on the contract conclusion only based upon this information in his or her possession.[36]

This requirement was already worded in the *Recommendation of the European Systemic Risk Board* (hereinafter: ESRB) in 2011.[37] In the field of the risk awareness of borrowers (debtors), the ESRB recommends national supervisory authorities and the Member States to:

> [R]equire the financial institutions to provide borrowers with adequate information regarding the risks involved in foreign currency lending. As it is worded, such information should be sufficient to enable borrowers to take well-informed and prudent decisions and should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate.[38]

4. Clear and Intelligible Contractual Terms – A Hungarian Perspective

The requirement of clarity and intelligibility was also a core question in the Hungarian judicial practice. The previously referred uniformity decision (6/2013 PJE) of the Curia stated that '[t]he statutory obligation of the financial institution to provide information had to extend to the possibility of exchange rate change and its impact on the payments'. Furthermore, the Curia stated that this obligation should not extend to the extent of the exchange rate change.[39] This expectation is lawful since the extent of the exchange rate change is an unforeseeable and objective circumstance. The Hungarian legal standpoint expressly mentions that financial institutions shall make the debtors understand the changeability of the exchange rate in the course of the repayment of the loan. This obligation is a necessary element of the duty to provide information, prescribed in general by the HCC.[40] However, this obligation should (and could) not extend to inform the debtor about the numeric change of the exchange rate.

The CJEU's judgement in the Kásler case has not only great impact on the case-law of the CJEU, but it gives new impetus to working out the legal solutions applicable to lending in foreign currencies in Hungary. In 2014, the Curia passed

36 Andriciuc et al., paras 46–48.

37 Recommendation of the European Systemic Risk Board of 21 September 2011 on lending in foreign currencies (ESRB/2011/1), OJ C 342, 22.11.2011, pp. 1–47.

38 ESRB/2011/1, Section 1, Recommendation A – Risk Awareness of Borrowers.

39 Uniformity Decision no 6/2013 PJE, Operative Part, Point 3.

40 Hungarian Civil Code, Article 6:62, paragraph (1).

another uniformity decision (2/2014 PJE), which was strongly influenced by the CJEU's judgement. The uniformity decision nearly adopted the position of the CJEU stated in the judgement. According to Point 1 of the uniformity decision's operative part, 'the clause of a foreign exchange loan contract which stipulates that the risk of foreign exchange shall be taken without restrictions by the consumer (…) forms part of the main subject matter of the contract', wherefore its unfairness can only be examined if it was clear and intelligible for the consumer at the time of contract conclusion.[41]

The Curia's uniformity decisions have their significance not only on their own but via their effects on the unification of the interpretation of the law and produce a strong impact on the future formation of the regulatory environment. Article 205, paragraph (3) of the HCC [1959] already prescribed for the contractual parties a general duty to cooperate with each other at the time of the contract conclusion and to provide information about all those circumstances which are essential for the contract to be concluded. The new HCC took over the 'old' civil code's provision on the duty to provide information and complemented it at the same time. According to Article 6:62, paragraph (1) of the HCC in force, parties should cooperate not only at the time of contract conclusion but also during the fulfilment and the cessation of the contract.[42]

It is worthy to mention that not only did the prior HCC and does the one in force prescribe the duty to provide information, but particular acts have also dealt with the question. The provision of the HCC [1959] was complemented by Act CXII of 1996 on Credit Institutions and Financial Enterprises (hereinafter: CIFE), which is no longer in force.[43] The CIFE contained some provisions on the foreign exchange loan contracts concluded with consumers. Article 203, paragraph (6) of the CIFE prescribed that in these kinds of contracts the financial institution shall expressly specify the risks to which the consumer is exposed, and the consumer shall verify acknowledgement ('statement of risk acknowledgement') by his signature. In the case of foreign exchange loan contracts, the statement of risk acknowledgement must expressly refer to the risks in any fluctuation of exchange rates and its effects on the instalment payments.[44]

From the year 2009, consumer credit has been regulated by a single act:[45] Act CLXII of 2009 on consumer credit (hereinafter CCA), as amended in 2014.[46] The

41 About the uniformity decision no 2/2014 PJE, see Fazekas 2016. 90–91.

42 See Juhász 2017a, Juhász 2017b. 285.

43 The CIFE was superseded by Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises, which is presently in force.

44 CIFE, Article 203, paragraph (7), point a).

45 With this act, the Hungarian legislator implemented Directive no 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealed Council Directive no 87/102/EEC, OJ L 133, 22.5.2008, pp. 66–92.

46 See Act LXXVIII of 2014 on the amendment of the Act CLXII of 2009 on consumer credit and other related acts, Article 9.

relevant rules of the CCA are more or less in line with the CIFE's rules on the obligation to provide information. According to Article 21/A, paragraph (1) of the CCA, in the case of a loan contract which is concluded with consumers and either recorded or lent and repayable in foreign currency (i.e. 'foreign-currency-based' loan contract), the financial institution (creditor) must inform the consumer about the risks to which the consumer is exposed in relation to the contract. The consumer's acknowledgement shall be certified by the statement signed by the consumer, in which the consumer has acknowledged the risks. This statement should also contain the risks in any fluctuation of exchange rates and its effect on the instalment payments.[47]

5. About the First Question, or When Shall the Significant Imbalance Caused by the Unfair Contract Term Be Examined?

Returning to the CJEU's judgement in the Andriciuc case, we go further with the first question submitted by the Romanian Court for preliminary ruling. This question asked for the interpretation of Article 3 (1) of Directive no 93/13/EEC, which determined the time when the 'significant imbalance between the rights and obligations of the parties' arising under the contract shall be examined by the national courts. This question was also quite important since the significant imbalance existing between the parties' rights and obligations can cause the unfairness of a certain contractual term. It is also worthy to mention that this criterion can solely be examined if it does not fall into the scope of Article 4 (2) of Directive no 93/13/EEC.[48]

In relation to this question, AG Wahl properly drew attention in his opinion to the fact that a difference must be made between two possible situations:

a) There are cases where a certain contractual term causes a significant imbalance between the parties' obligations from the outset, but this becomes manifest to the parties only during the performance of the contract. He referred to the CJEU's judgement in RWE Vertrieb,[49] in which the CJEU established relevant statements in relation to the unfair contractual practice of a German gas supplier company. According to the CJEU's statement, although the information to be provided is different with regard to the peculiarities of the certain product, the omission to inform the consumer before the contract is concluded cannot, in principle, be

47 CCA, Article 21/A, paragraph (2).

48 Cf. the 2nd point of the study.

49 Judgement of the Court in the case C-92/11 RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV. of the 21st of March 2013, ECLI:EU:C:2013:180.

compensated for by the mere fact that consumers will, during the performance of the contract, be informed in good time of a variation of the charges (e.g. change in price) and of their right to terminate the contract if they do not wish to accept the variation, but they will not be informed of the reasons of the changes.[50] That is, the contractual term, which was applied by the parties during the conclusion of the contract, already gave birth at this time to the significant imbalance between the parties, and therefore it was deemed unfair.

b) In other cases, the unfairness of a given contractual term does not arise at the time of the conclusion of the contract but appears because of the changes in circumstances, which may occur during the fulfilment of the contract. By reason of these changes, the extent of the obligation borne by the consumer changes, which the consumer perceives as excessive, i.e. such changes raise the significant imbalance between the contractual parties posteriorly.

The case of Andriciuc et al. is a good example for this case since the domestic currency's devaluation caused extra costs for the debtors. Nevertheless, it can also be stated that at the time of contract conclusion neither the debtors (consumers) nor the financial institution could reasonably be expected to foresee the exact measure of the changes in the exchange rate. The unpredictability of change in circumstances as an objective factor causes change in the parties' obligations. However, according to our view, these changes do not break the contractual balance since the financial institution that has lent to the debtor a certain quantity of currency units is entitled to the return of that same number of units.[51] The risk of the fluctuation or the significant change of exchange rates was known by the debtors at the time of contract conclusion, so the CJEU stated that the existence of significant imbalances between the parties' rights and obligations shall be examined at the time of contract conclusion. Moreover, the national court shall ascertain whether the financial institution was, with regard to all circumstances, observant of the requirement of good faith and fairness and whether the significant imbalance between the parties' rights and obligations existed at the time of contract conclusion.

Besides the CJEU's judgement, it is worthy to pay attention to Article 970 of the 'old' Romanian Civil Code, which was in force at the time of the main procedure. This article stated that contracts oblige the parties to fulfil not only the obligations expressly stipulated within them but to meet all those other requirements which – according to the nature of the contract – arise therefrom in accordance with equity, custom, or law.[52]

On the one hand, the above-mentioned provision primarily concerns contractual freedom, i.e. the Romanian legislator intended to make sure the

50 RWE (C-92/11), paras 51–53 and 55.
51 Opinion of AG Wahl (C-186/16), para 87.
52 'Old' Romanian Civil Code, Article 970.

parties could determine the content of the contract freely. On the other hand, among the contractual principles, the legislator puts the principle 'pacta sunt servanda' before the application of 'clausula rebus sic stantibus'[53] since the Romanian obligation law declares the obligatory nature of the legal transaction (*principiul forței obligatorii*) as a principle. According to this, a transaction between the parties has legal binding force, i.e. they shall compulsorily comply with the pact.[54] With regard to the transaction's binding force, parties are obliged to fulfil all contractual obligations since the balance and stability of relationships of economic exchange can be ensured only in this way.[55] It means that courts had no right to evaluate the change of circumstances even if the change was outside the parties' action (objective), was unforeseeable, and caused detrimental changes in the position of either of the parties. Such changes in the contractual circumstances did not facilitate the amendment of the contract by the court since only the parties have the right to amend the existing contract by their consent.[56]

The new Romanian Civil Code[57] (hereinafter: RCC), which came into force on the 1st of October 2011, brings changes in the above-mentioned provisions. With regard to the legal harmonization and implementation duty prescribed by the EU, Article 1271 of the RCC breaks through the principle of monetary nominalism and introduces the *theory of imprevision* based on the French model (*théorie de l'imprevision*).[58] Although the new RCC facilitates the intervention into contractual relations,[59] this possibility is not unlimited. Article 1271, paragraph (3) of the RCC determines four conditions, according to which the court has the right either to amend the contract and share the losses and advantages between the contractual parties or terminate the contract. The conditions, which must be fulfilled at the same time, are the following:

a) a change occurs in the circumstances after the contract conclusion;

b) this possibility of that change could not have been foreseen at the time of contract conclusion;

c) the debtor did not assume the risk of such change in circumstances, and it cannot be presumed that he would have assumed this risk;

d) the debtor made an attempt in reasonable time and good faith at negotiating a reasonable and equitable correction to the contract.

53 Although the 'clausula rebus sic stantibus' is known in the Romanian civil law jurisprudence, it was unregulated until the adoption of the new Romanian Civil Code.

54 Veress 2017. 121.

55 Pătru 2011. 125.

56 This statement is based on the presentation titled 'The Reform of the General Rules on Contracts in the New Romanian Civil Code' presented by Emőd Veress in Hungarian language in Miskolc (Hungary) on the 9th of November 2017.

57 Law No 287/2009 on the Civil Code.

58 Culda 2008. 19, Lachièze 2012. 181–184, Lutzi 2016. 94–97, Rösler 2007. 500–502.

59 Article 1271 of RCC.

The change in circumstances, which is an external factor independent of the parties, i.e. an objective condition, has an impact on the contract existing between the parties. Moreover, as a result of the change in circumstances, the fulfilment of the contract is overly burdensome and obviously disadvantageous for one of the parties. However, beyond the change of circumstances, other conditions having subjective nature shall also be examined. On the one hand, the above-mentioned provision is not applicable if the debtor expressly assumed the risk of a change in circumstances. On the other hand, the lack of such intention of the debtor also excludes the application of the previously examined article. Since the Romanian law prefers the amendment of the contract by the parties' consent to amendment by a court, the debtor having regard to the requirement of good faith must attempt cooperation with the other party in order to amend the contract existing between them. The amendment of the contract by the court is only possible if the negotiations were not successful or the other party refused the attempted negotiations.[60]

6. Consequences

The problem of loans denominated in foreign currencies has continued to be a contentious issue not only in Hungary but in other countries across Europe. Notwithstanding the fact that both the national legislators and the bodies applying the law intended to close the debates on lending in foreign currencies, statistics show the opposite. In Hungary, between the 1st of November 2013 and the 31st of December 2016, more than 36,000 cases were submitted to the different courts from all over Hungary. About 19,000 of them came from the year 2016.[61] Similarly to this, Romanian courts also passed several judgements which relate to foreign exchange loan contracts. In the final decisions, the judges stated the unfairness of a certain contract term and the nullity of these clauses.[62]

These numbers of judicial cases clearly indicate that debtors are not able to accept the solution proposals which were developed by the legislator as the remedy to the problems arisen. Instead, they steadily argue the fairness of the contracts and certain contractual terms. Debtors still hope that new and more favourable circumstances and possibilities will emerge and therefore have great expectations of both the national courts and the CJEU, which returns to the question of loans denominated in a foreign currency from time to time. This is well-demonstrated by the case introduced and analysed in the study.

60 Gânfălean–Gheberta 2014, 63. See in detail: Pătru 2011. 128, Oglindă 2012. 233.

61 http://birosag.hu/sites/default/files/allomanyok/stat-tart-file/devizahiteles_peres_eljarasok_2013._november_1.-2017._augusztus_31.pdf. (date of retrieval: 30 October 2017).

62 http://www.consumerchampion.eu/blog/end-loans-foreign-currency-romania (date of retrieval: 28 November 2017).

At first sight, the CJEU's judgement in Andriciuc et al.'s case gave hope for both Hungarian and Romanian debtors. However, after the thorough examination of the judgement, it is obvious that there is no meaningful change in the CJEU's judicial practice on lending in foreign currency. The CJEU's judicial practice on foreign exchange loans is uniform and mature, motions by Member States rarely reach the judicial body. It is one of the reasons why we are of the opinion that the chance for the emergence of cases which would bring significant changes in the already evolved judicial practice is far too little. This statement is supported by the CJEU's recent judgement in Andriciuc et al.'s case, where the judicial body answered to the questions submitted by the Romanian Court for preliminary ruling, but its answers were mostly based on its previous case-law, e.g. on the judgement in the Kásler case. Moreover, the judgement does not contain any new and relevant statements.[63]

In view of the judgements passed by the CJEU, a question arises: can any new element arise in the adjudication of litigation concerning loans denominated in a foreign currency at the European level? In our opinion, it may occur that some cases relating to foreign exchange loans will emerge and reach Luxembourg in the future. Nevertheless, if a Member State decides to create its own clear and mandatory regulation, addressing the CJEU for a preliminary ruling in foreign exchange loan cases is no longer necessary and justifiable.

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Abuse of the Right of Unilateral Termination in Contract Law

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Abstract. In the present article, we analyse the regulation of the topic of abuse of rights in general in the field of civil law, and in particular the possibility and consequences of such abuse during the unilateral termination of contractual relationships. We follow the historical development of different theoretical foundations by which legislators aimed to define proper use and abuse of rights in different legal systems, distinguishing between solutions inspired by French and German legal models. We then contrast these solutions with the ones adopted by the Hungarian legislator in the past and also in the present. We then analyse the contractual and legal means by which unilateral termination of a contract is barred or discouraged, with special emphasis on the abusive exercise of a discretionary right of the party to that effect. We conclude that during its application the solution adopted by the Hungarian legislator to deal with possible situations of abuse of rights, the 'venire contra factum proprium' rule, shall result in the application of sanctions specific to abuse of rights even if the contractual party acted in good faith, but his/her actions caused damages to the other party.

Keywords: chicane, abuse of rights, contractual law, continental law, civil law, unilateral termination

I. The Development of Theory: Chicane, Unfair, or Non-Functional Exercise of Rights

The Civil Law principle of abuse of rights has undergone a long evolution in legislative history. One of the oldest records of abuse of rights can be traced to the enactment of the regulation of chicane. In the old civil codes of Europe, exercising certain rights with an intent to impair was considered as an unlawful exercise which imposed liability in damages.[1]

1 E.g. BGB 226. § The exercise of a right is not permitted if its only possible purpose consists in

As the concept of abuse of rights encompassed a wider area, new institutions emerged such as elements of exercising rights *without interest* or *contrary to the purpose* of the right.

The French doctrine (chicane) was also widely applied in German legal practice. *Innentheorie* and *Außentheorie* gave a different interpretation of the nature of the abuse of rights. According to *Außentheorie*, the external limits for exercising substantive rights are constrained by legislation ensuring the exercise of another substantive right, whereas *Innentheorie* interprets the abuse of rights as limit of the contents of a given right: the regulations related to the substantive right do not authorize persons to exercise the right contrary to its purpose.[2]

The first drafts of the Hungarian civil code (HCC), for instance, the 1928 Private Law Bill – the provisions of which had been applied by courts until the civil code of 1959 came into effect –, did regulate *chicane* and set its prohibition as a rule along with the basic principle of good faith and fair dealing. The *manifest* abuse of rights cannot be protected by law. The legal interpretation implied the prohibition of chicane in this provision. The courts held the exercise of rights to be abusive in those cases when the entitled person exercised his/her rights for the sake of his/her own legal interest, but the aim of his/her exercise of the said right was to impair the interests of another person. Therefore, not only the intentionally harmful exercise of a right but also simply exercising such a right were deemed as abuse of right when the legal purpose of the right (interests defended by law) was dwarfed by the main aim, the malevolent intent. Nevertheless, these abusive exercises of rights had to be obvious. However, this term acquired a wider meaning in judicial practice before 1959: the conflicting interests of parties were given objective consideration. All exercise of rights was considered abusive when the advantages *were disproportionately lower* compared to the disadvantages caused to another. In the matter of the Private Law Bill of 1928, judicial practice also held abusive the exercise of a right which did not cause real damage but was still disruptive to other persons. The risk of damage was sufficient to constitute abuse of right, and *there was no need* for the exercise to be immoral or obvious.[3] Hungarian author *Kelemen* defined the nature of the abuse of rights as the situation when the lawful exercise of substantive rights combined with circumstantial factors renders the whole endeavour unlawful.[4] The exercise of rights to harm another person's rights is no longer the exercise of a right – in the opinion of *Ágoston*.[5]

The legal phenomenon of abuse of right in this time was difficult to distinguish from the notion of *good faith* and *fair dealing* (Treu und Glauben).[6]

causing damage to another.

2 Tercsák 2003. 188–196. See also Verebics 2000.

3 Kelemen 1935. 10.

4 Kelemen 1935. 11.

5 Ágoston 1912. 209.

6 Ágoston 1912. 212.

It was generally accepted that substantive rights which are unrestricted – and similarly the legal interests defended by them – were not unlimited; they were provided for in order to meet economic, moral, and social requirements. These social requirements were older in judicial practice than the provisions of the first Hungarian Civil Code of 1959.

Taking into consideration the general requirement of exercising of rights in conformity with their social function[7], the Civil Code of 1959 declared the prohibition of exercising of rights in an abusive way as a violation of the above-mentioned requirement. The ideology of social co-operation between citizens, however, restricted the freedom of the exercise of rights and basically contradicted the bourgeois principle of unrestricted substantive rights. After the Hungarian Civil Code, the opinions of the Hungarian legal doctrine either made no distinction between the doctrine of abuse of rights and requirement of exercise of rights in compliance with its social function or treated the abuse of rights as the narrower category[8] or qualified the non-functional exercise of a right as abusive only when the exercise of rights caused damage (Sárándi).[9]

Following the correct interpretation of the regulation of the Hungarian Civil Code of 1959, the abusive exercise of rights has a conceptual element of non-functionality, but the minor misuse of rights is not deemed as an abusive exercise. Otherwise, sanctions against these minor abusive exercises would fundamentally harm the principles of civil autonomy and the limitlessness of substantive rights. Additionally, the distinction between the two principles is manifest in the case when abuse is embodied in the withholding (repudiation) of a statement required by law[10] as such a particular abuse would not be deemed a non-functional exercise of a right.

II. Recent Changes in the Hungarian Civil Code

The new Hungarian Civil Code (hereinafter: new HCC) of 2013 brought novelties in the system of the general principles of civil law. The legislator did not set rules for a socialist principle of the requirement to exercise rights properly. He

7 Exercising any right directed toward an objective that is incompatible with the social function of that right shall be regarded as an abuse of rights, particularly if it would lead to damaging the national economy, harassing persons, impairing their rights and legal interests, or acquiring undue advantages (see: old HCC § 5 subsection 2).

8 Eörsi–Világhy 1962. 162–163.

9 Sárándi 1965. 207.

10 Where the abuse of a right is manifested in the repudiation of a statement required by law and this conduct does injury to an important public interest or a private interest deserving special consideration, the court is entitled to substitute its judgment for the party's legal statement, provided there is no other way of averting the injury. A court judgment may be substituted for a statement, especially if the statement had been made contingent upon the bestowal of an illegal advantage [old Civil Code § 5 (3)].

considered the principle of prohibiting the abuse of rights in the form of a general clause to be a final barrier to exercising substantive rights. The examples provided for abusive exercise of rights (particular hypotheses of abuse) listed in the statute have also been repealed. The question is whether this means the revival of old Hungarian legal traditions and whether it results in placing abuse on the basis of comparison of interests.

Another important novelty is that the state of 'venire contra factum proprium', which was in the international evolution of law a subcase of abuse, is regulated now under the principle of good faith and fair dealing: The requirement of good faith and fair dealing is also violated by one whose exercise of rights stands contrary to his/her former behaviour, upon which the other party had reason to rely.[11]

In the course of the codification of the new HCC, the opinion was formulated early in the beginning that though the notion of good faith and fair dealing and the prohibition of the abuse of rights shared the same root, still these two phenomena do not fully correspond. The prohibition of the abuse of rights does not mean only the final barrier against the behaviours not complying with the requirement of good faith.[12]

The interpretation of the prohibition of abuse of rights might be changed by the judicial practice of the future. The main question is how much emphasis will be put on the principle of good faith and fair dealing.

III. Discretional Rights and Their Content; External and/or Internal Limits to Substantive Rights

A question arises as to whether the so-called *discretional substantive rights* have a content exempt from any restriction. In most cases, it is impossible to abuse these rights, for instance, the right of division of joint ownership. In addition, another question arises as to whether the right of withdrawal is also a discretional substantive right – considering that there are legal provisions which constitute barriers against the limitless exercise of this right. The legislator created rules for unilateral termination in several cases (for the sake of consumer protection, as sanction of non-performance, in the interest of a party ordering services at a distance) but also created criteria for the exercise of this right.

An essay among Salamon Beck's works deals with the problem of how a contracting party could be entitled to breach the bonds of his/her obligation. Its title is expressive and striking: 'Shaking off the Obligation'. He explained his choice going back to the Roman concept of *obligation*: 'iuris vinculum, quo necessitate adstringimur'. The obligation is like a set of legal 'shackles', and

11 CC § 1:3, subsection (2).

12 Menyhárd 2002. 28–30.

its breaking reminds him of the circus spectacle performed by an escape artist breaking the shackles by which he was bound. Beck stated that it may be possible to break obligational bonds in certain cases.[13]

The abusive exercise of the right of termination can be restricted by contractual terms which restrict or temporarily exclude the unilateral right to terminate the contract. In recent Hungarian judicial practice, these restrictions are valid on the basis of contractual freedom unless legal provisions disallow them. For example, the parties can mutually exclude their unilateral rights to terminate a preliminary agreement (pactum de contrahendo), supporting the binding nature of the contractual obligation to conclude the targeted contract.[14]

Apart from the general principle of the prohibition of abuse of rights, there are also countless elements of legal norms which function as barriers against the exercise exceeding such a limit, for the sake of preserving the purpose of the substantive right. These elements help us to interpret legal regulations supply: e.g. indefinite phrases (good reason, substantial breach), the provision for appreciating and defending the interest of another party, other barriers to exercising rights [fundamental rights, other substantive rights of debtor (obligee) and creditor (obligor), distrainee], or other relevant issues (good faith, malevolent intent). It follows that the prohibition of abusive exercise of rights is an external limit of substantive rights, and the possibility of ascertaining depends always on the causal circumstances of the exercise.

In the first area, relations between neighbours, where the legal doctrine of the abuse of rights has developed, there are numerous provisions which limit the exercise of ownership rights. Furthermore, the law of obligations also contains numerous provisions disqualifying abuse of rights, i.e.: the avoidance of contract can be noticed provided only that the mistake is essential; the claim for restoration of the status quo ante is lawful only if it will not incur a considerable expense for the parties.[15] To fulfil the social and economic purpose of the contract, not only the obligor but also the obligee has to conduct themselves and to exercise their rights in this way.[16]

Similarly to withdrawal, the right of avoidance may result in the restoration of the former status of the parties ('in integrum restitutio'). This right may be exercised discretionally even if in certain cases this right might also be abused. The limits of the right of avoidance exclude certain cases (i.e. if the party would have recognized the avoidance or did accept the risk of mistake),[17] and the limited period of 1 year for the notice of avoidance is also a significant limit of the right.

13 Beck 1941. 25–64.
14 BH2017. 50 (Curia of Hungary).
15 Ágoston 1912. 215.
16 Nizsalovszky 1949. 60.
17 See. Ágoston 1912 and the new CC: section 6:90 subsection (3).

Exemplifying the first case stands the following fact of a litigious situation: the plaintiff bought a custom-made, special 'slow vehicle' suited for agricultural works. Soon after the signing of the contract, the plaintiff (buyer) put the buyer on notice by raising an objection as to the unreasonably high fuel consumption of the vehicle. The seller offered restitutio in integrum, but it was not accepted at that time. Thereafter, the buyer used the vehicle for works in the autumn when he scraped it. Later, the plaintiff brought a claim before the court to exercise the right of avoidance, referring to his significant error in the matter of the fuel consumption.[18]

According to the facts of another case, the buyer blocked "restitutio in integrum" by overburdening the real estate to be restituted by mortgages (hypothecs). Exercising his right of avoidance for objective disproportion ('laesio enormis'), his aim was to reach a better (lower) price, while avoiding having to return the property bought to the seller.[19]

IV. Examples for the Provisions against the Right of Termination

The right of unilateral termination is based either on legal provisions or on the contract. If the parties conclude a contract for such a right, its exercise is generally conditioned to the payment of forfeit money (earnest money). The forfeit is to compensate the detriment brought to the interest of the other party.

The right of termination (cancellation) may occur from legal provisions, and it may have objective or subjective characteristics. It may be a licence or a remedy for the breach of contract. The scholastic example for an objective right of withdrawal is the one for the service-ordering customer in professional services (or product delivery). The customer shall be entitled to cancel the contract at any time – until performance –, but they shall be liable for paying compensation for any damage suffered by the contractor.[20]

Following from the frequency of cases, when the right of cancellation is a remedy of non-performance, the exercise of this right draws down larger risks of abuse because the party is not compelled to restore the former state if the other party is liable for the impossibility of restitution (restoration).[21]

Judicial practice finds possible that the parties would square accounts with each other for the future instead of *in integrum restitutio*. If the party cannot

18 BH1985. 385. See: Molnár 2009.
19 BH1994. 187, under the former CC (Act No 4 of 1959).
20 New CC § 6:249. subsec. (1)–(2).
21 New CC § 6:140. subsec. (3).

return the service that was performed because the object of performance is deteriorated, their right to terminate is not exercised abusively.[22]

The *ultima ratio* nature of the right of cancellation as a remedy appears when the exercise of the right assumes that the contractual interest (*positive interesse* in German) for the performance has lapsed. Generally, the burden of proof is on the obligee. Furthermore, the creditor is not entitled to terminate the contract if the lack of conformity is minor.[23]

The above-mentioned examples for the barriers of the right to terminate do not exclude, however, all possibilities of abuse.[24] In the following, those cases are to be reviewed when the abusive exercise of rights is tested. Extra facts recolour the circumstances of the exercise of the right and swerve the substantive law into directions of non-functionality or misuse.

V. Abuse of Right to Terminate the Contract in Case-Law

The Budapest-Capital Regional Court of Appeal qualified the following case as abusive exercise of rights. The buyer *owed for more than ten years* a defined amount of money (as interest rates for default of the amount of price) to the seller. The performance had also been impeded by several events (credit assessment, obtaining official permits, etc.), but the abusive character arose from the fact that the seller (plaintiff) claimed not the factual debt but *a large amount of money, which he requested in order to revoke his (pending) notice of termination*. The claim of the seller showed his true intent of profiteering. The court found that his claim is ill-grounded and 'he exercises his right against its social function (…)'. The abusive exercising of the right to terminate is not protected by law, wherefore this notice of termination cannot result in the termination of the contract.[25] In this case, the court held that the notice of termination was invalid (ineffective) because of abuse.

In this latter case, the right of termination had a retroactive effect and resulted (or would have resulted) in the restoration of the former (earlier) status of the parties. But if a certain contractual relationship cannot be terminated retroactively the right to terminate has effects only for the future.

Under the relevant provisions of the new HCC, the long-term contracts (concluded for indeterminate periods) can be cancelled unilaterally. As a notice of termination can harm the interests of the other party, the exercise of the right

22 No 1 of the year 2012 – Opinion of Civil Council of Curia (Supreme Court of Hungary) about implied warranty, the remedies of non-conformity.

23 New CC § 6:159. subsec. (3).

24 See also Bíró 1985, 121–122.

25 Decision No 7. Pf. 21.268/2013/6.

of termination depends on other conditions (i.e. the price of the cessation of contract by mutual consent in contracts for immovable property renting). The engendered reasonable reliance in the continuity of the contract is especially important in commercial contracts, when the party invests considerable expenses and arranges his businesses around this contract.

In the following case, the arbitrator held that the exercise of the right to terminate was abusive, taking into consideration the terms and conditions of the contract and the contractual interests of the tenant for the long-term effectiveness and durability of the contact. The plaintiff as leaser contracted the defendant (leasee) on the 27th of February in 1998 for an unbuilt site for running a parking lot. According to the contract terms, the leasee relied on the long-term contractual relationship, but the leaser gave a notice of termination shortly after the signing of the contract. The leaser relied on the continuation of the contract. The harm to the interest of the leasee was so significant that the arbitrator considered the termination abusive in this case.[26]

Another decision shows that the passing of a large amount of money at the signing of a contract confirms the intended durability of the contract in that case. The parties did not exclude the right of termination for a period of time but relied on the continuation of the contract. The large payment encouraged the parties to conclude the contract. The exercise of a right to terminate would have been abusive in this case.[27]

The above-mentioned cases raise the question whether they constitute a conduct deemed as *venire contra factum proprium*. But this state of affairs requires a behaviour contrary to good faith and fair dealing.

In the following case, the mandator has exercised the right to terminate a power of attorney abusively. He pleaded that the breach of contract by the attorney was an external reason for termination, but the attorney met the mandator's requirements. As the mandator exercised the right of termination abusively, before the results of the power of attorney would manifest, the attorney can claim compensation because he has lost his success fee.[28] The court held that the notice of termination was valid, the mandator exercised his rights lawfully, but the attorney is entitled to claim compensation of his damage (lucrum cessans), which is equal to the agreed success fee. This case was judged under the relevant provision of the Old CC, but the new CC regulates the attorney's general claim for compensation of damage.

In recent judicial practice, the abusive nature of the unilateral right of termination was also dealt with in the mass cases of loan contracts. The court

26 Decision No 1999/6.

27 Decision No 2014/108.

28 According to the uniformity decision of Civil Law Chamber of Curia No 3 of year the 2006 (PJE). Decision No 2011/66. See also: Bíró 2012. 218.

held that the right of termination could be exercised only in the event of serious breach of contract, in accordance with its social purpose. Thus, the creditor abused his right to terminate the loan contract if there would have been other remedies to enforce the adequate performance. The creditor terminated the contract abusively if the debtor's non-performance was constituted by only a one-month delay in payment and not paid at a later date and the creditor would have had the possibility to claim the additional completion of the bailment.[29]

VI. Bumper Case: Unexpected Termination and the Answers of European National Legal Systems

As mentioned above, the abuse of rights has a very close relation to the notion of good faith and fair dealing. Zimmermann and Whittaker, when framing the project of the Common Core of European Private Law, published their results arising from research in the field of good faith and fair dealing.[30] Taking into consideration the topic of this paper, one case study has to be emphasized – *Case 14: Producing New Bumpers* –, in which the authors collected the answers of national laws for a specific state of affairs from the legislative and the judicial standpoint, for the issue of the exercise of the right of unilateral termination.[31]

According to the state of affairs, Hamish, who produced cars, concluded a contract with Ian for the delivery of bumpers. These bumpers had to be manufactured for a specific new car, and thus Ian had to set up a new assembly line, which involved considerable expenses. After seven months, Hamish sent a notice of termination for Ian, as he was entitled to it under a relevant legislative provision. (It was assumed that Hamish did not just want to change his contractual partner, and there was some breach of contract by Ian, which could be the reason for the termination.) Ian had reasons to rely on the continuation of this contract, but it is true that the parties did not exclude the right of termination in order to secure the contractual relation for a long period of time.

The regulation of national legal systems and judicial practice propose three types of solutions to such a situation.[32]

Under the first, if the legislative provisions entitle Hamish to terminate the contract, the exercise of this right is not subject to restriction. Ian cannot claim any compensation of his damage. This solution is applied by the common law regimes.

According to the second type of solution, the notice (withdrawal or termination) is valid, but, in spite of it, Hamish can be obliged to compensate Ian for damages.

29 Decision No EBD2015. P. 4. (Budapest-Capital Regional Court of Appeal).
30 Zimmermann–Whittaker 2000.
31 Zimmermann–Whittaker 2000. 404–418.
32 Id. 417–418.

By the notice of termination, the contract was terminated prematurely, and the delivered bumpers' price did not cover the expenses of the installation of the specific new production line. The notice of termination is therefore deemed as an abuse of right. The abuse of right is an unlawful conduct. The claim for compensation is on the basis of the liability for unlawful exercise of rights, either a contractual or a delictual (tort) liability for damages. This type of solution appeared in the French, the Belgian, the Greek, and the Dutch law.

The third type of solution is on the basis of the invalidity of the notice of termination. Certain national legal systems (such as the German, Austrian, Greek, and the Belgian, with consideration of special facts, circumstances of the case, and the Irish law as opposed to common law) apply the notion of good faith and fair dealing. According to German law, the exercise of the right of termination constituted *venire contra factum proprium*. It is worth protecting the engendered reasonable reliance in the continuation of the contract by law. In Austrian law, according to the prohibition of immoral (*sittenwidrig*) exercise of rights and the legislative rule of supplementary interpretation of a contract, the notice was immoral and ineffective under the relevant provision of ABGB.[33]

The latest type of solution has yet to appear in the Hungarian judicial practice. The Hungarian method for regulation shows influences from the Austrian and the German model, but the state of *venire contra factum proprium* is a *very new institution* of the Hungarian Civil Code system, wherefore it is not yet interpreted by judicial practice.

VII. The Right of Withdrawal in Consumer Contracts – Opportunistic Termination

On the 14th of June 2014, the new Government (Cabinet) Decree No 45/2014. (II. 26.) regarding particular provisions of consumer-to-business contracts entered into force. This Decree is the implementation of the EC Directive on Consumer Rights (2011/83/EC). This Decree sets a period of 14 days (in fact, 8) for exercising the right of withdrawal widely among consumer contracts (primarily selling at a distance and off-premises contracts). The period cannot be altered (shortened) to the disadvantage of the consumer. The Decree enumerates the circumstances and cases when the consumer is not entitled to withdraw, but these rules cannot prevent the abusive exercise of the right.

Professional circles have already taken account of the risk that the consumer could not only try but can effectively use the 'unwanted, non-conform' product in the relatively long term of 14 days. Certain standard terms and conditions have already qualified certain consumer behaviours as abuse of the right of

33 Id. 404.

withdrawal.[34] According to the Decree, the expenses of the restoration of the pre-contractual state are placed on the business party (and so is total reimbursement of the consumer) for the sake of consumer protection, but it encourages the consumer to abuse the right and to gain undue advantage.[35] 'Between contracting at the doorstep and the expiration of the cooling-off period, the seller can hardly monitor the behaviour – specifically, the proper handling of the product – of each and every consumer. The consumer might use the product during the cooling-off period excessively, i.e. beyond adequate usage, and return it to the seller following alleged non-satisfaction.'[36]

VIII. Conclusions

The general question arising from the novelties of the new Hungarian Civil Code is which facts and circumstances will be considered by courts in the following judicial practice to hold a certain case as an abusive exercise. As the prohibition of abuse can be meant as the negative side of the requirement of good faith and fair dealing, the courts would refer to this principle more often than to the abuse of rights. But the non-functional mode/method of exercising a right does not appear always as a bad-faith behaviour.

Because the legislator has placed the *venire contra factum proprium* rule in the semantic field of the principle of good faith and fair dealing, there will be typical cases which would be redirected from the principle of the abuse of rights and come under this new principle, but according to former judicial practice the abuse of rights furthermore does not require harmful effects or intentional exercise. It means that if someone caused prejudice to another person by exercising his/her right, his conduct is against the principle of good faith. Furthermore, on the one hand, it cannot be deemed that such conduct is an abuse, whereas, on the other hand, he is obliged to repair the damages only when other elements of fact appear simultaneously – suggestive behaviour – under Provision 6:587. § of the Hungarian Civil Code.[37]

The principle of exercise of rights regarding the above-mentioned economic and social purpose (requirement of functionality) is also to be considered even if the legal regulation has changed.

34 It ought to examine the unfair nature or the nullity of these conditions, as well.

35 Howells–Schulze 2009. 184. In eBay auctions, the consumer is not entitled to withdraw – except for the sale at a fixed price, a so-called 'buy-it-now', which contracts are regulated under the norms governing sales contracts concluded at a distance –, and so businesses choose to sell via auction on eBay to circumvent the right of withdrawal.

36 Hoeppner 2012; see: Luzak 2013.

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

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Restitution of Agricultural Immovable Property under Law No 18/1991 and Subsequent Instruments

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Abstract. In this study, we examine the legislative background and the process of post-communist restitution of agricultural immovable property in Romania. We present the historical context of land reform, the legal and political considerations at play when the legislator enacted restitution as well as the effects of these factors on the long-term process of restitution, and the exercise of immovable property rights. We outline the major issues of restitution, including from the perspective of immovable property registration, the various measures used to seize property (such as nationalization and collectivization), and the legislator's choice to accomplish restitution via an administrative procedure by restitution commissions instead of trusting this delicate process to the judiciary. We conclude that, due to the half-hearted commitment of the legislator to property restitution, this measure, similarly to historic land reforms, was destined to fail, while the repercussions of its failure in economic, legal, and political terms are diverse and still unfolding.

Keywords: transitional justice, restitution, agricultural assets, immovable property, agrarian reform, Romania

I. Introduction

The issues of land ownership in Romania have always stood at the confluence of a wide array of competing interests ranging from the purely economic to the social, political, and ethnic.[1] The problem of distribution and redistribution of land has haunted the Romanian polity from before its very emergence as a sovereign state in the latter half of the 19th century[2] and continues to befuddle policymakers today.

1 van Meurs 1999, Verdery 2003.
2 Nacu 2014.

II. A Brief History of Agrarian Reforms in Romania before Collectivization

II.1. The Agrarian Reform of 1864 and Its Aftermath

Land reform has been on the agenda of most governments of the precursor states that would go on to form modern-day Romania since at least the mid-18th century; however, it came to the fore only following the unification of Moldavia and Wallachia in 1859. Following the first wave of the Agrarian Reform in 1864, which accompanied the liberation of the serfs, the structure of land ownership in the United Principalities and later the Kingdom of Romania continued to be characterized by the preponderance of *latifundia*,[3] concentrated in the hands of just a few land owners. After the social upheaval caused by the Peasant Revolt of 1907 – a major rebellion with an anti-Semitic component, which claimed over 11,000 lives –,[4] the Romanian government was compelled to take measures towards the redistribution of land to ensure social and political stability.

The desired Agrarian Reform, however, was slow in coming: in 1913, the Liberal Party, then headed by Ion I. C. Brătianu, proposed a partial land expropriation to benefit successful smallholders and thereby strengthen the party base.[5] The stalled effort was given new impetus by Romania's entry into World War One on the 27th of August 1916, closely followed by a string of military defeats, the 'first' Russian Revolution (in February 1917), and the publication of Lenin's April Theses. The resulting rise in socialist agitation among the troops prompted the King of Romania to promise land reform on the 7th of April 1917, mainly to keep up the morale of the peasantry, which comprised the bulk of his armies.[6] The royal proclamation was supported by both the Liberal and Conservative parties. The fact that at the time Romanian armies were facing impending defeat by the Central Powers (Romania would go on to sign the Treaty of Bucharest on May the 7th 1918, in which it agreed to cease participation in the war) lends nuance to the proclamation: it demonstrates that agricultural reform was only half-heartedly endorsed by the political elite of the time, even as a measure of last resort, and exposes the correlation between the promise of such a reform and its intended goal of stirring up national sentiment.

3 van Meurs 1999.
4 Clark 2015, Eidelberg 1974.
5 Hitchins 2014.
6 van Meurs 1999, Hitchins 2014.

II.2. The Agrarian Reform of 1921

In the end, the fortunes of war favoured Romania: having re-entered the conflict by order of King Ferdinand on the 10th of November 1918,[7] by the cessation of hostilities, the country was counted among the victors of World War One. As a result of the peace treaties that ended the Great War, Romania had more than doubled its territory with the addition of the Banat, Crişana (also known as 'Partium'), Transylvania, Bucovina (all former provinces of Austria-Hungary), and Bessarabia (formerly part of Tsarist Russia). The corresponding increase in population – to more than double its pre-war size – also resulted in a sizeable proportion (about 30%) of various national minorities now being Romanian subjects for the first time in the nation's history.[8]

Land reform began in earnest in 1918 and would go on for decades,[9] being implemented more harshly[10] in Transylvania and Bessarabia, where many large estates were held by members of ethnic minority groups. After the lengthy expropriation of 6 million hectares of land (i.e. one third of all available arable land in Romania at the time), which lasted[11] up to the beginning of the 1940s, 1.4 million peasants were endowed with their own lots. This wave of land reform, made possible in large part by territorial gains resulting from World War One, turned out to be no more than a stopgap measure in service of short-term political gains.

The protracted 1921 Land Reform resulted in the dismantling of economically viable estates, the creation of numerous, economically inefficient, fractured smallholdings and did little either to enable investment in mechanization or to alleviate the economic plight of smallholders.[12] Also, two-thirds of eligible peasants did not actually benefit from its provisions.[13]

II.3. The Agrarian Reform of 1945

The final wave of land redistribution in Romania would occur in the immediate aftermath of the Second World War, in 1945. By the conclusion of this conflict, Romania would lose Bessarabia and Bucovina to the USSR (the former becoming the Republic of Moldova, while the latter part of Ukraine after the collapse of the Soviet Union). This so-called land reform set the stage for the later wholesale nationalization and collectivization of agricultural land, but it was, as to its scope

7 Hitchins 2014.
8 Hitchins 2014.
9 Verdery 2003.
10 van Meurs 1999.
11 Verdery 2003.
12 van Meurs 1999, Nacu 2014, Brooks–Meurs 1994.
13 Verdery 2003.

quite limited, probably owing to its role as a means for the legitimization of the ongoing socialist takeover of the state apparatus.[14]

The reform began on the heels of the seizure of power by Petru Groza, which occurred on the 6th of March 1945, aided by Stalin's right-hand man, the then Soviet ambassador to Romania, Andrey Yanuaryevich Vyshinsky.[15] On the 23rd of March 1945, Law no 187/1945 was passed. According to its provisions (Art. 3), all land holdings exceeding 50 hectares would be seized, without compensation, as well as all land regardless of size, belonging to ethnic German 'collaborators'[16] and to those who fled the country either to countries with which Romania was at war or to any other country subsequent to the regal coup d'état of the 23rd of August 1944, which saw the country change sides in the war.[17]

The goal of this last measure of land redistribution was multiple: (1) to 'deconstruct'[18] the old social order, (2) to remedy the economic consequences of the 1921 reform, (3) to avoid the creation of a land-owning middle class, (4) to maintain as much as possible the ethnic balance by maintaining proportionality between beneficiaries and so prevent the reform from looking like a land grab (while completely excluding from its benefits the German-speaking minorities), and finally (5) to prepare land ownership structures for collectivization, including by nationalizing forests and non-arable land without any intention of redistributing them.[19]

The primary goal of this reform was achieved by expropriating all land owned by some 143,000 landholders without compensation and redistributing a total of 1.5 million hectares among 800,000 peasants with a 75% rate of applications for land being granted, the rest denied. Rural German-speaking minorities were dispossessed of most means of their existence in the process, and the Romanian refugee populations of territories lost to the Soviet Union were resettled in Transylvania and the Banat,[20] also in areas formerly inhabited by these minorities. According to Law no 177/1947, any measures taken to accomplish the 1945 land reform were exempted from judicial review.[21]

14 Bottoni 2010.
15 Tismăneanu et al. 2006.
16 Brooks–Meurs 1994.
17 See: Kligman–Verdery 2011.
18 Bottoni 2010.
19 Bottoni 2010.
20 Bottoni 2010.
21 Andreea 2014.

III. What Was Taken and How?

One aspect to take into consideration before we delve into the process and results of post-communist land restitution in Romania is the myriad of measures used to dispossess land owners of the objects of their immovable property rights.[22] One would think this was the result of universal nationalization and appropriation of agricultural immovables by the Romanian State. Not so… As Bottoni[23] and Verdery[24] correctly identified, the fledgling socialist totalitarian regime could ill afford widespread popular discontent and resistance to its policies; so, it initially acted with self-restraint not only in matters of land reform but also in those of collectivization and nationalization. Collectivization is understood in the following to mean measures for achieving voluntary and coerced creation of collective farms, based on the Soviet kolkhoz model, while nationalization measures by which private property owners were stripped of their property with or without legal basis or any kind of title, in favour of the state or any other legal persons.

III.1. Collectivization

Collectivization in Romania began after the consolidation of the totalitarian rule in 1947, with the stated – and apparently legitimate – goal of modernizing inefficient agricultural structures. Like previous land reforms, it was also preceded by a preparatory phase[25] which took the shape of the setting up of collective farms (known by their Romanian abbreviation 'GAC', which stood for *Gospodării Agricole Colective*). The process of collectivization was then carried out in three main stages: *stage one* saw the creation of the basic structures (1949–1953), *stage two* (1953–1957) constituted the initial implementation of collectivization, and *stage three* (1957–1962) its finalization.[26]

The first stage was characterized by the creation of production quotas to be levied on individual farmers, deliberately set at levels impossible to attain in order to press the peasantry into joining collective farms and to persecute the 'kulaks'.[27] During the second stage, pressure was eased and existing collective farms prioritized, while the third stage was characterized by a brutal crackdown on remaining dissenters to collectivization, partly under the influence of the anti-communist uprising, which took place in Hungary in 1956.[28]

22 Verdery 2003.
23 Bottoni 2010.
24 Verdery 2003.
25 Andreea 2014.
26 Andreea 2014, Verdery 2003.
27 Verdery 2003, Kligman–Verdery 2011.
28 Andreea 2014, Avram–Radu–Bărbieru 2014, Kligman–Verdery 2011.

The legislative framework[29] of collectivization reflected a multi-tiered approach of 'sticks and carrots' (though mostly 'sticks') used to press landholders into joining collective farms. This process was explored in detail by Kligman and Verdery.[30] These tiers included several laws on the creation of collectivist structures [such as Decree no 133/1949 on the organization of cooperatives and Decree no 115/1959 for the liquidation of the remnants of any forms of exploitation of man by his fellow man in agriculture (…)] and the above-mentioned norms establishing taxes and oppressive production quotas for privately owned farms (such as decrees 111/1951 and 224/1951), which permitted confiscation of land for unpaid fiscal claims. The process, just like the measures of the 1921 reform, disproportionately affected Transylvania and the Banat but also Dobrogea.[31]

III.2. Nationalization

Such measures of confiscation had a dual purpose: not only did they aid in achieving the aim of collectivization but also hurried the process of nationalization of agricultural property in the name of the 'people'. This process began in 1948 by means of Decree no 176/1948 for the nationalization of the churches' agricultural assets used for the financing of schools and progressed by Decree no 83/1949, which instituted state ownership over all large landholdings expropriated according to Law no 187/1945 to strip the so-called 'kulaks' of their lands. The implementation of these measures was rife with violence and coercion,[32] and so in 1958 decrees 218 and 712 were adopted (the first one published in 1960 and the second one only in 1966 in the Official Journal of Romania). The first decree shortened the statute of limitations for claims to the effect of restitution of unlawfully seized property, while the second one stipulated that all unlawfully seized property belonged to state ownership even though the state did not even bother to respect its own legislation when seizing it. In 1969, a further wave of expropriation followed by means of Decree no 467/1969.

The nationalization of agricultural immovable assets was also carried out covertly, by making use of the complementary penal measure of confiscation of property from persons convicted of political and non-political crimes, who were often also deported to forced-labour and internment camps.[33] The confines of this article are insufficient to encompass all such measures; we encourage the reader to refer to the bibliography[34] section below for further details.

29 For a more detailed description, see: Avram–Radu–Bărbieru 2014.
30 See: Kligman–Verdery 2011.
31 Kligman–Verdery 2011.
32 Kligman–Verdery 2011, Avram–Radu–Bărbieru 2014.
33 Avram–Radu–Bărbieru 2014, Kligman–Verdery 2011, Verdery 2003.
34 See: Baias–Dumitrache–Nicoale 2001.

IV. Partial Conclusions

With regard to the agrarian reforms which occurred prior to the complete installation of the socialist model of economic organization in Romania, we can conclude that: (1) the legislator was mobilized to act on the land distribution issue by sometimes violent expressions of long-standing popular discontent and by the onset and consequences of both World Wars; (2) the reforms were not at all free of ethnic resentment as a mobilizing factor;[35] (3) land reforms were mainly considered a means for garnering short-term political support; (4) land reforms did little to increase wealth and combat economic inefficiency, instead leading to small, unfeasible[36] farm sizes.

We may also conclude that the measures for the collectivization and nationalization of agricultural immovable assets were elements of a heterogenous process characterized by several legal norms of diverse scopes and effects. To this, we must add the heterogeneity of the structures established as a result of this process,[37] manifested in both collective farms (abbreviated in Romanian as CAP, which stands for *Cooperative Agricole de Producție*, literally 'Agricultural Production Cooperatives') and later industrialized factory farms based on Western agricultural production models (abbreviated as IAS, *Întreprinderi Agricole de Stat*, literally 'State Agricultural Enterprises').

These conclusions are valuable with regard to the future fate of land restitutions in Romania, as we shall observe.

V. A Brief History of the Legal Norms Governing Registration of Ownership over Immovables in Romania

The acquisition of large provinces in the aftermath of World War One resulted in a variety of legal frameworks designed for the regulation of immovable ownership being simultaneously applied to different parts of the Kingdom, and later the Republic of Romania.

Of these regulatory regimes, two are of significance: the norms instituted by the Romanian Civil Code of 1864 in force in the territories of the pre-1918 Kingdom of Romania and those in force in Transylvania, the Banat, the Crişana, and Bucovina at the time of their incorporation into Greater Romania. The noteworthy differences between the two systems can be identified in their

35 van Meurs 1999.

36 Brooks–Meurs 1994, van Meurs 1999, Verdery 2003.

37 Aligica–Dabu 2003. For land distribution between the two forms of farms mentioned below, see: Brooks–Meurs 1994.

precision and efficiency in recording ownership and other (real) property rights constituted over immovables and any transfer of such rights.

The Romanian Civil Code of 1864 provided that the transfer of ownership and other property rights over immovables be registered into *land ownership ledgers* (the so-called 'registers of transcription and registers of inscription'), kept by local authorities. Any property transfer which took place in an administrative precinct would be recorded into its ledger of inscription in chronological order by a clerk, indicating the name of the parties and identifying the immovable by its general location and by the names of the owners of neighbouring lots. This system was therefore not very well suited to tracing repeated transfers over long periods of time as that would require the reading of the entire ledger (comprising several volumes) used in a given precinct, starting from the institution of this registration system and up to the present day. Due to the difficulty of such an endeavour, it was deemed among lawyers to be the 'diabolical proof' (*probatio diabolica*) of ownership. Also, the registration of instruments – by which property rights over immovables were constituted, transferred, or extinguished – into the ledgers would generally not affect the property rights of any parties as any legal consequences were considered to flow directly from the instruments (e.g. deeds) themselves and not their registration, a legal effect called 'opposability'.[38] Owners of immovable property were therefore not compelled to register any such instruments, except for making them known to others and preventing possible cases of fraud: if the same immovable was fraudulently sold to several parties, the first one to register his/her right in the ledger would become the owner.[39]

The land registration system implemented in Transylvania and the Banat was based on the Austrian *Land Cadastre* and *Land Registry* (the latter known in German as the 'Grundbuch', literally: 'Land Book'), a much more advanced method of keeping track of immovable property rights, still used today. Lisec and Navratil[40] provide a functional description and historic details of this system. In the *cadastre* system, each separate lot of land was uniquely identified by a 'cadastral number' allocated to it at the level of the administrative precinct in which it was located and charted on a topographic map of that precinct. All lots comprising a unitary estate were then registered in the Land Registry of the precinct, each identified by their numbers taken from the cadastre and recorded on a land record sheet, which in turn was also numbered. The totality of these sheets comprised the records of the Land Registry office of the precinct where they were held. No two land record sheets could have the same number in the same precinct.

38 Peptan 2014, Pop 2001.
39 Florea 2017, Pop 2001.
40 Lisec–Navratil 2014.

The land record sheets would indicate all the owners – both past and present – for each lot of each estate in chronological order. The basic unit used by this system was the lot (plot, or parcel) of land, and one estate was usually comprised several plots with possibly different utilizations (i.e. arable lands, pastures, vineyards, orchards, gardens, etc.). This system was considerably more suited to identifying the extent and previous ownership status of immovables. Also, the Land Registry having been used to aid efficient taxation of property, all persons benefiting from property rights over immovables were compelled to register the instruments by which they have acquired these rights as any unregistered instruments could not be invoked against a registered owner or any third party, including authorities charged with collecting fiscal revenue (the so-called constitutive effect of registration). All property rights over immovables therefore flowed from the Land Registry, not directly the titles registered in it.[41]

The cadastre and Land Registry system was so advanced that during the drive towards the modernization of Romania in the late 1930s and early 1940s plans were made to extend it to the entire territory of Greater Romania. This goal was set out in Decree with Effect of Law no 115/1938, which would govern the transfer of property rights over immovables in the Land Registry system, but only in the regions where the cadastre was already set up. Replacement of the ledger system was not implemented in the regions where it was prevalent, and it continues to be used to this day (albeit in a digital implementation).

The country would muddle through to the present day with this plurality (ledger, cadastre and Land Registry, Temporary Land Registry) of major immovable property rights registers used in different regions and with different legal effects. The registration of land property transfers in Romania continues to be quasi-optional because of the lack of the constitutive effect. The Law of Implementation enacted for the 2011 New Civil Code, now in effect, provided that the enforcement of compulsory land registration rules (and the constitutive effect) must be delayed until such time as full land registration in a given administrative precinct has been achieved; that is to say, *ad calendas Graecas*.

One further complication of Romanian land registration arises from the fact that the cartographic standards used when compiling topographic maps used for the charting of land plots under the land cadastre system and those used for charting plots during land restitution, based on a land survey of Romania conducted in the 1970s, are quite different. Therefore, the identification of lots subject to restitution on cadastre maps is hindered and requires a specialist surveyor (topographer) to achieve. In the incipient phases of land restitution, the shortage of such surveyors hindered registration of lands returned to former owners.[42]

41 Pop 2001.
42 Verdery 2003.

VI. Restitution of Agricultural Immovable Property after the Regime Change of 1989

VI.1. Agricultural Immovable Property Restitution and Transitional Justice

It must be stated that the Romanian experience of socialist totalitarianism somewhat differed from that of other Central-Eastern European countries in the more severe privations endured by the population, especially after 1982, due to the economic policies of the Ceauşescu regime, which caused widespread popular discontent, the regime's decidedly un-socialist policy of nationalist agitation, and the violent end to which it succumbed in 1989.[43]

Therefore, the dilemmas of property restitution as a form of much sought-after transitional justice astutely identified by Atuahene[44] in her analysis are, if possible, even more acutely valid in the case of Romania than in other countries. This dilemma can be summed up in the following questions:[45] (1) to maintain the status quo or to enact some form of reparations for the victims of property theft; (2) to grant monetary compensation or give back nationalized or collectivized land; (3) for which of the repeated waves of property nationalization or collectivization should any reparations be granted, knowing that some ethnic groups were more adversely affected than others (especially whether to grant restitution to the victims of the 1945 reform); (4) to create a new property status quo and dispense with any requirement of vindication by means of transitional justice and instead focusing on creating the conditions for economically efficient agricultural organization and alleviating socio-economic woes; (5) most importantly, to base the eventual restorative measures on the political will of the elite or, as Atuahene concludes, on a more inclusive process in which a wider swathe of the population is consulted.

Verdery, while adding[46] to some of these questions in the Romanian case (raising issues such as: 'should restitution be preferential or equitable', should it be integral or partial, should land be given back within its historic location, should the nationalized land of state agricultural enterprises be returned, should sales of returned land assets be restricted, etc.), explores the complex motivations for which the legislator opted to accomplish restitution the way it did: these measures were important to allay past resentment towards the communist regime but also to ensure foreign actors of the country's commitment to rule of law and respect for property, crucial for attracting[47] foreign investment. As for

43 Hitchins 2014. On this second point, for a more comprehensive analysis, see also: Verdery 1995.
44 Atuahene 2010.
45 See: Atuahene 2010.
46 Verdery 2003.
47 Aligica–Dabu 2003.

the political goals to be achieved, '[t]hey included issues of historical justice, political expediency, ethnic empowerment, equality, buying off the losers, economic efficiency, distributive effects, and accumulating political capital.'[48]

When facing the choice between enacting some form of reparations and maintaining the status quo, the Romanian government, under a mentality dominated by the logic of privatization,[49] opted to enact property restitution, leaving compensation as a measure of last resort if restitution is unattainable. This choice was unlike, which was made by many countries[50] in the region that either opted openly to deny reparations (initially Poland, albeit no collectivization took place there) or to only grant token compensation (Hungary), the latter approach being openly endorsed by the European Court of Human Rights' jurisprudence[51] on matters of compensation. However, the way in which this form of restitution was enacted showed less concerted views on the matter than the desire to accomplish the competing goals enumerated above. As we shall see, the implementation of this measure of restitution was also meant in some way to avoid recreating the status quo ante and instead accomplish a partially new distribution of agricultural immovable property.

VI.2. Law No 18/1991

Law no 18/1991, the Law Regarding Agricultural Land, was the means chosen by the legislator to accomplish the restitution of agricultural immovables. Adopted in a climate of political and administrative breakdown, when some farmers were already dismantling the infrastructure of the collectives and seizing (back) land on their own initiative, and victim to competing and contradictory[52] interests, it was not a dedicated measure of restitution but contained – and still contains – the general norms of agricultural land use in Romania. By opting to append restitution norms to a law on general land use, the legislator left the impression that restitution was not the main reason for enacting this law, and this first impression seems confirmed by the literature: the approach of the legislator was mixed, on the one hand, to privatize land in a way somewhat similar to the management–employee buyout (MEBO) model initially meant to set the stage for more efficient land use by encouraging the creation of modern agri-business companies, while, on the other hand, also achieving restitution as a measure of transitional justice and as a measure of property redistribution.[53] This approach, which mixed a bit of economic and social policy with a bit of restorative justice, resulted in a bit of a mess when it came to the actual commencement of land restitution.

48 Verdery 2003.
49 Aligica–Dabu 2003.
50 See: Verdery 2003, Bornstein 1997.
51 See: Fisher–Jaffe 2000, Allen 2006.
52 Verdery 2003.
53 Aligica–Dabu 2003.

VI.2.1. What Was to Be Given Back and Where? Who Would Stand to Benefit?

To begin with, Law no 18/1991 (Art. 8) only provided for the restitution of *collectivized* land [i.e. land belonging to the by then practically defunct agricultural production cooperatives, not to the state-owned agricultural enterprises, nor other agricultural assets such as tractors or combine-harvesters needed to work the land, which were meant to be attributed later to the agri-business enterprises – agricultural companies (associations) – to be established upon the ashes of the former collective farms, a result which for some time failed[54] to materialize]. It also provided for land grants to be apportioned to certain persons even if they or their predecessors were not dispossessed of agricultural land during collectivization if they worked as labourers in the cooperative or had other roles such as agronomists.[55] This measure of land grants was not as widely applied as the legislator would have desired, and the lack of agricultural equipment restitution, in lieu of which more or less useless vouchers were handed out, to be used by farmers to later acquire shares in the newly formed agricultural businesses resulted in the restitution of land without any useful means to cultivate it, thereby exposing the owners to the whim of those who owned agricultural machinery, sometimes the 'apparatchiks' of the old regime and the former personnel of the despised collectives.[56] As a result, though agricultural associations were formed, they were rapidly captured and exploited by those who controlled vital means of agricultural production other than the land itself.[57] This state of affairs also led to voluntary 're-collectivization' by some households,[58] including by banding together and farming in common, and to the rise of the rural 'entrepratchik',[59] the economically successful, former communist-turned-entrepreneur farmer.

Restitution was conditional upon submitting a written claim, thereby excluding persons who have emigrated since collectivization, while the 1991 Constitution [Art. 41, para (2)] barred all persons without Romanian citizenship from owning land, and Law no 18/1991 reiterated this prohibition.[60] Therefore, restitution was principally aimed at Romanian citizens living in Romania who had the effective means to participate in the procedure. The claim had to be submitted to the mayor's office of the local administrative authority in the precinct in which the land requested for restitution was found [Art. 9, para (3)], in a time limit of

54 See: Aligica–Dabu 2003.
55 Verdery 1994.
56 Verdery 2003.
57 Verdery 2003.
58 Brooks–Meurs 1994.
59 Verdery 1994.
60 Not unlike most other measures of restorative justice in the region. See: Karadjova 2004.

initially just 30 days, which was successively extended until the 31st of December 1998, after which any further claims became time-barred.

Later measures of restitution (laws no 169/1997 and 1/2000 – see below) which permitted submitting subsequent claims would be construed as referring only to persons who have already submitted a (possibly smaller) claim for restitution under Law no 18/1991.

Furthermore, by its reference to the beneficiaries of restitution as those 'who brought land into the collective or from whom land was taken in any way' [Law no 18/1991, Art. 8, para (2)], the law failed to: (1) explicitly enumerate which of the victims of numerous, heterogenous consecutive waves of dispossession would benefit from restitution, (2) benefit those from whom land was taken by covert means of collectivization or nationalization such as unjust criminal conviction, and (3) mention measures prior to collectivization, thereby excluding[61] from its benefits the victims of expropriation during the reform of 1945.[62]

The explicit reference to cooperatives meant that no land belonging to state agricultural enterprises and no land which was nationalized for other purposes was to be (initially) returned, regardless of its agricultural nature. The former occupied around 30% of Romanian arable land, while the latter also constituted significant areas, especially attributed to various industrial and agricultural research establishments.

The law also limited the amount of land subject to restitution, initially to just 10 hectares per family, while also setting a minimal limit of 0.5 hectares to be returned and defining family as spouses and their children – the latter only if they are part of the same household as their parents. It was suggested in the literature that capping the area of land to be returned at such a low amount was a deliberate measure to prevent the emergence of a rural middle-class, while setting an upper limit on land ownership (regardless of the mode of acquisition) of 100 hectares per family was an invitation to the former members of the *nomenklatura* to obtain as much land as possible by use of their disproportional resources.[63]

The problem of where land should be returned was left open by the legislator, as Law no 18/1991 stated only that 'as a rule' restitution should occur on the old sites, where the collectivized plots lay.[64] As the legislator failed to elaborate on the exceptions to the rule, this simple omission resulted in interminable litigations between those who received restitution, or land grants comprising other people's former property, and the pre-collectivization owners of the lands returned or granted to them.

61 Verdery 2003, van Meurs 1999.

62 For a comparative context regarding the legislator's motivations for such a solution in the case of other measures of restitution, see: Karadjova 2004.

63 van Meurs 1999, Aligica–Dabu 2003.

64 Verdery 2003.

The situation was complicated by the initial intention of the legislator to create a new land cadastre prior to restitution (in keeping with the principles of the Austro-Hungarian-style land registration system), which was undermined by fears that this may only prove to be a delaying tactic and subvert restitution altogether.[65] Therefore, this last initiative was promptly dropped from the final draft of the law.

The consequences of the lack of a clear rule for the restitution of land in its initial location, the absence of a unitary system of land registration throughout the country, able to clearly define the physical boundaries of that initial location, and consequently where restitution should occur would result in the utter subversion of the above mentioned 'rule'. Since the Land Register and corresponding cadastre were never implemented in a large part of the country, the legislator could not use this system to chart and demarcate lands subject to restitution. It therefore turned to a countrywide cartographic survey conducted in the 1970s using different geodetic standards as compared to those of the cadastre to topographically chart the plots subject to restitution.

Any agricultural land which was built over would be considered as always having constituted the property of the cooperative members whose buildings were erected upon it (Art. 23). This resulted in the added complication of making Law no 18/1991 applicable inside the boundaries of urban and rural settlements, not just to lands outside the communal, town, or city limits. Thereby, property titles could be and are still being emitted, which justify ownership not just of land but also of buildings to the benefit of the persons to whom the land was attributed to be built upon. Due to the difficulty of immovable rights registration and the plurality of registration systems, this practice may result in a dual title (in Transylvania: constitutive registration in the Land Register, and land property titles issued during restitution) granted for the same plot of land, sometimes to the benefit of different people. In such cases, the property title issued under Law no 18/1991 trumps all other titles, thereby benefiting the builder to the detriment of the previous owner, a situation which further encourages litigation.

VI.2.2. Multiple Land Registers

All land restitution titles in areas of the country where the Austro-Hungarian Land Register was used must be 'translated' according to the standards of the old cadastre to find out whether they infringe on property rights gained by owners prior to the entry into force of Law no 7/1996 regarding the Land Register.

This later law, enacted in part to curb the chaos which resulted from restitution, provided that land ownership registration would no longer have a constitutive effect but would only result in the opposability of registered immovable ownership

65 Verdery 2003.

towards third parties, the immovable property rights themselves flowing from the title by which such ownership was obtained (including the land restitution titles provided during restitution), just as in the old ledger system.

Law no 7/1996 set up a new land registration system based on the Austro-Hungarian model and also comprised a topographic map (the 'new' cadastre) – which now operated based on updated 1970s cartographic standards but by transforming maps compiled in the initial cadastre system – and a new, so-called non-definitive Land Register. All registration into this 'new' cadastre and register would result in the charting of plots on new maps and the registration of owners on 'non-definitive' land register pages, earmarked to become 'definitive' once the entire country has been surveyed. The Romanian National Agency of the Cadastre and Land Records keeps a rolling tally of this still ongoing survey, which now stands at around 27%.

Instead of correcting the problems of dual titles, this plurality of registers in Transylvania, the Banat, and Crişana resulted in the following possible situation: one plot of land registered to the name of a certain owner according to the 'old' Land Register may have a separate legal existence in the 'new' Land Register after it was subject to restitution to a person other than the owner stated in the 'old' Register. Since registration in the 'old' register was constitutive of property, while registration in the 'new' register only results in the publicity of ownership which flows from the land restitution title, it is entirely conceivable that a plot of land has two legitimate owners based on two titles, in which case the courts must decide between the 'strength' of two competing but for all intents and purposes equal titles. This procedure, called 'the comparison of titles', may have an excessive duration.

VI.2.3. Restitution by Commission

Restitution under Law no 18/1991 would take place according to an extra-judicial procedure and claims for restitution would be resolved by restitution commissions established by that Law, based on several types of evidence, including documents and witness statements.[66] Article 10 of the law, which dealt with this question only, provided that documentary evidence was to be preferred to witness statements and 'other' evidence. The legislator had to consider both the chaotic way in which land was initially seized (with or without title, sometimes just by brute force) but also the fact that during the decades that passed between collectivization and restitution both of the country's main land ownership registration systems have fallen into disuse as most agricultural land was deemed to no longer constitute private property and was barred from legal

66 See: Verdery 2003.

circulation.[67] The land ownership ledger system also showed the added problem of being quasi-impossible to properly search.

This restitution procedure was undertaken by land restitution commissions set up at the levels of all local administrative precincts (county, city/town/commune, and in the case of communes comprising several villages, also at the village level). Headed by the mayor in the latter two cases, and comprising the mayor, three locally elected members, an agronomist and a surveyor at the village level, as well as supplementary members at the commune/town/city and county levels (including jurists, agronomists, forestry personnel) operated with utmost autonomy with no time limit on their activity and with close to no judicial oversight, subject only to the possible removal of the mayor at the next local elections.[68] This meant that a commission comprised of people usually without formal legal training and at times thoroughly biased would have to decide on restitution, based on scarce evidence and subject to all the pressures exerted by their local communities. The election process of commission members offered no guarantees of independence or impartiality, and their activity was characterized by sometimes blatant abuse.[69]

As Verdery aptly describes[70] in some detail, using the results of research conducted in the commune of Aurel Vlaicu (in Transylvania), the problems which stemmed from this model of restitution were innumerable: (1) it resulted in a general souring of relations between former and current owners competing for restitution, for better-quality land, or simply for more of it, (2) thereby it effectively sounded the death knell for the rural culture of cooperation towards common goals and the sense of community which until then still permeated the Romanian countryside, (3) it transformed age-old mentalities linked to land ownership and agriculture, (4) it led to the economic empowerment of those with agricultural machinery and the exploitation of those without, (5) it resulted in an epidemic of cronyism and mafia-like behaviour in the activities of the restitution commissions,[71] (6) it fanned corruption and collusion, (7) it fuelled inter-ethnic strife,[72] (8) it contributed in no measurable way, shape, or form to increasing the efficiency of agriculture and lifting the rural population out of poverty,[73] and finally (9) it served to almost unanimously disappoint all parties involved, resulting in disillusionment with (transitional) justice, the free market, and ultimately democracy.

67 See: Verdery 1994.
68 Verdery 2003.
69 For several examples of the illegal ‘stretching’ of land surfaces, even to the amount of several hectares, see: Verdery 1994.
70 Verdery 2003.
71 Verdery 1994.
72 Verdery 2003.
73 See: Otiman 2012, Verdery 2003, van Meurs 1999, Aligica–Dabu 2003.

One question, largely left unasked, is why the legislator did not choose to implement a court procedure for restitution, subject to oversight by an appeal process conducted by specialized personnel with knowledge of the law. One possible answer is slightly hinted[74] at in the literature by references to the wave of litigation which resulted from the 1921 Reform and which was only averted after the 1945 Reform and collectivization by legal measures designed explicitly to supress the exercise of judicial remedies. This explanation would be simple: commissions were considered the better option to avoid clogging up the courts. Another possible explanation which is more widely explored[75] is to keep the process in the hands of the apparatchiks or to create the appearance of popular and not political control during the implementation of such a crucial measure of transitional justice.

To these, the author of this study would like to add some further considerations: by placing control over such a fundamental element of the economy as land ownership to laypersons' commissions instead of courts, the authority of the judiciary in matters of property rights could be effectively undercut. The Romanian Constitution of 1991 in Article 41, para (2) only committed the state to protecting (preserving) private property, falling short of guaranteeing it; this provision caused heated debate[76] during the adoption of the Constitution and was later amended to include an explicit guarantee in 2003. In such a climate, the courts of the transition period, as final arbiters of private property rights hitherto unrecognized by the previous regime, might have acted with a more legalistic attitude and liberal zeal than politically controlled local committees. They might have administered the restitution process with some degree of impartiality and professionalism. The period of political upheaval experienced in the early 1990s in Romania would have been incompatible with such excesses of legalism and invocations of property rights in court. If control over such a fundamental right as agricultural land ownership could be removed from under judicial oversight, other important measures of transitional justice, such as reparations for measures taken by the totalitarian regime, and the restitution of non-agricultural property (also accomplished by commissions under later instruments such as Law no 10/2001) could also be codified by eluding trial in courts, which were and remain subject to international monitoring, thereby preserving plausible deniability for any eventual failure of restitution or the myriad of illegalities perpetrated during the process as well as its unjust results.

For a regime not intent on exaggerating checks and balances, the choice to keep restitution as close to 'the people' as possible was a natural one. There may have been some merit in the view of the transitional elite to avoiding strengthening

74 Verdery 2003.
75 See: Verdery 2003.
76 See: Stănescu-Stanciu–Neacşu 2015.

legal consciousness among the populace, as contesting state measures regarding property seizure in court was already known to have this result even during the darkest days of totalitarianism.[77] Also, a restitution process placed at the disposal of the courts would have presupposed a moral condemnation of the regime which perpetrated land theft [something which did not occur until the drafting of the Final Report of the Tismăneanu Commission[78] – and even then only with great difficulty], as the measures of collectivization would have been undone in a way which would have underscored their illegality and would have granted the process an additional moral undertone.[79] As Barkan aptly states,[80] all measures of restorative justice, all the more property restitution require a conversation between perpetrators and victims of historical injustice. This was just the kind of conversation the Romanian legislator keenly wanted to avoid, especially in the period of political and ethnic tensions bordering on unrest, which marked the early years of transition.

VI.2.4. Restitution to the Heirs of Deceased Owners

Since land restitution was possible not only to the benefit of members of the cooperatives but also their heirs, Law no 18/1991 (Art. 13) had to deal with the prospect of such heirs submitting claims for restitution based on the rights of their predecessors. These situations had the added complication that land circulation was prohibited during communism, so heirs could oftentimes produce no wills or certificates of succession for these lands, and sometimes they have not even accepted the estate of their predecessors either as agricultural land – in principle – could not be legally inherited, and such estates rarely contained anything else of value.

Such heirs needed to produce to the restitution commission a title justifying their succession or any evidence which demonstrated that they accepted the estate. In lack of such evidence, the restitution claim itself was considered as acceptance of the estate if it was handed in during the six-month time limit stipulated for such acts of acceptance, counted from the entry into force of the restitution law. The restitution commissions were left to evaluate evidence for acceptance of the estate and would issue property titles to the names of all heirs they deemed to have accepted it, if they could produce a will, judicial decision, certificate of succession, or other evidence to this effect. Strangely, while allowing commissions to establish if someone was an heir, Law no 18/1991 did not allow them to determine the shares of the inheritance they were entitled to and grant them restitution in view of such shares. Therefore, the titles for restitution had to

77 See: Şerban 2014, Verdery 2003.
78 See: Tismăneanu et al. 2006.
79 See: Barkan 2001.
80 Barkan 2001.

be issued to the name of all heirs deemed by the commission to have accepted the inheritance, leaving courts of justice or notaries public to sort out the 'minutiae' constituted by the yet unknown extent of their inheritance rights and the kinfolk of the deceased to squabble over them.[81]

VI.3. Fine-Tuning Restitution by Other Instruments

As the political upheaval which characterized the immediate aftermath of the collapse of the totalitarian regime subsided, the legislator revisited the issues of property restitution, especially on the occasions when the opposition parties of the early transition period finally ascended to power, in the latter half of the 1990s and again in 2004.

Law no 169/1997 was passed for the amendment of Law no 18/1991 in order to clarify some provisions and extend some rights which could be reconstituted under Law no 18/1991. Those households which received their maximum of 10 hectares could, as an effect of Law no 169/1997, request further restitution up to the limit of 50 hectares per family, the upper limit[82] set by the 1945 Agricultural Reform. Other amendments introduced by Law no 169/1997 allowed for the restitution of church property, beyond the initial limits of 5 or 10 hectares respectively, depending on the type of property. Finally, it clarified the procedure by which property titles were to be issued to persons who erected buildings on collectivized land attributed to them by the defunct cooperatives.

Another major reform was instituted by means of Law no 1/2000 (later extensively amended by Law no 247/2005). The aim of this instrument was to facilitate restitution of agricultural immovable property, but also other immovable assets, mainly forests. Principal among its provisions were: (1) the possibility for the claimants to benefit from the restitution of nationalized lands, not just those that were collectivized (even if such a land had various uses), (2) restitution on the previously owned plots if these were free of constructions and not already attributed (though this provision was quickly repealed in 2001 and was only reintroduced by Law no 247/2005), (3) restitution of land from the state preserve, (4) restitution of pastures and fields, (5) restitution of lands at the perimeter of research stations, etc. This law also allowed for the reconstitution of communal ownership organizations for the management of pastures and fields, which were disbanded during collectivization, and for these reconstituted organizations to benefit from restitution on behalf of their previous members.

Later, Law no 10/2001 for the restitution of nationalized property comprising structures allowed for the restitution of property rights over agricultural buildings (such as storage facilities, mills, holding pens, silos, etc.) but also

81 See: Verdery 1994.
82 Aligica–Dabu 2003.

of living quarters and administrative buildings, including those that were parts of farms. This measure of restitution brought about further difficulties in implementation, comparable to – if not worse than – those raised by the application of Law no 18/1991.[83] As a novelty, when compared to other previous instruments, in the case of agricultural buildings, this law allowed persons to benefit even if they have not submitted restitution claims under Law no 18/1991 or subsequent instruments.

Meant to finalize the restitution process in the spirit of *restitutio in integrum*, in 2005, Law no 247/2005 was passed. This instrument, which amended Law no 18/1991, called for the restitution of nationalized agricultural property regardless whether it was collectivized or not, but only if a request for restitution was previously made under Law no 18/1991 or other instruments to that effect. It allowed the supplementing of evidence to be considered during restitution but did not herald a new wave of restitution in and of itself, as many had hoped.

Exhausted by the entire restitution process and under pressure from the European Court of Human Rights, which in the cases of Maria Atanasiu and Others v Romania (nos 30767/05 and 33800/06) unanimously passed a pilot judgement on the 12th of October 2010 to the effect of ordering Romania to enact legislation to resolve long-standing claims for restitution, the legislator passed Law no 165/2013.[84] Article 12, para (3) of this instrument provided a new procedure to resolve the claims of those who could not receive restitution of their lots in their initial locations, by requiring that their requests be solved in the order in which they were submitted.

It also instituted a statutory time limit for the completion of restitution-requesting documentations, setting a period of 120 days (subject to a single possible extension of 60 days) for claimants to hand in any documents which were requested from them by the commissions, under pain of having their claims rejected, as time-barred. Law no 165/2013 also provided a statutory time limit by which an inventory of all lands available for restitution should have been compiled in all administrative precincts,[85] which was extended several times, lastly until the 1st of January 2018 before being repealed. Finally, this law provided a somewhat unitary framework for compensation of victims of 'abusive' communist nationalizations and collectivization, without considering the fact that Law no 18/1991 did not require that collectivization be committed as an abuse and was not just a vehicle[86] for transitional justice but also a means of redistributing the land and of privatization.

83 See: Roşu 2014, 2015.
84 For details, see: Puie 2013.
85 Puie 2013.
86 Puie 2013.

VII. Final Conclusions

As we have seen, the Romanian legislator, when enacting and implementing the various measures and instruments aimed at the post-communist restitution of agricultural immovable property, was beset by the same difficulties that have plagued agrarian reform throughout the existence of the Romanian State. Chief among these was the myriad of competing interests to be appeased: a token measure of transitional justice had to be enacted, without upsetting existing political, economic, and ethnic power structures while still achieving privatization and stimulation of the economy. Evidently, such an approach was destined to fail because of the competing goals set. The result is a nearly three-decade state of continued chaos, reform, and the lack of it, constant reprimands from national and international structures such as the European Court of Human Rights, rural poverty, property uncertainty, and a non-transparent process of restitution far from being finalized.

As Verdery and Atuahene have shown in their works, the former based on the Romanian restitution experience, the latter on African processes of transitional justice, the coexistence of competing priorities, overpowering interests of the transitional elite, and a lack of social dialogue prior to the implementation of measures of transitional, restorative justice may result in such inconclusive and widely condemned results.

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Considerations regarding the Legal Nature of the Activity Undertaken by the County Committee on Land Restitution

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Abstract. In the following study, we aim to present and analyse the regulation and functioning of one of the principal administrative bodies charged with the accomplishment of land restitution in Romania, the County Committee on Land Restitution. This committee, as an administrative body of the state – which is nonetheless charged with property distribution (restitution) –, is regulated by several laws, chief among them being Land Law No 18/1991. Its activity of an administrative-jurisdictional character is, however, subject to little oversight and only limited judicial review. In the course of our study, we will present the consequences of this model of regulation and operation in practice. We conclude that, in the light of the provisions of the European Convention on Human Rights and the practice of the European Court of Human Rights, this model of regulation is untenable, and the judicial oversight of these committees should be strengthened.

Keywords: agricultural land restitution, Romania, administrative land restitution, Constitutional Court, European Convention on Human Rights

I. Introduction

In accordance with Art. 12 of Land Law No 18/1991, Art. 22 of Law No 1/2000, and Art. 72 of Government Decision No 890/2005 (Implementing Regulation of the Land Law), with the purpose of establishing or re-establishing property rights, effectively attributing arable and forested land to the legally entitled by vesting in possession and issuing a title to property, a County Committee on Land Restitution was instituted in each county by order of the prefect, who also served as its president. In accordance with Art. 4 of Government Decision No 890/2005, the Committee would be composed, besides the prefect, of the sub-prefect as well as of the leaders of decentralized public services.

II. The Problem of the Nature of the County Committee on Land Restitution

In a case[1] before the European Court of Human Rights regarding the County Committee, the Court decided that *the Committee holds an administrative function and does not fulfil the condition of independence in relation to the executive branch and as a result cannot function as a court of law (has no right to act in a jurisdictional capacity*. Even though the ECHR has stated that the Committees are not in compliance with the requirement of independence set forth by Art. 6, paragraph (1) of the Convention, the administrative-jurisdictional character of the Committees' activity has been imposed by law by means of maintaining Art. 52, paragraph (1) of Land Law No 18/1991 in force, however, without providing it with the necessary elements required for proper functioning as a Court of Law, in the meaning of Art. 6, paragraph (1) of the Convention.[2]

Based on Art. 51 of Land Law No 18/1991, the County Committee needs to resolve the challenges of those dissatisfied by the Decisions issued by the Local Committees on Land Restitution and also needs to validate/invalidate the measures (land restitution and land grants to persons not entitled to restitution) set forth by Local Committees. In both cases, the Decisions of the County Committee are administrative acts emitted by an administrative-jurisdictional entity that has been conferred this quality expressly by the law according to Art. 52, paragraph (1) of Land Law No 18/1991.

In relation to qualifying an authority that exercises an administrative-jurisdictional activity as a public authority or an administrative authority of the executive branch, the matter must be analysed in accordance with Law of Administrative Litigation No 554/2004. From the latter's content, we can conclude that not all public authorities can exercise an administrative-jurisdictional activity but only a certain category of public authorities, namely the administrative authorities of the executive branch.

According to Constitutional Court Decision No 97/30.04.1997,[3] the notion of *administrative authority* has been replaced by the concept of *public authority*. Nonetheless, the notion of administrative authority is still being used, usually when there is mention of administrative-jurisdictional decisions and special

1 Case of Glod v Romania – see ECHR Decision of 16.09.2003, published in the Official Journal of Romania no 1127 from 30.11.2004. The County Committee on Land Restitution cannot be considered 'a tribunal' in the meaning of Art. 6, paragraph. (1) of the Convention, whereby a jurisdictional activity cannot take place there, and thus it cannot be sentenced to paying the costs of litigation, as stated in the provisions of Art. 52, paragraph (3) of Land Law No 18/1991. Following the same logic, see: Deleanu 2008. 173.

2 For details on the unconstitutionality of the administrative-jurisdictional character of the activity done by the County Committee on Land restitution, see Trăilescu 2008. 116–120, Puie 2007. 130–153.

3 Published in the Official Journal of Romania no 210/27.08.1997.

administrative jurisdictions, with emphasis on the fact that only the administrative authorities of the executive branch may emit such decisions.[4] In the same sense, both legal doctrine[5] and jurisprudence[6] have generally qualified the County Committees on Land Restitution as administrative authorities.

In order to answer the question whether the County Committees on Land Restitution are administrative authorities, we must look at their organization and functioning as well as their legal attributions.

III. The Organization and Activity of County Committees

Firstly, the County Committees on Land Restitution are collegial bodies, having been formed by the members mentioned in Art. 4 of Government Decision No 890/2005.[7] From the standpoint of organization, the County Committees on Land Restitution are independent from the institution of the prefect even though they usually have their headquarters in the prefecture buildings, are run

4 See Cimpoeru 2007. 59–71.

5 See Petrescu 1996. 49, Popescu 1995. 31.

6 See the Supreme Court of Justice, section for administrative litigation, Decision No 1018/1995, Petrescu 1996. 49. The Supreme Court stated that the County Committee, as the issuing authority of the title of property, has the character of an *administrative authority*. In the same sense, see the Supreme Court of Justice, section for administrative litigation, Decision No 94/1995, Negoiță 1997. 38. In the same case, the Supreme Court qualifies the County Committee on Land Restitution as a *public administrative authority*. For an opposite meaning, see Dăuceanu 1993. 78. According to the opinion, 'the County Committee's competence demonstrates the fact that we are not dealing with an administrative authority because in its composition, apart from a few people from the administrative apparatus of the prefecture, it is composed of members that are outsiders to this authority' (translation by the author).

7 The County Committee or the Committee of the Municipality of Bucharest is named by order of by the prefect and will have the following composition: a) the prefect – the President of the Committee; b) the sub-prefect, named by the prefect – in case of determined lack of availability due to illness, resignation, or suspension of the prefect, he takes over the latter's prerogatives; c) the general secretary of the prefect's institution – the secretary of the Committee; d) the Director of the office of administrative litigation and control of legality; e) the Director of the County Land Registry Office; f) the Executive Director of the Department of Agriculture and Rural Development of the County or of the Municipality of Bucharest; g) the territorial representative of the Agency of State Domains; h) the Director of the territorial branch of the National Administration on Land Improvement Corp.; i) a representative assigned by the County Committee or the Committee of the Municipality of Bucharest; j) the chief-inspector of the Territorial Forestry Inspectorate or his representative; k) the director of the Forestry Inspectorate of the Romsilva National Forestry Administration or his representative; l) a representative of the Romanian Forrest Owner's Association; m) a representative of the Forrest Administrator's Association; n) a representative of the legally constituted Agricultural Land Owner's Association; o) a representative of the research and development unit, named by the Academy of Agricultural and Forestry Science 'Gheorghe Ionescu-Şişeşti', if it is necessary. In order to support the County Committee in fulfilling its attributions, by order of the prefect, a workgroup will be appointed, composed of specialists that are delegated by the directors of the institutions, economic agents, or associations listed above.

by the prefect as their president, are also composed of public servants from within the prefecture, and are the heads of decentralized public services, who are subordinates to the prefect.

All these elements have led the European Court of Human Rights[8] to the conclusion that these County Committees are not in compliance with the requirements set forth by Art. 6, paragraph (1) of the Convention regarding the requirement of independence from the executive. In the interpretation of the Court, the County Committees are administrative committees. Keeping in mind all the considerations listed above, it is necessary *de lege ferenda* to amend the provisions of Art. 52, paragraph (1) of Land Law No 18/1991 by qualifying the County Committees on Land Restitution as administrative authorities with an administrative-jurisdictional authority.

IV. The Legal Attributions of the County Committees

Regarding the issuing of property titles, the County Committees act as administrative authorities and not as administrative-jurisdictional organs because the procedure is non-litigious. The titles of property for the injured parties who have filed a claim before the Court of Law based on the provisions of the Land Law will be filled out and will only be released after the passing of the definitive judgement.[9]

The County Committees have jurisdiction in solving challenges and in validating or invalidating the measures established by Local Committees.[10] This way, the necessity has arisen of having to pursue an administrative-jurisdictional appeal at the County Committees when there is a litigation that stems from the solution given by the Local Committees on Land Restitution. In order for a decision to be adopted at the County Committees on Land Restitution, it is only necessary to present all the required documents, and they will take note of the neighbour's mutual acknowledgement of property boundaries,[11] without the possibility of emitting subpoenas and questioning the other parties who have filed a complaint against the solution, in order for the original parties to be able to express their arguments and points of view, as it is deemed necessary by the requirements of an administrative-jurisdictional procedure.[12]

8 See the Case of Glod v Romania, see ECHR Decision of 16.09.2003, published in the Official Journal of Romania no 1127 from 30.11.2004.

9 According to the provisions of Art. 36, paragraph (5) of Government Ordinance No 890/2005.

10 According to the provisions of Art. 51 of Land Law No 18/1991.

11 According to the provisions of Art. 8, paragraph (3) of Government Ordinance No 890/2005.

12 The procedure of resolving the challenges in front of the County Committee takes place in accordance with the provisions of Art. 27, paragraph (3), in conjunction with paragraphs (6)–(7) of Government Ordinance No 890/2005 in the following way: those unhappy with the proposals of the village, town, or municipal committees for establishing property rights can file a complaint addressed to the County Commission in 10 days' time calculated from the displaying

In conclusion, the rule that the parties should be heard is being infringed upon in relation to the administrative-jurisdictional character of the County Committee's activity. Despite these elements, the Constitutional Court, requested to solve a constitutional challenge directed at Art. 53 of Land Law No 18/1991, has stated that the Committee does exert administrative-jurisdictional attributes and that the procedure constitutes a protective measure that does not have the purpose of limiting access to justice and is in compliance with the requirements set forth by Art. 6 of the Convention.[13]

Art. 21, paragraph (4) of the Romanian Constitution provides for the optional and free character of special administrative jurisdictions. Nonetheless, the provisions of Art. 51 of Land Law No 18/1991 impose the compulsory nature of following through with the administrative-jurisdictional remedy at the County Committees on Land Restitution in cases of dissatisfaction with the solution of the Local Committees given to land restitution requests. Only after exhausting the above remedy[14] before the County Committee may a complaint be filed at the Court, this way entering the judicial field according to the provisions of Art. 53, paragraph (2) of Land Law No 18/1991,[15] removing the benefit given by Art. 21, paragraph (4) of the Constitution, which establishes the optional and free character of special administrative jurisdictions.

Constitutional Court Decision No 507/15.05.2012, which resolved the constitutional challenge to these provisions, can be presented in the light of the same reasoning, as Art. 255, paragraph (1) of the Government Emergency Ordinance No 34/2006 – regarding the attribution of public acquisition contracts, public works concession contracts, and public services concession contracts –, similarly to the provisions of Art. 53, paragraph (2) of Land Law No 18/1991, provides that it is mandatory for any person who feels that his/her rights or

of the proposal which is unsatisfactory to them. The filing of the complaint will be done at the secretary's office of the village, town, or municipal committees, the latter being legally obliged to receive it and hand it over to the county committee in 3 days' time. The county committees will analyse the proposals received from the village, town, or municipal committees under the aspect of being in compliance with legal provisions regarding the establishing of property rights as well as with regard to the challenges of those unhappy by the way the property rights have been established by the village, town, or municipal committees. After its analysis, the county committees will solve the challenges, will validate or invalidate the proposals by a decision in 30 days' time calculated from receival, and will pass it on to the local committees by means of a delegate in 3 days' time, the latter being obliged to display it in plain sight at its headquarters and to pass it on under signature of reception to the people who have originally filed the challenge.

13 See Constitutional Court Decision No 60/31.01.2007, published in the Official Journal of Romania no 118 of 04.02.2007 as well as Constitutional Court Decision No 908/18.10.2007, published in the Official Journal of Romania no 809 of 27.11.2007.

14 The county committees are competent in resolving complaints and in validating or invalidating the measures set by the local committees.

15 A complaint can be submitted against the decision of the County Committee at the Court which has territorial jurisdiction determined according to the place of the land, in 30 days' time calculated from the communication of the Judgement.

legitimate interests have been infringed upon by an act of the contracting authority, that is, in violation of legal dispositions regarding public acquisitions to file a complaint, ask for the annulment of the act, ask for the contracting authority to be compelled to issue an act, or ask for the recognition of the said right or legitimate interest by administrative-jurisdictional means.

The primary appeal for redress in public acquisition procedures needs to be directed towards the National Council for Solving Complaints, an organ qualified by the law to undertake administrative-jurisdictional activity. The author of the constitutional challenge stated that the criticized legal provisions are in violation of the constitutional provisions of Art. 21 regarding free access to justice.

Examining the constitutional challenge, the Court concluded that the unconstitutionality of the criticized legal provisions cannot be ascertained because the said provisions do not pose an obstacle towards free access to justice. Also, it was noted that the statement according to which the criticized legal provisions state that the administrative-jurisdictional procedure has a compulsory character for solving complaints against acts issued by contracting authorities regarding public acquisitions also cannot be established. In Art. 255, paragraph (1) of Government Emergency Ordinance No 34/2006, the lawmaker did not provide for an obligation for people to only follow the administrative-jurisdictional path before the National Council for Solving Complaints, but, quite oppositely, the term 'may ask for' means that the choice is recognized for the person who files the complaint to start an administrative-jurisdictional appeal, without being in any way obligated to follow this path. Such a conclusion can also be drawn from the provisions of Art. 256, paragraph (1) of Government Emergency Ordinance No 34/2006, which states *expressis verbis* that, in order to solve complaints in the administrative-jurisdictional field, the party whose rights have been allegedly violated has the right, and *not* the obligation, to file a complaint at the National Council for Solving Complaints.

The dispositions of Government Emergency Ordinance No 34/2006 do not imperatively state the necessity of following through with an administrative-jurisdictional appeal but view it as an option for the injured party. The reasons behind it are the social implications, an efficient way of preventing and limiting the abuse of rights, considering the fact that solving complaints in the field of public acquisitions needs to be done and needs to be tried according to a procedure that is characterized by celerity, and it is well known that trial proceedings in these kinds of matters can go on for a very long time. The existence of such an appeal does not prevent the injured party from choosing a judicial appeal at a court of law so long as he deems that it serves his best interests.

Since there is no interdiction in instituting proceedings directly before a court of law, the injured parties may choose such course of action. In support of such a conclusion, we note the provisions of Art. 8, paragraph (2) of Administrative

Litigation Law No 554/2004, according to which the court with jurisdiction in administrative cases also has jurisdiction in solving cases that originate pertaining to the conclusion, modification, or execution of an administrative contract as well as in the precontractual phase of such a contract. The fact that the provisions of Government Emergency Ordinance No 34/2006 do not reiterate what has already been established by Art. 8, paragraph (2) of Law No 554/2004 as well as the possibility of a judicial appeal does not mean that it cannot be used or that Government Emergency Ordinance No 34/2006 is in conflict with Art. 21, paragraph (4) of the Constitution.

The Court held that the provisions in question are fully in compliance with the constitutional requirement set forth in Art. 21, paragraph (4), according to which 'administrative special jurisdiction is optional and free of charge', the injured party having the option of choosing between filing a complaint for the administrative act via the administrative-jurisdictional route or bringing a direct lawsuit before a court of law, under general provisions in the field of administrative litigation.

For the same reasons, we believe that the above decision will also be applied in cases in the field of land law, the party injured by the decision of the Committee on Land Restitution having the option of choosing between contesting the solution before the County Committee on Land Restitution through the administrative-jurisdictional channel and pursuing an action directly before a court of law.

Another problem that has been brought before the constitutional court is the constitutional challenge regarding the provisions of Art. 53, paragraph (2) of Land Law No 18/1991.[16] In the reasoning of the Court, it is essentially shown that the legal provision in question institutes discrimination between people that can be put in the same category as well as between citizens whose properties have been taken abusively by the state, by a communist organization, or by a legal entity. This way, in the case of immovable property, which is the object of the provisions of Law no 10/2001 concerning the legal regime of immovable property taken by the state between the 6th of March 1945 and the 22nd of December 1989, the state entity that is in possession of the immovable property for which restitution is being requested is required to answer the claim regarding restitution in kind in 60 days' time via a decision or motivated disposition, and the decision in question can be challenged before a court of law in 30 days' time from the communication of such a decision or disposition.

On the other hand, according to the provisions of Land Law No 18/1991, the legal provisions in question have a similar legislative solution, the possibility of attacking the County Committee's decision before a court of law in 30 days' time from the communication of the decision, however, without the law setting an express time limit within which a County Committee needs to reach a decision;

16 See Constitutional Court Decision No 1053/11.12.2012, published in the Official Journal of Romania no 56 of 24.01.2013.

this way, in the absence of a decision from the County Committee, the injured party cannot bring his claim before a court of law – such action will be dismissed as having been introduced prematurely.

Analysing these claims, the Court dismissed the constitutional challenge to the dispositions of Art. 53, paragraph (2) of Land Law No 18/1991 as inadmissible, claiming that the author of the constitutional challenge is asking the Court to add to the text of the law, and such a request cannot be upheld, being contrary to the dispositions of Art. 2, paragraph (3) of Law no 47/1992, which states that in the exercise of its functions the Constitutional Court can decide 'only with regard to the constitutionality of the matters that have been referred to the Court, without being able to modify or complete the legal provisions that are subject to its control'.[17] Accepting such a critique would lead to transforming the Administrative Litigation Court into a positive legislator, a result that would come into conflict with the provisions of Art. 61 of the Constitution, according to which the Parliament is the country's sole legislator.

V. Conclusions

All this being said, *de lege ferenda*, Art. 53 of Land Law No 18/1991 should be completed by the setting of a time frame in which the County Committee is obliged to pronounce a decision with regard to the complaint, this way the injured party having the possibility of filing a complaint before a court of law. Without setting such a time frame, in which the County Committee on Land Law has to solve the complaint against the Local Committee's solution, we reach a serious breach of the principle of solving a complaint in a reasonable time frame and in a predictable way; moreover, it is also a breach of the principle of the safety and stability of legal relationships, which, in general, is part of the content of the right to a fair trial, as stated in Art. 6 of the European Convention on Human Rights.

17 Translation by the author.

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Changes which Occurred in the Role of the Hungarian Constitutional Court in Protecting the Constitutional System[1]

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Abstract. The present article aims to briefly illustrate how the role of the Hungarian Constitutional Court in protecting the constitutional system changed after the Fundamental Law had entered into force compared to its role under the Constitution. Our findings are based on quantitative data, and we use statistical tools, with the help of which further conclusions are going to be drawn regarding the nature of the role of the Constitutional Court, fulfilled by it today and expected to be fulfilled by it in the following years. To this end, in the initial part of our study, we will firstly review the tasks that can be provided by the Hungarian Constitutional Court; then, in the second part, we will describe those main functions which actually determine the activity of the panel today, and we will examine the extent to which present-day tasks differ from the pre-2012 situation, also trying to review the main features of the general functioning of the panel, including the most important details of the current practice related to constitutional complaints. Finally, in the third part, we will summarize the conclusions that we can formulate on the basis of our analysis, which will make it possible for us to draw estimative statements regarding the very probable future evolution of the defence practice of the Constitutional Court concerning constitutional and fundamental rights.

Keywords: constitutional adjudication, competencies and practice of the Constitutional Court of Hungary, real constitutional complaint

I. Methods for Protecting the Constitution

The bodies empowered to exercise judicial review can basically fulfil two functions in any legal system: (1) on the one hand, they can provide protection for the constitutional order, in particular for the constitution (i.e. constitutional

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norms) – this is an objective function that manifests itself in the maintenance of the integrity of the constitutional order and in ensuring the general application of the constitution; (2) on the other hand, they can provide protection for the fundamental rights of citizens (or other natural persons such as refugees, stateless persons, and in some cases legal entities and other non-natural entities). The latter is a subjective function that provides individual legal protection.[2] *In Hungary, the Constitutional Court provides objective constitutional protection mainly through abstract control exerted upon legal norms, while the protection of individual rights is provided by the so-called 'real constitutional complaint'; in the case of specific norm control competences (to varying degrees), the elements of objective constitutional protection and those of the subjective protection of fundamental rights are intermingled*.[3]

The main form of the objective constitutional protection provided by the Constitutional Court is therefore the control of legal norms (I), meaning the constitutional review of the laws and legal provisions. If, while exercising this power, the Constitutional Court determines that a certain law in its entirety or a legal provision contained within it runs contrary to the Constitution – or to the Fundamental Law –, it will annul the respective law or its provisions in such a manner that it is deprived of legal effect after the annulment enters into force.

Otherwise, the annulment, which results in the expiry of the law, may, as a general rule, produce effects: *ex nunc*, meaning that it is effective from the day following the publication of the Constitutional Court's decision in the Official Journal; *ex tunc*, meaning that it is effective retroactively, from the date of the entry into force of the law (or, exceptionally, from its promulgation); *pro futuro*, that is, from a future date (in this case, the law is still to be applied in legal relations until such future date elapses). There can be other legal consequences as well that are different from annulment – thus, *the establishment of the existence of a violation* of the fundamental law caused by the legislator through failure or neglect (in which case the Constitutional Court will call the defaulter to fulfil its legislative task, also indicating a deadline); *the prohibition of the application of the law* if this does not result directly from the law; *the establishment of a constitutional requirement* by which the Constitutional Court may determine the constitutional meaning of a certain law as well as the requirements that the application of the law by the courts or other organs have to comply with. In addition, it is possible to order the review of a criminal procedure that has been closed by a final

2 Besides these, of course – differing from country to country –, a variety of other powers can also be exercised by the constitutional panel, but these are not directly connected to the tasks related to the constitutional protection role of the panel empowered to exercise constitutional rights, and so the analysis of this topic is not relevant in the case of our study.

3 The division is, of course, idealistic since, on the one hand, abstract norm control also serves the enforcement of individual fundamental rights, while, on the other hand, the 'real' constitutional complaint provides the general enforcement of the provisions of the Constitution, as well.

decision taken on the basis of a law that was contrary to the Fundamental Law if the accused has not yet been released from the disadvantageous consequences of the criminal record or the execution of the sentence or the enforcement of the punitive measure has not yet been completed or is still enforceable;[4] further, it is possible to order the review of an infringement procedure closed by a legally binding decision based on a law that has contravened the Fundamental Law if the punishment or the measure imposed is in progress or the perpetrator has been listed in the offence record related to the case under review;[5] in such a case, the prosecutor has to submit – ex officio – an application for revision.

There are basically two types of norm control: the abstract and the concrete norm control. *Abstract norm control* (I/A) means that – based on the proposal of the entitled entity – the Constitutional Court examines the consistency of a norm with the Fundamental Law without reference to a specific case or procedure, whereas in the case of *concrete norm control* (I/B) there is a specific case or procedure related to which the unconstitutionality of a legal or regulatory provision arises.

There are two types of abstract norm control: preliminary and posterior review. *Preliminary abstract norm control* (I/A.a) is carried out before the promulgation of the given act. A petition in this sense can be submitted currently by the Parliament, and if the national assembly has not exercised this right, then the President of the Republic may submit such a petition; *Posterior abstract norm control* (I/A.b)[6] is the review of laws for constitutionality after promulgation *since, as of the 1st of January 2012, the possibility of initiating an action without legal interest (actio popularis) has*[7] *ceased to exist*, wherefore persons who are claiming the unconstitutionality of a legal or statutory provision without justifying their own legal interest can no longer appeal to the Constitutional Court; as an option, however, it is possible to report to the Ombudsman any suspicion of a violation of the fundamental law. The ombudsman, if he/she agrees, may then initiate, in his/her own name, the annulment of the relevant law(s) or segment(s) of law(s) by the Constitutional Court.

4 Act XIX of 1998. Article 416. § (1) letter e).

5 Act II of 2012. Article 133. § (1), (2) letter d).

6 According to Article 24. par. (2) letter e) and according to Article 24 and 37 of the Act on the Constitutional Court, the CC shall review the conformity with the Fundamental Law of the public (i.e. statutory) law and of any legal regulation (including local government by-laws). According to Article 24 § par. (2) letter f) and according to Article 32 § (1) and Article 37 § of the Act on the Constitutional Court, the CC shall examine any legal regulation (including the local government by-laws) for conflict with any international treaty to which Hungary is a party. According to Article 24. § par. (5) and according to Article 24/A § par. (1) of the Act on the Constitutional Court, the CC may proceed to the posterior review the Fundamental Law or the amendment of the Fundamental Law only if the procedure is initiated by: the Government (the Cabinet), one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General, or the Commissioner for Fundamental Rights, having no connection with any specific case.

7 For details about these issues and their impact, see: Tóth 2012.

However, those who have their own legal interest in establishing the unconstitutionality of a certain act still have a direct right of initiative (the tool of which is the concrete norm control presented in part I/B).[8] The concrete norm control has three forms: The first form (I/B.a) *is the constitutional complaint linked to the 'old' norm control* as described in Article 26 § (1) of the Act on the Constitutional Court, according to which[9] if, due to the application of a legal regulation contrary to the Fundamental Law, during judicial proceedings someone's rights enshrined in the Fundamental Law were violated, the harmed person may request the establishment of the norm's non-constitutional character and therefore the annulment of the law, act, or any legal provision underlying a court resolution or proceeding provided that the other ordinary remedies had been exhausted or the petitioner had not been afforded a remedy. The second form (I/B.b) is *the direct constitutional complaint* as described in Article 26 § (2) of the Act on the Constitutional Court, which may be referred to if, due to the application of a legal provision contrary to the Fundamental Law or when such legal provision becomes effective, rights were violated directly, without a judicial decision. The third form (I/B.c) is *the judicial initiative for norm control in concrete cases* (described in Article 25 of the Act on the Constitutional Court). This tool cannot be used by the person concerned but only by the proceeding court.

According to Act CLI of 2011 on the Constitutional Court of Hungary, since the 1st of January 2012, there exists a new form of individual protection of fundamental rights. This is the *'real' constitutional complaint* (II) described by Article 27 §[10] of the Act on the Constitutional Court, the essence of which is that persons or organizations affected by court decisions contrary to the Fundamental

8 Of course, an exception is the procedure of judicial initiative for a specific norm control, in which case – as mirrored by the name of the legal institution – the acting judge or council of judges may initiate a judicial review; the person concerned in the proceedings can only submit a motion to the judge to suspend the proceedings and to appeal to the Constitutional Court.

9 Act on the Constitutional Court of Hungary (Act no CLI of 2011).

10 Interestingly, the introduction of the constitutional complaint against 'real' court judgments has already been proposed during the change of regime; however, due to the resistance of the Supreme Court and the indifference of the Opposition Roundtable (as they considered the introduction of an *erga omnes* procedure, which makes it possible for everyone to initiate a posterior abstract norm review rather than the model of the 'real' constitutional complaint that would serve as the means of individual – basic – legal protection), it was eventually removed from the agenda of constitutional issues being debated at the time (see: Sólyom 2003, 19). After this, the idea of introducing the 'real' constitutional complaint has surfaced from time to time and was raised by the Constitutional Court and its President, who formulated at the beginning of the constitutional process the need to provide for an institution that would protect individual legal rights – concurrently with the abolition of the possibility of posterior abstract norm control. Thus, the constitutional body would be the one that resolves the 'real' constitutional complaint (for details, see: Paczolai 2010). The introduction of this legal institution was also promoted by several other constitutional lawyers (see, for instance: Halmai 1994, 45–50; Kovács 2011, 93–99; Bihari 1999, 200–214); others were sceptical regarding its introduction into the Hungarian legal system (see, for example: Csehi 2011, 100–109).

Law may submit a constitutional complaint to the Constitutional Court not only if they consider that the act based on which the decision was made was contrary to the Fundamental Law but also if they consider that the resolution itself or the judicial proceedings as a result of which the resolution had been given was unconstitutional.[11]

II. The Operation of the Constitutional Court in the Light of the Figures

As of January 1, 2012, there were three very important changes in the role of the Constitutional Court in protecting the constitutional system: on the one hand, the possibility of submission by anybody (without any legal interest) of the posterior norm control was abolished, and, on the other hand, the former constitutional complaint [as regulated by Article 26 § (1) of the Act on the Constitutional Court of Hungary] was completed by the direct constitutional complaint [settled by Article 26 § (2) of the Act on the Constitutional Court of Hungary] linked to the norm control and by the 'real' constitutional complaint submitted against a specific judicial decision [settled by Article 27 § of the Act on the Constitutional Court of Hungary].[12] Of course, besides the former-type, the direct, and the real complaints, it is still possible for the party to request the Court to initiate a specific (i.e. individual) norm control procedure connected to any uncompleted case, but the actual initiative continues to depend on the proceeding court's discretion, and so it will be launched exclusively if the court before which the procedure is ongoing itself considers that the law or statutory provision applicable to the individual case is unconstitutional.[13]

11 To differentiate between these (and other) functions of the constitutional courts and their competences, see, for example: Kukorelli 2007. 452–467, Legény 2006. 211–280, Téglási 2014. 135–148, Balogh 2012. 343–374, Cservák 2015. 59–66.

12 With this shift in emphasis, the legislator declared that the individual legal protection function of fundamental rights (e.g. judicial review of a specific case) is much more important than before, while the norm control function of constitutional jurisdiction (e.g. control over political legislation) is less emphatic or less desirable. With this, the Hungarian Constitutional Court was closer to the case-law than before. See, for example: Rixer 2012, 85. However, it is not true that the Constitutional Court would become a 'de facto court of justice' (such a statement was made, for example, by: Bobek 2007. 18).

13 There is another significant difference between the 'old' complaint and the individual judicial norm control: while in the case of the former the party concerned may submit a complaint for the establishment of the unconstitutional character of a law based on which the final court decision was made in his/her case, only if the law violates any of his fundamental rights provided by the Fundamental Law, in the case of the latter, the motion for norm control submitted by the judge is not limited to the violation of a fundamental right, the judge may turn to the Constitutional Court for alleged violations of any other provisions of the Fundamental Law. This also means

It can be stated that from 2012 onwards, the Constitutional Court's characteristic power (instead of posterior abstract norm control) has become the constitutional complaint.

The number of cases filed with the Constitutional Court between 1990 and 2011, i.e. under the Constitution, was an average of 1,400 (more exactly 1,399) per year. The average number of cases dealt with by the plenary panel of the CC or by a three-member panel was 298 per year (the total number of completed/closed cases was 1,329). Compared to this, after 2012, the number of cases judged (including plenary refusals) was: 640 in 2012, 256 in 2013, 369 in 2014, 322 in 2015, 332 in 2016, and 449 in 2017 – an average of 393 per year.

By comparing in detail the pre- and post-2012 data, the nature of change becomes evident. In the last year of the Constitution, which represents the average annual number of cases, and therefore may be considered to be a good point of reference, that is in 2009,[14] 1,452 new cases were submitted. Of these, the number of cases resolved 'otherwise' was 695, and the number of cases assigned to a judge-rapporteur was 757. Of the 757 cases, there were 368 cases of posterior abstract norm control (9 of which submitted by one of the ombudsmen and 359 were actio popularis), 98 cases of judiciary specific norm control, and 51 cases of constitutional complaints (of course, with norm control since this was the only type then). The proportion of posterior abstract norm control initiatives in all cases was 49.8% (of which, the ratio of cases initiated per actio popularis to all cases was 48.6%). The proportion of the judiciary specific norm control was 12.9%, and the rate of constitutional complaint (with norm control) was 6.7%.

Of the 7,233 cases solved between 1 January 2012 and 29 January 2018 (which do not include the cases disposed of by the Secretary-General or by the Judge's Chamber)[15], 63 were cases of posterior abstract norm control, which accounted for

that if the person(s) or organization(s) involved in the case consider that the (applicable) law has not violated a constitutional right but rather a constitutional value or principle, he/she (they) cannot directly rely on this infringement, they can only request the judge to submit a motion for individual norm control. In the latter case, however, they cannot wait for the final judicial decision because the motion for individual norm control submitted by the judge can only be conducted in a pending case. Furthermore, it is also an important difference between the two legal institutions that, according to Article 29 of Act on the Constitutional Court of Hungary, 'the Constitutional Court shall admit constitutional complaints if a conflict with the Fundamental Law significantly affects the judicial decision or the case raises constitutional law issues of fundamental importance', while in the case of the judge's norm control initiative such a restriction is not provided for; the judge may, therefore, suspend the proceedings in a case pending a decision by the Constitutional Court and may request a decision from the Constitutional Court, which in turn will neither affect the judicial decision substantively nor 'should be considered a decision having the character of constitutional law issue of fundamental importance'.

14 In 2010 and 2011, there were a lot of cases that involved a specific problem, namely the imposition of parking surcharges, and therefore relevant general conclusions cannot be deduced from the data of these years.

15 It was 2,726.

0.9% of all cases solved. In the specific norm control procedure,[16] 446 decisions were made, corresponding to a 6.2% ratio. In the constitutional complaint procedure, the panel made 6,666 decisions (92.2%).

Of the 6,666 resolved complaints cases between 1 January 2012 and 29 January 2018, 3,895 were constitutional complaints connected to norm control [as described by Article 26 (1) and (2) of the Act on the Constitutional Court of Hungary], which constitutes 58.4% of all complaints; the number of the 'old' type of complaints [as described by Article 26 (1) of the Act on the Constitutional Court of Hungary] was 968 (14.5%), and the number of 'direct' complaints referred to in Article 26 (2) of the same Act was 2,927 (43.9%). The number of cases completed according to the 'real' constitutional complaint (referred to in Article 27 of the Act on the Constitutional Court of Hungary) was 2,770, accounting for 41.6% of the total number of complaints solved.

As far as the way in which the complaints are completed is concerned, 306 decisions were made (this is 4.6% of the proceedings concerning the merits of the case), and only 81 of these were admitted,[17] i.e. the success rate of the complaints was a meagre 1% (more exactly 1.22%). In the cases of 'real' complaints (as set by Article 27 of the Act), the situation is more promising for the petitioners, but even thus the 55 annulments made in 2,770 cases represent only a 1.99% success rate, which is still more than three times that of the 0.59%[18] 'success rate' of the norm control complaints.[19]

This low ratio of proceedings on the merits of the claims and the even lower 'success rate' are not just Hungarian characteristics. Between 2005–2009, the German *Bundesverfassungsgericht* – according to its own statistics – out of 4,920, 5,985, 6,175, 6,090, and 6,051 complaints (regardless of the type and the solutions passed) turned down 4,667, 5,731, 5,885, 5,737, and 5 783 initiatives, respectively, and it completed proceedings on merits only in the case of 141, 145, 152, 115, and 128 complaints respectively. Out of the latter, the Court rejected a relatively

16 These are mainly ombudsman submissions: 56 out of 62 have been submitted by the Commissioner for Fundamental Rights, 4 by a total of one-fourth of Members of Parliament, one by the President of the Curia, and one by the Government (the Cabinet).

17 These cases ended either with the establishing of the unconstitutional character and annulment of the substantive law (6 cases) or with the annulment of the resolution given by the National Election Office (2 cases) or with the annulment of a court decision and/or decision of an authority (55 cases) or with total or partial annulment of a legal or statutory provision (17 cases).

18 During the judgment of the 3,895 cases related to constitutional complaint with norm control, only 23 annulling decisions were taken.

19 However, if we take into account the decisions that had been taken after the merging of the complaints received and that had admitted the norm control complaint (i.e. we will not take into consideration the total number of decisions taken but the number of initiatives based on which decisions were taken by the Constitutional Court), we must add these 60 merged cases to the above number – so, the Constitutional Court had given judgment upholding the submitted initiatives in the case of 83 petitions; this means a success rate of 2.13%, which is already corresponding to the success rate of the 'real' complaints (in fact, it even slightly exceeds that).

small number of complaints (8, 9, 4, 4, and 17 respectively) and upheld the submitted initiatives in 133, 136, 148, 111, and 111 cases respectively. The other cases – one to two hundred cases per year – ended mostly with the withdrawal by the petitioner and in smaller part in other ways. This means that between 2005 and 2009 95.1% (rounded) of the 29,221 complaints completed (exactly 27,803 initiatives) were rejected by the Panel; 2.5% (737) of the complaints were withdrawn by the petitioners, or the complaint procedure was terminated by other means (termination, relocation, etc.); 0.1% (42) were rejected by the Panel (always by one of the panels having 8 members), while 2.2% (639) of the petitions were admitted (most of them by a three-member chamber, some by one of the senates). So, the German practice sorts the petitions at the time they are submitted, and those admitted will be most probably upheld by the CC; the rejection subsequent to the analysis of the merits of the claims in the case of the German CC is exceptional.[20] In Spain, the practice of accepting the Amparos[21] – working as a special legal institution – is similar to that of the German CC: the Tribunal Constitucional formally rejected 47,705 complaints (90.5% of the 52,735 submitted) between 2008 and 2012, and only 1.3% (699) were judged on their merits.[22]

It is interesting to note that the 'success rate' has *risen* compared to 2015 [according to data, on 6 October 2015, out of the 3,399 complaints resolved, in 172 cases a decision was passed, and only 32 of them was such decision in the sense of upholding the claim, i.e. the success rate of the complaints was less than 1% (more exactly, it was 0.94%), but the number of complaints increased if we take into consideration the total number of cases (at the end of 2015, it was only 89.6%), and the proportion of 'real' complaints within the complaints increased as well, while the ratio of judiciary initiatives and abstract norm control has decreased (as compared to 2015)].[23]

Finally, to present the real impact of the constitutional complaint procedure, it is worth mentioning the legal bases according to which the annulment of decisions given in those 'real' complaint procedures that upheld initiatives was made, i.e. the type of complaints admitted by the Constitutional Court should also be taken in consideration to determine more exactly which are the rights conferred by the Fundamental Law[24] that are most commonly enforced in the

20 Source: Bundesverfassungsgericht.

21 See, for example: Pokol 2003. 26, Cservák 2013. 224.

22 See: Tribunal Constitucional de España.

23 For details regarding the situation, see: Tóth 2016. 121–138.

24 In 'borderline cases', it depends on the interpretation of the Constitutional Court whether the specific case has or has not a fundamental legal nature (whether it deals with subjective judicial protection or not). Thus, for example, the Panel accepted (in one case) the reference to the principle of judicial independence, in a case when the judge's rights were infringed, but only because the complainant was a judge; otherwise, judicial independence (which is a constitutional principle and not a right guaranteed by the Fundamental Law) cannot be invoked in the complaint procedure. Rule of law or constitutionality cannot be invoked either, except

practice of the CC (if you like: which rights enshrined by the Fundamental Law are most often violated by the courts).

By 29 January 2018, the Constitutional Court annulled judicial decisions in 55 'real' complaint cases. Among these decisions, there is a large proportion of resolutions that established the violation of the Fundamental Law not due to the infringement of a substantive law but purely because of the violation of procedural fundamental rights. In a total of fourteen cases, the Constitutional Court annulled one (or more) judicial decision(s) for the reason of violating the right to a fair trial;[25] the vast majority of them (more exactly ten) found only violations of the right to a fair trial,[26] three decisions found the violation of the right to a fair administrative procedure,[27] and a further one found the violation of both.[28] One of the above-mentioned 13 cases, besides the violation of the right to a fair trial, referred also to the violation of the right to a legal remedy, and[29] nine further constitutional judicial decisions established the unconstitutional character of a court resolution explicitly and exclusively based on the violation of the right to a legal remedy.[30] This constitutes a total of twenty-three constitutional judicial decisions in which the Panel has found the violation of procedural fundamental rights. Since these account for more than 40% of all decisions, it might be stated that court decisions have been annulled mostly based on procedural violations of constitutional rights.

In addition, freedom of expression has also been a common cause for annulment (either merely in itself[31] – on six occasions – or combined with the violation

for – based on the long-standing constitutional practice of the Constitutional Court – the cases when the requirement of sufficient time for preparation and the prohibition of retroactive legislation were infringed (amongst 51 cases, there was only 1 which established the violation of the latter). Finally, according to the Constitutional Court, the right to a referendum can be invoked by parties as well, not only by the natural entities entitled to vote (this was the basis for two of the body's decisions).

25 CC Decision 21/2014. (VII. 15.); CC Decision no 3081/2015. (V. 8.); CC Decision no 19/2015. (VI. 15.); CC Decision no 3124/2015. (VII. 9.); CC Decision no 3007/2016. (I. 25.); CC Decision no 21/2016. (XI. 30.); CC Decision no 5/2017. (III. 10.); CC Decision no 10/2017. (V. 5.); CC Decision no 20/2017. (VII. 18.); CC Decision no 3241/2017. (X. 10.); CC Decision no 3305/2017. (XI. 24.); CC Decision no 3353/2017. (XII. 22.); CC Decision no 3354/2017. (XII. 22.).

26 CC Decision 21/2014. (VII. 15.); CC Decision no 3081/2015. (V. 8.); CC Decision no 3124/2015. (VII. 9.); CC Decision no 3007/2016. (I. 25.); CC Decision no 21/2016. (XI. 30.); CC Decision no 20/2017. (VII. 18.); CC Decision no 3241/2017. (X. 10.); CC Decision no 3305/2017. (XI. 24.); CC Decision no 3354/2017. (XII. 22.).

27 CC Decision 5/2017. (III. 10.); CC Decision no 10/2017. (V. 5.); CC Decision no 3353/2017. (XII. 22.).

28 CC Decision 19/2015. (VI. 15.).

29 CC Decision 3124/2015. (VII. 9.).

30 CC Decision 3064/2014. (III. 26.); CC Decision no 12/2015. (V. 14.); CC Decision no 14/2015. (V. 26.); CC Decision no 24/2015. (VII. 7.); CC Decision no 9/2017. (IV. 18.); CC Decision no 11/2017. (V. 26.); CC Decision no 18/2017. (VII. 18.); CC Decision no 22/2017. (IX. 11.); CC Decision no 3285/2017. (XI. 14.).

31 CC Decision 13/2014. (IV. 18.); CC Decision no 31/2014. (X. 9.); CC Decision no 5/2015. (II. 25.); CC Decision no 9/2015. (IV. 23.); CC Decision no 19/2016. (X. 28.); CC Decision no 20/2016.

of the freedom of the press –[32] on other six occasions),[33] altogether in twelve cases, the petitioner's request being accepted by the constitutional body based on these reasons. In addition, in four cases, the right to know public interest data,[34] three times the prohibition of discrimination (i.e. the violation of the principle of equality in front of the law and that of non-discrimination)[35], and three times the violation of the right to peaceful assembly[36] and of the right to property[37] (in one case,[38] together with the right to inheritance) gave rise to the annulment of a court decision. The violation of the right to participate in the referendum[39] occurred twice as a basis for annulling a CC decision, while the violation of the right to the freedom of religion[40], the prohibition of retroactive legislation[41] (an

(X. 28.). With regard to the last two decisions, it should be mentioned that both in the case of Decision 19/2016 and 20/2016 (which essentially contained the same constitutional dilemma in the case of different petitioners) the CC referred as a legal basis for its decisions to Article IX (1) of the Fundamental Law (i.e. in general to the freedom of expression) and not to the right included in Article IX (2) of the Fundamental Law, that is the freedom of the press – though it would have been more appropriate for the situation in question. Yet, for the interpretation of this right [i.e. par. (1) of Article IX], the motivation of both decisions also includes paragraph (3) on the conditions for the publishing of political advertising [par. (3) of Article IX of the Fundamental Law: 'In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.'] According to the Constitutional Court, the legal basis for the two annulling decisions is precisely 'the broadcaster's freedom to edit the media content', as settled by Article IX par. (1). See: CC Decision 19/2016. (X. 28.); CC Decision, Motivation [52], 20/2016. (X. 28.) CC Decision, Motivation [57].

32 CC Decision 28/2014. (IX. 29.); CC Decision no 3/2015. (II. 2.); CC Decision no 16/2016. (X. 20.); CC Decision no 17/2016. (X. 20.); CC Decision no 3/2017. (II. 25.); CC Decision no 34/2017. (XII. 11.).

33 In five of the six cases, the Constitutional Court has explicitly invoked both the freedom of expression in its general terms [Article IX (1) of the Fundamental Law] and – as part of it – the freedom of the press (Article IX (2)]. But in one case [CC Decision 34/2017. (XII. 11.)] the CC decided that the explicit reason for the annulment was directly and explicitly the violation of the freedom of the press, without the prejudice of the general right to freedom of expression, in two further cases this being the reason for the annulment. Since freedom of the press is an immanent part of the freedom of expression, in this case, in fact, not only the freedom of the press but also the freedom of expression itself was violated; the fact that the Constitutional Court omits this element is due to the reason that the subject of the procedure was merely the interpretation of the 'constitutional mission of the press', namely the constitutional status of the press.

34 CC Decision 21/2013. (VII. 19.); CC Decision no 5/2014. (II. 14.); CC Decision no 25/2014. (VII. 22.); CC Decision no 6/2016. (III. 11.).

35 CC Decision 3086/2013. (III. 27.); CC Decision no 3087/2013. (III. 27.); CC Decision no 9/2016. (IV. 6.).

36 CC Decision 3/2013. (II. 14.); CC Decision no 30/2015. (X. 15.); CC Decision no 14/2016. (VII. 18.).

37 CC Decision 15/2014. (V. 14.); CC Decision no 5/2016. (III. 1.); CC Decision no 3012/2017. (II. 8.).

38 CC Decision 5/2016. (III. 1.).

39 CC Decision 31/2013. (X. 28.); CC Decision no 1/2014. (I. 21.).

40 CC Decision 35/2014. (XII. 18.).

41 CC Decision 13/2015. (V. 14.).

important element of the rule of law), the right to good repute,[42] and the right – as a right guaranteed by the Fundamental Law – to the judicial independence of the judges[43] (i.e. Article 26 of the Act on CC) each constituted once the reason for the annulment of a Constitutional Court decision. In addition, in one of its decisions (i.e. the constitutional review of the Curia decision authorizing the referendum submitted in the so-called case of 'Man 40'),[44] Article XV (5) of the Fundamental Law ('By means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities.') and the second sentence of Article XIX (4) ('The conditions of entitlement to state pension may be laid down in an Act with regard to the requirement for stronger protection for women.') gave the reason for declaring a judicial decision to be unconstitutional.

It is interesting to note that 20% (11 decisions) of the 55 annulment decisions were passed by the council panel and 'only' 44 were passed by the plenary panel of the fifteen constitutional judges. According to the procedural rules, the decision to annul a resolution of the Curia can only be decided by the plenary of the judges (a decision on the annulment of a resolution given by the Curia has been made in 21 cases out of 55), but in the cases in dispute – in practice – we always deal with a decision given by the Constitutional Court. However, whether the plenary court or a five-member panel has taken a decision in a particular case is in fact irrelevant and does not have any practical consequences. The panels of the Constitutional Court act on behalf of the Constitutional Court, and any of the panels that makes decisions does this on behalf of the Constitutional Court, i.e. the decision is always being taken by the Constitutional Court. The decisions passed by the Council have the same effect as the ones passed by the plenary sessions. This is so because if there are five judges who do not agree with the direction of a draft regarding a case on the agenda of the Council they may request that the case be submitted to the plenary session (and more than that, the President of the Constitutional Court may, at his own discretion, include the case on the agenda of the plenary session as well); a decision taken by the Council therefore also means that there were no five constitutional judges out of the fifteen who would have opposed the draft on the agenda of the Council.

III. Conclusions

After 2012, the constitutional complaint became the typical scope of authority of the Constitutional Court: over 90% of the cases in the last six years were complaints. Cases initiated in the post-2012 period based on Art. 26. § (1) and

42 CC Decision 1/2015. (I. 16.).
43 CC Decision 4/2014 (I. 30.).
44 CC Decision 28/2015. (IX. 24.).

(2) of the Act on CC constituted 53.9% of all cases and 58.4% of all complaints; however, among the successful complaints, there are many more 'real' complaints submitted against judgments than against the law on which the judgment was based (see: 'real complaint' as settled by Article 27 of the Act on CC). On the other hand, the rate of concrete judicial norm control has decreased compared to the period when the previous constitution was in force: roughly, it was halved (from 12.9% to 6.2%).[45] Lastly, although the number of judgments on merits and especially that of the successful complaints may appear to be low at the first glance, we must admit that, on the one hand, this is similar to the practice of foreign jurisdictions with longer-standing tradition of such an institution, and, on the other hand, the period of time in which the successful constitutional complaints were submitted makes it evident that, compared to the cautious abstinence of the first two years, the Constitutional Court has got 'accustomed' – since the end of 2013 (especially in the case of the 'real' complaint, which was a novelty for it, too) – to the changed rules of jurisdiction (and had established and later consolidated its[46] reception and decision-making practice) and has since continued to use the tool of annulment. Thus, if this tendency is going to continue, we can count on a higher success rate of the complaints in the coming years.

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45 The number of judicial initiatives was 446 between 1 January 2012 and 29 January 2018.

46 For details on the analysis of the admission practice of the Constitutional Court in 'real' complaint cases, see: Tóth 2014. 224–238.

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Post-Communist Restitution of the Nationalized Reformed and Roman Catholic Church Property in Romania

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Abstract. In the course of this study, we will analyse the process of nationalization and post-communist restitution of church property in Romania, with a special focus on the immovable property items which once belonged to the Reformed Church and the Roman Catholic Church. We show that nationalization of such assets took place in several waves and quickly resulted in the dispossession of these churches of the means of their educational and charitable activities. We also show that this nationalization was underpinned by a patchwork of legal norms and was carried out with utmost prejudice by the Soviet-type state apparatus. After the regime change of 1989, the Romanian legislative, owing to foreign pressure, half-heartedly endorsed the restitution of some nationalized church properties by several successive norms through a primarily administrative procedure. We demonstrate the shortcomings of this procedure on two examples of church schools, where restitution failed, and in one case even resulted in renationalization. We conclude that the restitution of church property, as devised by the Romanian legislative, is a deeply flawed solution to an ongoing problem.

Keywords: nationalization, communist regime, property restitution, church property, Romania

Overview

The commandment ‘Thou shalt not steal’ seems to be principally a rule of criminal law: anyone who takes any belonging of another person in order to illegally appropriate it commits theft. However, the criminal law approach is only one component of the biblical commandment. Indeed, the entire system of private property protection can be deduced from this one commandment. Even

more than that: it may be construed to cover the protection of such values as language or culture.

John Calvin interprets the 'Thou shalt not steal' commandment in the following manner:

> The end of this precept is, that, as injustice is an abomination to God, every man may possess what belongs to him. The sum of it, then, is, that we are forbidden to covet the property of others, and are therefore enjoined faithfully to use our endeavours to preserve to every man what justly belongs to him. For we ought to consider, that what a man possesses has fallen to his lot, not by a fortuitous contingency, but by the distribution of the supreme Lord of all; and that therefore no man can be deprived of his possessions by criminal methods, without an injury being done to the Divine dispenser of them.[1]

The question of communist nationalizations can also be interpreted in this context: in reality, the communists never desired that the redistribution of appropriated goods should benefit the people, instead they created a comprehensive system of state ownership used to maintain the dictatorship in order to preserve the power of the ruling oligarchy, the *nomenklatura*. Unfortunately, during attempts at the reparation of the abuses carried out by the communist dictatorships, these measures of nationalization were not disentangled correctly and in accordance with the values of the Ten Commandments.

The Soviet-type dictatorial regime illegally confiscated over 2,100 properties from the four traditional Hungarian-speaking churches in Romania (Roman Catholic, Reformed, Unitarian, and Lutheran). To date, only less than half of these church properties have been successfully reacquired – some only on paper – by decisions of the Government's Special Restitution Committee.

After the regime change in 1989, successive Romanian governments have impeded the country's full democratization by delaying and obstructing the restitution process with impunity. In doing so, the state was able to retain abusively confiscated properties as long as possible. By now, most of the buildings need extensive renovation. In the worst cases, they are dilapidated and uninhabitable.

The problems which occurred during the painfully slow restitution process of church properties, which were confiscated ('nationalized') by the Soviet-type regime at the stroke of a pen, justify a thorough analysis of the current status of church property restitution – focusing on its shortcomings; some of these have been common to all churches in Romania, while some others have been specific only to the Hungarian-speaking minority churches of Transylvania.

1 Calvin 1909. 367.

The Soviet-type dictatorship effectively outlawed denominational schools. Movable and immovable possessions used for educational purposes were simply confiscated by the state. Totalitarian law provided that any person opposing 'nationalization' could be sentenced to between 5 and 10 years of forced labour and could have his/her private property confiscated.

For the Hungarian minority churches in Transylvania, the consequences were devastating. More than 1,000 Hungarian-speaking denominational schools were confiscated by law; in the interwar period, 531 schools were operated by the Reformed Church, 468 by the Roman Catholic Church, 34 by the Unitarian Church, and 8 by the Evangelical Lutheran Church. These schools formed the basis of preservation of the minority language and culture.

In their complex structures, the churches owned different types of properties: schools, hospitals, orphanages, retirement homes, housing for the elderly, etc. It is very important to emphasize that churches used to perform a wide range of social activities, not only in the life of a national minority but in their whole communal environment. Via these charitable and educational activities, churches were often complementing the deficiencies of state structures or counterbalancing the negative effects of particular state policies directed against minority groups.

'Nationalization' was fast, simple, and effective: it was implemented overnight. On the contrary, property restitution is acrimonious and progresses at a snail's pace. Despite various legal instruments on property restitution and countless deadlines for implementation, the political will to enforce them has remained absent or severely limited. The slow pace of reform in the justice system directly affects religious freedom in Romania. Most notably, (1) refusals to enforce final judicial verdicts establishing property rights of churches; (2) the refusal to implement or enforce the law or government decisions referring to the restitution of properties; (3) misinterpretation of facts and legal provisions; (4) acceptance of legality of unlawful sales contracts concluded by the state before the start of the restitution process; and (5) even interpretation in bad faith of legal provisions.

In response to pressure from the European Commission, the Government passed an Emergency Ordinance no 94/2000, approved and modified later by the Parliament through Law no 501/2002, which constitutes the legal basis for the restitution of properties illegally seized from religious denominations under the communism in the period between 1945 and 1989. The legal solution came more than a decade after the end of Communism. This law was followed by other laws and decrees, all flawed and ineffectual. The current state of restitution is characterized by the interaction between legislation, the staggered evolution of this legislation (fragmented evolution), the limited efficiency of public administration, the general problems of the rule of law, the unpredictability of application of normative acts, and the contradictory jurisprudence of the courts. Another factor in the slowdown of the process is that Romania has already reached its main external policy goals

(i.e. NATO membership in 2004, EU membership in 2007), and the burden to prove its commitment to church property restitution has seriously weakened.

The central and actual problem of restitution refers to the cases in which a certain educational, cultural, or scientific institution of the Church figured in the land register as the owner of a certain building. The restitution committees reject claims motivating that the Church is not entitled to restitution because not the Church but a different legal person was the owner. This approach is totally wrong and disregards the complex internal structure of churches, which are constructed as very elaborate organizations with each element of their structure organically belonging to the body of the given church, as stated very clearly also by ecclesiastical law. Also, this approach does not take into consideration the fact that the organization which figured in the land register as the original owner has ceased to exist precisely due to the nationalization measure being taken. This approach of the restitution committee and of some courts needs urgent revision, and the correct and definitive legal solution must be identified at once.

Nationalization

The Romanian state after 1945 performed nationalization in several waves: health and social institutions, agricultural land, private properties, private companies, cultural/social institutions, and last but not least educational establishments. The nationalization of church properties was an important, early station in the establishment of the communist regime because the churches operated numerous educational, social, cultural, and missionary institutions.

The adoption of a new constitution (Official Gazette, Part I, no 87, 23 April 1948) at the beginning of 1948 was an important legal step that shaped the Soviet-type organization of the state. Among other provisions, Article 6 of the Constitution states that forests are owned by the state as public property. Article 22 states that the State provides for everyone the right to education, and according to the Article 27 a church or religious denomination cannot maintain general education facilities. Prior to the Constitution, the Land Reform of 1945 (Official Gazette, Part I, no 68, 23 March 1945) set the stage for the nationalization of agricultural land. Later on, a whole variety of additional legislation completed this process.

On the 3rd of August 1948, two decrees were issued by the legislature, which completely supplanted churches from educational activities, deprived them of any kind of property, and through these means a Soviet-type school structure was created, establishing an education system fully controlled (financially and ideologically) by the State.

'Educational Reform' Decree no 175 (Official Gazette, Part I, no 177, 3 August 1948), which was in fact an administrative regulation signed into law, in its first

phrase declares that a uniform public education structure is to be created and organized exclusively by the State.

According to this Decree, all schools operated by churches or private bodies became public schools. According to the Decree (Article 37), all persons resisting the implementation of these measures could be convicted to 5 to 10 years of forced labour and the confiscation of their property. For the entire Romanian educational system, the 'educational reform' opened a new era. For Hungarian-language education, however, the disbanding of all the elementary and secondary schools, which until then – in several cases, for three or four centuries – were operated by the historical Hungarian churches, brought forth a severely acute and dire situation. Altogether 531 schools operated by the Reformed Church, 468 schools of the Roman Catholic Church, 34 schools of the Unitarian Church, and 8 schools maintained by the Evangelical Lutheran Church were nationalized.

Together with the real estate, the State nationalized the associated movable assets as well, including furniture, libraries, equipment, scientific collections, and so forth.

Decree no 176 (Official Gazette, Part I, no 177, 3 August 1948), which is also a Council of Ministers regulation with legislative enactment, based on Decree no 175, provides for the nationalization of all religious schools along with all their assets. Within the meaning of the first paragraph of this law:

> For the good organization and operation of state-owned public education, as well as for the democratization and expansion of education, all movable and immovable assets which belong to the churches or any kind of congregations, religious communities, private associations, or if they were held by private physical and legal entities or they served the nationalized educational institutions according to Article 35 of the Public Education Act, are transferred into state property under the care of the Ministry of Education.

Any property serving the operation of schools, boarding schools, student homes, or canteens fell under the scope of this law. According this regulation, all those bodies which organized and operated private schools were disbanded.

These laws effectively proscribed all the church and private schools. The movable and immovable assets used for purposes of education were simply confiscated by the State. The nationalized schools and their detailed related lists of properties are to be found in the Annex of Law no 176. The list reveals a ruinous assault on the Hungarian historical churches in Romania. Based on the ethnic partition of the nationalized schools and the confiscation of the belonging assets, it is obvious that the Hungarian minority churches in Transylvania, Romania, were dramatically impaired. From the 1,611 religious schools which were nationalized by law, as we have stated before, 531 schools were operated by

the Reformed Church, 468 schools by the Roman Catholic Church, 34 schools by the Unitarian Church, and 8 schools by the Evangelical Lutheran Church.

Privately run health and social services were nationalized in 1948 by Decree No 302 (Official Gazette, Part I, no 256, 3 November 1948).

The communist state's repressive policy towards the churches has become more overt in 1948. The above mentioned and other legislative measures created new legal foundations for the rapport between the Romanian communist state and the churches. The legal framework ensured the closing down of all church-operated educational, social, and cultural activities and nationalized every church property which served these objectives. As for denominations, the General Law on Churches (Official Gazette, Part I, no 178, 4 August 1948), among other things, imposed that in order to operate lawfully all religious denominations should forward their operational and organizational by-laws, which had to be adopted by the Grand National Assembly, being previously approved by the Ministry of Culture. Article 23 stipulated that the Ministry of Cults has the power to overrule any kind of decisions regarding administration of the church on cultural, educational, and charitable dispositions, provisions, or instructions if those endanger state security and public order. All the pastoral letters, circulars should be sent to the same Ministry for censorship. Article 30 stated the strict financial monitoring of congregations. The budget of the Church districts and dioceses required a previous ratification by the Ministry of Cults. Article 40 stipulated that all the churches may keep contacts with the same denominations abroad only with the approval of the Ministry of Cults and through the mediation of the Ministry of Foreign Affairs. Article 41 barred foreign church structures from exercising any kind of jurisdiction over the churches in Romania.

Historically, the operation of the schools and charitable institutions was made possible by the buildings possessed by the churches. The maintenance of these establishments was funded by the income of agricultural lands and forests also owned by churches. With the expropriation, the social and educational service of the Church was practically left without any material basis.

Legal Background of the Restitution Process

The overthrow of the Soviet-type regime, based on the dominance of state property in all areas of social existence, a new chapter was opened in the history of the churches. The new Constitution adopted in 1991 [Article 29, para (3)] declared the freedom of religion, the organizational autonomy of the churches ('All religions shall be free and organized in accordance with their own statutes, under the terms laid down by law.'), and also the support of the state for religious denominations, including the facilitation of religious assistance in the army,

hospitals, prisons, homes for the elderly, and orphanages. In general, proper legal settings were implemented to facilitate the functioning of churches.

One essential matter remained open: if the acts of nationalization of the communist regime are considered abusive and illegal, how to proceed regarding these acts of expropriation? The restitution process included all private owners from whom properties were confiscated by the communist state: agricultural lands, privately owned forests, buildings, industrial property, and so forth. The tactic of the first governments after the regime change targeted a very limited restitution, gradually expanding, especially after 1996 (when a political coalition less rooted in the Communist past won the election), regulated as a labyrinthine, complicated, and contradictory process.

The churches in their complex organization were owners of different sorts of properties: kindergartens, schools, orphanages, hospitals, retirement centres, and homes for the elderly. It is very important to state again that the churches performed a wide range of social services not only in the life of a national minority but in their environment as well. These activities were often filling the gaps caused by inefficient state policy in the field of social welfare, at the same time also correcting the failures of this strategy or counterbalancing other state policies with negative effects concerning a minority group. Therefore, restitution of this property is seen as crucial, a special question.

All the shortcomings raised by the State in order to hinder the restitution process are rightfully perceived as a further deliberate limitation of these church activities.

The first step of church property restitution, based on Emergency Ordinance No 83/1999 regarding the restitution of property that belonged to communities of national minorities in Romania, was the return of immovable property. Emergency ordinances in the Romanian constitutional order are normative acts adopted by the Government (the Cabinet of the Prime Minister), having the force of law, conditioned to an exceptional situation that justifies this intervention and to *post facto* parliamentary approval. The real estates, consisting of constructions and adjoining land or free urban land were contained in the Annex as an integral part of the Emergency Ordinance. The Ordinance empowered the Government to supplement the Annex if necessary, through Government decisions.

This Emergency Ordinance established its own scope as the restitution of real estate which belonged to the communities (organizations, religious groups) of national minorities in Romania, which were nationalized after 1940 by the Romanian State by means of coercion, confiscation, nationalization, or deceptive manoeuvres, to be returned to their rightful owners or their heirs.

A Special Restitution Committee was established with 3 members [a representative of the Ministry of Justice, a representative of the Department for the Protection of National Minorities, and a representative of the concerned minority organization (depending on the real estate)].

Another normative act of limited restitution was *Emergency Ordinance No 94/2000 regarding the restitution of property that belonged to religious cults in Romania.* This ordinance, in its initial form, limited the maximum amount of real estate that may be restituted to each religious centre/diocesan centre to no more than ten. A new, seven-member committee was established, formed only by the representatives of state authorities, the representative of the Church having a guest status.

One of the most important general restitution norms, *Law no 10/2001 on the legal regime of some buildings taken abusively between the 6th of March 1945 and the 22nd of December 1989* stated that the legal regime of properties that belonged to religious or national minority communities, nationalized by the state or other legal entities, will be covered by special norms. Until such a restitution can take place, regulations prohibited the alienation (i.e. sale, donation, etc.) of the real estate in question or any change of destination, in some cases this interdiction being already too late.

The general regime of church property restitution was finally created by Law no 501/2002 approving Government Emergency Ordinance no 94/2000 regarding the restitution of properties that belonged to religious cults in Romania. This Law approved but also modified the Ordinance, creating the general legal framework for church property restitution.

The Restitution Committee took a new shape, working in the presence of 5 out of the 7 representatives of the state authorities. A new deadline of 6 months for submitting restitution request was opened, with the express statement that documents proving the required rights may be submitted within a reasonable time determined by the committee. (A further six-month deadline was granted by the provisions of Law no 247/2005).

Decisions of the Committee may be challenged before the administrative court within 30 days, calculated from the communication of the decision. The judgment of the administrative court is subject to appeals according to Law no 554/2004. Practically, the Committee being a central authority of the state, the first instance jurisdiction belongs to the Court of Appeals, and the High Court of Cassation and Justice of Romania passes the final verdict.

In cases when the restituted property was previously destined for activities of public interest, e.g. in education or healthcare, financed or co-financed from the national or the local budget, the new owner is required to maintain this public interest purpose for up to 5 years from the date of issuance of the restitution decision. During this period, the new owner will be the beneficiary of rents in the amount established by Government decision. Law no 165/2013 subsequently extended this term from 5 to 10 years.

Acts of sale of property covered by the Ordinance are null and void if they have been concluded in violation of the imperative legal provisions in force at the time of alienation.

According to this Law, in the case of restitution of an immovable property item, also movable property items are restituted if the movables were taken with the immovable and exist at the time of the request for restitution submitted by the concerned church.

For proof of ownership rights, the applicant may submit written evidence, certified testimonies, experts' opinions as well as any document which, combined, attest the authenticity of possession at the date of the abusive nationalization. In the absence of opposing evidence, the existence and, where appropriate, the extent of ownership is presumed to be the one resulting from nationalization documents, and also the person/entity determined in the nationalization documents is considered as the owner of such property. If the immovable property subject to this Ordinance was legally alienated after 22 December 1989, churches can opt for indemnification.

The fragmentation of the restitution process was caused by several factors. At first, there was no intention to restitute church properties. In the next stage, only a limited restitution was tolerable for the State and for the governing political parties. Just the latest phase provides for a general restitution.

External and internal factors played a crucial role in the evolution of the restitution process. External factors significantly determined the start and development of church property restitution. Romania has received a great deal of international criticism with regard to the restitution of church properties.

The United States of America followed the Romanian restitution process, and it has urged restitution according to the *restitutio in integrum* principle in all possible international forums. In 2002, during a debate in the US Congress preceding NATO enlargement, congressman Tom Lantos, senior member of the Committee on International Relations, as well as representatives Tancredo and Robert Matsui criticized Romania over the slowness of the restitution process of unlawfully confiscated properties.

In a resolution, unanimously adopted more than ten years ago (in 2005), the House of Representatives of the United States has urged Romanian authorities to complete the restitution of church properties as soon as possible.

In order to speed up the restitution processes, dozens of representatives of the US Congress requested Secretary of State John Kerry to intervene in the matter. In their reply, the US foreign policy structures regarded the issue of restitution as crucial, signalling that they are paying close attention to the development of this issue and find it important that the legislation on property restitution be strictly abided by.

In June 2015, at the meeting of the Budget Committee of the State Department, Marcy Kaptur, democratic congresswoman of the State of Ohio, expressed her concern regarding the way the Romanian government deals with the issue of restitution: 'It is our responsibility to stand on the side of human rights and religious freedom, most especially in countries still dealing with the dark

legacy of communism.' Congressman Andy Harris, republican representative of Maryland, stated that: 'The State Department has to take all possible steps to advance church property restitution.' It is for the first time that the Congress of the United States considers a community issue from Romania as their own interest by making it part of the budget of the State Department.

Court decisions ruled in several cases on the question of the rule of law in Romania, all the more given that Romania has stated on several occasions in front of international organizations that church properties confiscated by the communist regime would be restituted to their original owners. This opinion is shared also by the Conference of European Churches and the United Protestant Church of Belgium. According to these, faith in public authority and a reliable legal environment are the pillars of a State under the rule of law. Consequently, by ignoring the existing legislation, the rule of law in Romania is infringed.

According to the European Commission, the regulation of provisions regarding restitution is an attribute falling under the competence of Member States, wherefore neither the European Union nor the European Commission are competent to act in this respect. However, respecting human rights, compliance with the law and law enforcement is one of the EU's fundamental values. As soon as these rights are considered as violated during the restitution processes, the European Union becomes competent as well.

Regarding internal factors, for example, Law no 501/2002 approving Government Emergency Ordinance No 94/2000 regarding the restitution of property that belonged to religious cults in Romania was adopted mainly due to the fact that the governing Social Democratic Party had a minority government, and for its stability the parliamentary backing of the Democratic Alliance of Hungarians in Romania was needed. For this support, the two political organizations agreed to finally create the general church property restitution law.

Current Problems

The trend of restitutions which concern schools and other institutions operated by different churches and nationalized by the Soviet-type dictatorship has turned negative in recent times. The Romanian state, after nationalizing church property by tyrannical means and abolishing church institutions, now in several cases denies the return of these nationalized properties. There are some examples of the absurdity of the situation.

The buildings of the Reformed College in Cluj-Napoca (in Hungarian: Kolozsvár, in German: Klausenburg), founded in 1545, were restituted by the state in principle by means of Government Emergency Ordinance No 83/1999. In the single land register, however, there were two buildings recorded, the 'Old College', with an entrance

from a certain street, and the 'New College', the entrance of which opens from another, parallel street. The Emergency Ordinance provided the single land register number but only contained the postal address of the 'Old College', exactly as it was at the moment of the communist nationalization. The state school in possession of the 'New College' building filed a lawsuit, and the court set aside the land register as a real, legal, and accurate mean of identification, unlawfully used only the postal address to identify the property, and found that only the 'Old College' building was ordered to be restituted by the state with the referenced Emergency Government.

A subsequent law, a revised version of Government Emergency Ordinance No 94/2000, allowed the Transylvanian Reformed Church District to request the restitution of the 'New College' building in a new and separate procedure. However, the Restitution Committee stated that since the Reformed College has been entered in the land register as owner, the Transylvanian Reformed Church District is not entitled to the restitution of the property because it was not the former owner before the nationalization. I will return immediately to the legal grounds of this problem since this fictitious and artificial argument is at present the main reason for the refusal of restitution.

The Székely Mikó Reformed College in Sfântu Gheorghe (in Hungarian: Sepsiszentgyörgy), founded in 1858, was also returned to the Transylvanian Reformed District by Government Emergency Ordinance No 83/1999, but in this case a criminal court found that the restitution committee did not act lawfully and practically renationalized the by then completely renovated school building. The restitution procedure was resumed by the Church District, but the Restitution Committee rejected the request with the argument that I have already mentioned in the previous case: in the land register the Calvinist Székely Mikó College is recorded, wherefore the Church District is not entitled to claim back the property because it was not the previous owner of that property.

This argument, however, is completely unfounded. The essence of the argument is that the owner, according to the land register, was a school with legal personality and not the Transylvanian Reformed Church District, so the Church District is not entitled to restitution.

This artificial argument disregards the provisions of church law, the law in force at the moment of registration, and the law in force at the time of nationalization. The argument serves only the purpose of halting the restitution process and reversing the restitution that has already been achieved.

The Ecclesiastical Law of the Reformed Church defines these schools as parts of the organizational system of the Church, as autonomous structures belonging to the body of the Church. The Reformed Church Law therefore does not recognize schools as separate legal entities or as legal persons.

The law in force at the time of the land registration (the law of the Austro-Hungarian Monarchy in Transylvania) never gave legal personality to these schools.

Indeed, in 1911, a resolution published in the Official Gazette of the Judiciary stated that registration of the school into the land register does not call into question the ownership right of the Church, giving an official interpretation of this situation. This method of registration was otherwise generally used. In all cases, it mentioned that it is a Reformed school: the reference to the Church indicates the owner, and the word 'school' officially fixed the purpose of the property.

Following the annexation of Transylvania to Romania (1918–1920), church schools could continue to operate. The legal basis was granted by the Law on Private Education adopted in 1925, which did not, however, give the schools any legal personality other than that of the founder or of the maintainer. So, these schools were not separated from the church body even according to Romanian law. We also have to note that the land registry law has not changed, previous rules have been applied after World War I, and so the 1911 resolution of the Ministry of Justice solving the issue was in force in this era as well.

This was the situation at the moment of nationalization, and so nationalization has been carried out against the Reformed Church. The Church, as an owner, was able to suffer the nationalization, but it is not suitable for restitution.

From this schematic overview, it is apparent that the arguments used against the Transylvanian Reformed Church District to deny restitution are of an artificial character, without regard to the historical examination of the law. Modern perception of legal personality is projected into the past in order to stop the restitution process and refuse legitimate demands. It is interesting that this strong negative attitude exists mainly towards the Reformed and Roman Catholic Churches. The fate of the Roman Catholic Batthyaneum Library and the ongoing litigation revolves around the same problem. The building, which houses this magnificent library and scientific collection, has been registered into the land register as a Roman Catholic Astronomical Observer and Library. Therefore, according to the Restitution Committee, the Roman Catholic Church has never owned this property, and thus cannot claim it back.

These interpretations are also contrary to the rule of law and the right to freedom of religion. The state deviates from its own restitution laws in a discriminatory manner, diverting the scope of this legislation from its original aims and refusing to meet legitimate restitution requirements.

It is evident that the biblical commandment cited as an introduction is in fact a legal norm: those words would allow several infringements to be solved correctly if the court were to use the Bible as a code of law for the above mentioned legal disputes. Because many other laws, government ordinances, government decrees, administrative acts, and court decisions in practice and in fact only serve to avoid the simplest, most important, general-purpose norm: 'Thou shalt not steal.'

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Book Review

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The Share as a Security[1]

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Professor Emőd Veress has recently published a very compelling work entitled 'The Share as a Security'. The book comprises three main parts.

Firstly, we are presented with a detailed overview of the historical development of the joint-stock company as a form of economic organization, and of shares issued by such corporations. This is an analysis in context because the author highlights the historical and economic circumstances which shaped the evolution of the joint-stock company. The purpose of joint-stock companies was to pool capital in the large amounts necessary to set up the most extensive and most risky enterprises. One fundamental legal innovation – we might go so far as to say a veritable invention – comparable to others which made the Industrial Revolution possible was the expansion of limited liability to all members of the corporation (i.e. the shareholders). Otherwise, the urge to invest would have been significantly reduced and therefore could not have created the required high capital concentration necessary to fulfil the economic purpose of the first joint-stock companies: to finance the trade on the routes opened by the great geographical discoveries which underpinned later colonization.

A detailed analysis is devoted by the author to the British East India Company and its Dutch counterpart, the Vereenigde Oost-Indische Compagnie. The author examines their legal history and organization, their monopoly on trade, their internal crises, their ability to adapt, and ultimately their distortion to colonial administrative bodies having a public law nature. The bankruptcy scandals and stock exchange bubbles of the Mississippi Company and of the South Sea Company compromised the idea of the joint-stock company. In the 18th and 19th centuries, many people thought that the age of joint-stock companies had expired. The same would be announced in the 20th century in the context of Soviet-type dictatorships that condemn private enterprise and especially the joint-stock company as a means of capitalist exploitation. Both opinions proved

1 Veress, E., *A részvény, mint értékpapír* [The Share as a Security]. Forum Iuris Publishing House, Cluj-Napoca, 2018, ISBN 978-606-94372-0-9.

to be wrong. In the first case, the industrial revolution demanded the legal doctrine and practice to create a structure capable of ensuring adequate capital concentration and organizational efficiency to operate factories. The answer given by the law was not the creation of a new organizational form because the appropriate organizational structure was exactly the joint-stock company. Instead of corporations established under the formal authorization given by the monarch or by the state, the codified, regulated, formalized but freely-founded joint-stock company became very popular, qualified by the author as a legal mass product. In the case of Soviet-type dictatorships, the alternative offered, the state-owned enterprise, an economic structure integrated into the state administration, which functioned within the framework of a planned economy, proved to perform on a much lower level of efficiency than joint-stock companies.[2] Professor Veress identifies a very interesting breakthrough in the development of the regulation of joint-stock companies in Hungary. In the first decades of the 19th century, entrepreneurs were attempting to establish joint-stock companies based on the classic model (a charter granted by the monarch), followed in 1840 by the first modern regulation and by 1875 the re-regulation of joint-stock companies. The historical analysis is led up to the present regulation of joint-stock companies, highlighting the current problems such as the protection of minority shareholders, creditor protection, shareholder control, conflicts of interest, and corporate governance.

The second part of the book is devoted to the concept and to the typology of shares in the context of the Hungarian Civil Code (Act no V of 2013). The registered share identifies the shareholder, while the bearer share is a security entirely owned by whoever holds the physical share certificate at any given time. According to Professor Ödön Kuncz (1884–1965), the economic substance of the joint-stock company corresponds to the bearer's share because it has the highest circulation capacity. But the Hungarian law totally excluded the bearer's share starting from 2006. By contrast, in Romania, Companies Act no 31/1990 still allows the issuance of bearer's share. The basic principle of the Hungarian company regulation in the present is the dispositive character of this legislation; there arises the question whether it is possible to issue bearer's shares after the entry into force of the Hungarian Civil Code. The author's answer is negative. In this part of the book, we will find complex questions very carefully analysed, such as the acquisition of own shares by the company. The most important part is the detailed inquiry into the matter of preference shares. Also, a short chapter is committed to the problem of golden shares, and another interesting train of thought traces the issue of redeemable shares (redeemable by the shareholder, by the company, or by both).

2 The same author has several publications on the issues raised by state-owned enterprises in the context of the Soviet-type dictatorships. For more details, see: Veress 2018a. 2015.

The third part is dedicated to the circulation of shares. There are unavailable shares, owned by the state and declared non-transferable by law. According to Professor Veress, this non-transferable character of shares can be based only on law. The founding charter cannot create absolutely non-transferable shares. A conventional ban – absolute and unlimited in time – on share transferability is incompatible with the essence and the nature of the share. But there are several techniques of limitations of share transferability, and those can serve various aims. In my opinion, the third part of the book, especially the chapters devoted to limitation techniques of share transferability based on the founding charter or on contracts, represents the most interesting section of the volume. One can easily observe that the author regards the general theory of obligations and in particular creditor protection as his main field of research.[3] This is notably reflected in the analysis dedicated to the circulation of shares.

The book extensively utilizes the tools of legal history, often invokes classical authors of commercial law, utilizes the relevant court practice, and critically views the regulation and the proposed interpretations of legal texts. The legal literature has become richer by this book. The author also indicated that this volume contains the current state of the research he has carried out, and so we are looking forward to new research findings – primarily, the challenging examination of court cases, which will facilitate the application of the Hungarian Civil Code as a living law.

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3 See: Veress 2018b, 2018c.

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